

**(Re)Conceptualising Vulnerability in International
Refugee Law and Practice: An exploration of the
value of a more dynamic approach to vulnerability in
refugee status determination**

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Abstract

This thesis investigates whether a reconceptualisation of the concept of vulnerability is required in order to ensure that the needs of 'vulnerable' asylum seekers are accommodated in national refugee status determination (RSD) procedures. The inquiry is prompted by increasing allusion to vulnerability in refugee law and policy that is taking place despite a lack of scholarly or judicial material to guide approaches to vulnerability assessment in national asylum systems.

Through systematic analysis of international, European and Irish refugee law and policy, this thesis demonstrates that whilst the development of a coherent normative approach to vulnerability is in its embryonic stages at the international level, progress is *ad hoc* and stymied by inconsistent practice. This has implications on the ground at the national level, where asylum practitioners rely upon overly simplistic, group-based formulations of vulnerability that entrench stigma and stereotypes in the absence of clear conceptual guidance. The consequence of this overarching conceptual fuzziness is that asylum seekers' individual needs are not systematically recognised or addressed, reducing their capacity to fully articulate their protection claim, which can result in an erroneous RSD decision.

On the basis of findings from doctrinal analysis and empirical interviews with asylum practitioners, this thesis ultimately argues that a reconceptualisation of vulnerability is indeed required. It is proposed that vulnerability could more usefully be understood as 'dynamic.' The dynamic concept is more nuanced, recognising that vulnerability is fluid, stemming from a range of sources and fluctuating in intensity concurrent with the refugee journey. Input from practitioners allows the analysis to move beyond the theoretical and to tease out how a more nuanced approach to vulnerability could be operationalised in practice, lending a perspective to the debate on vulnerability that has heretofore been missing. The thesis concludes by using the findings to articulate how vulnerability assessment should be implemented in the national asylum system to greater protective effect under the dynamic conceptual approach, flagging some challenges that will first need to be overcome and the steps future research and advocacy might take.

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I could not have undertaken this project without the financial support of the Irish Research Council. I am not the type of person who is suited to prolonged confinement to a desk or the library but rather prefer to engage directly with people, so I consider myself extremely fortunate to have had the opportunity to participate in the Irish Research Council's innovative Employment-based Programme in partnership with the Irish Refugee Council's Independent Law Centre. Through work with the Law Centre, I witnessed the challenges people face navigating the asylum process but also the potential value of this research for achieving change and informing more nuanced approaches to refugee protection. I did not need greater motivation than that to see this project through to the end.

On that note, the moral and professional support of my former colleagues at the Irish Refugee Council was invaluable in lifting my spirits and keeping me engaged during those inevitable writing slumps. I count myself extremely lucky to have been able to spend four of the most enriching and transformative years of my life alongside colleagues who are at the forefront of refugee protection advocacy in Ireland. I am thankful for the many conversations (with colleagues and asylum seekers alike) that have immeasurably enhanced my understanding of the human rights challenges refugees face and the potential for law to provide some reprieve to people fleeing the most egregious human rights violations imaginable merely because they happened to be born in a particular place at a particular time. I am thankful to the practitioners working in the Irish asylum sector who agreed to participate in this research, who believed that this work is relevant and important, and whose contribution will hopefully lead to meaningful future reform. From a personal standpoint, I made friendships that will last a lifetime through the doctoral experience and I know I will always have a home at both the

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Declaration

I, **Luke Hamilton**, certify that this work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any other degree. This thesis is the result of my independent work and investigation, except where otherwise stated. Other sources are acknowledged throughout with explicit reference.



Signed: (Candidate)

Date: 12 December 2019

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Chapter 1 – Introduction

1.1 - Thesis Question

The concept of vulnerability is becoming ubiquitous in refugee protection discourse and identification of vulnerability has significant implications for the outcome of claims for refugee protection. Taking the emerging significance of the concept as the starting point, this thesis examines how vulnerability is conceptualised in refugee law and policy, and whether the needs of persons who might be considered ‘vulnerable’ are catered for in accordance with their rights under human rights and refugee law. Focusing on the Irish asylum system as a national case study, this thesis responds to the following primary question:

Is a reconceptualisation of vulnerability in international refugee law required in order to ensure that the needs of vulnerable asylum seekers are accommodated within national refugee status determination procedures?

Refugee status determination (RSD), the procedure for determining eligibility for international protection, is complex and a person with particular needs may require special support in order to engage with the different stages of that process and deliver an articulate account of their case. A robust approach to identification of vulnerability in asylum procedures, therefore, is crucial for ensuring that States’ asylum systems are efficient and fair. However, there has been little effort to clarify the substantive value of the concept or the scope of its implications on access to rights for asylum seekers and refugees in practice. Furthermore, there is a mounting body of literature flagging the dangers of a crude approach to vulnerability. An in-depth analysis of the concept and its implications for asylum procedures is timely and necessary.

In order to effectively respond to the research question, two sub-inquiries must be conducted in order to address some conceptual and doctrinal gaps with respect to the relationship between vulnerability and international refugee law.

Firstly, the thesis aims to dispel some of the ambiguity surrounding the concept of vulnerability as it applies to the refugee protection context. By engaging with critical scholarship and outlining the pitfalls and protective promise of the concept, this thesis develops and **proposes a conceptual framework for vulnerability** that is compatible with the fluid and multi-dimensional experience of the asylum seeker navigating national asylum procedures. That framework provides the foundation upon which approaches to vulnerability in refugee law and practice are analysed throughout this thesis.

Secondly, the *function* of vulnerability as a legal and practical concept in international human rights and refugee law is vague. More specifically, approaches to determination of vulnerability (i.e. who is vulnerable and what makes someone vulnerable?) are inconsistent and the added value of vulnerability for protection (i.e. what is the consequence of being designated vulnerable?) is unclear. To **clarify the function of vulnerability** in refugee status determination and protection more generally, doctrinal analysis of the applicable legal frameworks in this thesis traces developing approaches to the concept at the levels of international and regional (European) through to national (Irish) law, highlighting gaps as well as opportunities for more coherent practice.

The findings from the two sub-inquiries form the basis for an empirical component of the research that situates emerging developments in the theory and international legal framework in practice on the ground. The results of qualitative interviews with Irish practitioners help define a conceptual approach to vulnerability that avoids the pitfalls typically associated with the concept, whilst harnessing its protective potential. The empirical analysis examines the overall compatibility of the asylum law and policy *status quo* with the conceptual framework for vulnerability that will be proposed in this thesis. The findings will determine whether or not a conceptual shift with respect to the concept is needed and, if so, what that reconceptualisation should look like to ensure that refugees are able to avail of their right to seek and benefit from asylum in theory and in practice.

1.2 - Background to the Research

Against a global backdrop of increasing numbers of people suffering the effects of forced displacement,¹ Western States' refugee policies are becoming ever more restrictive and individuals face unique challenges in accessing the right to seek asylum. In Europe, the increase of people fleeing the Syrian conflict led to a proliferation of 'crisis' rhetoric in politics and the media after 2014.² However, as scholarship has been swift to demonstrate, contrary to sensationalist media coverage, the increased numbers arriving in Europe are not unmanageable by relative standards and if any crisis exists it is more likely a crisis of governance and of policy.³ The recent increase of applications for asylum in the European Union (EU) has revealed weaknesses at the heart of EU asylum policy, particularly with respect to solidarity amongst Member States as countries on the external EU border are left to shoulder the vast majority of new arrivals. Rather than address these issues directly, the EU response has made it more difficult for asylum seekers to apply for protection within its territory. For example, the EU actively pursues policies of 'externalisation', whereby the EU enters into bilateral arrangements with third countries to prevent onward movement of asylum seekers to the EU.⁴ For those who do manage to make it to the territory of the EU, the body of legislation intended to harmonise Member States' practice with respect to treatment of asylum seekers, the Common European Asylum System (CEAS), contains provisions that Member States use to deflect applications for asylum, namely by shifting responsibility for an application by designating a 'safe third country' outside of the EU where the asylum seeker could be returned to lodge an application, or by identifying another EU Member State

¹ UNHCR 'Global Trends Report 2018' (20 June 2019) 2.

² Mike Berry, Inaki Garcia-Blanco & Kerry Moore, 'Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries Cardiff' (Cardiff School of Journalism, 9 May 2016); Michal Krzyżanowski, Anna Triandafyllidou & Ruth Wodak, 'The Mediatization and the Politicization of the "Refugee Crisis" in Europe' (2018) 16(1-2) *Journal of Immigrant and Refugee Studies* 1.

³ Evangelia Tsoardi, 'Intra-EU Solidarity and the implementation of the EU asylum policy: a refugee or governance "crisis"?', in Odysseus Academic Network (ed.) *Searching for Solidarity in EU Asylum and Border Policies*, (February 2016) 5; Siobhán Mullally, 'A Crisis of Protection in Europe: Migrants at Sea' (2016) 110 *Proceedings of the American Society of International Law Annual Meeting*, 173.

⁴ Jonathan Zaragoza-Cristiani, 'Containing the Refugee Crisis: How the EU Turned the Balkans and Turkey into an EU Borderland' (2017) 52 *The International Spectator*, 59; Bill Frelick, Ian Kysel, & Jennifer Podkul, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) 4(4) *Journal on Migration and Human Security* 190.

responsible under the Dublin Regulation.⁵ While such initiatives might quell numbers in the short-term, their compatibility with international human rights raises serious concerns.⁶ The result is a precarious environment for asylum seekers in Europe generally, where the imperative of border control often supersedes that of refugee protection and asylum seekers are compelled to source alternative, usually more dangerous, routes to find protection in the absence of safe and legal access channels.⁷

It is in this tumultuous context that the concept of vulnerability is emerging in European asylum law and policy as a tentative mechanism by which to identify those who are ‘deserving’ of protection.⁸ In setting priorities towards the development of the European Area of Freedom, Security and Justice, the European Council has stated, for example, that ‘strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and especially people and groups that are in vulnerable situations. In this regard, priority will be given to those in need of international protection.’⁹ Certain instruments of the CEAS outline various provisions for the identification of the special needs of vulnerable individuals in national asylum procedures who require specific support.¹⁰ In parallel to developments in EU law, the European Court of Human Rights (ECtHR), acting in its capacity as supervisory body to the European Convention on Human Rights (ECHR), is in the process of developing a line of jurisprudence requiring states to identify and give particular consideration to the ‘special protection’ to be afforded to

⁵ For detailed analysis of the legality of EU Member States’ practice of employing CEAS responsibility allocation provisions to stymie access to protection, see: Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 190–220.

⁶ Cathryn Costello, ‘Safe Country? Says Who?’ (2016) 28(4) *International Journal of Refugee Law* 601.

⁷ For example, Violeta Moreno-Lax argues that the human rights imperative of search and rescue of migrants crossing the Mediterranean has been co-opted by the EU to justify policies of interdiction and inhibit access to EU asylum procedures: Violeta Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-Through-Interdiction/Rescue-Without-Protection” Paradigm (2018) 56(1) *Journal of Common Market Studies* 119. See also: Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, ‘The 2015 Refugee Crisis in the European Union’ (2015) Centre for European Policy Studies Policy Brief No. 332, 1-5.

⁸ Cathryn Costello and Emily Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in Vincent Chetail, Philippe de Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System - The New European Refugee Law* (Brill 2016).

⁹ Council of the European Union, ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens’ (2 December 2009) 17024/09, 55.

¹⁰ Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (29 June 2013) OJ L 180/96 -105/32, arts 21-25; Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (29 June 2013), OJ L 180/60 -180/95, arts 24-25.

asylum seekers as a ‘particularly underprivileged and vulnerable group.’¹¹ However, EU policies of externalisation, which are more concerned with burden shifting rather than sharing, only heighten the vulnerability of asylum seekers arriving on European shores.¹² It is evident that emerging recognition of the special needs of vulnerable asylum seekers in International and European law is not being reflected in practice (at least at EU level) with respect to access to asylum procedures. This thesis examines in detail the fact that while it is clear that the concept carries significant protective weight for those in need of protection, emerging approaches to vulnerability under European law are not always consistent or clear. This conceptual fuzziness means that national authorities are left with wide discretion to interpret their obligations towards vulnerable asylum seekers as they wish, resulting in disparity of practice between countries, more pronounced protection gaps and further obfuscation of the meaning and value of the concept.¹³

To set the scene for this study, the following subsections will introduce the overarching normative framework from which States’ international obligations to address vulnerability in refugee protection matters derive. Specifically, this section will briefly introduce the relationship between international human rights law and refugee law, which shapes normative approaches and States’ responsibilities towards vulnerable asylum seekers, particularly with respect to RSD. It will also explain why an empirical examination of the national context is an appropriate domain from which to assess the impact of conceptual ambiguity in practice and whether a different approach to vulnerability is required.

1.2.1 The normative framework for the study

Despite its promulgation in European refugee law, the concept of vulnerability has no explicit presence in the international treaties that guide the evolution of human rights and refugee protection norms. At the heart of the legal framework for this study is the

¹¹ Alexandra Timmer, ‘A Quiet Revolution: Vulnerability in the European Court of Human Rights’ in Martha Fineman & Anna Grear (eds.), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 147-170.

¹² Siobhán Mullally (n 3) 175.

¹³ European Council on Refugees and Exiles, ‘The concept of vulnerability in European asylum procedures’ (August 2017).

1951 Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol, the cornerstone of States' obligations towards refugees. The Refugee Convention was brought into force in response to the atrocities of World War II, during which the rise of totalitarianism saw certain cohorts of society rendered vulnerable to targeted extreme violence and death.¹⁴ Notwithstanding the historical context, the text of the Refugee Convention does not make any explicit reference to vulnerability. However, its absence from the Convention does not mean that States are absolved of any responsibility to respond to vulnerability in the asylum context. The level of protection available under the Refugee Convention is not static and must be interpreted together with other areas of international law.¹⁵

In particular, changes in international human rights law have extended the remit of refugee protection beyond the content of the Refugee Convention. In many respects, norms under international human rights law serve to amplify the general protection afforded to refugees and asylum seekers under the Refugee Convention and, in particular, lend interpretative guidance for key elements of the refugee definition that is central to the process of RSD (discussed later).¹⁶ The International Covenant on Civil and Political Rights (ICCPR) requires that States provide a range of rights to 'individuals within its territory', including asylum seekers and migrants, that are not provided under the Refugee Convention.¹⁷ The ICCPR extends, for example, the right not to be subjected to arbitrary arrest, detention or exile and the right to a fair hearing to asylum seekers and refugees on the territory of any State party to the ICCPR, expanding the substantive human rights protection available to them.¹⁸ Similarly, the Convention against Torture (CAT) enshrines an absolute prohibition on *refoulement* (return to a country where a refugee is likely to face persecution) by prohibiting forcible return to a country where the person can demonstrate that 'there are substantial grounds for believing that he would be in danger of being subject to

¹⁴ Volker Turk and Frances Nicholson, 'Refugee protection in international law: an overall perspective' in Erika Feller, Volker Turk, Frances Nicholson, (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 3.

¹⁵ James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 119.

¹⁶ Corinne Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2014) 108.

¹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 2.

¹⁸ *ibid* arts 9, 14.

torture.’¹⁹ This is broader than the same prohibition in the Refugee Convention, where article 33 contains an exception to its *non-refoulement* provision by permitting return where ‘there are reasonable grounds for regarding as a danger to the security of the country in which [the refugee] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the country.’ Further, the UN Committees responsible for providing interpretative guidance on the content of the various international human rights treaties frequently consolidate the position of asylum seekers and refugees *vis-à-vis* international human rights law. For example, the Human Rights Committee, responsible for overseeing implementation of the ICCPR has clarified that pursuant to article 7 of that convention (prohibition on torture or cruel, inhuman or degrading treatment or punishment), States ‘must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.’²⁰ Following such developments in international human rights law with respect to return of individuals to situations of torture, the United Nations High Commissioner for Refugees (UNHCR), the international agency responsible for providing interpretative guidance to States on implementation of the Refugee Convention has concluded that ‘international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture.’²¹ This is just one example of where international human rights law can amplify norms contained within the Refugee Convention.²²

In line with increasing overlap between refugee and human rights law, UNHCR’s Executive Committee – responsible for setting UNHCR’s protection priorities and providing interpretative statements on issues related to international protection - has assumed the position that States’ approaches to modern refugee protection must go beyond the standards contained in the Refugee Convention ‘to take all necessary measures to ensure that refugees are effectively protected, including through national legislation, and in compliance with their obligations under international human rights

¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 art 3.

²⁰ UN Human Rights Committee, ‘CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) HRI/GEN/1/Rev.9 (Vol. I) para 9.

²¹ UNHCR ‘Note on International Protection’ UN Doc A/AC. 96/951 (13 September 2001) para 16.

²² Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press 2007) 285–345.

and humanitarian law instruments bearing directly on refugee protection.²³ The different international human rights treaties, therefore, interact with refugee law in a range of ways that serve to supplement and reinforce the norms contained in the Refugee Convention, creating a more comprehensive international refugee protection regime. These standards must be reflected in regional legal frameworks and domestic asylum systems.

Thus, when responding to the needs of vulnerable asylum seekers, States' must take guidance from international human rights developments when interpreting their Refugee Convention obligations. This thesis adopts that principle as the normative foundation for this research, tracing the role of vulnerability through the interrelated layers of discourse in the theory, international law and European jurisprudence that inevitably converge and shape RSD practice at the national level.

1.2.2 Rationale for a national case study

While States have a duty to respond to vulnerability in RSD procedures through the overlapping of their international human rights and refugee convention obligations, the concept of vulnerability itself, including how it is identified and its consequences, remains under-theorised in refugee law. It is unclear exactly how developments at the international level and the increasing recourse to the concept in law and policy across all levels actually impact on the ground in national asylum systems. However, there is a growing body of evidence supporting the underlying assumption of this thesis that while vulnerability is becoming a staple feature of refugee protection nomenclature, this does not automatically translate into enhanced safeguards for vulnerable asylum seekers on the ground.

At the regional level, for example, the European refugee regime is nurturing a fledgling concept of vulnerability. However, early critique suggests that the concept is being employed with limited consideration of the value it brings to the fairness or efficiency of national procedures. Analysis of ECtHR jurisprudence pertaining to 'vulnerable groups' reveals that while vulnerability is operationalised by the Court to

²³ UNHCR, EXCOM Conclusion No. 81 'General Conclusions on International Protection' (1997) para (e).

enhance protection against rights violations for those groups, unregulated application of the concept risks further essentialising, stigmatising and stripping agency from those groups it deems vulnerable.²⁴ In EU asylum legislation, obligations towards vulnerable asylum seekers are gradually being ‘laid down in principle’, however, in the absence of any conceptual clarity, the legislation does not prescribe the methods by which States should carry out vulnerability assessment, nor how exactly vulnerability should be responded to.²⁵ These concerns are borne out by recent comparative research of practice across EU Member States demonstrating that practice with respect to assessment of vulnerability in national asylum systems varies widely, if it takes place at all.²⁶ There appears to be a significant gap between on-going developments at the regional level and practice in national asylum systems with respect to vulnerability assessment and response. In order to bridge that gap and determine the extent to which conceptual approaches to vulnerability at the regional level are contributing to a more robust refugee protection framework that adds value at the national level, it was necessary to interrogate those patterns and ideas emerging from the doctrinal analysis in this thesis in a national case study. Ireland was deemed a particularly suitable laboratory for analysis of the emerging vulnerability norm in refugee law for a number of reasons.

Firstly, the Irish system of international protection is relatively new and has had a particularly turbulent history characterised by sequences of critical administrative and protection failings that have only recently become targets for meaningful reform, broadening the scope for consideration of vulnerability and its role in the asylum system. In the space of less than five years, in the wake of almost two decades of persistent human rights advocacy, Ireland has: introduced new legislation overhauling its national asylum procedure;²⁷ has undergone a process of transposing the EU Reception Conditions Directive into domestic law,²⁸ and for the first time has initiated

²⁴ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1071–1072.

²⁵ Ulrike Brandle and Philip Czech, ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?’ in Francesca Ippolito and Sara Iglesias Sanchez (eds) *Protecting vulnerable groups: the European human rights framework* (Oxford, United Kingdom: Hart Publishing 2015) 270.

²⁶ European Council on Refugees and Exiles (n 13) 16.

²⁷ International Protection Act 2015; Patricia Brazil, ‘The International Protection Act 2015: An overview’ (Irish Refugee Council/ECRE seminar on the Single Protection Procedure: Meeting International Obligations, Dublin, 3 March 2016).

²⁸ European Communities (Reception Conditions) Regulations 2018, SI 230/2018.

multi-stakeholder initiatives bringing civil society and government representatives to the same table to discuss wide-reaching issues pertaining to asylum system reform.²⁹ These developments in the Irish context will be outlined and examined in detail later on but suffice it to say that the contemporary landscape of law and policy in Ireland is more amenable to analysis of the role of vulnerability in refugee law than it has ever been.

Secondly, as a result of the aforementioned human rights advocacy, there is an abundance of reports and research stemming from academia, civil society organisations, statutory human rights bodies and international monitoring bodies to suggest that if the protective potential of vulnerability is indeed being drawn out at the international level - as this thesis will clarify in subsequent chapters - this is not necessarily being felt by asylum seekers navigating the Irish system. For example, Non-Governmental Organisations (NGOs) working with asylum seekers in Ireland have repeatedly expressed concern at the lack of a mechanism in place for identifying vulnerability in the asylum system and its consequences.³⁰ Government-convened working groups have noted the disadvantage faced by vulnerable asylum seekers in the RSD procedure due *inter alia* to piecemeal adoption and implementation of relevant CEAS instruments.³¹ The UN Committee against Torture in 2017 expressed concern at the lack of a formal process of identification of victims of torture and other vulnerable asylum seekers in the Irish system, recommending that such a mechanism be established as soon as possible.³² Against the backdrop of broad commentary on the lack of tailored vulnerability response, there is widespread analysis of the particular challenges faced by certain groups in the Irish asylum system. Over the past

²⁹ Department of Justice and Equality, 'Working Group to report to Government on improvements to the protection process, including Direct Provision and supports to asylum seekers' (October 2014); Department of Justice and Equality, 'Consultation on National Standards for accommodation offered to people in the protection process' (16 August 2018) [<http://www.justice.ie/en/JELR/Pages/PB18000267>] accessed 15 October 2019.

³⁰ Irish Refugee Council, 'Refugee Organisations Highlight Absence of Vulnerability Assessment in Irish Asylum Procedure' (27 May 2019) [<https://www.irishrefugeecouncil.ie/news/refugee-organisations-highlight-absence-of-vulnerability-assessment-in-irish-asylum-procedure/7094>] accessed 15 October 2019.

³¹ Department of Justice and Equality, 'Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers - Final Report' (June 2015) [<https://bit.ly/2Re1etJ>] accessed November 2019.

³² UN Committee against Torture, 'Concluding observations on the second periodic report of Ireland' (31 August 2017) CAT/C/IRL/CO/2 paras 11-12.

decade, the adverse experiences of children;³³ victims of sexual and gender-based violence,³⁴ lesbian, gay, bisexual and transgender people,³⁵ and victims of torture³⁶ are among just some of the cohorts of asylum seeker to receive dedicated attention in Irish human rights advocacy. This suggests that, in spite of recent reform efforts, much remains to be done to ensure that the vulnerabilities or particular needs of certain cohorts are addressed in the Irish asylum system in line with international standards. The recent convergence of human rights advocacy and Irish asylum law and policy reform provides fertile ground for examination of the influence vulnerability brings to bear on Irish RSD procedures.

Finally, the research environment itself provided a particularly unique standpoint from which to scrutinise the interplay of the emerging vulnerability concept with on-going undulations in Irish refugee law and policy. This doctoral study was funded under the Irish Research Council's Employment-Based Programme,³⁷ a scheme requiring that at least 50% of the researcher's time be spent in employment with an organisation or entity whose mandate is aligned with the research being undertaken. In the case of this research, the programme was situated within the Irish Refugee Council's (IRC) Independent Law Centre,³⁸ where the author was employed as Legal Officer. The Law Centre delivers tailored legal advice to asylum seekers at all stages of the Irish RSD process, which requires daily interaction with the range of stakeholders (including decision makers, legal representatives, NGOs and State bodies) that are involved in RSD. Through the course of the four-year research

³³ Geoffrey Shannon, 'Eleventh Report of the Special Rapporteur on Child Protection – A Report Submitted to the Oireachtas' (2018) 17. See also, previous reports of the Special Rapporteur on Child Protection, available at: [\[https://bit.ly/2IREaMg\]](https://bit.ly/2IREaMg) accessed 15 October 2019.

³⁴ Maeve Foreman, 'Migrant Women and Gender Based Violence in Ireland: Policy, Research & Practice', (The EU Mutual Learning Programme in Gender Equality, Support services for victims of violence in asylum and migration, Comments Paper – Ireland, Greece 20 – 21, February 2018); Rape Crisis Network of Ireland, 'Asylum-Seekers and Refugees Surviving on Hold' (2014) 23-24.

³⁵ Irish Refugee Council, 'Submission on the National LGBTI Inclusion Strategy' (10 January 2019) [\[https://www.irishrefugeecouncil.ie/news/irc-submission-on-the-national-lgbti-inclusion-strategy/6882\]](https://www.irishrefugeecouncil.ie/news/irc-submission-on-the-national-lgbti-inclusion-strategy/6882) accessed 15 October 2019; LGBT Ireland, 'Submission to Oireachtas on LGBT+ Asylum Seekers in Direct Provision' (May 2019) [\[https://lgbt.ie/wp-content/uploads/2019/05/LGBT_Ireland_Oireachtas-submission-29.5.19-1.pdf\]](https://lgbt.ie/wp-content/uploads/2019/05/LGBT_Ireland_Oireachtas-submission-29.5.19-1.pdf) accessed 15 October 2019.

³⁶ Spirasi, 'Submission to the United Nations Committee against Torture, 61st Session of the UN Committee Against Torture 24th July – 11th' (August 2017) [\[https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27968_E.pdf\]](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27968_E.pdf) accessed 15 October 2019.

³⁷ See: Irish Research Council, 'Employment-Based Programme' [\[http://research.ie/funding/ebp/\]](http://research.ie/funding/ebp/) accessed 15 October 2019.

³⁸ See: Irish Refugee Council, 'Independent Law Centre' [\[https://www.irishrefugeecouncil.ie/law-centre/\]](https://www.irishrefugeecouncil.ie/law-centre/) accessed 15 October 2019.

programme, in addition to responsibility for RSD casework, the author had direct engagement with major initiatives informing the direction of law and policy related to the inquiry of this thesis. This afforded the privilege of a level of insight that would not have been available under a desk-based doctoral programme.

On-going holistic reform of the Irish asylum system provides a unique window of opportunity to examine exactly how national asylum apparatus engage with abstract concepts such as vulnerability and the extent to which normative developments at the international level resonate on the ground. The findings from the Irish case study will bear relevance for other national asylum systems that are struggling to reconcile practice on the ground with their international obligations.

1.3 - Thesis Structure

This thesis comprises six substantive chapters (excluding the introduction and conclusion), which can be separated into three thematic parts according to the primary question (is a reconceptualisation of vulnerability in the asylum context required?) and two sub-inquiries (setting out the proposed conceptual framework and clarifying the function of vulnerability) being examined here.

The first third of the thesis corresponds with the first sub-inquiry, which establishes the rationale and the theoretical framework for the study and includes this introductory chapter and Chapter Two. Through a review of literature and theory pertaining to vulnerability, Chapter Two sets out existing theoretical approaches and critique of vulnerability. In theorising vulnerability, the aim is to identify aspects of the concept that might be useful and add value in the refugee protection context. Chapter Two argues that while there are pitfalls associated with a traditional, rigid application of a categorical or group-based approach to vulnerability that can lead to disempowerment, stigma and paternalism, the concept also carries value as a heuristic tool with which to identify individual needs and nuances within a heterogeneous group such as the refugee and asylum seeker group. However, in order to harness that value, this thesis argues that the approach to vulnerability assessment must be ‘dynamic,’ so as to recognise the multifarious aspects of vulnerability: the sources and

states of vulnerability; the influence of its temporal nature (in that vulnerability fluctuates in concert with individual experience at different moments during the refugee's migratory journey) and that vulnerability generates an obligation on authorities to enhance the capacity of individuals so as to guarantee equal access to asylum procedures.

Concerning the second sub-inquiry, Chapters Three and Four comprise the doctrinal analysis, which drills deeper into the normative framework for States' obligations to respond to vulnerability in the context of refugee protection. Given the implications of developments in international human rights law for the elaboration of standards in refugee law, Chapter Three will focus primarily on analysis of the jurisprudence of the international human rights system and soft law material providing interpretative guidance on refugee protection norms. That analysis will ascertain whether a coherent approach to the determination of vulnerability can be extrapolated from the outputs of the treaty monitoring bodies and how this intersects with refugee protection. Chapter Four will then draw the analysis down to the regional level, analysing the extent to which normative developments at the international level permeate regional refugee law. The Chapter will outline in detail where the dual systems of EU and ECHR law corroborate patterns at the international level but also the extent to which both bodies of European law are developing their own approaches to vulnerability as a concept and the implications this may have for national asylum systems under their jurisdiction.

The final third of the thesis will bring the analysis back to the primary question and assess the extent to which developments at the international level have paved the way for more protection-oriented and comprehensive vulnerability assessment in national systems and how the dynamic conceptual framework underpinning the thesis can be applied in practice. Chapter Five will set the context for the case-study by providing an overview and analysis of recent legal and policy developments in the Irish system to assess how Irish law and policy reflects standards and obligations towards vulnerable asylum seekers extrapolated from the international level. Chapter Six will then use the findings from the qualitative interviews to examine the substance of patterns at the international level, and any gaps between law, policy and practice by

sharing the perspectives of practitioners on the identification and value of vulnerability in their day-to-day work implementing the applicable refugee law and policy. Chapter Seven will consolidate the findings from the interviews and doctrinal analysis in order to propose what a dynamic conceptual framework for vulnerability assessment might look like in practice and any challenges that would need to be addressed. Some reflections on the key findings, as well as future directions that can be taken to build on the research, will conclude the thesis in Chapter Eight.

1.4 - Overview of the Methodology

On a general level, this study adopts a socio-legal methodological approach in seeking to respond to the research questions. While the inquiry is primarily concerned with examining the scope of an emerging legal concept, it is also concerned with clarifying the meaning and value of that concept in practice. Bridging that gap between law, policy and practice required stepping out from behind the desk, in order to engage with the issues underpinning this thesis. Hence, three distinct methodological approaches are employed throughout the thesis.

Firstly, taking as its starting point the fact that vulnerability is an ambiguous but increasingly prevalent and consequential concept in refugee protection discourse, this study seeks to hone in on an appropriate conceptual framework for vulnerability assessment in the RSD context. To do so, it is necessary to examine the broader literature pertaining to vulnerability in order to get a feel for the state of the field with respect to vulnerability theory, to problematise the concept and also to distil conceptual ideas that could conceivably add value to refugee protection practice. This thesis employs a broad literature review of available scholarship on vulnerability theory to outline key critique of the concept and ground the research in recognition of the pitfalls typically associated with vulnerability, but also the value of the concept for protection. The literature review establishes a conceptual approach to vulnerability assessment that guides analysis throughout this thesis.

Secondly, this study aims to drill deeper into the normative framework for States' obligations towards vulnerable asylum seekers in order to clarify the legal meaning

and value of vulnerability for refugee protection. In order to do so, this thesis conducts a rigorous doctrinal analysis of the relevant bodies of law. As demonstrated already, while the Refugee Convention is the primary source of international refugee law, it is necessary to have reference to other legal doctrines in order to interpret the standards of the Refugee Convention in light of specific concepts or thematic issues. Although this study eventually narrows the scope of inquiry to the Irish national asylum system, the doctrinal analysis in this thesis is broader as it traces the evolution of vulnerability from its normative basis in international human rights and refugee law, through its refinement in regional asylum law for the European context, to its application at the national level. Thus, analysis covers the jurisprudence of the UN international human rights treaties, EU asylum law (the CEAS and related jurisprudence of the Court of Justice of the European Union (CJEU)) and the ECHR (namely, jurisprudence of the ECtHR concerning asylum seekers). With regard to the international human rights system, the analysis is concerned primarily with expanding upon understandings of vulnerability through review of the interpretative guidance of the treaty-monitoring bodies. That review has entailed a systematic search of international human rights jurisprudence, including the General Comments, Concluding Observations and individual complaints decisions of the treaty monitoring bodies. The research material was downloaded from the online jurisprudence³⁹ and Universal Human Rights Index⁴⁰ databases of the UN Office of the High Commissioner for Human Rights (OHCHR) by flagging documents containing keywords related to vulnerability. The documents obtained have been systematically scoured to extrapolate patterns and to generate a picture of how vulnerability is determined and the value it adds in the context of human rights protection under international human rights law (see Chapter 3 for more detail on the methodological approach employed for analysis of the treaty body outputs). The Refugee Convention has no judicial body with the power to issue binding judgements; therefore a similar systematic review of related international jurisprudence was not possible. However, as noted already, UNHCR (and its Executive Committee) has the authority to issue interpretative guidance on the Refugee Convention and matters related to international protection. To further demonstrate the interrelationship between international human

³⁹ OHCHR, 'Jurisprudence Database' [<https://juris.ohchr.org/>] accessed 13 October 2019.

⁴⁰ OHCHR, 'Universal Human Rights Index' [<https://uhri.ohchr.org>] accessed 13 October 2019.

rights and refugee law, a review of UNHCR soft law (not legally binding but nonetheless persuasive) material complements the systematic analysis of international human rights jurisprudence. That material was sourced primarily from UNHCR's online repository of refugee law, policy and research documents.⁴¹

With regards to EU law, relevant EU policy and preparatory documents, reports and legislative proposals have been reviewed in order to situate vulnerability in the context of the on-going evolution of the CEAS.⁴² The text of the CEAS instruments themselves, which contain numerous references to vulnerability, have been scrutinised with analysis supported by relevant case law of the CJEU, which provides further clarity on the substantive content of the CEAS. Given the relationship between EU law and the ECHR, the ECtHR has had occasion to clarify States' obligations to vulnerable asylum seekers in their implementation of CEAS provisions. As such, a review of ECtHR case law completes the analysis of the emerging concept of vulnerability applicable in European refugee law.⁴³ The selection of CJEU and ECtHR cases for analysis was limited to cases involving asylum seekers where vulnerability was central to the judgement issued by the Court. Upon the normative foundation established by the analysis of human rights jurisprudence and refugee convention soft law, the European case law analysis succinctly clarifies the function of vulnerability in refugee law in a specific regional context. The findings should have relevance for similar research pertaining to other regional contexts.

Finally, as mentioned previously, this study acknowledges the fact that literature review and doctrinal analysis can clarify understandings of the concept of vulnerability in theory only. To that end it was deemed necessary to empirically test the proposed conceptual framework and analyse the trends emerging from international standards against practice on the ground in order to bridge the remaining knowledge gap between law and practice. Introducing the national case study, Chapter Five first examines the extent to which trends at the international level are reflected in Irish asylum law and policy. The analysis of the national level employs a

⁴¹ UNHCR, 'Refworld' [<https://www.refworld.org/cgi-bin/texis/vtx/rwmain>] accessed November 2019.

⁴² The primary source of EU legislative material for this thesis was EUR-lex, the online database of EU law. [<https://eur-lex.europa.eu/content/welcome/about.html>] accessed 13 October.

⁴³ The primary source for case law from the ECtHR for this thesis was the HUDOC database: [<https://echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=>] accessed 13 October 2019.

broad literature review of Irish law, policy and scholarship to set the scene for the empirical analysis in Chapter Six. In order to plug the knowledge gap between law, policy and practice, qualitative semi-structured interviews were conducted with twenty-three practitioners working in the asylum sector, who have specific exposure to RSD either through their work as decision makers or as advocates for asylum seekers. The full overview of the methodological approach to the empirical portion of this study is contained in Chapter Six. Noting that the experience of practitioners is often omitted from discourse on both vulnerability and refugee law, the aim of the qualitative interviews is to determine whether developments at the international level are reflected in national RSD procedures. The findings also serve to highlight the challenges that exist and steps that can be taken – in line with the normative framework and the conceptual framework defined in this thesis – to establish a more nuanced, protection-oriented approach to vulnerability assessment in practice in the national asylum system.

1.5 - A Comment on the Terminology Used

To avoid confusion, it is worth providing a brief account of some of the terminology that is commonly used throughout the thesis before proceeding.

This thesis is centred on the role of vulnerability in **refugee status determination (RSD)**, the process through which eligibility for refugee protection under the Refugee Convention is assessed. There is no standardised definition of or approach to RSD and the Refugee Convention does not set out any specific procedures to be adopted for the determination of refugee status.⁴⁴ Therefore, status determination modalities differ between countries (i.e. it may be a legal or administrative process, or in some countries RSD is not conducted by the State authorities at all, in which case UNHCR may take over). However, all States must adhere to the relevant international human rights and refugee law standards when conducting RSD (these standards will be discussed in detail in Chapter Three). It should also be noted that under EU asylum procedures, asylum seekers may be granted either refugee status or subsidiary

⁴⁴ UNHCR, 'Note on Determination of Refugee Status under International Instruments' (24 August 1977) EC/SCP/5 para 11.

protection, both of which fall under the umbrella of **international protection**.⁴⁵ While the eligibility criteria and entitlements attached to each status are slightly different, the determination procedures are largely the same (Ireland was, until recently, an outlier in this regard, as one of the few Member States to determine refugee status and subsidiary protection as part of two separate procedures. This will be discussed in detail in Chapter Five). However, for consistency with the language used in international standards (and in particular, UNHCR's normative guidance) this thesis will employ 'refugee status determination' or 'RSD' throughout, including when referring to EU law.

Similarly, this thesis will use the term '**asylum seeker**' to refer to persons applying for international protection (that is, either refugee status or subsidiary protection) and will spell out the distinction between statuses where necessary. The expression 'asylum seeker' typically refers to someone who has not been formally granted international protection and is awaiting the outcome of the RSD process. However, keeping in mind the declaratory nature of refugee status (that a person becomes a refugee from the point they fulfil the criteria of the refugee definition and not from the point they are formally recognised as such following RSD), the term 'refugee protection' used throughout this thesis will include asylum seekers unless stated otherwise.⁴⁶

1.6 - Some Limitations

In determining whether or not vulnerability requires reconceptualising in refugee law, it is first necessary to establish how vulnerability is *already* conceptualised. In the refugee law context, where there is increasing recourse to the concept in law and policy, there is little or no existing research examining what that means for the asylum seeker. In that sense, this study also serves as a chronicle of the evolution of the concept in refugee law. The thesis traces how vulnerability has come to be situated in

⁴⁵ Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (20 December 2011) OJ L. 337/9-337/26, art 2(a).

⁴⁶ James C Hathaway (n 15) 11.

the national asylum system, which involves an examination of the concept at different levels of discourse: academic scholarship; international human rights and refugee law; European refugee law and the national setting. This is a lot of ground to cover and while every effort is made to be as comprehensive as possible, there are some questions that will not be answered by this thesis.

Firstly, the thesis focuses on the Irish national context to exemplify the impact of international trends with respect to vulnerability within a single State. Accordingly, this thesis is not a comparative analysis of how States are implementing their domestic refugee law. There could well be value in a comparative analysis in the EU context - an examination of the extent to which the CEAS aim of achieving harmonised practice is being achieved with respect to vulnerability. Comparative analysis of the domestic jurisprudence, policy and practice of the Member States could also yield useful insight into different interpretations of vulnerability, and could identify good practice and provide a fuller indication of the impact of international law at the national level. However, the decision was made to focus on the Irish context as the sole national case study primarily because a comparative approach is beyond the scope of this research, which is already quite broad. The first half of this thesis is concerned with exploring the development of the concept of vulnerability in law, and it was necessary to leave space for that analysis. Furthermore, the particular research environment afforded by the employment-based doctoral scheme provided a unique opportunity to engage with the national context at a depth that would not have been possible from a comparative perspective. The findings from the Irish example could certainly inform the basis for such a comparative study in the future.

Secondly, the research does not include a systematic review of national case law nor decisions from the decision-making bodies. The reason for this is that first instance decisions are not publicly available on confidentiality grounds. With respect to judgements of the Irish High Court, on the basis of a cursory review, there appears to be no engagement with the substantive content of vulnerability as a legal concept in the Irish asylum context to date. However, individual judgements will be referred to as deemed relevant.

Finally, the thesis aims to propose how vulnerability can be operationalised in a more protection-sensitive way that adds value to the RSD process. In doing so, the research inevitably identifies a number of conceptual and practical challenges that would need to be overcome in order for any conceptual shift to take place. This thesis briefly discusses those substantive challenges in Chapter Seven but does not purport to offer concrete solutions, which is beyond the scope of the primary research question. Again, however, it is hoped that the findings throughout this research and the enhanced clarity of the concept and its value will form the basis for future research and advocacy to address those challenges. Some proposals to that effect are offered in Chapter Eight.

1.7 - Contribution to the Field

While an emerging concept of vulnerability in international human rights law is at an embryonic stage, rigorous analysis of the concept in international refugee law is practically non-existent. This thesis aims to go some way towards filling a significant conceptual and doctrinal gap by providing an analysis of the role of vulnerability in international refugee law and protection, and the particular consequences of the concept for individual RSD that is otherwise missing from the discourse on contemporary refugee protection challenges. In particular, by supplementing doctrinal analysis with a qualitative research component, the thesis provides an innovative approach to reconceptualisation of the concept by capturing the core theoretical, doctrinal *and* practical aspects of vulnerability in refugee protection.

The thesis provides an original contribution to the discourse on vulnerability more generally in that the focus of the inquiry creates a link between the normative legal framework, the national system and the first-hand experiences of practitioners implementing the applicable law with respect to vulnerable asylum seekers. This is in contrast to much of the existing socio-legal research on vulnerability, which tends to focus disproportionately on the experience of the vulnerable subject, rather than the structures and actors in positions of power that shape those experiences. While in no way intending to diminish the importance of the asylum seeker voice, this research does not engage directly with asylum seekers, a group which – in the Irish context, at

least – is arguably over-researched (the full rationale for this methodological choice is detailed in Chapter Six). Rather, the empirical focus is on the practitioners who are called upon to identify and respond to the needs of vulnerable asylum seekers in their day-to-day work. The methodology adopted for this study, therefore, provides a unique perspective on how the developing influence of vulnerability on protection standards can be shaped, without subjecting asylum seekers themselves to interviews about their experiences that could cause frustration, retraumatisation or even exacerbate existing vulnerability.

Finally, by clarifying some of the ambiguity, investigating normative gaps and proposing an alternative way of approaching vulnerability in refugee law, this thesis concludes by setting out what a conceptual framework for addressing vulnerability in national asylum procedures should look like. At a time when there is need for innovative responses to refugee protection challenges, this thesis should provide a foundation from which national authorities – in Ireland and further afield - can consider how best to respond to the needs of vulnerable asylum seekers in their national RSD procedures, whilst satisfying their human rights and refugee law obligations.

Chapter 2 – Defining a Conceptual Framework for Vulnerability in the Refugee Protection Context

2.1 - Introduction

Before determining whether and to what extent there is any protective value to be found in a reliance on vulnerability as a refugee protection tool, it is necessary to first unpack the concept. By reviewing literature on vulnerability theory, this chapter aims to establish the theoretical basis for the research by outlining key critiques of the concept from existing research in different fields of enquiry. The intention is to chart efforts to capture an understanding of the concept, including any associated pitfalls and attempts in the literature to overcome those pitfalls, with a view to determining how vulnerability can usefully be conceptualised in a way that would add value to the efficiency and fairness of national refugee status determination (RSD) procedures.

A lack of understanding of the myriad ways that vulnerability can manifest in the case of the individual asylum seeker can have severe consequences for the outcome of his or her international protection application (as will be elaborated in subsequent chapters). The aim of the analysis in this chapter therefore is to present a snapshot of understandings of vulnerability discourse, problematize the concept, identify the key conceptual challenges and opportunities and set the conceptual framework against which the analysis of law and policy throughout this thesis will take place and an appropriate vulnerability assessment mechanism can be devised in the national context. The approach to the review of the literature is guided by two broad but fundamental questions that recur throughout the literature and are of key relevance to the refugee protection context:

What is vulnerability and how is it determined? and What is the value of vulnerability?

2.2 - What is Vulnerability and How is it Determined?

Traditionally, vulnerability has been (and continues to be) used to help draw a distinction between those who are ‘deserving’ and ‘undeserving’ of assistance – a universal yardstick by which to identify beneficiaries of state welfare systems.¹ However, the situations in which a person or group can be recognised as vulnerable and in need of specific protection have become more diverse and complex in recent years. With the development of the international human rights framework throughout the 20th century, the use of vulnerability in human rights protection language has become more widespread but also more contentious. Although guidelines and legislative frameworks outline special protection for designated populations in specific contexts,² there is no universally recognised definition or harmonised criteria for the application of the term in theory or in practice. As a result, ‘vulnerability’ in its contemporary sense remains a nebulous concept; one that is defined on an *ad hoc* basis to suit the multitude of circumstances in which it arises. While the link between vulnerability and human rights is becoming increasingly intertwined and consequential, the practical value of vulnerability risks being obscured by a limited framework of understanding and inconsistent approaches to the concept. In his observations, based on the behaviour of the international human rights system and its monitoring bodies towards groups requiring special attention (to be analysed more systematically in the next chapter), Morawa notes that despite a burgeoning practice of classifying certain groups in need of special protection, there ‘is no single approach to definition of vulnerability’ and ‘there is no purposeful categorisation at all.’³ The lack of a coherent understanding allows greater leeway for problematic approaches to the concept to thrive.

¹ Richard Black, ‘Livelihoods under Stress: A Case Study of Refugee Vulnerability in Greece’ (1994) 7(4) *Journal of Refugee Studies* 360.

² On the tentative link between population-specific treaties that have emerged in the international human rights framework and response to the identification of the needs of vulnerable groups see generally: Sylvie Da Lomba, ‘Vulnerability, Irregular Migrants’ Health-Related Rights and the European Court of Human Rights’ (2014) 21(4) *European Journal of Health Law* 345; Anna Grear and Upendra Baxi, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010) 104.

³ Alexander Morawa, ‘Vulnerability as a Concept in International Human Rights Law’ (2003) 6(2) *Journal of International Relations and Development* 150.

Attention is increasingly being drawn to the dangers associated with approaches to vulnerability that are grounded in out-dated and rigid conceptualisations linked to one-dimensional identity categories of cohorts in need. Three predominant critiques that are relevant to this research can be extracted from the literature. Firstly, there is a concern that the prevalent approach to vulnerability that is preoccupied with identifying vulnerable groups can create or further entrench vulnerability. Martha Fineman, for example, critiques the traditional liberal State response to vulnerability in the context of equality and non-discrimination law, which is the identification of ‘vulnerable populations’ who require targeted support.⁴ She notes that the typical political and legal response to such populations is regulation and surveillance, which can have the adverse effect of entrenching ‘victimhood, deprivation, dependency, or pathology.’⁵ The lack of nuance afforded by a rigid-sub-populations approach to vulnerability is ultimately stigmatising, as such groups are perceived ‘as lesser, imperfect, and deviant’ by mainstream society.⁶ Gilson expands upon Fineman’s critique in the context of responses to sexual violence, arguing that the traditional view of vulnerability dominating (typically Western, capitalist) thought reflects a ‘reductively negative understanding’ of the concept as it is considered a ‘condition of weakness, dependency, passivity, incapacitation, incapability, and powerlessness.’⁷ When groups are deemed vulnerable, their vulnerability becomes a ‘fixed property that is relatively immutable [...] and this attribution of vulnerability is unlikely to change.’⁸

Secondly, traditional approaches to vulnerability, specifically the practice of segmenting society into vulnerable populations, creates a misleading presumption of homogeneity, which ‘masks significant differences among individuals’ within groups whose *particular* needs go unmet.⁹ Levine et al, in the context of bioethics have similarly criticized the concept of vulnerability for stereotyping ‘whole categories of individuals, without distinguishing between individuals in the group who indeed

⁴ Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20(1) Yale Journal of Law & Feminism 8.

⁵ *ibid.*

⁶ Martha Fineman, ‘Equality, Autonomy and the Vulnerable Subject in Law and Politics’ in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 16.

⁷ Erinn Cunniff Gilson, ‘Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence’ (2016) 42(1) Signs: Journal of Women in Culture and Society 71, 74.

⁸ *ibid.*

⁹ *ibid.*

might have special characteristics that need to be taken into account and those who do not.’¹⁰ When an entire group is deemed vulnerable or susceptible to harm on account of a shared characteristic, identity or status, the presumption, as Gilson notes, is that ‘vulnerability means the same thing for all those deemed vulnerable.’¹¹ Thirdly, the conventional preoccupation with vulnerable populations can also have the effect of excluding from consideration those who do not necessarily fit within traditionally recognised vulnerable groups. Fineman notes, as ‘perhaps the most insidious effect’ of the vulnerable subpopulations approach, that ‘[t]hose who stand outside of the constructed vulnerability subpopulations are thus fabricated as invulnerable.’¹²

In attempting to move away from these out-dated and rigid conceptualisations of vulnerability, Fineman proposes a shift towards a more nuanced approach to vulnerability as a ‘universal’ trait, shared by all.¹³ From this vantage point of vulnerability as an ontological feature of humanity, she exposes the problems at the heart of traditional attempts to define and operationalise the concept. Fineman links the adverse effects that have come to be associated with the ‘vulnerable group’ approach to an ‘impoverished sense of equality.’¹⁴ She describes how vulnerability can draw into relief the tension between the independence of the so-called autonomous liberal subject who benefits from formal equality under contemporary liberal legal and political systems, and the reality for groups who are unable to benefit from such systems due to their marginalised position in society. Referring to the contemporary liberal equality paradigm in which the autonomy of the individual liberal subject is given paramount importance, Fineman points out how those who are not seen as independent or self-sufficient are placed together in ‘vulnerable populations’ categories. Members of such categories are characterised by their inherent dependency or lack of capacity and little attention is paid to the adverse social environments and structures that might have created that dependency in the first place. The equality framework that exists in this context requires that individuals are treated the same in order to be treated equally, which disregards fundamental

¹⁰ Carol Levine and others, ‘The Limitations of “Vulnerability” as a Protection for Human Research Participants’ (2004) 4(3) *The American Journal of Bioethics* 44, 47.

¹¹ Gilson (n 7) 74.

¹² Fineman (n 6) 16.

¹³ Fineman (n 4) 1.

¹⁴ *ibid* 2.

differences in circumstance and ability, presuming a ground-level equivalence of opportunity from which all purportedly have the same chance at success. Fineman states that such a paradigm places those deemed vulnerable at an automatic disadvantage against others who are in a privileged position in society in that they are able to capitalise on the opportunities afforded by the State to the fully independent and autonomous. Within this framework ‘profound inequalities are tolerated – even justified – by reference to individual responsibility and the workings of an asserted meritocracy within a free market.’¹⁵ Those who are not deemed sufficiently autonomous are categorised in positions of vulnerability based on assumptions about choices they have made or deemed to be able to make in the future.¹⁶

The rigid categorisation of vulnerable populations is paternalistic and problematic in that doing so a) constructs ‘relationships of difference’ between individuals and groups within society, serving to exclude and isolate those seen as being vulnerable, and b) such designation often places vulnerable populations in competition with each other when it comes to proving that their vulnerability is of such a degree that they are most deserving of access to the resources available for assistance (for example, in the case of social welfare payments).¹⁷ This resonates with the refugee context, where refugees and asylum seekers are often the subject of rhetoric that they are a) a burden on the resources of their host state due to their perceived dependency, and b) placed in opposition to one another by formulations of vulnerability in law and policy that guarantees special provisions for certain categories of person depending on the severity of their vulnerability or neediness (for example, in the prioritisation of asylum application decision making for cases deemed the ‘most’ vulnerable).

¹⁵ Martha Fineman. ‘The Vulnerable Subject and the Responsive State’ (2010) 60(2) Emory University School of Law – Public Law & Legal Theory Research Paper Series 251.

¹⁶ Fineman gives three examples: 1. If someone is in a position where they may not be able to conform to the mandate of the autonomous liberal subject, which requires self-sufficiency, (such as children, the disabled or profoundly ill etc.), then they are perceived as being dependent and in need of protection; 2. If someone is deemed a ‘failure’ under the mandate of the autonomous liberal subject based on ‘poor choices’ they are deemed to have made (a single mother who requires state welfare for subsistence, or those who are unemployed and did not graduate from second-level education etc.) we are concerned with the ‘moral hazard’ of ‘rewarding’ them with social support; 3. Those deemed deviant or dangerous (prisoners, youth who engage in anti-social behaviour etc.) are separated from mainstream society and placed in facilities where they are institutionalised and ‘punished’ for bad behaviour. Martha Fineman, ‘“Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility’ 20(1) *The Elder Law Journal* 71-111, 85

¹⁷ *ibid* 85-86.

Fineman’s reconceptualisation of vulnerability has paved the way for substantive discussion on the need for a more nuanced understanding of the concept. In engaging more extensively with the question of ‘What is vulnerability?’ Mackenzie, Rogers and Dodd observe that attempts to define vulnerability can be divided into two broad responses: one is based on an understanding of vulnerability as universal, or a feature of our embodied humanity and the other focuses on attempts to distinguish vulnerable individuals or groups within society. The first response, as in Fineman’s work, characterises vulnerability as ‘inherent in human embodiment’ and our shared capacity for suffering, that ‘to be vulnerable is to be fragile, to be susceptible to wounding and to suffering; this suffering is an ontological condition of our humanity.’¹⁸ While under theories of embodied vulnerability everyone has potential to be vulnerable, the degree of vulnerability is dramatically impacted by the quality of the social environment, the actions of others and the capacity or willingness of the State and power structures to provide support. Judith Butler, for example notes that in contemporary society there ‘are ways of distributing vulnerability, differential forms of allocation that make some populations more subject to arbitrary violence than others.’¹⁹ In this sense, vulnerability is inextricably linked with dependency – not just on others but also on institutions and social structures - and fluctuates based on how needs associated with dependency are met (or not). The second response identified by Mackenzie et al focuses on the ‘susceptibility of particular persons or groups to specific kinds of harm or threats by others.’²⁰ While not incompatible with the idea that everyone is vulnerable, the ‘group-based’ approach is primarily concerned with the fact that ‘what makes some persons or groups especially [vulnerable] is their lack of or diminished capacity to protect themselves.’²¹ Group-based vulnerability is also informed by relationships of dependency but focuses more on those groups in society whose dependency on others is heightened by shared characteristics or whose position of relative inequality or disadvantage in society renders them more vulnerable to harm than others.

¹⁸ Catriona Mackenzie, ‘Introduction’ in Catriona Mackenzie and others (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 4.

¹⁹ Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2006) xii.

²⁰ Mackenzie (n 18) 6.

²¹ *ibid.*

Mackenzie describes a tension between the two approaches, with each presenting both valuable and problematic elements. Critique of the categorical approach is concerned with its inflexible nature, that members of vulnerable groups are affixed with a static label, increasing the potential for disempowering, excluding and stigmatising the group,²² and casting such groups ‘as ‘others’ worthy of pity, a view rarely appreciated.’²³ This traditional approach is inflexible and consigns people to a particular classification that may be difficult or impossible to shed, even after their vulnerability or particular needs have dissipated. Such an approach inhibits the nuance required to accurately capture diverse human experiences and needs at different points in time. An over-reliance on a group-based categorisation of vulnerability constrains the possibility to recognise individuals within a group who might have special characteristics that need to be taken into account. Luna, on the issue of vulnerability in research ethics guidelines, highlights that guidelines on vulnerability may actually confer vulnerability as a ‘blank concept’ on all members of the identified group.²⁴ Furthermore, vulnerable group categories may be proliferating to such an extent that vulnerability begins to lose any meaning or protective force. Levine et al, describe current conceptualisations of vulnerability as being ‘too broad’ in that ‘so many categories of people are now considered vulnerable that virtually all potential human subjects are included.’²⁵ The preoccupation with group-based approaches, which may fast create a situation under which ‘nearly everyone can be vulnerable,’²⁶ makes it very difficult to conduct meaningful analysis and is likely to contribute to further marginalisation.

On the other hand, while more abstract conceptualisations of vulnerability (i.e. the universal, embodied approaches as supported by Fineman and Butler) cast a wider net in terms of who is eligible for special support, they are of limited practical value on the ground where specific criteria and indicators are required to assess vulnerability

²² Mary Keogh, Noelin Fox and Eilionóir Flynn, ‘How Far Towards Equality? A Vulnerabilities Approach to the Rights of Disabled People’ (5 July 2010) 29 University College Dublin Working Papers in Law, Criminology and Socio-Legal Studies 3.

²³ Marion Danis, ‘Health Policy, Vulnerability, and Vulnerable Populations’ in Marion Danis, Carolyn M Clancy and Larry R Churchill (eds), *Ethical Dimensions of Health Policy* (Oxford University Press 2006) 320.

²⁴ Florencia Luna, ‘Elucidating the Concept of Vulnerability: Layers Not Labels’ (2009) 2(1) *International Journal of Feminist Approaches to Bioethics* 121, 125.

²⁵ Levine and others (n 10) 46.

²⁶ Luna (n 24) 128.

and identify beneficiaries of support.²⁷ Mackenzie *et al*, in their review of the literature, suggest that this is because such approaches to vulnerability are too broad, which ‘obscures rather than enables the identification of the context-specific needs of particular groups or individuals within populations at risk.’²⁸ In summary, exclusive adherence to either of the two approaches to vulnerability identified in the literature reflects an unrealistic view of the person at the heart of processes requiring assessment of needs. Acknowledging vulnerability as an embodied feature of humanity is a useful and important way of reconceptualising vulnerability and its relationship with social structures and equality but is of limited value to practitioners who require clear legal and policy guidance in order to provide support. On the other hand, a growing preoccupation with vulnerable categories and groups – while useful for the purposes of identifying persons in need of special support - risks rendering the concept meaningless, increasing group-based stigma and excluding those not members of a designated vulnerable group from protection.

This dichotomy between embodied and group-based vulnerability is particularly relevant to the international protection regime, where asylum seekers as a group require protection on account of a shared lack of State protection but also require individual recognition of vulnerability stemming from, *inter alia*, their precarious legal status, treacherous journey, or on account of the individual circumstances shaping the substance of their asylum application.²⁹ As Black argues, a static labelling approach to vulnerability in State policy can further entrench marginalisation and ‘a conception of vulnerability which classifies all refugees as vulnerable’, without leaving room for a nuanced review of individual needs, effectively contributes to ‘institutionalised dependency.’³⁰ Vulnerability assessment that takes place in that

²⁷ Mary C Ruof, ‘Vulnerability, Vulnerable Populations, and Policy’ (2004) 14(4) Kennedy Institute of Ethics Journal 411.

²⁸ Mackenzie (n 18) 6.

²⁹ By way of example, see: UN Committee on the Protection of the Rights of all Migrant Workers and their Families and the Committee on the Rights of the Child, ‘Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’ (16 November 2017) UN Doc CMW/C/GC/4-CRC/C/GC/23 para 39: ‘Children in the context of international migration, in particular those who are undocumented, stateless, unaccompanied or separated from their families, are particularly vulnerable, throughout the migratory process, to different forms of violence, including neglect, abuse, kidnapping, abduction and extortion, trafficking, sexual exploitation, economic exploitation, child labour, begging or involvement in criminal and illegal activities, in countries of origin, transit destination and return.’

³⁰ Black (n 1) 362.

context needs to be flexible enough to be able to recognise group-based and individual needs. For groups that may be vulnerable due to their shared circumstances, like refugees, there is a need to develop a conceptual framework for vulnerability analysis that, without disregarding the broader vulnerability associated with the refugee group, also facilitates examination of the range of particular vulnerabilities that inevitably apply to individuals within that group.

2.3 - What is the Value of Vulnerability?

Problematizing vulnerability is an important first step in addressing the barriers to elucidating a more nuanced understanding of the concept and opens up the opportunity to explore the potential utility of a richer understanding of a concept that can embrace the capacity of each of the two theoretical strands to ‘capture significant aspects of marginalised groups.’³¹ While acknowledging the flaws, commentators recognise the place of vulnerability at the core of ‘personal, economic, social and cultural circumstances within which all individuals find themselves at different points in their lives, and [as] a fundamental feature of humanity.’³² A more holistic understanding of vulnerability, of the positive as well as the detrimental aspects, ‘may provide a useful way of integrating [different approaches], by distinguishing distinct but overlapping kinds of vulnerability.’³³

Fineman highlights the potential value of vulnerability ‘for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.’³⁴ When vulnerability is conceived of as an inevitable feature of human embodiment, the burden of responsibility shifts from the individual, for whom vulnerability-causing events are beyond control, to the State that has the power to allocate resources and assets that might alleviate vulnerability and reduce its destructive potential, and increase resilience. A concept of vulnerability that embraces the role of States, institutions and

³¹ Erika Blacksher and John R Stone, ‘Introduction to “Vulnerability” Issues of Theretical [sic] Medicine and Bioethics’ (2002) 23(6) *Theoretical Medicine and Bioethics* 421.

³² Kate Brown, ‘“Vulnerability”: Handle with Care’ (2011) 5(3) *Ethics and Social Welfare* 313, 317.

³³ Mackenzie (n 18) 7.

³⁴ Fineman (n 4) 8.

other actors with responsibility and power to mitigate vulnerability draws vulnerability out of the private domain of the liberal subject and into the public sphere of State responsibility. As responsibility for mitigating vulnerability shifts to the State, it becomes clear that individuals are ‘positioned differently within a web of economic and institutional relationships’ which has a significant impact on the quality of resources at one’s disposal.³⁵ In this way, inequalities and false equivalences are laid bare as vulnerability becomes situated in its social context. Rather than treat everyone the same, a more nuanced concept of vulnerability that has as its starting point a person’s position within societal structures has the potential to highlight individual differences inherent in the reality and diversity of lived human experience, and may contribute to the achievement of more substantive equality.³⁶

Operationalising this concept of vulnerability in a way that has practical value is a separate challenge. In her critique of Fineman’s universal concept of vulnerability, Mackenzie – while ultimately agreeing with the notion of vulnerability as inherent to the human condition – argues that Fineman’s concept focuses primarily on the source of vulnerability as arising from one’s biological corporeality. She refers to a core issue with that assumption, which is that, in reality, ‘many kinds of vulnerability are primarily the result not of unavoidable biological processes but of interpersonal and social relationships or economic, legal, and political structures.’³⁷ While vulnerability is inextricably linked to one’s biological condition, it can also be ‘created, shaped, or sustained, at least in part, by existing social arrangements. None is wholly natural.’³⁸ To exemplify her point, Mackenzie uses the example of a woman who is a victim of domestic abuse. While one source of a domestic abuse victim’s vulnerability is indeed her biological predisposition to harm, a primary source is also her relationship with her abusive partner and also the availability (or lack) of social supports in place to provide protection and redress. Mackenzie argues that Fineman’s universalist analysis

³⁵ *ibid* 10.

³⁶ There is an intrinsic link between universal, embodied vulnerability and the notion of substantive equality. Sandra Fredman proposes a multi-dimensional framework for substantive equality that promotes a dynamic concept of equality that ‘addresses the distributional, recognition, structural and exclusive wrongs experienced by out-groups.’ For an overview, see: Sandra Fredman, ‘Substantive Equality Revisited’ (Legal Research Paper Series, University of Oxford, Paper No 70/2014, October 2014).

³⁷ Catriona Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ in Catriona Mackenzie and others (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 38.

³⁸ *ibid*.

places too much emphasis on vulnerability as a feature of our shared embodiment, which serves to ‘obscure important distinctions between different sources and states of vulnerability.’³⁹

Mackenzie proposes that both inherent and group-based approaches are valid and capture valuable features of vulnerability that ‘both need to be incorporated into an ethics of vulnerability.’⁴⁰ Perhaps it would be useful to shift the focus away from the current scholarly preoccupation with the question of ‘What is vulnerability?’ and towards consideration of the related question of ‘What causes vulnerability?’

Mackenzie suggests that rather than focusing exclusively on a definition of vulnerability, it may be useful to shift the perspective to the *sources* of vulnerability. To do so, Mackenzie proposes a taxonomy of three different sources from which vulnerability may stem: inherent, situational and pathogenic vulnerability.⁴¹ Inherent vulnerability refers to sources of vulnerability that arise from our corporeal and physiological dependency, such as medical needs, or from immutable features such as gender or age.⁴² The second source, situational, refers to vulnerability that is caused or exacerbated by the environment of the person or group and the capacity of institutions and social structures to respond to need.⁴³ Finally, Mackenzie identifies a third source of vulnerability they refer to as *pathogenic* vulnerability. This source stems from ‘morally dysfunctional or abusive interpersonal and social relationships and socio-political oppression or injustice.’⁴⁴ Pathogenic vulnerability occurs when entities that have the responsibility or capacity to alleviate vulnerability have the adverse impact of exacerbating vulnerability by undermining autonomy (Mackenzie gives the example of the susceptibility of a person with cognitive impairment to sexual abuse from their carer).

When the focus of inquiry shifts to the source of vulnerability, its capacity to generate stigma is reduced and the responsibility of societal institutions to provide redress are brought more sharply into focus. This recalibration of the analytical approach more

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid* 38-39.

⁴² *ibid* 38.

⁴³ *ibid* 39.

⁴⁴ *ibid.*

readily highlights how people occupy different positions of privilege within the framework of the State – vulnerable subject relationship and that vulnerability can range in severity and magnitude depending on how one is positioned relative to others within society. However, identification and response to specific needs is difficult due to the current preoccupation in law and policy with enumerating vulnerable populations, rather than the sources of vulnerability. As Mackenzie states, ‘a theory of vulnerability should also identify the obligations involved in responding to vulnerability and the agents or institutions that bear primary responsibility for discharging these obligations.’⁴⁵ In contrast to Fineman, who situates vulnerability and the liberal ‘myth’ of autonomy in opposition to one another, Mackenzie argues that for vulnerability responses to effectively address need and avert stigma or further marginalisation, developing autonomy should be at the heart of the response. She borrows from Anderson’s theory of capabilities to demonstrate the importance of autonomy for an effective response to vulnerability.⁴⁶ According to Anderson, the fundamental obligation of democratic society is to secure the social condition of freedom for its citizens and that the ‘relevant metric of equality is capabilities.’⁴⁷ Capabilities are defined as the opportunities and choices actually available to a person in order for them to achieve fundamental standards of functioning associated with a democratic society. The value of a capabilities component for developing a more dynamic theory of vulnerability is that it recognises that people are provided with more or less resources and capability to achieve equality depending on their specific position of privilege or disadvantage within society. The ‘stress is on a guarantee of **equal effective access** or the capabilities sufficient for equal standing rather than on equal functioning [emphasis added].’⁴⁸ In order for equal access to be made effective, citizens who require additional support to achieve the democratic standard of freedom are entitled to additional resources and support as necessary. As Anderson states, ‘The basic structure should provide, to each person, access to a package of resources adjusted to that person’s ability to convert resources into relevant functionings, and sensitive to environmental factors and social norms that also affect individuals’

⁴⁵ *ibid* 40.

⁴⁶ *ibid* 41- 48.

⁴⁷ *ibid* 52.

⁴⁸ *ibid* 53.

conversion abilities.’⁴⁹ A more holistic concept of vulnerability that can distinguish between sources and states of vulnerability (arising from human embodiment, group-based vulnerability and other sources such as those set out in Mackenzie’s taxonomy) is valuable because it facilitates identification of ‘different kinds of capability deficits and the actual or potential harms they cause’, as well as the actors responsible for intervening with a response to the person’s needs.⁵⁰

When approached from the perspective of sources, capabilities and needs, vulnerability becomes more relational.⁵¹ Luna (using women as an example of a group to whom the vulnerability label is often applied in a blanket fashion) suggests that while all members of a group may not be ‘essentially’ vulnerable, members of that group are often ‘rendered’ vulnerable by specific situations or circumstances.⁵² For example, while women are often labelled vulnerable as a group in various settings, it is plainly wrong to presume that every woman experiences vulnerability uniformly or to the same degree. In arguing for a more flexible approach, Luna calls for a more relational approach that takes account of the connection ‘between the person or a group of persons and the circumstances or the context’ in which they are situated.⁵³ In this sense, vulnerability is relational and fluid – and recalling the temporal nature of vulnerability and need to identify its various sources - vulnerability can usefully be understood as consisting of multiple overlapping layers, where layers of vulnerability are gained or removed as a situation unfolds and sources of vulnerability are addressed.

In this light, the value of vulnerability as a practical concept begins to become clearer. A more dynamic concept of vulnerability is one that acknowledges the individual differences, societal positions and disadvantages that shape each person’s unique experience of universal vulnerability but also the sources of that vulnerability and whether they are inherent to the individual or group, or generated by external forces. This leads us to the next question: How can lessons learned from theories of

⁴⁹ *ibid.*

⁵⁰ *ibid.* 54.

⁵¹ Robert E Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press 1985) 112.

⁵² Luna (n 24) 122.

⁵³ *ibid.* 129.

vulnerability be applied to refugee protection and what value could this have for the refugee?

2.4 - Vulnerability and Refugee Protection

The refugee protection context, where the complexities of the vulnerability debate are particularly salient, provides a useful platform for the examination of contemporary questions raised in the literature and for exploration of how a dynamic concept of vulnerability might apply in a given context. Under the notion of universal, embodied vulnerability, ‘human rights are rights enjoyed by individuals by virtue of being human – and as a consequence of their shared vulnerability.’⁵⁴ A cursory reading of the refugee definition enshrined in the Refugee Convention would suggest that it is the refugee’s perceived vulnerability, on account of the fact that they fear persecution and are denied the protection of their country of origin that obliges a host State to intervene on their behalf. In this regard, all refugees could technically be considered to be ‘politically vulnerable’, in that they require protection from a host State, lest they be returned to a country where they face serious threats to their life or wellbeing.⁵⁵ As will be discussed in detail in the next chapter, contemporary jurisprudence and soft-law guidance has developed in support of this assertion. However, as previously highlighted, critics have warned against a rigid affixation of vulnerability for its labeling quality and the dangers of imposing an institutional dependency on the individual, which may exacerbate vulnerability. In order to propose a conceptual approach to vulnerability that might avoid these negative outcomes, it is necessary to look at how vulnerability manifests – with a focus on the sources of that vulnerability – in the particular context in which it is being analysed.

As will be demonstrated in the following chapters, group-based approaches to vulnerability are proliferating in international human rights and asylum law. On a theoretical level, a rigid classification of group-based vulnerability on account of being a refugee or asylum seeker immediately throws up red flags by virtue of the fact that the refugee group is not homogenous. Such a generalisation ignores the basic fact

⁵⁴ Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press 2006) 3.

⁵⁵ Black (n 1) 362.

that asylum seekers, while no doubt a ‘group’ for the purposes of their shared pursuit of legal protection, are composed of individuals who each bear the burden of their respective experiences and may be in need of further, more specialised assistance better suited to their particular needs. Lack of attention to these details can have significant and potentially life-threatening consequences on the outcome of the RSD process. Disregard for the particular vulnerabilities that might be evident in individual cases can have significant implications for the asylum seeker in terms of his or her capacity to engage effectively with the complex RSD process, which in turn influences the outcome of their application.

Increasing use of the concept in international legal and policy frameworks is well intended; to identify those who are at a disadvantage to others in accessing basic rights. What is lacking, as will be shown in the following chapters, is a coherent approach to the concept or guidance that can facilitate policy-makers, asylum adjudicators and legal representatives to capitalise on the protection-enhancing elements of vulnerability while steering clear of the associated risks. In the case of refugees, labelling the group vulnerable as a whole is a simplistic response to a more complex problem that runs deeper than the group unit. Without a thorough understanding of the unique ways in which vulnerability can manifest on a case-by-case basis, it is difficult (or often impossible) for the asylum decision maker to make an accurate and fair evaluation of a claim. On the other hand, one must also be conscious of the risks associated with singling out specific categories of vulnerability for special protection. By delineating different criteria of vulnerability within a group of people who potentially all warrant some degree of protection, there is a risk of creating a hierarchy of vulnerability and a competitive environment, whereby the threshold for obtaining protection becomes higher for those who may be deemed less vulnerable than others. Thus, the conceptual framework for vulnerability in the asylum context must be able to maintain the fact that asylum seekers as a group are vulnerable, while also taking account of particular vulnerabilities at the individual level that can place some asylum seekers at a disadvantage to other members of the same group in terms of their capacity to fully engage with the protection process. During the RSD interview, for example, some asylum seekers might have particular difficulty providing a coherent testimony of their claim due to their particular

circumstances (e.g. a victim of torture who hasn't received adequate psychological support, an unaccompanied child asylum seeker who hasn't been provided with appropriate safeguards, or a person who seeks protection on the grounds of sexual orientation and is expected to prove an aspect of their life that they have never before had to explain or felt safe discussing). Recalling Anderson's capability theory, vulnerability in the asylum context can be usefully considered as reduced capacity to engage with the asylum procedures. Given the heterogeneous nature of the asylum seeker group, such vulnerability can be caused by any number of sources and occur at any stage in the asylum process; from the treacherous journey in search of international protection, to the conditions in the host country. No two asylum seekers will likely present with the same set of personal circumstances or sources contributing to their vulnerability.

Vulnerability assessment in the asylum context, therefore, must be more flexible. As Ippolito and Sanchez note, vulnerability 'is a particularly dynamic concept that encompasses, but also transcends, the notion of minority groups.'⁵⁶ While law and policy conceive of vulnerability as applicable to list-based categories and groups, space must be made available for decision makers to extrapolate individual vulnerabilities and needs on a case-by-case basis. To borrow from Ippolito and Sanchez's terminology, effective vulnerability assessment must be sufficiently 'dynamic' to conduct the delicate balancing act of acknowledging group-based vulnerability and needs arising from individual circumstances, while ensuring equal access to asylum procedures for all applicants. It is clear from the literature that the rigid approach to vulnerability that is prevalent in practice is not capable of adequately responding to these different dimensions that arise in the asylum context.

This thesis argues that a dynamic approach to vulnerability analysis is required to enable decision makers to acknowledge the reality that people's circumstances are constantly in flux and that vulnerability is not a static condition but a multi-dimensional state. For the purposes of this thesis, a multi-dimensional, dynamic vulnerability model is one that incorporates key aspects of the different strands of

⁵⁶ Francesca Ippolito and Sara Iglesias Sanchez 'Introduction' in Francesca Ippolito and Sara Iglesias Sanchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart Publishing 2015) 1.

vulnerability that have been identified in the literature. This thesis proposes that an approach to vulnerability that incorporates those features can allow the decision maker to identify special requirements and address inequalities that arise within the asylum seeker group. The value of this more nuanced approach to vulnerability lies in its multi-dimensional nature: it can hone in on individual disadvantages at an early stage in the process, identify new vulnerabilities as they arise and the various sources of that vulnerability. Thus, the conceptual framework that will underpin the analysis in this thesis incorporates the following core elements that should inform approaches to the identification of and response to vulnerability in the evolution and implementation of asylum law and policy:

1. An overarching recognition of vulnerability as a feature of human **embodiment**, as applicable to **groups** with shared characteristics and also capable of manifesting differently on an **individual basis**;
2. A focus on the various **sources and states** of vulnerability, as defined by Mackenzie in her taxonomy (inherent, situational and pathological);
3. An obligation to enhance the capabilities of vulnerable people on the basis of their individual needs to engage with asylum procedures so as to guarantee **equal effective access** to the right to seek asylum.

When the above constituent components of the dynamic vulnerability analysis are in place (through legislation, policy and resources on the ground), steps can then be taken to ensure that all members of the asylum seeker group have equal access to the protection system.

The more dynamic concept resonates with the narrative of the asylum seeker group, whose members come from a multitude of cultural, religious, political and socio-economic backgrounds each of which can influence their particular vulnerability in myriad ways that leave some individuals in need of special attention that others might not require. Take, for example, a girl in Afghanistan who may be vulnerable due to the general treatment of women in her country. She is not solely vulnerable on

account of her gender. Her vulnerability is added to after she is subject to forced marriage as a child, denied an education and subsequently abused by her husband. With no State remedy available, the same girl decides to flee her country and seek asylum elsewhere thus acquiring additional layers of vulnerability on account of potentially dangerous migratory route and her asylum seeker status, which may be removed or added to in the future depending on the support she receives, the eventual outcome of her asylum application and the extent to which she can successfully integrate into her new home. She acquires and loses layers of vulnerability as a result of the interaction between her particular characteristics and the context in which she is situated, and not as a result of some affixed label associated with her gender or other categorisation. While those aspects of her personhood no doubt play a part, to assume that her vulnerability stems from a single aspect of her experience is reductive. By considering her vulnerability against the specific context and range of experiences that have led to her application for asylum, it becomes easier to identify sources of that vulnerability. Her agency is preserved but space remains in which to acknowledge aspects of her particular situation where she might require special assistance. For the asylum seeker, access to this assistance ensures that he or she is able to fully engage with the asylum procedure and benefit from international protection if that is the appropriate outcome.

At this point, a connection can be made with ongoing developments in the European regional asylum legal framework, where a link between vulnerability, capabilities and special needs is emerging. A conceptualisation of vulnerability that recognises the relationship between vulnerability and ‘special needs’ is in its nascent stages in the European context. As will be explored in detail in Chapter Four, in EU asylum law the role of vulnerability is emphasised through specific provisions for ‘special needs’ within various directives that of the Common European Asylum System. They provide particular guarantees that aim to promote equal access to various entitlements at each stage of the asylum process.⁵⁷ A special need in this case would be the provision of a resource or support that can ensure someone’s engagement with the asylum procedure, for example a need of guardianship for an unaccompanied minor, a need of medical treatment for victims of torture, or a need of psycho-social support

⁵⁷ See Chapter Four, Section 4.2 for a full overview.

for victims of trafficking.⁵⁸ These needs can be considered ‘special’ in their link to the asylum seeker’s capacity to participate in the asylum process and if not immediately satisfied, might negatively impact on the course of the procedure. In this regard, particular vulnerability highlights the disadvantage that some asylum seekers might face in terms of access to protection. In the context of European Convention on Human Rights law, for example, the ECtHR has established a baseline from which all asylum seekers can be considered vulnerable as a group.⁵⁹ In subsequent judgements, the Court has developed this to recognise gradations of vulnerability that, while maintaining the vulnerable status of the asylum seeker group, recognise that personal factors may give rise to increased vulnerability amongst individuals within that group.⁶⁰ Developments within the European asylum system reflect the two ‘responses’ to vulnerability that have been highlighted in the literature in that there is recognition of the general vulnerability of the refugee group but also distinguishing various grades of vulnerability on a case-by-case basis.⁶¹

On the surface, these nascent approaches to vulnerability in European asylum law seem to be compatible with the components of the dynamic approach to vulnerability, including recognition of the need to provide adequate resources to ensure ‘effective access’ to the asylum procedure. Ultimately, however, how international law and policy translate into the identification of vulnerability and response to associated special needs in practice is uncertain. Vulnerability assessment is a highly subjective process that is left entirely at the discretion of States and decision makers, resulting in widely disparate practice across the EU.⁶² What is clear is that acknowledgement of special needs is a crucial element of protection. However, special guarantees are

⁵⁸ Joanna Pétin, ‘Exploring the Role of Vulnerability in Immigration Detention’ (2016) 35(1) *Refugee Survey Quarterly* 91-108, 97.

⁵⁹ Gina Clayton, ‘Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*’ (2011) 11(4) *Human Rights Law Review* 758.

⁶⁰ See *inter alia*: *Mubilanza Mayeka and Kaniki mitunga v Belgium* App No 13176/03 (ECtHR, 12 October 2006) para 55; *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR, 19 January 2010) para 74 [in relation to minor asylum seekers]; *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011) para 86 [in relation to unaccompanied minors]; *Aden Ahmed v Malta* App no 5532/12 (ECtHR, 23 July 2013) para 97 [in relation to applicants with fragile physical or mental health]; *Sufi and Elmi v United Kingdom* App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011), para 303 [in relation to an applicant with post-traumatic stress disorder]; *SJ v Belgium* App no 70055/10 (ECtHR, 27 February 2014), para 125; *Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011), para 64 [in relation to applicants living with HIV].

⁶¹ Ulrike Brandl & Philip Czech ‘General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?’ in Francesca Ippolito and Sara Iglesias Sanchez (eds) (n 56) 251.

⁶² Natalia Caicedo & Andrea Romano, ‘Vulnerability in the context of EU asylum policies: the challenges of identification and prioritisation’ in Alisa Petroff & others (eds) *Refugees on the Move: Political, Legal and Social Challenges in Times of Turmoil* (Bellaterra: Universitat Autònoma de Barcelona 2018) 78.

meaningless unless there is a coherent approach or mechanism to facilitate the early identification of vulnerability at the level of national asylum procedures. The following chapters will explore how vulnerability as a legal and practical concept already plays into the relevant international standards and European asylum practice. This will clarify the extent to which the applicable legal and policy framework is compatible with the dynamic approach to vulnerability supported by the literature.

2.5 – Concluding Remarks : Towards a dynamic conceptual approach to vulnerability

It is clear from abundant critique that the traditional concept of vulnerability has lost much of its moral and political force and at worst can create or exacerbate vulnerability. Traditional approaches are preoccupied with the identification of rigid subpopulation categories, which has been shown to entrench stigmatisation by reinforcing paternalistic, essentialising qualities; by stereotyping groups to the detriment of individual needs and by excluding those who do not fit within designated categories. This static adherence to a fixed concept of vulnerability disregards the nuances of individual lived experience and the particular vulnerabilities that can affect different members of the same group. However, developments in scholarship have highlighted how different responses to the question of ‘What is vulnerability’ reveal different approaches to the concept, each with its own positive and negative features. Recent critique suggests that asylum practitioners and asylum seekers themselves would be better-served if the focus shifted away from defining vulnerability and more towards identifying sources of vulnerability.

This thesis argues that a more dynamic concept of vulnerability, which allows for overlap of the different approaches described in the literature but that also facilitates understanding of the multi-dimensional nature of vulnerability (including the various sources and temporal states of vulnerability) can add value to the refugee protection context. Such an approach can sustain the status of asylum seekers as a vulnerable group, while also facilitating the identification of those individuals within the group

who might require special attention in order to fully engage with the asylum process at different points in time throughout that process.

However, in order for this concept to have any positive impact, particular vulnerabilities must be identified as early as possible in the asylum process. While international and European asylum law seem to be espousing vulnerable group approaches, the impact of this in practice, including the extent to which the negative aspects of such approaches as outlined in this chapter are emerging, have not been analysed in any detail in the scholarship to date. By positioning this conceptual framework against the developments at the international level and using the Irish context as a European case study, the following chapters will explore the potential of the dynamic concept of vulnerability and how it can be operationalised to further the realisation of fairer and more efficient asylum procedures.

Chapter 3 – Vulnerability in International Human Rights and Refugee Law

3.1 – Introduction

Having established that there is a need for a more dynamic conceptual approach to vulnerability, it is next necessary to turn to the normative framework for this thesis and examine in detail how theoretical debates on vulnerability are reflected in international law governing national asylum law and refugee status determination (RSD). This chapter outlines the nexus between the concept of vulnerability and the dual systems of international human rights and refugee law. In particular, it emphasises the point introduced in Chapter One, that refugee law does not exist in a vacuum and that interpretation of the Refugee Convention is often directly informed by normative developments in international human rights law. As such, this chapter reinforces the principle that States must have regard to corresponding human rights standards when implementing their Refugee Convention obligations, including with respect to vulnerability.

In order to clarify the function of vulnerability in domestic RSD procedures, it is therefore necessary to examine the extent to which a coherent approach to the concept exists in international human rights law. The international human rights system, given its sophisticated array of treaty-monitoring mechanisms, yields greater capacity for a rich analysis of vulnerability than what is available under the Refugee Convention, which lacks any enforcement mechanism. In that light, the chapter begins with a systematic analysis of the outputs of the mechanisms in place for monitoring State implementation of the core international human rights treaties. For consistency, the analysis is guided by the key questions that informed the review of the literature and the development of the conceptual framework in the previous chapter:

1) What is vulnerability and how is it determined? and 2) What is the value of vulnerability?

The chapter then proceeds to an examination of international refugee law, specifically the body of soft-law material produced by the United Nations High Commissioner for Refugees (UNHCR), to demonstrate whether interpretation of vulnerability in the refugee protection context is in sync with or diverges from developments in international human rights law.

3.2 –The International Human Rights System

The UN system of international human rights monitoring is composed of a complex arrangement of institutional ‘bodies’ that stem from two sources:¹ ‘Charter-based bodies,’ whose mandate derives directly from the UN Charter, such as the General Assembly or the Human Rights Council and ‘treaty-based bodies’, such as the committees tasked with overseeing implementation of the nine international human rights treaties.² Each of these bodies has established dedicated mechanisms for fact-finding, interpretation and standard setting with respect to international human rights. In their reporting and guidance, both sets of mechanisms often overlap or corroborate each other’s findings, as the following paragraphs will demonstrate.

In order to develop an understanding of the role that vulnerability plays in international human rights law and the extent to which that role corroborates the theoretical critique on vulnerability, this section draws from the core functions of the international human rights treaty monitoring bodies.³ The body of jurisprudence

¹ Philip Alston, Ryan Goodman and Henry J Steiner, *International Human Rights: Text and Materials* (Oxford University Press 2013) 685.

² The nine core international human rights treaties are: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); International Covenant on the Elimination of all forms of Racial Discrimination (21 December 1965) 660 UNTS (ICERD); Convention on the Elimination of all forms of Discrimination against Women (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) 1467 UNTS 85 (CAT); Convention on the Rights of the Child (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Adopted 18 December 1990, entered into force 1 July 2003) A/RES/45/158 (ICMW); International Convention for the Protection of All Persons from Enforced Disappearance (Adopted 12 January 2007, entered into force 23 December 2010) A/RES/61/177 (CPED); Convention on the Rights of Persons with Disabilities (Adopted 24 January 2007) A/RES/61/106 (CRPD).

³ There ten treaty-monitoring bodies, which are committees comprised of independent experts tasked with monitoring the implementation of the core human rights treaties: the Human Rights Committee (HRC); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); Committee

produced by these mechanisms clarifies provisions contained in the core human rights treaties and provides States with interpretative guidance along with examples of where distinct bodies corroborate with or deviate from their counterparts on specific thematic or substantive issues. A review of their outputs provides valuable insight into how vulnerability is conceptualised in the international human rights system, the consequences this has for access to human rights protection and whether or not the conceptual concerns identified in the theory are replicated in the international human rights context. Analysis covers the treaty bodies' Concluding Observations on States,⁴ their General Comments⁵ and decisions on individual complaints.⁶

3.2.1 Methodological remarks

For the sake of clarity, it is worth briefly outlining how the data informing the discussion in this section was obtained. Due to the sheer volume of outputs from the various treaty mechanisms, manually searching each document for references to vulnerability would not have been possible within the scope of this research. However, a key resource that made a thorough search possible was the Office of the High Commissioner for Human Rights' (OHCHR) online Universal Human Rights Index⁷ and Jurisprudence Database,⁸ which facilitated a streamlined and comprehensive search process, including the option to adjust the search function by date, keyword and relevant mechanism. These resources were used to systematically scour the entire archive of Treaty Body Concluding Observations, General Comments, and decisions on individual complaints, separately, in order to retrieve

against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED); and the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT). See generally: Michael O'Flaherty, *Human Rights and the UN: Practice before the Treaty Bodies* (2nd ed, M Nijhoff Publishers 2002); Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

⁴ Concluding Observations are findings and recommendations stemming from regular assessments of a State's implementation of the standards contained in the various human rights treaties they have ratified by the respective treaty-monitoring body. States are obliged to submit frequent reports to the relevant treaty-monitoring body, which form the basis of treaty-monitoring bodies' examination of States.

⁵ Each of the treaty-monitoring bodies has the authority to publish its interpretation of the provisions contained within the respective treaty under which it is mandated, which are commonly known as 'General Comments.' An overview of all General Comments to date is available at [\[https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx\]](https://www.ohchr.org/en/hrbodies/pages/tbgeneralcomments.aspx) accessed June 2019.

⁶ Eight of the human rights treaties have complaints mechanisms that can receive individual complaints on alleged violations of the human rights contained within the respective treaty. States are obliged to cooperate with complaints procedures and, where a violation is found, required to implement measures to remedy the situation.

⁷ OHCHR, 'Universal Human Rights Index' [<http://uhri.ohchr.org/>] accessed August 2019.

⁸ OHCHR, 'Jurisprudence Database' [<http://juris.ohchr.org/>] accessed August 2019.

documents that make explicit reference to vulnerability. With regards to the search parameters used, this review focused on documents containing the keywords ‘vulnerable’ *or* ‘vulnerability’. All documents that were flagged as containing the keywords were manually downloaded from the OHCHR databases for review.⁹

The documents were reviewed systematically by mechanism and findings were categorised into different tables for each mechanism, keeping in mind the respective function of each. The findings were categorised for analysis according to: title of the document; the vulnerable subject identified; the type of language used; intersectionality of vulnerability (is a person or group vulnerable as a result of a number of criteria); vulnerable to what (what rights are at risk of being violated); impact or role of vulnerability (for example, in the case of jurisprudence, the weight of the subject’s vulnerability in the committee’s findings; in the case of General Comments, the effect of vulnerability on a state’s obligations).¹⁰ Analysis covers documents issued by the human rights system up until the end of 2018. It is not the intention of this section to quantify or document every single example of vulnerability that occurs but rather to capture a snapshot of patterns and trends in the approaches of the different mechanisms.

3.3 - Who is vulnerable? How vulnerability is determined in international human rights law

In none of the human rights treaties is there a definition of vulnerability nor has there been an attempt to compile an exhaustive list of all those who might be considered vulnerable. Keeping in mind the concerns raised in the literature with regards to categorisation and list-based approaches to identifying vulnerable persons and groups, this section will examine whether the international human rights mechanisms have established a coherent approach to identifying vulnerability in the absence of a clear

⁹ As the focus is on the vulnerable subject and how the human rights mechanisms determine and engage with vulnerable subjectivity, a number of exclusions from the search findings could be made. A general rule of thumb was applied whereby any document referencing vulnerability that did not play a direct part in the assessment of facts, legal standards applied or recommendations made could be excluded. For example, external references to vulnerability, such as in State party submissions, often do not have any impact on committee recommendations or decisions.

¹⁰ Copies of all findings are on file with the author.

definition for the concept. The following subsections will review, in turn, the treaty bodies' General Comments, Concluding Observations and decisions on individual complaints.

3.3.1 *The General Comments*

The treaty monitoring committees frequently issue so-called General Comments, articulating and clarifying States' responsibilities with regards to specific or thematic human rights issues arising within the remit of their respective treaty. While not legally binding, General Comments are influential sources of authoritative guidance on interpretation of the rights and obligations contained in the human rights treaties. Their contents may be referred to by State legislators aiming to draft law in light of international obligations, in complex legal cases by setting out principles against which laws can be analysed and can help States and non-State actors develop their policy positions on specific issues.¹¹ The General Comments should be the first port of call in seeking to determine the legal significance of vulnerability in the international human rights framework.

It can be noted from the outset that vulnerability has a significant presence in the content of the General Comments. Of all 154 General Comments reviewed, 64 (41 per cent) contained references to vulnerability.¹² Numerous broad provisions are made for the 'special vulnerability of certain categories of person'¹³ and for 'vulnerable or marginalized sections of the population,'¹⁴ to give a few examples of where vulnerability is acknowledged, albeit in ambiguous fashion. A number of the General Comments have sub-sections dedicated specifically to groups in need of special protection despite there being no explicit reference made to vulnerability whatsoever

¹¹ Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their Legacy' in Helen Keller, Geir Ulfstein and Leena Grover (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 129.

¹² As might have been expected, the frequency of vulnerability references is much higher in General Comments pertaining to 'typically' vulnerable groups: 90 per cent of the CRC's comments and 100 per cent of the CAT and CMW's comments (three each) referenced vulnerability. Other committees are far less liberal in their use of vulnerability language. The HRC, for instance, references vulnerability in six out of their 35 total General Comments and CERD makes reference to vulnerability in five out of a total of 33 General Comments.

¹³ HRC, 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 13.

¹⁴ CESCR, 'General Comment No. 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (26 November 2002) UN Doc E/C.12/2002/11.

in association with these groups. For example, the Committee on Economic Social and Cultural Rights (CESCR) General Comment on the right to health has a subsection on ‘special topics of broad application,’ which refers to particular groups who require special attention¹⁵ and its General Comment on the right to cultural life designates a similar list of minorities, migrants, and persons living in poverty as ‘persons and communities requiring special protection.’¹⁶ A number of General Comments focus entirely on groups with particular needs. For example, the CESCR has issued General Comments on the rights of persons with disabilities¹⁷ and older persons;¹⁸ the Committee on the Rights of the Child (CRC) has a General Comment on indigenous children;¹⁹ the Committee on the Elimination of Discrimination against Women (CEDAW) has a General Comment dealing with the rights of older women²⁰ and the Committee on Migrant Workers (CMW) has a General Comment dedicated to articulating the rights of migrant domestic workers,²¹ to give some examples. In a number of cases, the treaty bodies do acknowledge that some groups are not homogenous in terms of membership or level of need and often place obligations on States to identify those *within* the group with particular needs and to provide disaggregated data on such groups so that vulnerable members of the group can be identified. For example, the CESCR recognises that ‘older persons as a group are as heterogeneous and varied as the rest of the population’ but that ‘side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries and who feature prominently among the most vulnerable.’²² The CMW and CRC have produced a joint General Comment on the situation of children in the context of migration, which indicates the ways children in migration can be rendered vulnerable due to multiple personal characteristics stemming from *inter alia*, gender, disability,

¹⁵ CESCR, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (11 May 2000) UN Doc E/C.12/2000/4.

¹⁶ CESCR, ‘General Comment No. 21: Right of Everyone to Take Part in Cultural Life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights’ (21 December 2009) UN Doc E/C.12/GC/21.

¹⁷ CESCR, ‘General Comment No. 5: Persons with Disabilities’ (25 Nov. 1994) UN Doc E/1995/22.

¹⁸ CESCR, ‘General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons’ (24 Nov. 1995) UN Doc E/C.12/1995/19.

¹⁹ CESCR, ‘General Comment No. 11: Plans of Action for Primary Education’ (10 May 1999) UN Doc E/C.12/1999/4.

²⁰ CEDAW, ‘General Comment No. 27 on older women and protection of their rights’ (16 December 2010) UN Doc CEDAW/C/GC/27.

²¹ CMW, ‘General Comment No. 1 on Migrant Domestic Workers’ (23 February 2011) UN Doc CMW/C/GC/1.

²² CESCR (n 18) paras 16 – 19.

unaccompanied or other status and sexual orientation.²³ In the concept note for that General Comment children are described as being in a situation of ‘double vulnerability – as children and as children affected by migration in some way.’²⁴

Group-based approaches to vulnerability are widespread within the General Comments and recognition of the heterogeneity of those groups is welcome practice, in line with the conceptual aims of the dynamic model of vulnerability. However, the approach to vulnerability determination lacks structure, or reference to standards or a common framework, relying instead on ad-hoc interpretation. It is unclear in many cases whether or not specific guidance in the General Comments is applicable to vulnerable groups, individuals, or both. Most mentions of vulnerability are in broad terms in relation to the particular right under discussion, so it is unclear whether those groups can be considered vulnerable in contexts beyond the scope of the particular General Comment. In the context of CESCR General Comments, Chapman and Carbonetti identify a shift in language from vulnerable groups in earlier comments to speaking of vulnerable ‘individuals and groups’ in later comments.²⁵ However, the CESCR gives no explanation for this inconsistency. Similar shifts away from general ‘vulnerable group’ terminology can be identified in the General Comments of other treaty bodies. For example, the HRC goes from hardly any mentions of vulnerability in its early General Comments, to suddenly highlighting the needs of ‘particularly vulnerable persons’²⁶ and the ‘special vulnerability of certain categories of person’²⁷ in the contexts of specific situations in their most recent General Comments.

The language in the General Comments becomes notably stronger when addressing individuals or groups who might be at particular risk due to an *overlap* of multiple

²³ CMW & CRC, ‘Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’ (16 November 2017) UN Doc CMW/C/GC/4-CRC/C/GC/23.

²⁴ CMW & CRC ‘Call for submissions on a Joint General Comment on the Human Rights of Children in the Context of International Migration, Concept Note’ [<http://www.ohchr.org/EN/HRBodies/CMW/Pages/JointGeneralCommentonChildren.aspx>] accessed June 2019.

²⁵ Audrey R Chapman and Benjamin Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33(3) Human Rights Quarterly 682, 692.

²⁶ HRC, ‘General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992) HRI/GEN/1/Rev.9 (Vol. I)

²⁷ HRC, ‘General Comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant’ (29 Mar. 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

vulnerabilities. For example, the CRC frequently notes the ‘particular vulnerability’ of unaccompanied or separated children.²⁸ Likewise, in its General Comment on the rights of persons with disabilities, the CESCR considers children with disabilities to be ‘especially vulnerable’ and thereby entitled to ‘special protection.’²⁹ The CMW considers ‘undocumented migrant domestic workers, especially women and children’ to be ‘extremely vulnerable.’³⁰

The General Comments apply vulnerability as the unit of measurement by which certain people may be at risk of reduced access to specific rights. However, the committees seem to determine vulnerability on an *ad hoc* basis in isolation from any overarching conceptual framework or explanation as to why a person or group is vulnerable, instead leaving it to the reader to extrapolate that from the specific context in question.

3.3.2 Concluding Observations

Treaty monitoring bodies also have the function of periodically reviewing States’ implementation of the rights set out in the treaties and issuing their findings in their Concluding Observations. Of the 1822 documents reviewed, 917 (approximately 51 per cent) contained references to ‘vulnerable’ and/or ‘vulnerability’, meaning that half of all Concluding Observations consider vulnerability in some way. Some remarks can be made on how the committees link vulnerability to different groups and individuals in their Concluding Observations.

Firstly, the language used by the treaty bodies implicitly recognises various sources of vulnerability, distinguishing between those who are inherently vulnerable and those who are made vulnerable by the external circumstances in which they find themselves. Numerous references are made across the various committees to those who are vulnerable as a result of immutable aspects of their identity that are unchangeable, or cannot reasonably be expected to change. For example, ethnic

²⁸ CRC, ‘General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin’ (1 September 2005) UN Doc CRC/GC/2005/6.

²⁹ CESCR (n 17) para 32.

³⁰ CMW (n 21) para 52.

minorities, indigenous populations, women and children are among persons whose vulnerability is linked to their identity. In its 2005 Concluding Observations on Thailand, the Human Rights Committee notes, ‘ethnic minorities and migrants from Myanmar are particularly vulnerable to exploitation.’³¹ The Committee against Torture (CAT) has expressed concern about ‘torture and ill treatment of members of vulnerable groups, especially indigenous communities, sexual minorities and women.’³² The CEDAW acknowledges the ‘special vulnerabilities of young women and women with disabilities to different forms of violence.’³³ Committee recommendations and State obligations often involve heightened non-discrimination efforts and positive action that seeks to address inequalities. On the other hand, the treaty bodies also frequently refer to people who have *become* vulnerable or are likely to be made vulnerable due to external forces. In Concluding Observations on the United States of America, the CAT expressed concern at ‘the situation of certain individuals and groups who *have been made* vulnerable by discrimination or marginalization [emphasis added],’ with regards to access to legal redress.³⁴ The Committee on the Elimination of Racial Discrimination (CERD) highlights the migrant worker’s dependency on their sponsor as ‘*rendering* them vulnerable to various forms of exploitation and abuses [emphasis added].’³⁵ The external nature of this category of vulnerability is characterised by deficiencies in State processes, which inevitably creates vulnerability. The Sub-Committee on the Prevention of Torture in its review of Honduras in 2010 highlighted systemic defects leading to a ‘range of abuses or irregular practices [that] render the population disturbingly vulnerable.’³⁶ Vulnerability is often described as explicitly situational and the treaty bodies frequently comment on groups who, when found in ‘vulnerable situations’, require State intervention. The CESCR, for example, refers to ‘women in vulnerable

³¹ HRC, ‘Concluding Observations of the Human Rights Committee: Thailand’ (8 July 2005) UN Doc CCPR/CO/84/THA para 23.

³² CAT, ‘Conclusions and Recommendations of the Committee against Torture: Ecuador’ (11 January 2017) UN Doc CAT/C/ECU/CO/3 para 17.

³³ CEDAW, ‘Concluding Observations on the combined sixth and seventh periodic reports of the Dominican Republic’ (3 May 2017) UN Doc CEDAW/C/DOM/CO/6-7 para 24.

³⁴ CAT, ‘Concluding Observations on the combined third to fifth periodic reports of the United States of America’ (19 December 2014) UN Doc CAT/C/USA/CO/3-5 para 29.

³⁵ CERD, ‘Concluding Observations of the Committee on the Elimination of Racial Discrimination: Qatar’ (13 April 2012) UN Doc CERD/C/QAT/CO/13-16 para 15.

³⁶ CAT Subcommittee, ‘Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras’ (10 February 2010) UN Doc CAT/OP/HND/1 para 81.

situations, such as women in rural areas.³⁷ In addition to recognition of different sources, the Concluding Observations also identify those responsible for addressing sources of vulnerability. Recommendations in these cases tend to focus on the State's responsibility to implement policies or legislative changes that address the societal factors that create 'vulnerable situations.' In the aforementioned General Comment, the Committee calls on the State to develop 'a comprehensive public policy to combat trafficking in persons and to provide protection and assistance to victims.'³⁸

Secondly, the language in Concluding Observations suggests that there are different degrees of vulnerability. For example, the treaty bodies have highlighted how members of the Roma ethnic minority 'face multiple and intersecting forms of discrimination based on sex, ethnic or cultural background and socio-economic status.'³⁹ Inherently vulnerable persons in State institutions are often rendered further vulnerable where the procedures and policies governing that institution are insensitive to their needs, adding an external source of vulnerability. Children and women in detention or deportation settings that are unsuited to their particular needs, for example, are often designated as 'especially vulnerable.'⁴⁰ As in their General Comments, treaty bodies identify heightened vulnerability in Concluding Observations where they encounter people or groups who possess multiple, overlapping vulnerabilities. The CEDAW regularly highlights how overlapping vulnerabilities can impact on women, especially the 'particular circumstances of women belonging to different groups of vulnerable people, including refugees, asylum-seekers, displaced persons and disabled people and notes that, despite de jure equality, women belonging to these groups are at risk of multiple discrimination.'⁴¹

A final point, linked to the previous comment on multiple vulnerabilities, is that in certain circumstances the committees stop short of alluding to a hierarchy of

³⁷ CESCR, 'Concluding Observations on the fourth periodic report of Paraguay' (6 March 2015) UN Doc E/C.12/PRY/CO/4 para 25.

³⁸ *ibid.*

³⁹ CEDAW 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Romania' (10 February 2010) UN Doc CEDAW/C/ROM/CO/6 para 26.

⁴⁰ CAT Subcommittee, 'Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Benin' (15 March 2011) UN Doc CAT/OP/BEN/1 para 108; CAT, 'Concluding Observations of the Committee against Torture: Germany' (18 Nov 2011) UN Doc CAT/C/DEU/CO/5 para 24.

⁴¹ CEDAW, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Cyprus' (30 May 2006) UN Doc CEDAW/C/CYP/CO/5 para 31.

vulnerability. Some vulnerable persons are put in a position of priority in recommendations to States, where language like ‘most vulnerable’ or ‘more vulnerable’ is used to signify that certain persons have a greater need of additional support than their less vulnerable counterparts. For example, the CEDAW calls on States to give ‘special attention’ to ‘the most vulnerable groups of women, including rural and migrant women.’⁴² The CESCR highlights the need to pay particular attention to ‘groups most vulnerable to the violation of their rights, such as Roma and migrant workers.’⁴³ Of course, these examples should not be taken out of the context of the particular rights issue to which they are associated, as different groups are ‘most’ or ‘more’ vulnerable in different circumstances. The link between vulnerability and prioritisation of support provides some insight into the practical consequences and value of vulnerability as a tool for gauging the level of support required to ensure access to human rights protection.

3.3.3 Individual complaint mechanisms

The treaty monitoring bodies have the power to adopt authoritative (but not legally binding) findings in disputes between individuals and respondent States with respect to alleged human rights violations.⁴⁴ Where the General Comments and Concluding Observations provide interpretation of who might be considered vulnerable and what the determinants of that vulnerability are, the decisions arising out of the treaty bodies’ individual complaint mechanisms demonstrate how those interpretations of human rights standards are enforced in practice in individual cases. Of the 2162 documents reviewed, there were 108 documents (approximately five percent) that explicitly mentioned vulnerability, a much lower figure than that of the other mechanisms. This may be attributed to the nature of the documents surveyed; for example, admissibility decisions (the majority of documents in the jurisprudence database), which are often concerned with whether or not an appellant has exhausted domestic remedies and other procedural issues, would not necessarily conduct

⁴² CEDAW ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women: Libyan Arab Jamahiriya’ (6 February 2009) UN Doc CEDAW/C/LBY/CO/5 para 44.

⁴³ CESCR ‘Concluding Observations on the second periodic report of Slovenia’ (28 Nov 2014) UN Doc E/C.12/SVN/CO/2 para 9.

⁴⁴ Geir Ulfstein, ‘Individual Complaints’ in Helen Keller, Geir Ulfstein and Leena Grover (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012).

substantive analysis of a case, which is where vulnerability considerations are most likely to arise. Additionally, the comparatively low frequency of vulnerability references may be reflective of the weight afforded by the committee to a vulnerability finding in its decision. For example, where a claimant is found to be vulnerable, the decision is more likely to turn in their favour, as will be discussed in more detail in the following section.

The vulnerable subjects identified in the individual complaint jurisprudence are often referred to using language like ‘particularly vulnerable’ and ‘especially vulnerable.’ Furthermore, a large majority of the claimants in these cases are either explicitly identified as having multiple overlapping vulnerabilities, or this fact can be discerned from their particular status and the language used to describe them. While the committees’ practice of determining vulnerability in General Comments and Concluding Observations can be said to be *ad hoc*, they do at least refer back to those documents in establishing and addressing vulnerability in their complaints decisions. For example, in a complaint involving a deaf girl, the CEDAW recalled its General Comment No. 18 on violence against women, in observing that ‘disabled women are considered as a vulnerable group’, ‘who suffer from a double discrimination linked to their special living conditions.’⁴⁵ The CEDAW has noted ‘multiple discrimination’, referring to a prior Concluding Observation in which ‘it noted the existence of de facto discrimination against women, especially women from the most vulnerable sectors of society such as women of African descent.’⁴⁶

On the other hand, the committees also use previously established standards to negate as well as confirm the alleged vulnerability of a claimant. The CAT, in a number of cases involving potential violations of the prohibition on refoulement, referred to a clause in General Comment No. 1, which includes amongst the relevant information that the State should take into consideration in a case of potential refoulement whether a claimant has ‘engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of

⁴⁵ *R. P. B. v. the Philippines* (21 February 2014) UN Doc CEDAW/C/57/D/34/2011 para 8.3.

⁴⁶ *Alyne da Silva Pimentel Teixeira v. Brazil* (25 July 2011) UN Doc CEDAW/C/49/D/17/2008 para 7.7.

being placed in danger of torture.’⁴⁷ The CAT has frequently applied this clause as part of a test for determining whether the claimant reaches the threshold of vulnerability for the purpose of finding a violation of article 3 of the Convention against Torture (on the prohibition of torture or inhuman and degrading treatment). For example, in one case where an Iranian journalist feared government reprisals if returned to Iran, the Committee took note of a number of facts (he had previously come under attention from the Iranian authorities and he continued his journalist activities after leaving Iran, including a weblog which had been shut down by the Iranian authorities), which were deemed to reach the threshold of the above activities that made him vulnerable to torture or ill treatment, thus contributing to a finding of a violation of article 3 of the Convention.⁴⁸ Conversely, the CAT has used this method to find no violation of article 3. In another case concerning an Iranian whose asylum claim was rejected by the Swedish authorities, the Committee considered whether his return to Iran would constitute a violation of article 3. Among its findings, the CAT noted that because the claimant’s asylum application had made no reference to his alleged political activity and he had otherwise ‘failed to adduce evidence about the conduct of any political activity of such significance that, would attract the interest of the authorities, and, in the language of the Committee’s General Comment No. 1 on article 3, would make him ‘particularly vulnerable’ to the risk of being placed in danger of torture.’ The applicant’s failure to satisfy the content of the CAT Committee’s General Comment No. 1 contributed to the conclusion that his return would not result in torture, inhuman or degrading treatment or punishment, in breach of article 3.⁴⁹

3.3.4 Summary

With respect to the issue of identifying vulnerability, the international human rights mechanisms do not appear to operate under a common framework of understanding and vulnerability is instead addressed on a case-by-case basis. Recalling the core components of the dynamic conceptual framework for vulnerability analysis

⁴⁷ CAT, ‘General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)’ (21 November 1997) UN Doc A/53/44, para 8(2).

⁴⁸ *Eftekhary v. Norway* (25 Nov 2011) UN Doc CAT/C/47/D/312/2007 paras 7.7 - 8.

⁴⁹ *Zare v. Sweden* (12 May 2006) UN Doc CAT/C/36/D/256/2004 para 9.6.

underpinning this thesis, a number of observations can be made in relation to the UN human rights mechanisms approach to identification following this review of their outputs:

- Vulnerability is a significant factor in securing access to rights for certain groups or individuals. However, vulnerability language used to identify vulnerable subjects is often ambiguous (e.g. there are inexplicable shifts in language from vulnerable groups, to vulnerable individuals and groups) and does not seem to be guided by a common framework of understanding of vulnerability.
- Use of vulnerability language is most explicit in the context of specific rights and in individual cases. This aligns with the dynamic conceptual framework's rationale of ensuring effective access to rights by responding to individual needs and addressing sources of vulnerability.
- Each of the human rights mechanisms acknowledge, in some shape or form, that people can be subject to multiple or intersecting vulnerabilities, which often renders an individual, or group, extremely vulnerable. This supports the characteristics of the dynamic model in that it is fluid and multi-dimensional.
- The treaty bodies appear to make the distinction between people who have inherent, immutable vulnerabilities, and those who are rendered vulnerable by external (often State-generated or structural) sources, corroborating Makenzie's taxonomy of sources outlined in the previous chapter.
- A substantial degree of cross-referencing takes place between mechanisms and identification of vulnerability often occurs on the basis of precedents already set by the different committees. As some mechanisms are better-able to identify distinct aspects and dimensions of vulnerability than others, when working in concert the mechanisms yield strong potential for producing a finer-grained analysis than they can independently.

3.4 - What is the Value of Vulnerability? The implications of vulnerability for human rights protection

While there has not been a concerted effort to define vulnerability or streamline approaches to identification within the international human rights system, the previous section outlined some patterns suggesting that developments at the international level are compatible with the dynamic vulnerability model. This section examines the practical consequences for a person or group once vulnerability is identified and the extent to which that designation actually adds value and enhances human rights protection for those involved. Three significant trends with respect to the impact of vulnerability and its potential value were identified across the treaty monitoring bodies' General Comments, Concluding Observations and independent complaint functions and are discussed in turn in the following subsections.

3.4.1 Enhanced obligations on the State to protect vulnerable persons

Vulnerability plays a significant role in delineating the extent to which a State must take measures to protect people and groups who require special provision in order to access their rights. On the basis of the findings from this research, these enhanced obligations can take on at least four forms. States have heightened obligations to *identify* vulnerability or vulnerability-causing factors, *monitor* the situations of vulnerable groups or persons, *take measures* to alleviate vulnerability and disadvantage, and *prioritise* vulnerable persons in the provision of resources and support required to realise their rights.

The human rights mechanisms frequently call on States to be extra vigilant in identifying vulnerable individuals or factors that might contribute to vulnerability, particularly amongst groups where there is already an established high susceptibility to rights violations. The CRC, for example, calls on States to 'identify factors at national and subnational levels that create vulnerabilities for children or that

disadvantage certain groups of children.’⁵⁰ States are often encouraged to establish human rights-based training programmes that will allow for early identification of vulnerability. In its General Comment on women in conflict situations, the CEDAW calls on States to provide groups involved in conflict, conflict prevention and transition (such as national troops, peacekeeping forces, police forces, humanitarian actors, etc.) ‘with gender-sensitive training on how to identify and protect vulnerable women and girls.’⁵¹ Concluding Observations often express concern at States’ dearth of mechanisms for the identification of particularly vulnerable groups. In its Concluding Observations on Poland, the CAT recommends that the State take all necessary measures to ‘ensure the identification of vulnerable asylum seekers who are victims of torture and provide them with the support they require, including treatment and counselling.’⁵²

In conjunction with identification efforts and to support the creation of environments that will ameliorate vulnerability, States are also often required to carry out monitoring and data gathering in order to measure the needs of vulnerable persons. A number of Concluding Observations highlight the importance of establishing data collection methods that will identify trends and help implement strategies ‘aimed at empowering vulnerable groups.’⁵³ For example, several of CEDAW’s Concluding Observations urge states to conduct ‘comparative studies on trafficking and prostitution, including the collection of disaggregated data, to identify and address root causes in order to eliminate the vulnerability of girls and women.’⁵⁴ The CESCR’s first General Comment, which addresses States’ reporting procedures, highlights the importance of monitoring and data collection in order to be fully aware of the extent to which various rights are or are not being enjoyed by all people. Importantly, the General Comment emphasises that aggregate national data is not sufficient and ‘that special attention be given to any worse-off regions or areas and to

⁵⁰ CRC ‘General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)’ (17 April 2013) UN Doc CRC/C/GC/15 para 11.

⁵¹ CEDAW ‘General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations’ (17 April 2013) UN Doc CEDAW/C/GC/30 para 41.

⁵² CAT ‘Concluding Observations on the combined fifth and sixth periodic reports of Poland’ (23 Dec 2013) UN Doc CAT/C/POL/CO/5-6 para 14.

⁵³ HRC ‘Concluding Observations on the second periodic report of Nepal’ (26 Mar 2016), UN Doc CCPR/C/NPL/CO/2 para 18.

⁵⁴ CEDAW ‘Concluding Observations of the Committee on the Elimination of Discrimination against Women: Zambia’ (19 September 2011) UN Doc CEDAW/C/ZMB/CO/5-6 para 24.

any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.’⁵⁵ Official data that can be obtained from national monitoring activities is crucial to enable human rights mechanisms to be able to conduct a comprehensive report of the State’s implementation of rights, and for States themselves to be able to effectively address issues faced by aggrieved groups: ‘Disaggregated data permits the States parties and the Committee to identify, compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed.’⁵⁶ Monitoring, collecting and disaggregating data is a crucial measure in dismantling out-dated, static approaches to vulnerability and laying the foundation for a more comprehensive response to the needs of vulnerable persons.

In addressing and alleviating vulnerability, States must be proactive in the realisation of rights for vulnerable persons. CESCR General Comment No. 5 on persons with disabilities, for example, states that ‘the obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantage and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality.’⁵⁷ Recognition of the structural sources of vulnerability is an important step towards redistributing responsibility for vulnerability and realisation of a more dynamic approach to the concept. States are often urged to dedicate attention to the particular needs of vulnerable persons and to include in their periodic reports ‘information on the measures taken to improve the economic situation of ... those belonging to vulnerable groups.’⁵⁸ The committees also permit preferential treatment in order for States to ensure that vulnerable groups can be brought to an equal standing with the rest of society (see section 3.4.3 for more discussion on the link between vulnerability and substantive equality). A number of General Comments from the different committees condone prioritisation with respect to ‘particularly vulnerable’ groups. The CRC reminds States that ‘the particular vulnerability of unaccompanied and separated

⁵⁵ CESCR ‘General Comment No. 1: Reporting by States Parties’ (24 Feb. 1989) UN Doc E/1989/72 para 3.

⁵⁶ CAT ‘General Comment No. 2: Implementation of article 2 by States parties’ (24 January 2008) UN Doc CAT/C/GC/2 para 23.

⁵⁷ CESCR (n 17) para 9.

⁵⁸ See: CEDAW, ‘Concluding comments of the Committee on the Elimination of Discrimination against Women: Georgia’ (15 Aug. 2006) UN Doc CEDAW/C/GEO/CO/3 para 28; CEDAW ‘Concluding comments of the Committee on the Elimination of Discrimination against Women: Republic of Moldova’ (16 Aug. 2006) UN Doc CEDAW/C/MDA/CO/3 para 21.

children, explicitly recognized in article 20 of the Convention, must be taken into account and will result in making the assignment of available resources to such children a priority.⁵⁹ In the context of humanitarian emergencies, a number of General Comments prescribe that priority in the provision of international aid ‘should be given to the most vulnerable or marginalized groups of the population.’⁶⁰

In theory, such an array of enhanced obligations should make for a robust protection regime for vulnerable persons. However, in the absence of any overarching guidelines as to how recognition of vulnerability should occur in the first place, States are left with broad discretion to respond to vulnerability, conceptual clarity is restricted and good practice remains inconsistent.

3.4.2 Higher level of protection under the treaties

While treaty bodies seem somewhat reluctant to engage with vulnerability from a conceptual standpoint, their complaints mechanisms often provide the opportunity for a claimant’s vulnerability to be operationalised as a contributing factor towards findings of convention violations. For example, the Human Rights Committee afforded due weight to the ‘special vulnerability’ of a minor girl in the finding of a violation of article 24 of the ICCPR,⁶¹ the CAT found that a person’s ‘particular vulnerability as a migrant’ aggravated his existing suffering resulting from prior physical and mental abuse to the extent that his treatment ‘exceed[ed] the threshold of cruel, inhuman or degrading treatment or punishment, under the terms of article 16 of the Convention’⁶² and ‘the particular vulnerability’ of the Roma ethnic minority was considered an aggravating factor in the finding of a violation of article 16.⁶³ As mentioned previously, and of particular relevance in the context of international protection, the CAT often uses vulnerability as a contributing factor in cases dealing with *refoulement*. In every case where a vulnerability finding was made, a concurrent finding of a potential violation of article 3 followed and the same can be said for the

⁵⁹ CRC (n 28) 16.

⁶⁰ See: CESCR (n 15) 40; CESCR ‘General Comment No. 12, The Right to Adequate Food (art. 11)’ (12 May 1999) UN Doc E/C.12/1999/5 para 38.

⁶¹ *Karen Noelia Llantoy Huamán v. Peru* (24 October 2005) UN Doc CCPR/C/85/D/1153/2003 para 6.5.

⁶² *Sonko v. Spain* (25 Nov. 2011) UN Doc CAT/C/47/D/368/2008 para 10.4.

⁶³ *Hajrizi Dzemajl et al. v. Yugoslavia* (21 November 2002) Individual opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete UN Doc CAT/C/29/D/161/2000 para 9.2.

converse; where vulnerability was not deduced, no violation of article 3 was found.⁶⁴ In this regard, it is clear that a finding of vulnerability carries significant weight, at least in certain types of cases.

In individual complaints proceedings, vulnerability also seems to have a significant effect where it impacts on a claimant's capacity to engage with judicial or administrative procedures. For example, the CAT found a man to be in an 'extremely vulnerable position' due to being denied access to appeals procedures in the State concerned, which contributed to the Committee finding that the requirement for the claimant to exhaust all domestic remedies, given the man's particular circumstances, could be overlooked and did not preclude the Committee from accepting the claim's admissibility.⁶⁵ Similarly, in a case where the state had issued a negative decision in an asylum seeker's refugee status application due to 'significant gaps' in his testimony, the Committee pointed out that this could be attributed to his 'psychological vulnerability', which contributed to a finding that the State would be violating the principle of *non-refoulement* were the claimant returned on the sole basis of the gaps in his claim.⁶⁶ Depending on individual circumstances, vulnerability can lower the procedural burden on the applicant and may act as the lynchpin for securing a favourable decision for him or her.

3.4.3 Link between vulnerability and substantive equality

Patterns in approaches to vulnerability identification by the international human rights mechanisms reveal a link between vulnerability and the nature of States' duties with regards to fundamental rights principles such as equality and non-discrimination. The CRC, for example, states explicitly that '[d]iscrimination is responsible for heightening the vulnerability of children to HIV and AIDS,'⁶⁷ and in another General

⁶⁴ For other examples of cases where the vulnerability threshold was met, see: *V.L. v. Switzerland* (20 Nov. 2006) UN Doc CAT/C/37/D/262/2005 para 8.7; *Eftekhary v. Norway* (n 47) para 7.2; *Faragollah and ors v Switzerland* (21 Nov. 2011) UN Doc CAT/C/47/D/381/2009 para 9.3; *Jahani v. Switzerland* (23 May 2011) UN Doc CAT/C/46/D/357/2008 para 9.3; For other examples of cases where the vulnerability threshold was not met, see: *Zare v. Sweden* (n 49) para 9.6; *R.D. v. Switzerland* (8 Nov. 2013) UN Doc CAT/C/51/D/426/2010 para 9.7; *Elmansoub v. Switzerland* (17 May 2006) UN Doc CAT/C/36/D/278/2005 para 6.5.

⁶⁵ *Diory Barry v. Morocco* (19 May 2014) UN Doc CAT/C/52/D/372/2009 para 6.2.

⁶⁶ *Falcón Ríos v. Canada* (23 Nov 1999) UN Doc CAT/C/33/D/133/1999 para 8.5.

⁶⁷ CRC 'General Comment No. 3: HIV/AIDS and the Rights of the Child' (17 March 2003) UN Doc CRC/GC/2003/3 para 7.

Comment states that '[d]iscrimination takes place - often de facto' in the case of 'particularly vulnerable' groups such as children with disabilities.⁶⁸ The CESCR in its General Comment on the right to water calls on States to 'guarantee that the right to water is enjoyed without discrimination,'⁶⁹ which includes the adoption of 'relatively low cost targeted water programmes to protect vulnerable and marginalized groups.'⁷⁰ As touched upon above, in their attempt to remedy discrimination, the treaty bodies often permit prioritisation of vulnerable groups in order to promote their access to rights under certain circumstances. On the subject of children's access to healthcare, the CRC encourages 'States to prioritize the establishment of facilities and services in under-served areas and to invest in mobile outreach approaches, innovative technologies, and well-trained and supported community health workers, as ways of reaching especially vulnerable groups of children.'⁷¹ As was highlighted earlier, the CESCR holds that '[p]riority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.'⁷²

In the case of disabled persons, the CESCR actually holds that giving vulnerable groups priority is a *duty* incumbent on states, whose 'obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality.'⁷³ While this justifies preferential treatment in the pursuit of substantive equality, there is no explicit indication whether this measure should apply to other vulnerable groups. However, the CESCR General Comment focusing on equal rights between men and women gives broader guidance on the link between identifying disadvantage and achieving substantive equality: 'The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized

⁶⁸ CRC 'General Comment No. 9: The rights of children with disabilities' (27 February 2007) UN Doc CRC/C/GC/9 para 8.

⁶⁹ CESCR (n 14) para 13.

⁷⁰ *ibid* para 37(h).

⁷¹ CRC (n 50) para 8.

⁷² CESCR (n 15) para 65.

⁷³ CESCR (n 17) para 9.

persons or groups of persons to the same substantive level as others.’⁷⁴ In this light, vulnerability may be used as a benchmark to determine who requires such special measures and how resources should be allocated to reduce inequality, even if that requires ‘preferential’ treatment for certain groups on a temporary basis.

While this analysis suggests that there is scope for vulnerability to be used as part of a toolkit for achieving substantive equality through enhancing access to rights for disadvantaged people, a lack of conceptual clarity acknowledging this role presents a barrier. In order to be compatible with the dynamic model, and recalling Makenzie’s critique of the approaches to vulnerability that fail to promote autonomy, capability-enhancing measures must be incorporated into responses to vulnerability to ensure that solutions and responses are sustainable. This is particularly relevant in the refugee protection context, where access to rights is contingent on the asylum seeker’s capacity to engage with the national asylum system.

3.5 - Vulnerability in International Refugee Law

As introduced in Chapter One, while the Refugee Convention does not make any explicit reference to vulnerability, States’ implementation of their refugee law obligations should not be conducted in isolation of their parallel obligations under the various human rights treaties. That includes corresponding obligations to identify and respond to vulnerability as highlighted throughout this chapter. While distinct areas of law, the legal regimes of international human rights law and international refugee law are interconnected and simultaneously applicable.⁷⁵ In this light, developments in international human rights law with respect to particular legal concepts like vulnerability should be reflected in international discourse on refugee law and policy. This section analyses the extent to which that dialogue takes place between international human rights law and international refugee law with respect to vulnerability.

⁷⁴ CESCR ‘General Comment No. 16, The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights’ (11 August 2005) UN Doc E/C.12/2005/4 para 15.

⁷⁵ ‘Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha Tanzania, 11-13 April 2011’ (2011) 23(4) International Journal of Refugee Law 860, 861.

The international entity with responsibility for monitoring and guiding States’ interpretation and application of the Refugee Convention – and ensuring that implementation does not conflict with standards in other areas of international law – is UNHCR. UNHCR’s governing statute entrusts the organisation with the role of ‘seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations.’⁷⁶ One way in which UNHCR fulfils this duty is by providing interpretative guidance to States on the application of the Refugee Convention. Article 35 of the Refugee Convention enshrines this supervisory responsibility of UNHCR, requiring that ‘Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.’ Contrary to the work of the UN human rights system, UNHCR takes on less of a watchdog role and assumes a more cooperative position in line with the stipulation in its statute that the office is ‘humanitarian and social and of an entirely non-political character.’⁷⁷

UNHCR typically fulfils its supervisory role in either a practical, more hands on fashion (for example, by conducting refugee status determination procedures (RSD), leading on resettlement or voluntary repatriation activities, or managing refugee camps), or in a more technical sense (by producing legal opinions, assisting with the drafting of legislation, or publishing policy notes and guidance relevant to the Refugee Convention and international protection more generally).⁷⁸ UNHCR’s priorities are set by its Executive Committee, which maintains oversight of the organisation and makes decisions related to its budget and programming. The Executive Committee also issues frequent so-called ‘Conclusions on International Protection’, clarifying UNHCR’s position with respect to specific refugee protection issues. As with the General Comments of the international human rights system, the material issued by UNHCR and its Executive Committee are not legally binding on States but nonetheless carry strong authoritative weight. In order to comply with

⁷⁶ UNGA, ‘Statute of the Office of the United Nations High Commissioner for Refugees’ (14 December 1950) A/RES/428(V) art 1.

⁷⁷ *ibid*, preamble.

⁷⁸ Gil Loescher and others, *UNHCR: The Politics and Practice of Refugee Protection* (2nd ed, Routledge 2012) 82–104.

Refugee Convention obligations, States must consider such soft-law material in the development and implementation of their domestic asylum systems. This section analyses both the technical and practical strands of UNHCR's supervisory role, clarifying the role of vulnerability in international refugee law and the extent to which this aligns with aforementioned conceptual approaches in international human rights law.

3.5.1 UNHCR, refugee status determination and vulnerability

For the purposes of this research, the most important provision in the Refugee Convention is the refugee definition contained in Article 1A(2), whose criteria asylum seekers must satisfy in order to be granted refugee status and benefit from the associated rights and entitlements contained in the Convention. Article 1A(2) states that a refugee is a person who:

...owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The definition forms the basis for national RSD procedures and can be broken down into a number of core elements that must be satisfied during the RSD process for refugee status to be granted to an applicant. It is implicit in the wording of the definition that in order to be considered a refugee a person is vulnerable on account of the risk of persecution they face due to their association with any of the five grounds: 'race, religion, nationality, or membership of a social group or political opinion.' However, it is not just recognised refugees but also asylum seekers (who may or may not transpire to be refugees upon completion of the RSD process) who are in a generally vulnerable situation. According to its 'Handbook on Procedures and Criteria for Determining Refugee Status' (the UNHCR Handbook), which provides

interpretative guidance to State authorities and practitioners on the application of article 1 of the Refugee Convention, UNHCR calls on States to recall that ‘an applicant for refugee status is normally in a particularly vulnerable situation’⁷⁹ because ‘[h]e finds himself in an alien environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country, often in a language not his own.’⁸⁰ While the Refugee Convention itself makes no reference to the vulnerable situation of those undergoing RSD, UNHCR asks States to take as the point of departure the fact that asylum seekers as a group are vulnerable due to their shared experience of being outside of their country of origin and dependent on the host country to facilitate their engagement with the RSD process. This collective vulnerability sets the baseline from which to obligate national authorities to ensure that asylum procedures can capture *individual* needs by providing for cases to be ‘examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant’s particular difficulties and needs.’⁸¹

Applicants who are vulnerable on account of their ‘particular difficulties or needs’ may face specific procedural and personal challenges in satisfying the various elements of the Refugee Convention definition. The requirement to demonstrate a ‘well-founded fear’ of persecution, for example, entails both an objective assessment of the facts surrounding the context of the case to determine its well-foundedness and a subjective assessment of the applicant’s personal ‘fear’ of persecution.⁸² While the burden of proof to put forward the relevant material in support of their claim lies with the asylum seeker, the duty to ascertain and evaluate all the relevant facts is shared between the examiner and the applicant. Nonetheless, with respect to the objective assessment of well-foundedness, a vulnerable applicant can have particular difficulty submitting the required supporting documentation to prove the facts of their case and may be unable to articulate their claim sufficiently to substantiate their protection claim. In this regard, the UNHCR Handbook makes special provision for certain

⁷⁹UNHCR ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) HCR/1P/4/ENG/REV.3 para 190.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid* para 14.

categories of applicant whose claim may give rise to particular difficulties establishing the facts. In the case of ‘mentally disturbed persons’, for example, the burden of proof is lessened and the decision maker must adjust their approach to the assessment by seeking expert advice and reducing the importance normally attached to the subjective element of the overall assessment.⁸³ With respect to the subjective assessment of an applicant’s ‘fear’, particularly in circumstances where objective evidence is unavailable or the circumstances are not sufficiently clear on the basis of the available facts, decision makers must conduct a credibility assessment of the applicant’s personal account of their claim.⁸⁴ This assessment must take into account ‘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 – in other words, everything that may serve to indicate that the predominant motive for his application is fear.’⁸⁵ Credibility assessment poses particular challenges to certain cohorts of applicant. UNHCR has issued specific guidance on credibility assessment in the EU, which notes how the applicant’s individual and contextual circumstances can variously impact on the complexity of credibility assessment.⁸⁶ For example, post-traumatic stress disorder may affect the ability of a person to recall key events linked to their claim, or their behaviour and comportsment in the course of an interview.⁸⁷ Persons suffering from trauma may appear emotionally disconnected or indifferent when asked about personal details pertaining to their fear of persecution, which may result in an adverse credibility finding by a decision maker not familiar with signs and symptoms of trauma.⁸⁸ Persons fleeing persecution on account of their sexual orientation or gender identity may feel intense shame stemming from their cultural background, which may make it difficult or impossible for them to articulate their testimony or may result in late disclosure of this element of their claim.⁸⁹ These types of claim also pose particular challenges for the decision-maker who may rely on stereotypical assumptions about gender, sexual orientation or gender identity in their credibility

⁸³ *ibid* para. 41.

⁸⁴ *ibid* para. 41.

⁸⁵ *ibid*.

⁸⁶ UNHCR ‘Beyond Proof, Credibility Assessment in EU Asylum Systems’ (Division of International Protection Geneva 2013).

⁸⁷ *ibid* 61.

⁸⁸ Jane Herlihy and Stuart W Turner, ‘The Psychology of Seeking Protection’ (2009) 21(2) *International Journal of Refugee Law* 171, 177.

⁸⁹ UNHCR (n 79) 71.

assessment.⁹⁰ Such approaches have led to problematic scenarios whereby applicants have been subject to inappropriate lines of questioning or have felt compelled to submit inappropriate material to ‘prove’ their sexual orientation (practice which has been found to violate the fundamental right to private and family life, and to be incompatible with human dignity under EU law).⁹¹ Credibility assessment of a claim must therefore have due regard to vulnerability arising from the particular difficulties that different applicants might face in articulating their case.

In attempt to capture the nuance required in RSD procedures with respect to different cohorts of asylum seeker presenting with unique needs, UNHCR has in recent years supplemented its Handbook with a range of guidance material and authoritative statements that expand interpretation of the refugee definition by linking in with relevant human rights standards and pointing to contexts in which certain cohorts of applicant might be considered vulnerable in the RSD process. Many of UNHCR’s guidelines pertain to the particular situations of people who belong to specific groups at disproportionate risk of facing human rights abuse – similar to those groups frequently identified in the outputs of the UN human rights mechanisms. For example, the guidelines address cases where specific procedural and practical challenges are likely to arise in the context of RSD, such as cases of gender-related persecution,⁹² victims of trafficking or those at-risk of being trafficked,⁹³ child asylum claims⁹⁴ and claims of persecution on account of sexual orientation and gender identity.⁹⁵ The guidelines provide for additional support and procedural safeguards to be made available to those who require it. Children, for example, on account of their young age ‘should enjoy specific procedural and evidentiary safeguards to ensure that fair

⁹⁰ Sabine Jansen & Thomas Spijkerboer, ‘Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’ (COC Netherlands 2011) [<https://www.refworld.org/docid/4ebba7852.html>] accessed November 2019.

⁹¹ Joined Cases C-148/13 to C-150/13 *A, B, C v. Staatssecretaris van Veiligheid en Justitie* (2014) OJ C 171.

⁹² UNHCR, ‘Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (7 May 2002) HCR/GIP/02/01.

⁹³ UNHCR, ‘Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked’ (7 April 2006) HCR/GIP/06/07.

⁹⁴ UNHCR, ‘Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees’ (22 December 2009) HCR/GIP/09/08.

⁹⁵ UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (23 October 2012) HCR/GIP/12/01.

refugee status determination decisions are reached with respect to their claims.’⁹⁶ UNHCR’s guidelines on claims based on sexual orientation or gender identity set out a series of special measures that should be put in place to ensure an open and safe environment conducive to eliciting sensitive information, such as specialised training on claims based on sexual orientation and gender identity for decision makers to reduce stereotypical or offensive approaches to RSD questioning.⁹⁷ UNHCR supports these positions by linking to relevant international human rights standards. For example, in its guidance on gender-related persecution, UNHCR notes that ‘developments [in analysis and understanding of sex and gender in the refugee context] have run parallel to, and have been assisted by, developments in international human rights law and standards.’⁹⁸ In the context of asylum claims from children, UNHCR advises that in determining the extent of persecution against a child ‘it is essential to analyse the standards of the CRC and other relevant international human rights instruments applicable to children.’⁹⁹

In its published guidance to date, UNHCR avoids delving into analysis of vulnerability as a concept, preferring instead to focus on the technical factors that practitioners need to take into account when conducting RSD. UNHCR does, however, rely extensively upon relevant provisions in international human rights jurisprudence to justify its positions and to emphasise the vulnerability of certain groups by virtue of their disadvantage with respect to specific rights. For example, in emphasising the heightened needs of children in the context of access to socio-economic rights, UNHCR’s guidelines draw upon analysis of the UN Committee on Economic Social and Cultural Rights (CESCR): ‘The lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, children who may live in abject poverty and not lead healthy lives are particularly vulnerable to forced labour and other forms of exploitation.’¹⁰⁰ Similarly, to support its assertion that ‘unaccompanied or separated children are especially vulnerable to trafficking,’ UNHCR’s guidelines on victims of trafficking or those at-risk of trafficking links the reader to relevant international

⁹⁶ UNHCR (n 94) para 65.

⁹⁷ UNHCR (n 95) para 60.

⁹⁸ UNHCR (n 92) para 5.

⁹⁹ UNHCR (n 94) para 13.

¹⁰⁰ *ibid* para 14.

human rights instruments such as the Convention on the Rights of the Child (CRC), its optional protocols and the Committee on the Rights of the Child's General Comment on Treatment of Unaccompanied and Separated Children Outside their Country of Origin.¹⁰¹

3.5.2 UNHCR, the broader refugee protection regime and vulnerability

Beyond UNHCR's guidance material on article 1 of the Refugee Convention, vulnerability also plays a central role in decisions and statements shaping UNHCR's broader refugee protection activities under the Refugee Convention. This is evident, for example, from the Conclusions on International Protection issued by UNHCR's Executive Committee. One of the Executive Committee's earliest conclusions deals with the topic of refugee women, noting that 'many of them [refugee women and girls] are exposed to special problems in the international protection field [that] result from their vulnerable situation which frequently exposes them to physical violence, sexual abuse and discrimination.'¹⁰² Other groups singled out by the Executive Committee as requiring particular focus in the conduct of UNHCR's mandate include the elderly,¹⁰³ victims of sexual abuse, exploitation, torture and trauma.¹⁰⁴ The particular needs of refugee and asylum seeking children have been raised on numerous occasions. For example the Committee's Conclusion on Children at Risk, in justifying the need for a more child protection-focused approach to international protection, states that 'children, because of their age, social status and physical and mental development are often more vulnerable than adults in situations of forced displacement,'¹⁰⁵ referring also to relevant instruments of international human rights law, such as the CRC and its optional protocols. Thus, vulnerability is operationalized in the context of UNHCR's supervisory mandate as a mechanism with which to justify calls for particular focus on groups and individuals who have been identified

¹⁰¹ UNHCR (n 93) para 20.

¹⁰² UNHCR, 'Executive Committee of the High Commissioner's Programme, Conclusion on Refugee Women and International Protection No. 39' (1985) A/40/12/Add.1 paras (c) – (d).

¹⁰³ UNHCR, 'Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, 52nd session, 1-5 October 2001' (5 October 2001), A/56/12/Add.1 para (i).

¹⁰⁴ UNHCR, 'Executive Committee of the High Commissioner's Programme, Conclusion on reception of asylum-seekers in the context of individual asylum systems No. 93' (8 October 2002) A/AC.96/973 para (b)(iii).

¹⁰⁵ UNHCR, 'Executive Committee of the High Commissioner's Programme, Conclusion on Children at Risk No. 107' (5 October 2007).

(in the jurisprudence of international human rights monitoring bodies and elsewhere) as facing a disproportionate risk of being prevented from accessing protection.

This is evident in many of the activities UNHCR carries out under the more practical strand of its mandate concerned with humanitarian intervention and response where vulnerability also plays a central role. For example, UNHCR is responsible for identifying suitable refugee candidates for resettlement to a third country from refugee camps or host countries where obtaining a durable solution is often impossible for many displaced people. The Executive Committee in its Conclusion on Resettlement as an Instrument of International Protection ‘[r]ecognizes the need for rapid and flexible response to UNHCR resettlement requirements *in particular* for vulnerable groups [emphasis added].’¹⁰⁶ Due to the fact that demand for resettlement vastly outweighs the number of resettlement places pledged by third countries, UNHCR must implement the preliminary selection process based on strict criteria, including factors linked to vulnerability. Despite recognising that all asylum seekers are ‘normally in a particularly vulnerable situation’ in the context of RSD, resettlement places are typically awarded to those deemed to be especially vulnerable. UNHCR’s Resettlement Handbook in this regard states that the ‘identification of refugees potentially in need of resettlement requires detailed knowledge of the refugee population and of their specific needs and vulnerabilities.’¹⁰⁷ It then goes on to provide a non-exhaustive overview of the different groups whose ‘specific protection needs and potential vulnerabilities [...] could warrant resettlement intervention’, including women and girls, children and adolescents, older refugees, refugees with disabilities, gay, lesbian and transgender refugees, and refugees from minorities and indigenous groups.¹⁰⁸ In justifying the particular needs of these groups, the handbook makes extensive reference to relevant international human rights instruments, jurisprudence and reports of the Office of the High Commissioner for Human Rights and other international organisations.

¹⁰⁶ UNHCR, ‘Executive Committee of the High Commissioner’s Programme, Resettlement as an Instrument of Protection No. 67’ (1991).

¹⁰⁷ UNHCR, ‘UNHCR Resettlement Handbook’ (July 2011) 182.

¹⁰⁸ *ibid* 182.

In addition to resettlement, UNHCR also provides support to asylum seekers and refugees in the context of detention, as well as to organisations monitoring conditions in detention centres and providing direct assistance to detainees. In this regard, the organisation has issued its Guidelines on Detention setting out the applicable international standards with respect to detention of asylum seekers and refugees.¹⁰⁹ The guidelines advocate against the use of detention of asylum seekers and refugees except as an absolute last resort, urging States to instead develop alternatives to detention. When considering whether and how an individual should be detained, States should ‘pay close attention to the specific situation of particular vulnerable groups such as children, pregnant women, the elderly, or persons with disabilities or experiencing trauma.’¹¹⁰ In particular, Guideline number nine states that the ‘special circumstances and needs of particular asylum-seekers must be taken into account’ and goes into detail on the particularly severe implications of detention on groups with special needs, such as victims of torture, children, women, victims of trafficking, asylum seekers with disabilities, elderly and gay, lesbian and transgender asylum seekers.¹¹¹ To assist authorities responsible for making decisions related to detention and to identify particular needs, UNCHR (in collaboration with the International Detention Coalition) has published a ‘Vulnerability Screening Tool.’ The document sets out the appropriate steps for assessing the best interests of asylum seekers where detention is concerned and emphasises that addressing ‘vulnerability is informed by the principles and standards of international refugee and human rights frameworks, other areas of international law, and how these are applied in individual country contexts.’¹¹² The tool represents an attempt to add a more practical dimension to existing UNHCR policy, advocating for a standardised interview format through which vulnerability is identified in the detention context by way of checklist criteria and with which appropriate decisions can be made regarding accommodation and referral to key supports.

¹⁰⁹ UNHCR, ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012).

¹¹⁰ *ibid* 23.

¹¹¹ *ibid* 33 – 39.

¹¹² UNHCR, ‘Vulnerability Screening Tool - Identifying and addressing vulnerability: a tool for asylum and migration systems’ (2016) 2.

3.5.3 Summary

This brief analysis of UNHCR policy and guidance indicates that vulnerability plays a central role in both the interpretation and implementation of the Refugee Convention. Rather than establishing its own distinct definition of vulnerability for the refugee context, trends evident in UNHCR guidance material demonstrate that vulnerability is instead woven into developing international refugee law by adoption of corresponding standards in international human rights law, in particular through extensive reference to the outputs of the UN treaty monitoring bodies with respect to specific rights. While this reflects a welcome convergence of these two sprawling international legal systems, avoiding further obfuscation of the vulnerability concept, it also means that international refugee law adopts the same pitfalls associated with the concept under international human rights law. The focus on specific vulnerable groups in UNHCR's guidelines and the conclusions of UNHCR's Executive Committee means that other cohorts who do not fit within special categories risk being excluded from certain forms of protection if vulnerability assessment is not conducted carefully. For example, single male refugees and asylum seekers are systematically absent from much of the material covering vulnerability under UNHCR's mandate and may face a presumption of *capacity*, making it more difficult for them to avail of protection channels. In practice, this means that they face higher scrutiny in demonstrating need for resettlement, that they should benefit from alternatives to detention, or even that they have a well-founded fear of persecution in the RSD procedure. The danger here is that a simplistic and inconsistent application of vulnerability criteria risks contributing to an environment where an individual may not be deemed as in need of protection unless he or she is able to demonstrate vulnerability. Identification of vulnerability and particular needs on an individual basis, as called for by UNHCR in its RSD Handbook, and response in line with the components of the dynamic conceptual framework for vulnerability could open up the analysis of vulnerability and reduce the risk of any exclusionary effects.

3.6 – Concluding Remarks : The emerging potential of vulnerability as a tool for protection in international human rights and refugee law

Vulnerability is a dominant feature in the outputs of the international human rights and refugee law machinery. Despite this, the relevant mechanisms have not made any attempt to define the concept, instead relying on ad hoc reference to vulnerability in specific cases, which has created some conceptual ambiguity. Nonetheless, findings suggest that normative developments are ostensibly compatible with core components of the dynamic conceptual model of vulnerability, subject to a concerted effort on the part of the international standard setting mechanisms to harmonise approaches to vulnerability. Some comments can be made regarding their approach to determination of vulnerability and what that means in terms of human rights and refugee protection.

Each of the human rights mechanisms reviewed here explicitly recognise that both individuals and groups can be vulnerable, under different circumstances and to varying degrees of severity. They offer no exhaustive list of those who might be considered vulnerable, perhaps because it might not be possible, or desirable, to compile such a list. This means that language used to discuss vulnerability is often ambiguous and the various mechanisms' approach to determining vulnerability does not seem to be guided by a common framework of understanding. The language used by the mechanisms seems to acknowledge that vulnerability occurs on a spectrum, ranging from the lower intensity 'at risk of vulnerability' or 'potentially vulnerable' to the more severe 'most vulnerable' or 'extremely vulnerable.' An individual or group's position on this spectrum seems to be directly linked to multiple discrimination, or a mix of factors contributing to an intersection of vulnerability. Those considered to be 'extremely vulnerable' often possess many of these vulnerability-producing factors. This vulnerability spectrum seems to have a direct impact on States' obligations and responses to the mitigation of vulnerability and the treaty bodies have affirmed States' obligations to identify, monitor and to alleviate vulnerability. Where groups are identified as 'extremely vulnerable', or 'most vulnerable', States' obligations are enhanced and they are often encouraged to prioritise these groups in redress measures.

This analysis of the treaty bodies' approach to vulnerability shows that, if inconsistent practice can be overcome and good practice harnessed, there is emerging potential for vulnerability to be a valuable tool in the interpretation of international human rights standards and obligations. This potential is in line with the need for a more nuanced conceptualisation of vulnerability as called for in the theoretical critique set out in the previous chapter. In particular, positive trends (such as the capacity for vulnerability to enhance substantive equality and access to protection with respect to specific rights) are compatible with the dynamic model, which promotes the value of a more holistic approach to vulnerability in ensuring effective access to rights. For example, the treaty bodies employ vulnerability analysis to outline the scope of States' non-discrimination duties. Under developing international human rights standards, States are encouraged to identify the various sources of vulnerability (the treaty bodies do acknowledge inherent and external sources in line with Mackenzie's taxonomy set out in Chapter One) and to prioritise the protection of vulnerable groups or persons as a legitimate aim of addressing systemic and societal inequality and discrimination. Other trends reflect components of the dynamic conceptual framework outlined in Chapter One, such as the positioning of vulnerability on a spectrum, fluctuating in parallel with the changing circumstances of the individual. These dovetail with the different 'states' of vulnerability described by Mackenzie *et al* and the conceptualisation of vulnerability as a series of layers noted by Luna. Finally, it is evident that the parallel systems of international human rights law and refugee law seem to operate in concert on the issue of vulnerability, with the former directly informing the approach of the latter. This enhances the potential for elucidation of a more effective and holistic approach to vulnerability assessment in practice in national asylum procedures. However, conceptual gaps in international human rights law are also transferred to international refugee law.

The above features demonstrate compatibility between international law and key components of the dynamic concept of vulnerability that is being argued for in this thesis. The extent to which the relevant regional framework has already begun to engage with issues of vulnerability and whether that practice deviates or aligns with the trends at the international level will be explored in the next chapter, with a view to assessing whether the applicable legal and policy landscape is conducive to the

introduction of a more nuanced approach to vulnerability assessment at the national level.

Chapter 4 - Vulnerability in European Refugee Law

4.1 – Introduction

The previous chapter demonstrated that conceptual developments in international human rights law are interwoven with parallel developments in international refugee law. With respect to vulnerability, many of the emergent patterns - both the positive and negative - are transferred from the international human rights framework to the refugee protection regime. The extent to which these standards are reflected in national practice will largely depend on how they are interpreted in the applicable regional framework. As this thesis will hone in on the Irish national context as a case study in subsequent chapters, the relevant legal regime is the body of European law relating specifically to asylum.

This chapter unpacks European law with a view to fine-tuning the clarity of the legal framework concerning the nexus of vulnerability and asylum in Europe. That framework is drawn from two inter-related bodies of law, that of EU law and the European Convention on Human Rights (ECHR). To chart how vulnerability interacts with European asylum law and policy and thus, the national asylum system, the next section firstly examines the evolution of the Common European Asylum System (CEAS) from a vulnerability perspective. That analysis will be followed by an examination of the relationship between the European Convention of Human Rights (ECHR) and vulnerability, with a particular focus on asylum-related case law of the ECHR's monitoring body, the European Court of Human Rights (ECtHR). The analysis of the European regional framework will serve three broad purposes. Firstly, it will provide an opportunity to highlight areas where approaches to vulnerability in the European framework correspond with or deviate from those at the global human rights level. Secondly, it will determine whether the two European legal systems are operating in harmony or otherwise on the issue of vulnerability in refugee protection, and thirdly, the extent to which regional trends mesh with the core argument of this thesis that a reconceptualization of vulnerability can lead to fairer and more effective asylum procedures. The concluding section will summarise by drawing together the

findings of the analyses and demonstrating how the two bodies of European law complement each other, highlighting their divergence or convergence with patterns at the international level, assessing their compatibility with the proposed conceptual framework for the thesis, and setting the legal context for scrutiny of domestic European asylum systems. As the national asylum procedures of EU Member States are shaped by developments in European law, this section will form the European legislative and policy backdrop for the Irish national case study analysis to follow.

Bearing in mind the key questions informing discussion on vulnerability as a human rights concept throughout this thesis so far, analysis will be led by the same questions:

1) What is vulnerability and how is it determined? and 2) What is the value of vulnerability?

4.2 - Vulnerability in European Union Refugee Law

4.2.1 The Common European Asylum System, an overview

Asylum became a major policy priority in the EU on foot of efforts to enhance freedom of movement within the EU for EU citizens with the abolition of internal borders, introduced by the Schengen Conventions of 1985 and 1990, and the subsequent entry into force of the Treaty on European Union in Maastricht in 1992.¹ At the same time as new measures were being introduced for EU citizens to avail of the Single Market, policymakers became concerned that those seeking asylum within the EU would take advantage of this system by engaging in what has become known as ‘asylum shopping’.² The concern was that persons in need of protection would, upon arrival on the territory of the EU, travel to the Member State perceived as having the most favourable asylum procedures and conditions or move onwards to another Member State to submit a subsequent application in the event that their initial application is refused. This led to increased impetus to develop measures aimed at

¹ Hemme Battjes, *European Asylum Law and International Law* (M Nijhoff 2006) 30.

² Céline Bauloz and others, ‘Introducing the Second Phase of the Common European Asylum System’ in Céline Bauloz and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff 2015) 3-4.

controlling the movement of asylum seekers on European territory and clear standards on approaches to common issues such as reception conditions, status determination procedures and rules on content and recognition of refugee status across EU Member States.³ Efforts to coordinate access to EU asylum procedures began with the establishment of a mechanism to determine which EU Member State is responsible for processing an asylum claim. This was first laid down in the 1990 Schengen Convention⁴ and brought into force with the 1997 Dublin Convention – a forerunner to today’s Dublin Regulation.⁵

Asylum policy was first formally recognised as a common intergovernmental priority in the context of EU Member States’ cooperation on Justice and Home Affairs with the Maastricht Treaty in 1992.⁶ This was followed by the 1999 Amsterdam Treaty, amending the Treaty on European Union to make the issuance of binding legislation on asylum possible.⁷ Article 63, in particular, obliged the European Council and Member States to adopt within a period of five years ‘measures on asylum,’ including: a mechanism for determining the Member State responsible for processing an application; minimum standards on reception conditions; minimum standards on qualification criteria for refugee status and subsidiary protection, and minimum standards on status determination procedures.⁸ Development of these measures began with a European Council summit in Tampere, Finland at which it was agreed that development of the CEAS should take place over two consecutive phases.⁹ The first phase, to set out the minimum standards for the measures outlined in article 63 in their respective legislative instruments, was to be achieved by 1 May 2004. The purpose of the second phase was to build on the first phase instruments with a view to increasing harmonisation of practice across national asylum systems in the EU by introducing a ‘common asylum procedure and a uniform status for those who are granted asylum

³ Pieter Boeles and others (eds), *European Migration Law* (2nd ed, Intersentia 2014) 247.

⁴ Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Agreement) (19 June 1990) OJ L 239 arts 28-38.

⁵ Convention Determining the States Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (19 August 1997) OJ C254/1 (Dublin Convention).

⁶ Treaty on European Union (7 February 1992) art K1(1).

⁷ Treaty on European Union (1 May 1999) ex arts 61-69.

⁸ *ibid* ex art 63(1).

⁹ Council of the European Union, ‘Presidency Conclusions, Tampere European Council, 15-16 October 1999’ (16 October 1999) paras 14-15.

valid throughout the Union.’¹⁰ In written communication following the Tampere Conclusions, the European Commission proposed that the objectives underlying an effective common asylum system be guided by ‘clear principles’ that, among other things, assist states to ‘identify those who genuinely need protection and respond properly to situations of vulnerability’¹¹ and calling on Member States to adopt a ‘special approach in view of the vulnerability of certain protected persons due to the experience of political persecution or prison, torture and the circumstances of their flight.’¹²

A series of drafts of the first phase instruments were presented to the European Council by the European Commission and despite being subject to intense negotiation between Member States and whittled down in substance due to States’ reluctance to allow for regional interference in their national asylum systems,¹³ were all ultimately adopted by 2005.¹⁴ With the entry into force of the Lisbon Treaty in 2007, the Treaty on European Union was amended and replaced by the Treaty on the Functioning of the European Union (TFEU) and a new legal basis for asylum policy was introduced under article 78. The focus shifted towards harmonisation and was replaced with obligations to develop ‘uniform statuses’ and ‘common procedures’, rather than establishing ‘minimum standards’ as was the aim of the first phase legislation. By way of evaluation of the first phase CEAS instruments, the Commission produced a series of reports evaluating Member State implementation of the different instruments,¹⁵ as well as its ‘Green Paper’ on the future of the CEAS.¹⁶ The Green

¹⁰ *ibid* para 15.

¹¹ European Commission, ‘Communication from the Commission to the Council and the European Parliament, Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum’ COM (2000) 755 final para 1.2.

¹² *ibid* para 3.3

¹³ Vincent Chetail, ‘The Common European Asylum System: Bric-à-Brac or System?’ in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System* (Brill Nijhoff 2016); Samantha Velluti, *Reforming the Common European Asylum System: Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 69.

¹⁴ Regulation 341/2003 establishing the criteria and mechanisms for determining the Member State responsible for Examining an asylum application lodged in one of the Member States by a third-country national (18 February 2003) OJ L 50/1-50/10 (Dublin II Regulation); Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (6 February 2003) OJ L 31/18-31/25 (Reception Conditions Directive); Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (30 September 2004) OJ L 304/12-304/23 (Qualification Directive); Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (2 January 2006) OJ L 326 (Asylum Procedures Directive).

¹⁵ ‘Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system, COM (2007) 299 final; ‘Report from the Commission to the Council and to the European Parliament on

Paper reiterated the vision for phase two, which was to achieve ‘a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States.’ Achieving this aim included the need to address key gaps identified in the evaluation of Member States’ implementation of the phase one instruments. One target for improvement was the approach to vulnerability. In a section of the paper articulating an ‘[a]ppropriate response to situations of vulnerability’, the Commission highlighted that while the first phase CEAS instruments rightly emphasised the need to ‘take account of the special needs of vulnerable persons’, it also expressed concern ‘that serious inadequacies exist with regard to the definitions and procedures applied by Member States for the **identification** of more vulnerable asylum seekers and that Member States lack the necessary **resources, capacities and expertise** to provide an appropriate response to such needs [emphasis added].’¹⁷ For identification of vulnerability, the 2007 Green Paper suggested that State authorities should employ, at all stages of the asylum process, tailored medical and psychological assistance for traumatised persons and victims of torture; appropriate interview techniques for vulnerable persons ‘based inter alia, on cultural, age and gender awareness’, and specialised interviewers and interpreters.¹⁸

On the basis of stakeholder consultation following the publication of the Green Paper, the Commission initiated the second phase of CEAS development by issuing a Communication: ‘Policy Plan on Asylum – An Integrated Approach to Protection across the EU’, setting out overarching objectives for a ‘coherent, comprehensive and integrated CEAS.’¹⁹ Among those objectives was the need to better ‘incorporate gender considerations and take into account the special needs of vulnerable groups’ in future asylum policy.²⁰ The Commission subsequently presented a series of draft

the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers’ COM (2007) 745 final; ‘Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status’ COM (2010) 465 final.

¹⁶ European Commission ‘Green Paper on the future Common European Asylum System’ COM (2007) 301 final (Green Paper).

¹⁷ *ibid* s 2.4.1.

¹⁸ *ibid*.

¹⁹ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum – An Integrated Approach to Protection Across the EU’ COM (2008) 360 final.

²⁰ *ibid* 3.

proposals to the European Council and Parliament to revise, or ‘recast’ the existing legislation.²¹ Despite a fraught negotiation process, during which the Council and Parliament had difficulty agreeing on common standards and some draft proposals had to be amended, all second phase proposals were adopted by June 2013 and are currently in force at time of writing.²²

It should also be noted that negotiations around the development of the second phase of the CEAS also saw the establishment of a dedicated agency tasked with coordinating and supporting intra-Member State cooperation on implementation of the CEAS.²³ An EU regulation establishing the European Asylum Support Office (EASO) came into force in 2010, setting out three core pillars of activity under the agency’s mandate: (i) support for practical co-operation between Member States; (ii) support to Member States under particular pressure and, of most relevance to this thesis, (iii) contribution to implementation of the CEAS.²⁴ The third pillar of EASO’s duties allows the agency to provide practical support to Member States implementing the CEAS.²⁵ While EASO has no direct or indirect power over Member States’ domestic asylum systems or individual decision-making processes,²⁶ article 12(2) of its founding regulation empowers the agency to develop ‘technical documents on the

²¹ Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2008) 820 final; Proposal for a Directive laying down minimum standards for the reception of asylum seekers (recast), COM (2008) 815 final; Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast), COM (2009) 554 final; Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third-country nationals and stateless persons as beneficiaries of international protection and the content of the protection granted (recast), COM (2009) 551 final.

²² Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (29 June 2013) OJ L 180/31-180/59 (Dublin III regulation); Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (29 June 2013) OJ L 180/96 -105/32 (recast Reception Conditions Directive); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (29 June 2013) OJ L 180/60 -180/95 (recast Asylum Procedures Directive); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (20 December 2011) OJ L 337/9-337/26 (recast Qualification Directive).

²³ European Commission (n 19).

²⁴ Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (25 May 2010) OJ L 132/11.

²⁵ Françoise Comte, ‘A New Agency Is Born in the European Union: The European Asylum Support Office’ (2010) 12(4) *European Journal of Migration and Law* 373, 432.

²⁶ EASO Regulation (n 24) art 2(6), which states: EASO ‘should have no direct or indirect powers in relation to the taking of decisions by Member States’ asylum authorities on individual applications for international protection.’

implementation of the asylum instruments of the Union, including guidelines and operating manuals,’ which must have due regard to ‘relevant UNHCR guidelines’ when engaging with issues of international refugee law. These technical documents are not legally binding on States’ decision-making practice (article 12(2) explicitly states that the ‘documents shall not purport to give instructions to Member States about the grant or refusal of applications for international protection’) but provide practical and judicial guidance to Member States on implementation of the different CEAS instruments. EASO’s outputs are more practical in nature and while several of them do engage directly with vulnerability in the context of the CEAS, they do not provide much by way of interpretative guidance on the concept of vulnerability. EASO’s Work Programming document for 2018-2020 includes under the agency’s activities in the area of asylum support to Member States, ‘activities on vulnerable applicants.’²⁷ In that regard, ‘[p]ractical support tools, guides and information material, including in the context of operational support, will be developed to assist Member States in dealing with vulnerable applicants.’²⁸ By way of example of this support, EASO has developed a ‘Tool for Identification of Persons with Specific Needs’, an online, interactive checklist with which a practitioner may enter vulnerability ‘indicators’ to determine the special needs of an asylum seeker.²⁹ While such a tool might be useful at first point of contact with the asylum authorities, it provides no conceptual insight into vulnerability, relying instead on the same group-based approaches to vulnerability that have been problematised in this thesis. Indeed, the overview provided on the tool’s website includes the disclaimer: ‘It should be underlined that this practical tool can in no way replace the need for training and efforts to raise awareness about potential special needs in the asylum context.’³⁰ For this reason, this thesis does not draw from EASO materials. One interesting initiative currently in its embryonic stages at EASO that should be noted is the establishment of a ‘Vulnerability Expert Network’, replacing previous expert networks on children and victims of human trafficking. The network brings together experts to address ‘crosscuttings issues [related to vulnerability] in a holistic fashion while responding to

²⁷ EASO, ‘EASO Single Programming Document 2018 – 2020, Amendment 1’ (31 July 2018).

²⁸ *ibid* 73.

²⁹ EASO, ‘EASO Tool for Identification of Persons with Special Needs’ [<https://ipsn.easo.europa.eu/easo-tool-identification-persons-special-needs>] accessed November 2019.

³⁰ *ibid*.

their specificities in the international protection context.’³¹ The network has yet to produce any publicly available material on their work to date, however the composition and rationale behind the initiative is very much in line with the multi-disciplinary approach of the dynamic concept of vulnerability and practice from the group may provide useful lessons for the establishment of a similar network in the national context.

The adoption of the second phase does not mark the end of the evolution of the CEAS. Against the backdrop of the so-called ‘refugee crisis’,³² in April 2016, the European Commission issued a communication, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe.’³³ The communication sets out priorities for future enhancement of the CEAS and launching the process for further reform, including the establishment of a safe and fair procedure for determining the Member State responsible for determining an asylum claim, achieving greater convergence on CEAS rules across EU Member States and strengthening mechanisms for preventing secondary movement. To achieve these objectives, the European Commission adopted two packages of proposals for reform of the CEAS in May and July of 2016.³⁴ The packages also include a proposal for an overhaul of EASO, establishing a European Union Asylum Agency, with the aim of integrating the agency more tightly with the CEAS and potentially expanding the agency’s powers to examine asylum applications.³⁵ At time of writing, however, the third phase proposals are currently at a stalemate in negotiations.³⁶ Substantial progress has been made on drafts of most of the proposed instruments, however

³¹ EASO, ‘EASO Vulnerability Expert network: kick off meeting, 25-26 April 2018’

[<https://www.easo.europa.eu/kick-off-mt-vulnerability-expert-network>] accessed November 2019.

³² Geoff Gilbert, ‘Why Europe Does Not Have a Refugee Crisis’ (2015) 27(4) *International Journal of Refugee Law* 531.

³³ European Commission, ‘Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe’ COM (2016) 197 final, 6.

³⁴ The first package, adopted on 4 May 2016, included a proposal for reform of the Dublin System, a proposal for reform of the Eurodac system (the system of registering and maintaining fingerprints of third country nationals entering the EU) and a proposal for a regulation to establish a European Asylum Agency, which would replace EASO. The second package of draft proposals was introduced on 13 July 2016, which included a proposal for a new regulation to replace the current Asylum Procedures Directive; a proposal for a new regulation to replace the current Qualification Directive, and a proposed recast of the current Reception Conditions Directive. See: European Commission ‘Towards a sustainable and fair Common European Asylum System’ (Press Release) (4 May 2016); European Commission ‘Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy’ (Press Release) (13 July 2016).

³⁵ Evangelia Tsourdi, ‘Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office’ (2016) 1(3) *European Papers* 997, 1027.

³⁶ European Council on Refugees and Exiles, ‘Making the CEAS Work, Starting Today’ (Policy Note #22 2019).

Member States have been unable to reach agreement on the contents of the proposed recast to the Dublin Regulation and the Asylum Procedures Regulation.³⁷ As a majority of Member States had agreed on the ‘package approach’ to reform, agreement must be reached on all proposed reforms in each package before any of them can be brought into force.³⁸ The European Council has underlined ‘the need to find a speedy solution to the whole package’ and has requested Member States to do so as soon as possible but has not set any deadlines on negotiators.³⁹ As the future of reforms are uncertain, analysis here will therefore focus primarily on the historical legislative development of the CEAS instruments that have already been brought into force and are binding on (most) EU Member States. Reference is made to commentary on the draft proposals where relevant or where they provide conceptual insight on the role of vulnerability in the future of EU refugee law. This chapter will focus on four CEAS instruments of most relevance to the role of vulnerability in asylum procedures:

- The Reception Conditions Directive – which sets minimum standards for accommodation and associated rights and entitlements for asylum seekers awaiting a decision on their asylum application;
- The Asylum Procedures Directive – which sets out the standards for asylum status determination;
- The Qualification Directive – which outlines the eligibility criteria for protection and what the entitlements are for those who are granted protection;
- The Dublin Regulation – which outlines the criteria for determining the Member State responsible for examining an asylum application.

³⁷ European Council on Refugees and Exiles, ‘Asylum at the European Council 2018: Outsourcing or Reform? ECRE’S Analysis of the proposals launched at the June 2018 European Council and its updated assessment of the CEAS legislative reforms, with recommendations on the compromise texts’ (August 2018) 14.

³⁸ European Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council – Progress report on the Implementation of the European Agenda on Migration’ (October 2019) COM (2019) 481 final, 2.

³⁹ ‘European Council meeting (28 June 2018) – Conclusions’ (2018) EUCO 9/18.

With the exception of the Dublin Regulation, all the above secondary legislative instruments are EU Directives. The key difference between regulations and directives in EU law is that Member States have more discretion as to how Directives are transposed into national law within a given timeframe, whereas Regulations are directly applicable from the moment they come into force. The discretion afforded to States when transposing Directives bears significant implications for assessment of vulnerability. The following subsections will look at how the concept of vulnerability has been incorporated into each of the instruments of the CEAS in order to obtain an understanding of if and how the import of vulnerability – as presented in the EU Commission’s framing of Member States’ human rights responsibilities – is woven into the text of key legislation.

4.2.2 Vulnerability in the evolving Common European Asylum System

This section examines the role that vulnerability has come to play in EU asylum law. To show how the concept of vulnerability has developed throughout the lifespan of the CEAS, the analysis will focus on the transition from the first to second phase of each of the instruments. This approach also serves to reinforce the notion of vulnerability as a dynamic concept, as the influence of factors such as the jurisprudence of the European Courts and the political environment on the evolving conceptualisation of vulnerability in EU asylum law become evident in the transition between the phases of the CEAS.

A. Vulnerability in the evolution of the Reception Conditions Directive

(i) The Reception Conditions Directive (Phase One)

The first phase Reception Conditions Directive set minimum standards on accommodation and subsistence to be provided to asylum seekers in EU Member States while they await a final decision on their asylum application. These minimum standards outline basic guarantees that ‘will normally suffice to ensure them a

dignified standard of living,⁴⁰ such as material housing provisions, access to medical care, education and access to the labour market. Out of all instruments, the Reception Conditions Directive has given the most detailed consideration to vulnerability. In its preamble the phase one Directive specified that Member States must ensure that ‘[r]eception of groups with special needs should be specifically designed to meet those needs.’⁴¹ By focusing on groups, this statement might seem to provide the State with a wide margin to sidestep particular circumstances of individuals with special reception needs. However, in the general rules for the implementation of key provisions of the directive, article 13 provided more specificity in that States must ‘ensure that that standard of living is met in the specific situation of persons who have special needs,’ requiring an individual assessment of the reception needs of vulnerable asylum seekers.⁴²

With regards to *who* might be considered vulnerable, article 17 of the 2003 Reception Conditions Directive provided a non-exhaustive list of categories of person who might be considered ‘vulnerable’:

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 and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence... in implementing the provisions... relating to material reception conditions and health care [emphasis added].⁴³

The inclusion of ‘such as’ implies that the list is open-ended, leaving open the possibility for the authorities to identify additional categories of vulnerable person within the context of the individualised assessment of each ‘specific situation’ required under article 13. The second part of article 17 holds that the provision of special reception needs shall apply ‘only to persons found to have special needs after

⁴⁰ Reception Conditions Directive, Preamble.

⁴¹ *ibid.*

⁴² *ibid* art 13 (2).

⁴³ *ibid* art 17 (1).

an individual evaluation of their situation.’⁴⁴ Therefore, vulnerable persons with special needs cannot be considered as such until their personal circumstances have been evaluated and their vulnerability officially identified. The remainder of that chapter of the Directive contains provisions specific to the needs of minors generally,⁴⁵ unaccompanied minors⁴⁶ and victims of torture and violence,⁴⁷ reflecting the wide recognition of the vulnerability of these cohorts in international human rights law.

While the addition of explicit vulnerability provisions outlining a non-exhaustive list of groups was a progressive step, the first phase of the Reception Conditions Directive was not without its shortcomings. The EU Commission’s 2007 report evaluating the transposition and implementation of the first-phase RCD amongst Member States pointed out a number of areas where Member States’ response to ‘asylum seekers with special needs’ was deficient.⁴⁸ Firstly, while there are provisions that cater to the special needs of vulnerable applicants, States are not provided with any guidance on how or when to identify vulnerability. With regards to the definition of vulnerable groups outlined in article 17, some States were found to adopt a selective approach to this list in their domestic system, while other countries failed to address special needs at all.⁴⁹ Furthermore, the need for a formal vulnerability identification mechanism was flagged as key to ensuring that vulnerable asylum seekers with special needs have access to special needs provisions in practice.⁵⁰ The Commission’s evaluation drew attention to the need for more robust identification procedures, emphasising that ‘[i]dentification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose *[sic]* any meaning.’⁵¹

⁴⁴ *ibid* art 17 (2).

⁴⁵ *ibid* art 18.

⁴⁶ *ibid* art 19.

⁴⁷ *ibid* art 20.

⁴⁸ European Commission ‘Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers’ (26th November 2017) COM (2007) 745 final, s 3.5.

⁴⁹ *ibid* s 3.5.1.

⁵⁰ *ibid*.

⁵¹ *ibid*.

At the core of the Commission's issue with identification is the complex way vulnerability was construed in the first phase instrument. According to article 17 of the 2003 directive, special needs arise out of a person's classification as being a 'vulnerable person' as per the enumerated list. The second part of article 17 emphasises that States' obligations towards vulnerable persons are only triggered once special needs can be ascertained after the applicants' identification as a 'vulnerable person' following an 'individual evaluation' of their case.⁵² The 2003 directive, however, fails to include guidance on how vulnerability should be identified or any obligation on the State to incorporate a mechanism for vulnerability assessment into their asylum procedures. This generates definitional ambiguity that drastically weakens the effect of these safeguards as identification of vulnerability rests on the quality of individual State practice, rather than a common standard. The non-exhaustive list of vulnerable persons provided in article 17 provides no criteria for the identification of additional categories of person who might be considered vulnerable under the Directive. Without enhanced guidance as to how States should identify vulnerability, such provisions are effectively rendered meaningless except in cases of proactive State practice or where an asylum seeker has the capacity to self-identify as vulnerable.

Additionally, the Commission's 2007 evaluation identified significant deficiencies in States' approaches to addressing special reception needs *after* vulnerability had been identified. Among issues flagged were access to key services such as rehabilitation, legal representation and adequate medical services (i.e. lack of effective access to care, no specific care for victims of torture and violence, and failure to cover costs for medical care throughout the asylum procedure).⁵³ While the report noted that legal representation for minors was provided in all Member States, it expressed concern at the failure of some States to adopt specific provisions relating to particularly vulnerable minors, and lack of effective access to special arrangements for minors with special needs.⁵⁴ In relation to detention, the Commission warns that detention of vulnerable asylum seekers should only occur as a last resort. Where vulnerable asylum seekers are detained, this should not hinder their access to the special

⁵² Reception Conditions Directive, art 17(2).

⁵³ European Commission (n 48) s 3.5.2.

⁵⁴ *ibid.*

arrangements set out in the RCD.⁵⁵ The Commission’s concerns echoed prior independent research on implementation of the Directive, such as the 2006 study by the Odysseus Academic Network, which found State practice to be widely divergent across a number of areas, including with respect to special reception needs, finding that some countries had not transposed those provisions at all.⁵⁶

(ii) Reception Conditions Directive (Phase Two and beyond)

Drawing on the findings of its 2007 evaluation, the Commission put forward its proposal for a recast Reception Conditions Directive in December 2008.⁵⁷ Vulnerability was at the heart of the recast proposal, which cited the need to address special needs as ‘the most serious concern in the area of reception of asylum seekers’ under implementation of the first phase Reception Conditions Directive.⁵⁸ The proposal was passed to the European Council in 2009, where States were unable to agree on the final text of the instrument.⁵⁹ Among points of contention was the modality by which Member States would conduct vulnerability identification. The 2008 proposal, for example, contained a provision requiring that Member States ‘shall establish procedures in national legislation with a view to identifying [...] whether the applicant has special needs.’⁶⁰ This was further altered in a subsequent amended proposal in 2011, which required States to ‘establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs.’⁶¹

The amendment process emphasised that the ‘particular situation of vulnerable persons must always be a primary concern.’⁶² The amended proposal reiterated the

⁵⁵ *ibid.*

⁵⁶ Odysseus Academic Network, ‘Comparative overview of the implementation of the Directive 2003/9 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States’ (2006) 76 - 86.

⁵⁷ European Commission ‘Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (Recast)’ (3 December 2008) COM (2008) 815 final.

⁵⁸ *ibid.* 6.

⁵⁹ European Parliament, ‘European Parliament legislative resolution of 7 May 2009 on the proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)’ (7 May 2009) OJ C 212E.

⁶⁰ European Commission (n 57) art 21(2).

⁶¹ European Commission, ‘Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast)’ (1 June 2011) COM (2011) 320 final, 3 art 22.

⁶² *ibid.* para 1.1.

importance of systematic identification of special reception needs under a section on ‘Ensuring dignified standard of living’:

Addressing special reception needs has been identified as one of the areas where current national standards are very problematic.

Identifying special reception needs not only has a bearing on access to appropriate treatment, but could also affect the quality of the decision-making process. The amended proposal reiterated the need for identification of special needs in ensuring that reception conditions meet dignified standards of living.⁶³

The above statement is noteworthy as the Commission explicitly links the identification of vulnerability in the context of reception to the overall quality of decision making, recalling that the distinct provisions on vulnerability assessment contained within the different instruments of the CEAS should be read not in isolation but as part of a comprehensive response to special needs throughout all aspects of the asylum system. The amended proposal aimed to ensure the establishment of national measures for the swift identification of the special reception needs of vulnerable persons and the continuous support and monitoring of individual cases. UNHCR’s comments on the proposal welcomed the introduction of more developed provisions for identifying and addressing special needs, such as the requirement for States to take account of persons with special needs in their national asylum legislation and efforts to facilitate early identification by linking to other CEAS instruments, such as the Asylum Procedures Directive.⁶⁴

The final text of the recast Reception Conditions Directive adopted in 2013, however, removes the obligation on States to ‘establish a mechanism’ for vulnerability identification, as was provided for in the proposals. Article 22 of the 2013 recast contains provisions for the ‘[a]ssessment of the special reception needs of vulnerable persons’, including that ‘Member states shall assess whether the applicant is an

⁶³ *ibid* para 3.1.5.

⁶⁴ UNHCR ‘Comments on the European Commission’s amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers’ (July 2012) 16-17.

applicant with special needs.’⁶⁵ Article 22 also offers some procedural guidance encouraging States to conduct such an assessment ‘within a reasonable period of time after an application for international protection is made’ and to address special needs where ‘they become apparent at a later stage in the asylum procedure.’⁶⁶ This latter point is an important addition, recognising that special needs may arise during the process and the importance of national asylum systems being able to identify and accommodate such needs at any time. While a significant improvement on the 2003 Directive, the omission of any obligation to establish a dedicated mechanism and vague language around implementation of such assessments (for example that they ‘**may** be integrated into existing national procedures [emphasis added]’) weakens the provisions’ protective potential and leaves the conduct of special needs assessments to the discretion of Member States.

Furthermore, provisions for applicants with special needs can only apply to ‘[v]ulnerable persons in accordance with Article 21 [who] may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.’⁶⁷ Article 21, to which the special needs assessment provision refers, outlines the same list of ‘vulnerable persons’ contained in the prior version of the Directive (expanded to include other vulnerable groups, such as victims of trafficking, people with serious illness and mental disorders, and victims of female genital mutilation). However, yet again, there is no guidance or obligation on States to put in place a mechanism for determining whether or not an applicant is a ‘vulnerable person’ in the first place. In its amended recast proposal, the Commission had recommended that States ‘establish mechanisms with a view to identifying whether the applicant is a vulnerable person and, if so, has special reception needs.’⁶⁸ However, this was removed by the final draft.⁶⁹ Article 22 does place the obligation firmly on the State to ‘assess whether the applicant is an applicant with special reception needs,’ implying that national authorities should not rely on an applicant’s

⁶⁵ Recast Reception Conditions Directive art 22(1).

⁶⁶ *ibid.*

⁶⁷ Recast Reception Conditions Directive art 22(3).

⁶⁸ European Commission (n 61) art 22(1).

⁶⁹ Steve Peers, ‘The Revised Directive on Asylum-seekers’ Reception Conditions: The Member States hit rock-bottom’ (*Statewatch*, March 2012) 3 [<https://www.statewatch.org/analyses/no-172-reception.pdf>] accessed June 2019.

self-identification as vulnerable in order to ensure access to special reception facilities.⁷⁰

Unfortunately, without guidance on the implementation of such assessment in practice, by way of a formal identification mechanism for example, the process by which special needs are screened is left at the discretion of national authorities. If States fail to identify whether a person is vulnerable in accordance with Article 21, then the subsequent obligation to make a special needs assessment does not arise. The consequence of this is the creation of an illogical requirement to establish a nexus between vulnerability and special needs before such needs can be addressed, further complicating asylum procedures and reducing the likelihood of harmonised EU practice. For States to give effect to special guarantees in practice, a dedicated assessment mechanism is necessary to facilitate full engagement with the process and ensure that decision makers can gather the appropriate evidence and make an accurate decision at first instance.⁷¹

The extent of Member States' obligations when providing reception conditions for vulnerable asylum seekers has been elaborated by the CJEU. In *Saciri*, the Court clarified the obligations on the State where reception facilities are overcrowded and accommodation is not available.⁷² The case dealt with a family (including minor children) who had been refused asylum seeker accommodation in Belgium due to a lack of available space in State reception centres. They sought financial assistance to seek private accommodation but were refused as they were not living in State-provided accommodation. Accepting that States may provide material reception needs by way of a financial allowance to applicants in lieu of available accommodation in state reception centres, the CJEU ruled that such an allowance must be provided from the point of application, and must be sufficient to ensure a dignified standard of living.⁷³ In calculating the value of the allowance, States are required to take account of the individual circumstances of the applicant/s to ensure that they would be able to

⁷⁰ Recast Reception Conditions Directive art 22(1).

⁷¹ UNHCR 'Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) To assist with transposition and implementation' (April 2015) 51.

⁷² Case C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others* (27 February 2014) ECLI:EU:C:2014:103.

⁷³ *ibid* para 46.

find housing suited to the ‘the preservation of the interests of persons having specific needs, pursuant to article 17 of that directive.’⁷⁴ In this case, the particular needs of the minors require that they must have dignified accommodation that maintains the family unity of the applicants. The case confirms that national authorities must do more than simply pay lip service to vulnerability and must take special needs into account in practice when providing reception conditions, even in circumstances where State capacity is stretched.

The CJEU has also emphasised that vulnerability is a critical element in the context of imposing sanctions on persons who commit ‘seriously violent behaviour’ or ‘serious breaches of the rules of the accommodation centres’, pursuant to article 20(4) of the recast Reception Conditions Directive. While the directive provides no guidance on what may constitute a ‘sanction’, article 20(5) requires that such decisions ‘shall be based on the particular situation of the person concerned, especially with regard to persons covered by article 21 [vulnerable persons], taking into account the principle of proportionality.’ In *Haqbin*, the Court dealt with the case of an unaccompanied minor boy who was expelled from his reception centre on the grounds that his participation in a mass brawl breached the accommodation centre rules.⁷⁵ The Court was asked whether withdrawal of reception conditions (in this case, expulsion from the centre) may constitute a ‘sanction’ under article 20(4). In its judgement, the Court emphasised that while a sanction may concern material reception conditions, it may never result in the ‘withdrawal, even if only a temporary one, of the full set of material reception conditions or of material reception conditions relating to housing, food or clothing,’ which would be irreconcilable with the requirement to ensure a dignified standard of living for the applicant.⁷⁶ Rather, the Court suggests that such sanctions could involve transfer to a different accommodation facility or prohibition on contacting certain residents of the centre.⁷⁷ In any case, a sanction that involves a reduction of material reception conditions must ‘ensure under all circumstances that, in accordance with Article 20(5) of the Directive, such a sanction, having regard to the particular situation of the applicant as well as all of the circumstances of that case,

⁷⁴ *ibid* para 52.

⁷⁵ C-233/18 *Haqbin v Federaal Agentschap voor de opvang van asielzoekers* (12 November 2019) ECLI:EU:C:2019:956.

⁷⁶ *ibid* para 47.

⁷⁷ *ibid* para 52.

complies with the principle of proportionality and does not undermine the dignity of the applicant.’⁷⁸ The obligation to consider the appropriateness of sanctions in a given case is heightened where the individual concerned ‘is a ‘vulnerable person’ within the meaning of Article 21’ for whom the authorities ‘must especially take into account [...] the particular situation of the minor and of the principle of proportionality.’⁷⁹

The proposal for a further recast of the Reception Conditions Directive, as with the other instruments of the CEAS, is in a state of limbo at time of writing. Nonetheless, the fact that the latest Council progress report from June 2017 cites ‘guarantees for those with special needs’ as one of two key thematic areas suggests that there is a consensus that reconciling the issues around vulnerability and special needs remain key to progressing the CEAS.⁸⁰ In fact, the Commission proposal in its current form eliminates all explicit reference to the language of ‘vulnerability’ or ‘vulnerable persons,’ replacing it with ‘applicants with special reception needs.’ Chapter IV of the phase three proposal, which in phase one and two referred to ‘provisions for vulnerable persons,’ refers to ‘provisions for applicants with special reception needs’ in the 2016 version. Similarly, the previously delineated list of vulnerable persons has been deleted (and is now contained in article 2(13), which defines ‘applicant with special reception needs’) and replaced with the much trimmer ‘Member States shall take into account the specific situation of applicants with special reception needs in the national law implementing this Directive.’⁸¹ By removing explicit reference to ‘vulnerable groups,’ the problematic obligation on States to first identify whether or not an applicant is a vulnerable person before their special needs can be assessed is removed. This eliminates a layer of complexity from of an already cumbersome process. The altered text clarifies the role of vulnerability in the asylum context in legal terms by reframing it in terms of ‘need’, which better captures the individual nature of vulnerability. UNHCR, in its comments on the proposal, welcomed the departure from the abstract reference to vulnerability and renewed focus on individual needs. It noted that for some people, such as children, vulnerability might be more

⁷⁸ *ibid* para 51.

⁷⁹ *ibid* para 53.

⁸⁰ European Council ‘Note on Reform of the Common European Asylum System and Resettlement’ (2 June 2017) 9781/17, 2.

⁸¹ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)’ (July 2016) COM (2016) 465 final art 20.

apparent, whereas for others who may not fit readily within the enumerated list of vulnerable categories ‘their individual circumstances and context may determine their specific needs [which] are shaped by personal (internal) factors and contextual (external) factors.’⁸² The 2016 proposal also provides the welcome addition that special needs assessments should be ‘systematically’ carried out ‘as early as possible after an application for international protection is made’⁸³ and that personnel carrying out such assessments should be properly trained to identify special reception needs throughout the applicant’s time in the asylum process.⁸⁴ The proposal provides a finer-tuned concept of vulnerability that is more palatable for practitioners and more closely aligned with the different dimensions (sources, temporality and states, etc) of the dynamic model.

In summary, the recast Reception Conditions Directive provides the fullest conceptualisation of vulnerability within the CEAS. However, gaps persist and many of the issues inherent in the original Directive prevail in the 2013 iteration. Most significantly, the text of the recast Directive provides no guidance by which States can define who is a ‘vulnerable person,’ despite being required to make such a deduction before individual special needs can be assessed. Notwithstanding an expanded remit, article 21 of the recast still relies on the delineation of an arbitrary list of ‘examples’ of groups which may be considered vulnerable, leaving it to States to determine whether or how an applicant falls within a vulnerable group. This leads to disparate practice and potentially excludes certain applicants with special needs who do not fit within the enumerated categories from procedural safeguards, reflecting the concerns raised in the literature with regards to group-based approaches to vulnerability.⁸⁵ A 2014 report by the European Migration Network synthesising approaches to reception of asylum seekers across EU Member States demonstrates that while ‘most States report’ that they conduct vulnerability assessments, there is wide disparity in practice, particularly with regards to ‘how and for whom’ tailored accommodation is

⁸² UNHCR ‘UNHCR Comments the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) – COM (2016) 465’ (August 2017) 15.

⁸³ European Commission (n 81) art 21(1).

⁸⁴ *ibid* art 22.

⁸⁵ Asylum Information Database ‘Wrong counts and closing doors: The reception of refugees and asylum seekers in Europe’ (March 2016) 35-36.

provided.⁸⁶ Similarly, the European Council on Refugees and Exiles in a 2016 report detailing the extensive disparity in reception conditions practice throughout the EU noted that States’ ‘increasing use of accommodation systems which fill short-term capacity renders the rights which vulnerable persons are specifically entitled to a mirage.’⁸⁷ In their report and recommendations on the recast Directive, UNHCR recommend that, as well as establishing an early-identification mechanism for vulnerability, it is crucial for States to develop techniques for identifying ‘invisible vulnerabilities,’ such as for LGBTI persons, people with non-obvious disabilities and illiterate applicants.⁸⁸ The ambiguous formulation of the vulnerability provisions in the recast Reception Conditions Directive renders them ineffective until such time as future legislative reform facilitates the introduction of clearer assessment modalities.

B. Vulnerability in the evolution of the Asylum Procedures Directive

(i) Asylum Procedures Directive (Phase One)

The first phase Asylum Procedures Directive set the minimum standards by which Member States should conduct procedures for determining applications for international protection. The first phase of the Directive made limited reference to vulnerability. Vulnerability was flagged once in the preamble in the context of unaccompanied minors for whom ‘specific procedural guarantees [...] should be laid down on account of their vulnerability,’ reflecting the general presumption in human rights norms of the vulnerability of children. This was reiterated in article 17 providing ‘[g]uarantees for unaccompanied minors.’ The second and last appearance of vulnerability in the first phase document was in relation to the personal interview, arguably the most critical element of the entire status determination process as it is the applicant’s best opportunity to present their personal testimony to the decision-maker. Article 13 of the 2005 Directive called on Member States to ‘take appropriate steps to ensure that personal interviews are conducted under conditions that allow applicants

⁸⁶ European Migration Network ‘The Organisation of Reception Facilities for Asylum Seekers in different Member States’ (2014) 32.

⁸⁷ Asylum Information Database (n 85) 43.

⁸⁸ UNHCR (n 82) 53.

to present the grounds for their applications in a comprehensive manner.’⁸⁹ In doing so, States must ‘ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability.’⁹⁰

The CJEU has taken the opportunity to explicitly link the State’s obligation to ensure the competency of interviewers to respond to vulnerability under article 13(3)(a) Asylum Procedures Directive to article 4(1) of the 2005 Qualification Directive, which set out an obligation on the applicant ‘to submit as soon as possible all elements needed to substantiate the application for international protection.’ Joined cases *A, B and C* concerned three asylum seekers whose claims of persecution on account of their homosexuality were rejected on the basis of negative credibility findings against them, including that they had failed to reveal their sexual orientation ‘as soon as possible.’⁹¹ In considering the application of article 4 of the Qualification Directive in the context of cases based on sexual orientation, the Court stated that the obligation on applicants to cooperate and submit the relevant information as soon as possible ‘is tempered by the obligation on the competent authorities’ to take account of ‘the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.’⁹² Among its findings on the case, the Court found that ‘to hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the grounds of persecution, would be to fail to have regard to the requirement referred to in the previous paragraph.’⁹³ The obligation on the decision making authorities to conduct an individualised assessment and ‘take account of the vulnerability of the applicant’ as per the Asylum Procedures Directive and the outcome of that assessment defines the weight of the obligation on the applicant under article 4(1) of the Qualification Directive to put forward evidence of their claim. The case demonstrates the inter-related nature of the CEAS with respect to vulnerability assessment and the outcome

⁸⁹ Asylum Procedures Directive art 13(3).

⁹⁰ *ibid* art 13(3)(a).

⁹¹ Joined cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie* (2 December 2014) OJ C 46.

⁹² *ibid* para 70.

⁹³ *ibid* para 71.

should have ramifications for other vulnerable groups that may be unable to present key evidence on account of their special needs.

The 2005 Directive did not expand on the meaning of vulnerability, nor did it provide any indication of how Member States should ensure that asylum officials are ‘sufficiently competent’ to take account of the applicant’s vulnerability. In its review of implementation of the first phase of the CEAS, the European Commission noted that ‘serious inadequacies exist with regard to the definitions and procedures applied by Member States for the identification of more vulnerable asylum seekers.’⁹⁴ The Commission recommended that the ‘the ways in which special needs should be identified and addressed in all stages of the asylum process should therefore be prescribed in more depth and detail.’⁹⁵ In particular the Commission called for enhanced guidance on ‘what constitutes adequate medical and psychological assistance and counselling’ and frequent training and evaluation of international protection officials.⁹⁶

With regards to the examination procedure itself, the Directive introduced a host of mechanisms for accelerating the RSD process, alongside the regular procedure. For example, article 23 permitted States to prioritise applications ‘where the application is likely to be well-founded or where the applicant has special needs.’⁹⁷ Given the ostensible link between special needs and vulnerability, such prioritisation presumably applies to vulnerable persons as outlined in the Reception Conditions Directive. However, article 23 includes no link to its sister-instrument and no guidance on identifying special needs, leaving this provision open to weak implementation. In addition to provisions for streamlining well-founded or vulnerable cases, the Directive also contains a range of ‘exceptional’ measures to expedite the assessment of claims that are not well-founded. For example, the Directive also provides for accelerated or truncated procedures where an application is deemed manifestly unfounded,⁹⁸ inadmissible,⁹⁹ subject to the safe third country or safe

⁹⁴ Green Paper (n 16) para 2.4.1.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Asylum Procedures Directive art 23(3).

⁹⁸ *ibid* art 28.

⁹⁹ *ibid* art 25.

country of origin principles¹⁰⁰ and where an application is made at a border crossing or transit zone.¹⁰¹ Overall, the non-prescriptive language in the 2005 Directive and wide scope of possibility for States to diverge from basic procedural safeguards ‘contributed to the proliferation of divergent arrangements across the EU, and [the fact] that procedural guarantees vary considerably between Member States.’¹⁰² The net effect of the range of exceptional procedures was that Member States were left with an array of mechanisms with which to diverge from basic procedural standards, serving to undermine the protective potential of provisions addressing special procedural needs.¹⁰³

(ii) Asylum Procedures Directive (Phase Two and beyond)

The recast Asylum Procedures Directive, which came into force in 2013, contains a number of amendments that aim to bolster the limited protection afforded to vulnerable applicants in its predecessor. Most significantly, article 24 sets out provisions for ‘[a]pplicants with special procedural guarantees,’ including that ‘Member States shall assess within a reasonable period of time [...] whether the applicant is an applicant in need of special procedural guarantees.’¹⁰⁴ While provision for assessment of special procedural needs early on in the process is a welcome inclusion, the lack of definition of what constitutes a ‘reasonable period’ leaves the provision open to inconsistency in State practice.

Member States must also ensure that special procedural needs are assessed and responded to ‘where they become apparent at a later stage in the procedure.’¹⁰⁵ This is an important addition as certain people, such as survivors of torture and trauma may not be willing or able to disclose their needs at the outset of the application process. That the ‘assessment may be integrated into existing national procedures and/or into the assessment referred to in article 22 of Directive 2013/33/EU [the recast Reception

¹⁰⁰ *ibid* arts 27, 31.

¹⁰¹ *ibid* art 35.

¹⁰² European Commission, ‘Report on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States’, COM (2010) 465, 15.

¹⁰³ Evangelia Tsourdi, ‘Enforcing refugee rights under EU procedural law: the role of collective actors and UNHCR’ European University Institute (2017) 99 - 112.

¹⁰⁴ Recast Asylum Procedures Directive art 24 (1).

¹⁰⁵ *ibid* art 24(4).

Conditions Directive]¹⁰⁶ is a significant and welcome addition. While special reception needs and special procedural needs are distinct and might not necessarily be explicitly connected, they are interrelated insofar as they can both impact on an individual's capacity to engage with the application process. In this respect, encouraging States to integrate both assessments is a welcome development and sets the foundation for a more refined analysis of vulnerability. Such provisions are certainly helpful insofar as they cross-reference other elements of the CEAS and reinforce efforts at harmonisation overall. However, the lack of an explicit obligation on States to operationalise an assessment of procedural needs by way of a dedicated mechanism – despite signposting to corresponding standards in the Reception Conditions Directive – undermines the usefulness of such safeguards.

Additionally, a number of provisions in the recast Asylum Procedures Directive contain enhanced guidance as to the competencies required of international protection officials and decision makers in responding to vulnerability and special needs. This is an important development as the dynamic conceptual framework requires that responsibility for identification and response to vulnerability is distributed appropriately between the relevant authorities and key stakeholders. For this to be effective, the responsible actors must be adequately trained and competent. Article 10 on 'requirements for the examination of an application' provides for decision makers to 'seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.'¹⁰⁷ With regards to the person conducting the personal interview, the recast Asylum Procedures Directive enhances the original standards by requiring 'that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability'¹⁰⁸ and is 'conducted by a person of the same sex if the applicant so requests.'¹⁰⁹ In the case of unaccompanied minors, article 25 requires that any personal interview 'is conducted by a person who has the necessary knowledge of the special needs of minors' and that 'an official with the

¹⁰⁶ *ibid* art 24(2).

¹⁰⁷ *ibid* art 10(3)(d).

¹⁰⁸ *ibid* art 15(3)(a).

¹⁰⁹ *ibid* art 15(3)(b).

necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.’¹¹⁰

The recast Asylum Procedures Directive emphasises the significance of recognising special needs at all stages of the application process, linking procedural needs to diverse issues that often influence the outcome of decision-making such as gender, age, language, cultural background and directly referring to other aspects of the EU asylum system, such as reception conditions. Unfortunately the positive elements of the recast Directive risk being undermined by lingering conceptual gaps. For example, the method by which vulnerable applicants are identified, as in the recast Reception Conditions Directive, remains unclear and there have been no opportunities to date for this issue to be probed by the CJEU. Furthermore, as expressed by Costello and Hancox, the detailed provisions for safeguarding the procedural needs of vulnerable individuals creates stark contrast between the need to identify vulnerability on the one hand, and provisions (such as the aforementioned accelerated procedures) for screening out the ‘abusive’ asylum seeker on the other.¹¹¹ They argue that the way vulnerability is construed within the recast instrument creates a dynamic grounded in traditional stereotypes that is preoccupied with pitting the (archetypal) ‘vulnerable’ refugee deserving of protection (and who are not deemed sufficiently ‘robust’ to have their claim processed in accelerated procedures) against the abusive asylum seeker who is not vulnerable and whose claim is not genuine. This distracts from ‘the basic notion of refugee status determination as a process for recognising refugees, on the assumption that many (although of course not all) of those who apply will be recognised.’¹¹² While the provisions on vulnerability have potential to enhance protection for those in need, it is important that they do not create a situation in which asylum seekers who are not deemed ‘vulnerable’ in line with the CEAS face a presumption that they are ‘abusers’ and are subject to heightened scrutiny.

¹¹⁰ *ibid* art 25(3)(b).

¹¹¹ Cathryn Costello and Emily Hancox, ‘The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee’, in V Chetail, P de Bruycker and F Maiani (eds), *Reforming the Common European Asylum System - The New European Refugee Law* (Brill 2016), 376.

¹¹² *ibid*.

The latest Commission proposal for a third iteration of the instrument, an Asylum Procedures Regulation, was published in July 2016 and further clarifies the responsibility of decision makers towards vulnerable applicants in two ways. Firstly, there are much clearer obligations on the different authorities involved in asylum procedures. With regards to the existing temporal ambiguity around when exactly a special needs assessment should occur, the Commission Proposal is unequivocal: ‘The process of identifying applicants with special procedural needs **shall be initiated** by authorities responsible for receiving and registering applications **as soon as an application is made** and shall be continued by the determining authority once the application is lodged [emphasis added].’¹¹³ In light of this, the ‘determining authority shall **systematically** assess whether an individual applicant is in need of special procedural guarantees [emphasis added].’¹¹⁴ This addresses the ambiguity present in article 24 of the 2013 Asylum Procedures Directive, which does not differentiate between identification of initial signs of vulnerability upon presentation at the asylum authority, the actual vulnerability assessment itself, or vulnerability revealed at a later stage of the decision-making process. Secondly, the proposal clearly outlines the roles of the different officials involved at various stages of national asylum procedures and in doing so has the potential to bring the CEAS closer in line with what is envisaged under the dynamic conceptual framework by establishing that vulnerability assessment is something that should be carried out on a continuum by a range of actors who the applicant may come into contact with throughout procedures – and not just as a once-off at the beginning. Those who receive and register asylum seekers at the first instance are responsible for detecting initial, more visible signs of vulnerability that may require special procedural guarantees, which is then lodged on their file.¹¹⁵ The determining authority must then take this on board and continue to ‘systematically’ assess the need for procedural guarantees.¹¹⁶ This delegation of tasks assigns clear responsibility at key points in the procedure. Such an approach is logical from a procedural perspective but also reflects the reality of vulnerability and its fluid nature in the context of a process that takes place in a series of stages and often over a

¹¹³ European Commission ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ (July 2016) COM (2016) 467 art 20(1).

¹¹⁴ *ibid* art 19(1).

¹¹⁵ *ibid* art 20 (2).

¹¹⁶ *ibid* art 19 (1).

significant period of time. However, the developments with respect to vulnerability in the 2016 proposal also take place alongside a variety of procedural mechanisms for enhancing externalisation of asylum by way of a mandatory assessment of whether a third country could be considered a first country of asylum or a safe third country where the applicant could be returned to make their application.¹¹⁷ The proposal also foresees designation of EU-level safe third countries (contrary to existing practice of individual Member States designating their own lists of safe countries).¹¹⁸ As Tsourdi notes with trepidation, '[w]hile these practices will enhance a uniform approach, their impact on the quality of decision-making is less than certain, and depends [...] on a rigorous assessment of information, coming from a multitude of sources, including civil society.'¹¹⁹ However, if current trends (such as the EU-Turkey deal and EU arrangements with Libya regarding Mediterranean migration) are any indication, the procedural challenges facing all asylum seekers, let alone those with particular needs, are likely to increase.

C. Vulnerability in the evolution of the Qualification Directive

(i) Qualification Directive (Phase One)

The purpose of the Qualification Directive is to set the minimum standards and criteria by which EU Member States define who qualifies for international protection, as well as the rights and entitlements attached to that status. The first version of the Qualification Directive (2004) contained a single explicit reference to vulnerability that is relevant to the discussion here. Article 20 called on States to '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 and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence' when ensuring access to the 'content of protection,' or in other words, the rights and entitlements that come with refugee status or subsidiary protection.¹²⁰

¹¹⁷ *ibid* art 36.

¹¹⁸ *ibid* art 46.

¹¹⁹ Tsourdi (n 103) 105.

¹²⁰ Qualification Directive art 20(3).

Article 20 of the Directive also holds the caveat that such provisions shall ‘apply only to persons found to have special needs after an individual evaluation of their situation.’¹²¹

The CJEU has elaborated on the role vulnerability can play with respect to the criteria for determining eligibility for subsidiary protection under article 2(e) and article 15(b) of the (2004) Qualification Directive, particularly in circumstances where the factors which caused serious harm in the past no longer exist. The case of *MP* concerned a victim of torture who had been refused international protection because it was deemed that the risk of torture reoccurring upon his return to his country of origin no longer existed.¹²² The applicant argued, however, that there remained a risk of serious harm to his psychological health on account of the inability of the State to provide adequate redress for the ill treatment they had caused in the first place. The Court found that in making a decision to return someone to their country of origin, consideration must be had to article 4 of the EU Charter on the prohibition of torture, which requires that ‘particular attention must be paid to the specific vulnerabilities of persons whose psychological suffering, which is likely to be exacerbated in the event of their removal, is a consequence of torture or inhuman or degrading treatment in their country of origin.’¹²³ In such circumstances, where it is established that there is a risk of the applicant being ‘intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture,’ the applicant would be eligible for subsidiary protection. The judgement brings to bear the important role vulnerability plays in assessing the risk of serious harm upon return, whereby in the case of a vulnerable applicant that assessment must consider whether or not the applicant’s country of origin can provide necessary redress, treatment or support to mitigate the effect of previous harm received there.

On specific entitlements, such as access to healthcare, the Qualification Directive requires that Member States ‘shall provide [...] adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs.’¹²⁴ This would ensure that international protection beneficiaries who have specific medical or

¹²¹ Qualification Directive art 20(4).

¹²² Case C-353/16 *MP v Secretary of State for the Home Department* (24 April 2018) ECLI:EU:C:2018:276.

¹²³ *ibid* para 42.

¹²⁴ Qualification Directive art 29(3).

psychological needs, such as victims of torture, or rape, have access to specialised medical care. Similarly, with regards to unaccompanied minors, Member States are to ‘ensure that the minor's needs are duly met’ in implementation of the Directive.¹²⁵ While there was no specific mention of vulnerability in relation to access to other entitlements such as education, accommodation, social welfare etc., States were obliged to ‘take into account the specific situations of vulnerable persons’ when ensuring access to content of protection more generally as held in article 20, as mentioned above. How or the extent to which national authorities were expected to fulfil this obligation is undefined and this has not been addressed by the CJEU in relation to the original or recast version of the Directive at time of writing.

While the 2004 Qualification Directive set out standards to be applied to the assessment of applications, there was no reference to vulnerability or special needs, likely because those provisions are covered in the Asylum Procedures and Reception Conditions Directives. This leaves a gap, however, in the case of Ireland, which has transposed the Qualification Directive but not opted into the other phase one Directives. This has resulted in an imbalanced approach to vulnerability in Irish asylum legislation, where consideration of vulnerability is required with respect to content of protection but not throughout the status determination procedures (to be discussed in the following chapter).¹²⁶ However, in its case law, the CJEU has gone some way towards bridging the provisions contained in the first phase Qualification Directive with the procedural guarantees for vulnerable persons contained in the Asylum Procedures Directive, such as in the *A, B and C* case described earlier on the relationship between the obligation on the authorities to conduct an individual assessment and the corresponding duty of the applicant to put forward the relevant evidence on their claim. In the *M* case, dealing with a case referred from the Irish High Court, the Court was asked to elaborate on the extent of the applicant’s right to be heard in the context of an assessment of their application for subsidiary protection specifically.¹²⁷ The Court ruled that while an interview is not generally required in national contexts where assessments of grounds for subsidiary protection directly

¹²⁵ Qualification Directive art 30(2).

¹²⁶ International Protection Act 2015 s 58.

¹²⁷ Case C-560/14 *M. v Minister for Justice, Equality and Law Reform and Others* (22 November 2012) ECLI:EU:C:2017:101.

follow an application for refugee status (as was the case in Ireland at the time), the obligations on the State shift where it becomes apparent ‘in the light of the personal or general circumstances in which the application for subsidiary protection has been made, in particular any specific vulnerability of the applicant, due for example to his age, his state of health or the fact that he has been subjected to serious forms of violence — that [an interview] is necessary in order to allow him to comment in full and coherently on the elements capable of substantiating that application.’¹²⁸ While the facts of the case pertain to a specific domestic legal framework, the Court’s findings corroborate existing jurisprudence on the enhanced obligations on status determination authorities to adjust procedures in light of vulnerability to ensure the applicant’s full capacity to engage with the process.

(ii) Qualification Directive (Phase Two and beyond)

The second phase Qualification Directive provides limited reform by way of provisions for vulnerable persons, or addressing special needs. The list of vulnerable persons to be taken into account with regards to content of protection is expanded slightly, incorporating victims of human trafficking and persons with mental disorders.¹²⁹ The provision on healthcare is similarly amended to include ‘treatment of mental disorders when needed, to beneficiaries of international protection with special needs.’¹³⁰

Neither the original nor the recast Qualification Directive explicitly provides for vulnerability or special needs with respect to assessment of applications. Articles 4 to 8 of the recast Qualification Directive, for example, provide standards for the assessment of applications, where it would have been appropriate to include reference to vulnerability. Under article 4, which deals with assessment of facts and circumstances, assessments are ‘to be carried out on an individual basis and includes taking into account [...] the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the

¹²⁸ *ibid* 51.

¹²⁹ Recast Qualification Directive art 20(3).

¹³⁰ Recast Qualification Directive art 30(2).

applicant has been or could be exposed would amount to persecution or serious harm.’ This sort of individualised approach is a key component of a vulnerability identification mechanism and it is puzzling that the legislators chose to focus on ‘background, gender and age’ here, rather than cross-referencing with existing vulnerability provisions in both the Reception Conditions and the Asylum Procedures Directives.

The European Commission proposal for a recast Qualifications Regulation, currently under negotiation, while not adding any explicit reference to vulnerability or special needs, does make efforts to address this gap and to enhance consistency among CEAS instruments. Article 4 of the proposal document states that the ‘determining authority shall assess the relevant elements of the application in accordance with article 33 of Regulation (EU)XXX/XXX [Procedures regulation].’¹³¹ Article 33 of the proposed Asylum Procedures Regulation, as mentioned previously, deals with the examination of applications and calls on officials to *inter alia* ‘examine applications objectively, impartially and on an individual basis,’¹³² to take account of ‘the individual position and personal circumstances of the applicant,’¹³³ to ‘seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious and child-related or gender issues’¹³⁴ and to prioritise an application where the applicant has ‘special reception needs within the meaning of Article 20 of Directive XXX/XXX/EU (Reception Conditions Directive), or is in need of special procedural guarantees.’¹³⁵ This demonstrates a level of cognisance on the part of the Commission that for any harmonisation of practice to be achieved with regards to special needs and asylum standards more generally, there must be a more symbiotic relationship between the different CEAS instruments to ensure that different modalities for identification do not exist in a vacuum but are rather part of a comprehensive system.

¹³¹ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents’ (July 2017) COM (2016) 466 final, art 4(3).

¹³² European Commission (n 113) art 33(2).

¹³³ *ibid* art 33(2)(d).

¹³⁴ *ibid* art 33(3).

¹³⁵ *ibid* art 33 (5)(b).

D. Vulnerability in the evolution of the Dublin Regulation

(i) The Dublin Convention and Dublin II Regulation (Phase One)

Preceding official EU recognition of the need for a harmonised, regional asylum system by way of the CEAS, the regime for determining the Member State responsible for processing an asylum claim had already been established with the Dublin Convention, which was signed in 1990 and first came into force in 1997. The text of the Dublin Convention itself and the policy material surrounding its conception and evaluation make no explicit reference to vulnerability, focusing on the criteria for determining responsibility and the technical aspects of implementing and requesting the transfer of asylum seekers from one Member State to another and generally seeking to reduce secondary movements of asylum seekers throughout the EU.¹³⁶ Similarly, the Dublin Convention's successor, the Dublin Regulation, which establishes 'the criteria for examining an asylum application lodged in one of the Member States by a third-country national' within the framework of the CEAS, made no explicit reference to vulnerability. It did, however, contain mechanisms by which Member States could take vulnerability into account when determining the Member State responsible for processing an application. For example, Chapter III of the 2003 Regulation laid down, in order of priority, a hierarchy of criteria with which Member States could check against the specific case at hand to determine whether or not they were responsible for processing that case. At the top of the list, while not explicitly acknowledging vulnerability, articles 8 to 11 provided special guarantees for unaccompanied minors and applicants who have family members who were already present in a Member State. Other mechanisms within the Dublin system through which vulnerability can come into play are the so-called discretionary 'sovereignty' and 'humanitarian' clauses, whereby a Member State can choose to 'take charge' of an asylum application where they wouldn't ordinarily be responsible,¹³⁷ or where humanitarian imperatives exist for taking charge of an application (such as in cases of

¹³⁶ Commission of the European Communities 'Commission Staff Working Paper, Evaluation of the Dublin Convention' (13 June 2001) Sec (2001) 756; Commission of the European Communities, 'Commission Staff Working Paper, Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States' Sec (2000) 522.

¹³⁷ Dublin II Regulation (n 14) art 3(2).

promoting family unity, or preventing exacerbation of trauma).¹³⁸ Vulnerability often figures into State application of the discretionary clauses, compelling them to take charge of any application. For example, States have applied the sovereignty clause in cases of potential risk of breaches of Article 3 ECHR and applied the humanitarian clause where applicants are medically unfit for travel.¹³⁹ However, given the discretionary nature of those provisions, research has shown that they have been subject by different States to ‘restrictive’, ‘widely divergent interpretation and application.’¹⁴⁰ Some countries have been reported as not applying the discretionary clauses at all.¹⁴¹

The CJEU has had several opportunities to pronounce on the role of vulnerability with respect to implementation of Phase One of the Dublin system. For example, in the *MA, BT, DA* case, the Court responded to questions on the application of article 6 of the Dublin II Regulation, which set out the criteria for determining responsibility for asylum claims of unaccompanied minors (mainly that the Member State responsible would be that in which the minor has a parent or guardian present, if any). The case dealt with unaccompanied minors who had no family members present in any Member State and had lodged applications in more than one EU country.¹⁴² As a solution to the question of responsibility could not be directly inferred from the text of the Dublin II Regulation, the Court drew upon the principle of the best interests of the child as the starting point, pursuant to article 24(2) of the Charter of Fundamental Rights of the European Union,¹⁴³ holding that the Dublin Regulation must be applied in a manner compliant with that principle.¹⁴⁴ Designating unaccompanied minors as ‘a category of particularly vulnerable persons,’ the Court stated that it was in the applicants’ best interests not to be subject to prolonged procedures under the Dublin regulation on account of their particular vulnerability. The Court’s solution to this was

¹³⁸ *ibid* art 15.

¹³⁹ Silvia Morgades-Gil, ‘The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?’ (2015) 27(3) *International Journal of Refugee Law* 433.

¹⁴⁰ UNHCR ‘The Dublin II Regulation – A UNHCR discussion paper’ (Brussels, April 2006) 30.

¹⁴¹ *ibid*.

¹⁴² Case C-648/11 *The Queen on the application of M.A., B.T., D.A. v Secretary of State for the Home Department* (6 June 2013) ECLI:EU:C:2013:367.

¹⁴³ Charter of Fundamental Rights of the European Union [2010] OJ C83/391, art 24(2): ‘In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.’

¹⁴⁴ *MA, BT, DA* (n 142) para 58.

that ‘as a rule, unaccompanied minors should not be transferred to another Member State,’ where they do not have family present.¹⁴⁵ As well as having substantial impact for the applicants in this case, the findings directly impacted on the development of the Dublin Regulation across later iterations. Article 8(4) of the Dublin III regulation, for example, contains explicit reference to the best interest of the child in response to the CJEU’s judgement, and the European Commission published a proposal in 2014 to amend Article 8 of Dublin III to fully incorporate the CJEU’s standpoint and ensure that unaccompanied minors are never transferred to another member state in practice.¹⁴⁶ However, due to inability to reach agreement on the draft, the Commission withdrew its proposal in 2016, instead opting to include the amendment in the 2016 proposal for a recast of the Dublin III Regulation.¹⁴⁷ The case is also an example in the European context of human rights norms being used to guide the scope of application of refugee law with respect to vulnerable asylum seekers.

While not explicitly referencing vulnerability, the Court has expanded on the family unity criteria held in the humanitarian clause at article 15(2) of the Dublin II Regulation with respect to dependency and particular needs. The case of *K* involved the daughter-in-law of an asylum seeker who was dependent on the asylum seeker for support as she had a newborn baby and herself suffered from a serious illness.¹⁴⁸ Despite not being covered by the family definition contained in article 2(i) of the Dublin II Regulation, the Court emphasised the purpose of article 15(2), which is to reunite families, in particular where there are exigent humanitarian concerns. The Court decided that in situations where a Member State may not ordinarily be responsible for receiving an application under article 2 of the Dublin II Regulation, the State *becomes* responsible when the humanitarian criteria in article 15 are fulfilled – even where the individual concerned may not strictly fit within the definition of

¹⁴⁵ *ibid* para 55.

¹⁴⁶ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State’ (26 June 2017) COM(2014) 382 final.

¹⁴⁷ European Commission, ‘Proposal for a Regulation of the Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ (4 May 2016) COM (2016) 270 final, 5.

¹⁴⁸ Case C 245/11 *K. v Bundesasylamt* (6 November 2012) ECLI:EU:C:2012:685.

family.¹⁴⁹ The daughter-in-law in this case satisfied the humanitarian criteria on account of her particular vulnerability and dependency on family members in order to be able to access and avail of international protection. It is a welcome decision, reaffirming that implementation of the Dublin system must always ensure effective access to asylum procedures, which requires a broad interpretation of the Regulation insofar as vulnerability is concerned.

(ii) *The Dublin III Regulation (Phase Two and beyond)*

In an attempt to further clarify its determination criteria, the 2003 Dublin II Regulation was recast in 2013 with the adoption of the Dublin III Regulation. In line with criticisms and recommendations on the application of its predecessor, the Dublin III regulation includes slightly more explicit obligations on determining authorities to consider the particular needs of vulnerable asylum seekers. For example, the previously discussed findings from the CJEU are given substance in the Dublin III Regulation. The preamble of the Regulation calls for ‘specific procedural guarantees for unaccompanied minors [to] be laid down on account of their particular vulnerability.’ Those guarantees are further reflected in more elaborate guidance on Member States for determining the family members or capable guardians of unaccompanied minors under article 8 pertaining to minors. In line with the CJEU’s interpretation of corresponding provisions in the Dublin II Regulation in *K*, the recast Regulation also provides wider scope for consideration of vulnerability in the context of keeping applicants together who are dependent on each other due to particular needs. Article 16 encourages Member States to ‘keep or bring together’ an applicant who ‘on account of pregnancy, a new-born child, serious illness, severe disability or old age [...] is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant.’ Furthermore, article 17(2), allows Member States to request other countries to take charge of an application ‘in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations.’ Vulnerability is also considered more in the operational components of the Dublin III

¹⁴⁹ *ibid* art 41-43.

Regulation, including the need to ensure procedural safeguards for vulnerable persons being transferred. For example prior to transfer, the transferring Member State is required to submit to the responsible Member State information on ‘any immediate measures which the Member State responsible is required to take in order to ensure that the special needs of the person to be transferred are adequately addressed, including any immediate health care that may be required’ upon transfer.¹⁵⁰

Both of the European courts have elaborated on the role vulnerability plays in ensuring that the actual transfer itself is legitimate and in line with the EU Charter and ECHR obligations. While these safeguards apply to all applicants, the European Courts have elucidated particular responsibilities on States with respect to vulnerable groups before a transfer can be affected under the Dublin Regulation. For example, in the *M.S.S.* case, the European Court of Human Rights (ECtHR) found the return of an asylum seeker under the Dublin Regulation to appalling detention and reception conditions in Greece to be in violation of article 3 of the ECHR.¹⁵¹ Central to that finding was the fact that, while in detention in Greece, the applicant’s ‘distress was accentuated by the vulnerability inherent in his situation as an asylum seeker.’¹⁵² The sweeping designation of asylum seekers as a vulnerable group has not been without its scrutiny, which will be discussed in more detail in the next section. However, the ECtHR makes clear that States must take vulnerability into account when assessing the viability of a transfer under the Dublin Regulation.

This was emphasised in the subsequent case of *Tarakhel*, in which the ECtHR determined that there would be a violation of Article 3 of the ECHR if a family with young children was returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the family would be cared for ‘in a manner adapted to the age of the children’ and ‘kept together.’¹⁵³ The Court noted in particular when considering the transfer of children that ‘it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Children

¹⁵⁰ Dublin III Regulation (n 22) art 31(2)(a).

¹⁵¹ *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

¹⁵² *ibid.*

¹⁵³ *Tarakhel v Switzerland* App no 29217/12 (ECtHR, 4 November 2014) para 121.

have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status.’¹⁵⁴ *Tarakhel* also confirmed the obligation on transferring States to obtain guarantees in each individual case that the applicant will not be subject to treatment in contravention of their fundamental rights upon return: ‘The source of the risk [...] does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.’¹⁵⁵ The obligation is duly heightened in the context of cases involving vulnerable applicants, such as children. The CJEU has corroborated the requirement for national authorities to obtain individual guarantees prior to the implementation of a Dublin transfer in subsequent caselaw. For example, the case of *C.K. and Others*, which concerned the transfer of a husband and wife who both had serious psychiatric needs and their new-born child, concluded that ‘it is for the authorities of the Member State having to carry out the transfer and, if necessary, its courts to eliminate any serious doubts concerning the impact of the transfer on the state of health of the person concerned by taking the necessary precautions to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person’s state of health.’¹⁵⁶

The European Courts have gone some way towards inhibiting State practice of implementing Dublin transfers in a blanket fashion on the basis of over-simplistic approaches to the responsibility determination criteria focused on first country of arrival rather than humanitarian concerns and fundamental rights. Member States must assign responsibility for status determination by interpreting the determination criteria in Chapter III of the Dublin Regulation and the discretionary clauses in a manner that respects fundamental rights contained in the ECHR and the EU Charter. This obligation – as with similar procedural obligations in other areas of the CEAS and in international human rights law generally – is more acute when dealing with vulnerable asylum seekers. However, while the weight of the duty to provide safeguards is heightened by vulnerability, the scope of the duty is dependent on vulnerability being identified in the first place. As the previous sections on the

¹⁵⁴ *ibid* para 99.

¹⁵⁵ *ibid* para 104.

¹⁵⁶ Case C578/16 *C. K., H. F., A. S. v. Republika Slovenija* (16 February 2017) ECLI:EU:C:2017:127, para 96.

Reception Conditions Directive and the Asylum Procedures Directive have highlighted, State practice with respect to identification of vulnerability is far from consistent.

The proposal for a third recast of the Dublin Regulation (Dublin IV Regulation) was published in May 2016.¹⁵⁷ However, its contents contain little by way of new provisions to introduce safeguards for vulnerable asylum seekers, being preoccupied instead with increasing intra-EU Member State burden-sharing in the wake of the major increase in Mediterranean arrivals to Europe in 2015. On the contrary, the proposal in effect removes the possibility for Member States to exercise broad discretion with respect to vulnerable asylum seekers by narrowing the scope of the discretionary clauses exclusively to cases ‘based on family grounds.’¹⁵⁸ By curtailing State discretion, the possibility is significantly reduced for authorities to exercise pragmatism and ensure that vulnerable asylum seekers in greatest need of protection have speedy access to the asylum procedure.¹⁵⁹ This contravenes the CJEU’s rationale in cases such as *MA & others* and *K* – and the underlying spirit of CEAS reform more broadly – of achieving efficiency and fairness in EU asylum procedures.

4.2.3 Summary

The trajectory of the emerging concept of vulnerability in the CEAS as a practical tool for ensuring access to national asylum systems for those with special needs is very much in line with the different components of the dynamic vulnerability model. The vulnerability provisions in the recast Reception Conditions and Asylum Procedures Directives, for example, require initial and ongoing assessment throughout the process; they outline potentially vulnerable groups but also allow for the identification of particular vulnerabilities on a case-by-case basis through individual assessment by adequately trained personnel. As evident from the background material on the drafting process, these safeguards are often drawn from international human rights norms and have been reiterated and reinforced by the European Courts.

¹⁵⁷ European Commission (n 146).

¹⁵⁸ *ibid* art 19.

¹⁵⁹ European Council on Refugees and Exiles ‘Comments on the Commission Proposal for a Dublin IV Regulation, COM (2016) 270’ (October 2016) 18.

However, with respect to implementation at the national level, gaps persist. The obligation to conduct vulnerability assessment is a positive development in EU law but only effective insofar as Member States implement the assessment as a comprehensive tool for protection in their national contexts. While the safeguards available to vulnerable asylum seekers are robust in the text of the legislation, reports have demonstrated that they are often illusory as Member States adopt disparate practice with respect to identification of vulnerability in the absence of prescriptive guidance.

Negotiations on the third recast of the instruments show some promising signs, such as the clarity of language, and clear delineation of the temporal quality of the vulnerability assessment and the persons involved in conducting it at the different stages. However, the future of those proposals is uncertain and the extent to which positive additions will win out over more restrictive provisions, such as the reduction of State discretion in the Dublin Regulation, remains to be seen. In the context of recent European elections and the creation of a new European Parliament, the institutional and political landscape is shifting and whether or not negotiation on the recast CEAS packages are pursued in their current iterations will very much depend upon political appetite.¹⁶⁰ In the meantime, the European courts are in the embryonic phases of responding to gaps in CEAS implementation by Member States as they arise. This section has already touched on how the ECtHR can intervene where implementation of EU law with respect to vulnerable asylum seekers raises issues. In order to complete the overview of the regional framework, the following section will expand on the jurisprudence of the ECtHR, which further clarifies obligations towards vulnerable asylum seekers *vis-à-vis* EU asylum law and human rights standards under the ECHR.

¹⁶⁰ Kris Pollet, 'All in vain? The fate of EP positions on asylum reform after the European elections' (*EU Migration Blog*, 23 May 2019) [<https://bit.ly/2rOuDA3>] accessed October 2019.

4.3 - Vulnerability and Refugee Law under the ECHR

4.3.1 *The European Convention on Human Rights and asylum seekers: An overview*

EU law and the ECHR, while separate legal systems, are becoming increasingly linked with respect to the human rights obligations of EU Member States.¹⁶¹ The fundamental rights contained in the EU Charter are informed by the contents of the ECHR, which serves as a minimum threshold for EU Member States' human rights obligations.¹⁶² Therefore, when interpreting or imposing limitations on fundamental rights contained in the EU Charter, national courts and the CJEU are required to comply with corresponding standards contained in the ECHR and case law of the ECtHR.¹⁶³ Indeed, the Lisbon Treaty crystallised this relationship by adding a protocol to the EU Treaties providing that that the EU will eventually accede to the ECHR.¹⁶⁴

Notwithstanding the fact that EU asylum law should take human rights standards held in the ECHR as a baseline, there is no mention of a right to asylum in the actual text of the ECHR and the ECtHR in its case law has repeatedly maintained that no right to asylum *per se* exists in the Convention.¹⁶⁵ However, similarly to how asylum seekers' rights have been expanded by reading international human rights norms into Refugee Convention obligations, the rights of asylum seekers under the ECHR have been extrapolated from general human rights principles and the 1951 Refugee Convention; in particular article 33(1) of the Refugee Convention prohibiting *refoulement*. Over time, the prohibition on *refoulement* has become universally recognised as a fundamental principle of international customary law and, as detailed in the previous chapter, international human rights monitoring bodies have linked it with a wide

¹⁶¹ Evangelia Tsoardi, 'Reception conditions for asylum seekers in the EU: towards the prevalence of human dignity' (2015) 29(1) Journal of Immigration, Asylum and Nationality Law 9.

¹⁶² EU Charter art 52(3).

¹⁶³ 'Explanations Relating to the Charter of Fundamental Rights' (14 December 2007) OJ 2007 No. C303/17, Explanation on Article 52 — Scope and interpretation of rights and principles.

¹⁶⁴ Treaty on the Functioning of the European Union (Consolidated Version) 'Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms' (26 October 2012) OJ C 326 art 6.

¹⁶⁵ *Vilvarajah and others v the United Kingdom* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 102; *Salah Sheekh v the Netherlands* App no 1948/04 (ECtHR, 13 January 2007).

range of human rights.¹⁶⁶ In the case of the ECHR, the ECtHR's earliest and most substantial body of case-law concerning asylum seekers has built up around the application of article 3 ECHR on the prohibition of torture and inhuman or degrading treatment or punishment to situations where there is a risk of such treatment upon expulsion to another country. In its judgement on the case of *Salah Sheekh* the Court consolidated existing case law,¹⁶⁷ making its position on the expulsion of asylum seekers to situations of torture or inhuman and degrading treatment very clear:

The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture [...]. The expulsion of an alien may give rise to an issue under this provision, and hence engage the responsibility of the expelling state under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country.¹⁶⁸

¹⁶⁶ As outlined previously, international human rights treaties and monitoring mechanisms recognise the application of the prohibition on *refoulement* where there is a risk of a wide range of serious human rights violations including torture and other cruel, inhuman or degrading treatment; risk of violation to the right to life; serious forms of sexual and gender-based violence and female genital mutilation, the death penalty and prolonged solitary confinement. See, eg: UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 3; Human Rights Committee (HRC), 'General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 12; *Njamba and Balikosa v Sweden*, No. 322/2007 (3 June 2010) CAT/C/44/D/322/2007 para 9.5; Committee on the Elimination of Discrimination against Women (CEDAW), 'General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women' (5 November 2014) CEDAW/C/GC/32, para 23; *Kaba v Canada* (21 May 2010) CCPR/C/98/D/1465/2006, para 10.1; *Roger Judge v Canada* (20 October 2003) CCPR/C/78/D/829/1998 para 10.3; *Soering v United Kingdom*, App no. 14038/88 (ECtHR, 7 July 1989) para 111; HRC 'General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)' (10 Mar 1992) para 6.

¹⁶⁷ The earliest case on applicability of Article 3 ECHR to expulsion concerned extradition in the case of *Soering* (*ibid*), in which it was found that extradition of a fugitive to the United States, where he would face capital charges and inhumane conditions on death row, was in breach of the UK's article 3 obligations. However, the reasoning established in that case has since been applied to prohibit the expulsion of asylum seekers under article 3, see for example: *Cruz Varas and others v Sweden* App no. 15576/89 (ECtHR 20 March 1991); *Vilvarajah and others* (n 165); *Nasri v France* App no. 19465/92 (ECtHR 13 July 1995); *Chahal v the United Kingdom*, App no 22414/93 (ECtHR 27 June 1995).

¹⁶⁸ *Salah Sheekh v the Netherlands* (n 165) para 135.

While the Court has most frequently considered the circumstances of asylum seekers in relation to article 3, a number of other ECHR provisions may be triggered in the asylum context in conjunction with *non-refoulement* considerations. For example, (as has been demonstrated analogously in the international human rights context by the Committee against Torture in the previous chapter) asylum seekers are entitled to procedural guarantees such as the right to an effective remedy against breaches of the ECHR, under article 13 (including the requirement that such remedies have suspensive effect against removal),¹⁶⁹ or the prohibition on collective expulsion of aliens under article 4 of the ECHR's Protocol 4 (except in circumstances where such measures are taken on the basis of an appropriate examination of the particular case of each individual involved).¹⁷⁰ The expulsion of an asylum seeker with family members in the host country can, in exceptional circumstances, amount to a violation of the right to respect for private and family life under article 8 ECHR.¹⁷¹ Finally, article 5 ECHR on the right to liberty and security is engaged in the context of immigration detention. For example, the Court has held that asylum seekers may only be detained on condition that certain safeguards are put in place, including that detention of asylum seekers is carried out 'in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.'¹⁷²

As demonstrated already, asylum seekers have come within the remit of the ECtHR in situations where the application of EU asylum law comes into conflict with the ECHR. A key feature of the interrelationship between EU law and the ECHR is that the Convention has provided a lens through which to identify substantial deficiencies in EU asylum law from a human rights protection standpoint. Some argue that these gaps may be attributed to the late insertion of a formal approach to asylum into the sphere of EU competency and that the development of the EU asylum system was approached from the standpoint of the rationale informing the structure of the EU

¹⁶⁹ *Conka v Belgium* App no 51564/99 (ECtHR, 5 May 2002) para 79; *Gebremedhin v France* App no 25389/05 (ECtHR 26 July 2007) para 58.

¹⁷⁰ *Conka v Belgium* (ibid) para 59.

¹⁷¹ *Amrollahi v Denmark* App no 56811/00 (ECtHR, 11 October 2002) para 28.

¹⁷² *Saadi v The United Kingdom* App no 13229/03 (ECtHR 29 January 2008) para 74.

overall – that of internal market logic. It is this ‘internal market’ approach to asylum policy, one that is arguably developed on the back of ‘a territorial integration project which is hostile to refugees,’ that exposes human rights protection failings.¹⁷³ The ongoing evolution of EU asylum law in this policy framework, in conjunction with the increasing capacity of the ECtHR to receive asylum-related cases, has revealed attempts by member states to shirk their Refugee Convention obligations by employing specific provisions of the CEAS to prevent access to the asylum system.¹⁷⁴ A key example of this practice arises under States’ application of the Dublin Regulation, which is predicated on a presumption of EU uniformity of standards and practice, and a mutual respect for fundamental rights and the principle of *non-refoulement*.¹⁷⁵ However, as already mentioned, case law from both of the European Courts provides that there can be no automatic presumption of safety across EU Member States and the ECtHR has firmly established that States remain liable for any violations of the prohibition of *refoulement*, notwithstanding that they may have been acting pursuant to the Dublin Regulation and EU law.¹⁷⁶

In the context of a regional framework that is in constant flux, the European asylum environment is a precarious one. The additional layer of protection provided by the ECHR keeps States in check but European human rights and asylum standards are in a constant state of being defined and interpreted. In particular, while EU law contains safeguards for vulnerable asylum seekers, that protection is weakened by ambiguity. Against that backdrop, vulnerable asylum seekers are particularly at risk of falling through the cracks. The following section examines the extent to which the ECtHR has engaged with the nexus between vulnerability and asylum and whether the Court has made any strides in refining the concept in the European asylum context.

¹⁷³ Elspeth Guild, ‘The Europeanisation of Europe’s Asylum Policy’ (2006) 18(3-4) *International Journal of Refugee Law* 630, 634.

¹⁷⁴ Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12(2) *Human Rights Law Review* 287.

¹⁷⁵ Dublin II Regulation (n 14) Preamble para 2.

¹⁷⁶ *T.I. v the United Kingdom* App no 43844/98 (ECtHR, 7 March 2000); *Bosphorus Hava Yollari ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005); *KRS v the United Kingdom* App no 32733/08 (ECtHR, 2 December 2008); *M.S.S. v Belgium and Greece* (n 151); Joined Cases C-411/10 and C-493/10 *N. S. (C 411/10) v Secretary of State for the Home Department and M. E. (C 493/10) and others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10* (21 December 2011) ECLI:EU:C:2011:865; *MA, BT, DA (n 108)*; *Tarakhel v Switzerland* (n 153).

4.3.2 *Vulnerable asylum seekers and the ECHR*

Recourse to vulnerability is an emerging trend in the practice of the ECtHR where the concept of the ‘vulnerable group’ is gaining traction.¹⁷⁷ The vulnerability of various groups has on numerous previous occasions been identified by the European Courts with significant legal impact. In its earliest case law dealing substantively with vulnerable group categorisation, the Court has classified members of the Roma minority as belonging to ‘a specific type of disadvantaged and vulnerable minority’ with a ‘turbulent history.’¹⁷⁸ Subsequent case law has used similar language to describe people with mental disabilities as ‘a particularly vulnerable group in society, who have suffered considerable discrimination in the past’¹⁷⁹ and has followed this practice in relation to people with HIV.¹⁸⁰

Thus, the formula by which a finding of vulnerability has traditionally been made by the Court requires that the group meets two criteria: that they are socially perceived as a group, and that the group in question can be said to have faced a history of systematic discrimination. The Court’s formula for determining vulnerability, however, has since been disrupted in the context of asylum seekers where a tension is emerging between recognition of the vulnerability of asylum seekers as a group and the imperative to focus on individual needs of members of that group. This tension is precisely the barrier raised in the critique on vulnerability in the literature and that which the dynamic conceptual framework seeks to resolve. The following section will examine how the ECtHR has engaged with vulnerability in its asylum case law and outline the development of this conceptual tension between group and individual vulnerability, and the consequences of vulnerability for the protection of asylum seekers’ human rights. This, together with the previous analysis of EU law, will provide a comprehensive overview of the European legal landscape as far as vulnerability in asylum law is concerned.

¹⁷⁷ Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11(4) *International Journal of Constitutional Law* 1056, 1061–1062.

¹⁷⁸ *DH and others v the Czech Republic* App no 57325/00 (ECtHR, 7 February 2007) para 182.

¹⁷⁹ *Alajos Kiss v Hungary* App no 30696/09 (ECtHR, 20 May 2011) para 251.

¹⁸⁰ *Kiyutin v Russia* App no 2700/10 (ECtHR, 10 March 2011).

A. Expansion of vulnerability – the M.S.S. Case

In the case of asylum seekers, the ECtHR has broken with tradition and pushed for more flexibility in terms of who can be considered vulnerable. The seminal case in this regard is that of *M.S.S. v. Greece*, which represents the first case at the European level to explicitly link vulnerability to asylum and in its reasoning, the Court substantially broadens the scope for who might be considered vulnerable under the ECHR.¹⁸¹

The facts of the case pertain to an Afghan man who sought asylum in Europe. His claim was lodged in Belgium; however, pursuant to the Dublin Regulation, he was returned to Greece where he was detained in a confined space with restricted access to basic necessities. Upon release, he was told to report to a local police station to declare his home address where he would receive notification of his asylum proceedings. As he had no home address, he did not report to the police station, thinking that having an address was a precondition to entering the asylum process. Furthermore, he received notification of his substantive asylum interview on a piece of paper written in the Greek language, which he could not understand. He eventually attempted to leave Greece on false documents but was arrested, detained again in similar conditions as before (during which time he claimed that he was beaten) and sentenced by a criminal court for attempting to leave Greece using false papers. Throughout his time in Greece, the man had no means of subsistence, spent most of his time looking for food and slept in a public park.

M.S.S. claimed in application to the ECtHR that his treatment at the hands of *both* Belgium and Greece amounted to breaches of the ECHR. He claimed that Greece had violated article 3 (prohibition of inhuman or degrading treatment or punishment) of the ECHR on account of his living conditions and his detention, as well as a breach of article 13 (the right to an effective remedy) due to the deficiencies inherent in the Greek asylum system that effectively precluded him from accessing protection and leading to a risk of expulsion in violation of Greece's *non-refoulement* obligations. He also claimed that Belgium had breached articles 3 and 13 by sending him to Greece

¹⁸¹ *M.S.S. v Belgium and Greece* (n 151).

and exposing him to the inhumane conditions there and the risk of *refoulement*. In its final judgement, the Court found in favour of the applicant and that both Belgium and Greece had indeed violated articles 3 and 13.

In examining the questions relating to conditions in Greece, the Court found that, while detention is indeed permissible as part of a functioning asylum procedure, such practice must be accompanied by appropriate safeguards and that the conditions the applicant had experienced while in detention in Greece were far below what is permissible under international standards. Furthermore, the Greek authorities' rebuttal that their asylum system was under extreme pressure due to increased arrivals of asylum seekers and its location on the EU's external border was noted by the Court but did not absolve the State of its obligations, on account of the 'absolute character of Article 3' of the ECHR.¹⁸² With regards to the living conditions experienced by the applicant in Greece, the Court found that the State had, through its inaction, rendered him destitute and exposed him to degrading treatment amounting to a violation of article 3. In coming to this finding, the Court placed significant emphasis on the applicant's particular circumstances as an asylum seeker and thus 'a member of a particularly underprivileged and vulnerable group in need of special protection.'¹⁸³ The applicant's vulnerability arising out of his membership of the asylum seeker group is the starting point from which the Court's article 3 analysis takes place. The Court rebukes the Greek authorities' submission that the period of detention of the applicant was insignificant and that the State must 'take into account that the applicant, being an asylum seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experience he was likely to have endured previously.'¹⁸⁴ In effect, the Court is saying that any ill treatment faced by the applicant during detention is magnified by his vulnerability on account of his being an asylum seeker in a way that might not have had such an impact on an individual who was not an asylum seeker, or did not come from a vulnerable group. In his separate (partly concurring and partly dissenting) opinion on the case, Judge Sajo clarifies what the Court is doing: 'For the Court the duration of the detention in the present case is comparable in its effects to much longer stays in detention because of

¹⁸² *M.S.S. v Belgium and Greece* (n 151) para 223.

¹⁸³ *ibid* para 251.

¹⁸⁴ *ibid* para 232.

the assumed vulnerability of the applicant.’¹⁸⁵ In other words, once it is established that the claimant is a member of a vulnerable group, the threshold for establishing a violation of article 3 ECHR is considerably lowered.

This begs the question of whether or not all members of a so-called vulnerable group are vulnerable to the same extent and should all be subject to a lower threshold of scrutiny in relation to ECHR violations (which would contradict the findings of the analysis of international human rights law in the previous chapter). In his partially dissenting opinion on the *M.S.S* judgement, Judge Sajo disagreed with the classification of asylum seekers as a vulnerable group, primarily because asylum seekers do not meet the vulnerability test established in the Court’s earlier case-law. He pointed out that asylum seekers cannot be understood to be a homogenous group with a shared experience of discrimination or stigma, nor are they a group ‘historically subject to prejudice with lasting consequences, resulting in their social exclusion.’¹⁸⁶ He warned that the open-ended classification of asylum seekers as a vulnerable group could contribute to an unconditional obligation on States to provide for the basic needs of all members of the group, despite the fact that asylum seekers’ individual needs are likely to be distinct from those of other asylum seekers owing to the myriad experiences and circumstances they bring to the asylum process. Judge Sajo’s concerns echo the theoretical critique of Levine, Luna and others detailed in Chapter Two that by ascribing vulnerability too broadly, the concept risks losing any substantive value.

Separately, however, Judge Sajo agreed that Belgium had breached article 3 ECHR by returning the applicant to Greece where he described how the ‘legal uncertainty caused by official neglect arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, and therefore it may be characterised as degrading.’¹⁸⁷ This description is in line with the Court’s approach to State-created vulnerability, as in the situation of prisoners, who have been treated as a vulnerable group due to the fact that their capacity to engage with society and national

¹⁸⁵ *ibid* Partly Concurring and Partly Dissenting Opinion of Judge Sajó.

¹⁸⁶ *ibid*.

¹⁸⁷ *ibid*.

systems is completely dependent on the State.¹⁸⁸ In this way vulnerability, as well as being linked to both group-based social perception and a history of discrimination, can also be determined in light of a group or individual's direct vulnerability *to* the State and its systems. *M.S.S.* may have expanded on the initial group-based test of vulnerability by recognising systemic or external sources as a factor that can generate additional vulnerability on top of any pre-existing vulnerability stemming from their individual circumstances. At the very least, and notwithstanding controversy over the departure from the Court's traditional construction of the vulnerable group, *M.S.S.* indicates that asylum seekers are, like prisoners, vulnerable on account of the fact that they are completely dependent on their host state for protection and access to rights.

The construction of vulnerability in *M.S.S.* doesn't say anything about how particular vulnerabilities affect individuals within the asylum seeker group. As warned in the scholarship on vulnerability, the value of a broad group-based definition of vulnerability as in the case of asylum seekers is significantly weakened when there is no mechanism by which to distil the unique procedural and substantive needs of vulnerable individuals within that group. As Judge Sajó points out in his separate opinion, asylum seekers are *not* a homogenous group, whereas the needs of other recognised vulnerable groups like persons living with HIV who have shared medical needs and Roma, who face discrimination on account of their shared ethnic background for example, are generally comparable. Individual asylum seekers arrive on European shores from innumerable diverse backgrounds, some with more heightened special needs than others that can only be identified on a case-by-case basis. What defines asylum seekers as a group, and thus their group-based vulnerability, is their quest for international protection stemming from alleged persecution in their country of origin and their shared dependency on their host state to provide adequate human rights protection while they await a decision on their asylum application. However, this conceptualisation of vulnerability remains broad and unwieldy, as not all asylum seekers have a shared experience of persecution, the same needs or level of dependency, and certainly not all asylum seekers will ultimately be recognised as refugees.

¹⁸⁸ E.g. *Davydov and others v Ukraine* App nos 17674/02 and 39081/02 (ECtHR, 1 July 2010).

The Court has since had the opportunity, under similar factual circumstances, to clarify its position on asylum seekers as a vulnerable group but has confusingly omitted to explicitly do so. For example, the case of *V.M and others* dealt with a family of Serbian asylum seekers of Roma ethnicity, including a new-born child and a severely disabled girl, who lodged an asylum application in Belgium.¹⁸⁹ The family was issued with a Dublin transfer decision and assigned accommodation in a reception centre 160 kilometres from Brussels prior to the transfer. Upon presenting at the centre, they were refused accommodation on the grounds that their documents were invalid and they returned to Brussels where they stayed in a train station before returning to Serbia, after which their disabled daughter passed away due to a pre-existing medical condition. The Court referred by analogy to the assessment in *M.S.S.*, stating ‘that the situation experienced by the applicants calls for the same conclusion as in the case of *M.S.S. v. Belgium and Greece* [and that] the Belgian authorities did not duly take account of the vulnerability of the applicants as asylum-seekers or of that of their children.’¹⁹⁰ The Court found a violation of article 3 on the failure of Belgium to provide adequate reception conditions, however, the case was subsequently forwarded to the Grand Chamber. In its judgement the Grand Chamber ordered the case be struck out pursuant to article 37(1)(a) of the ECHR on the basis that the applicants had ceased communication with their legal representative. Article 37 also permits the continuation of the examination of a case where ‘respect for human rights as defined in the Convention and the Protocols thereto so requires,’ however the Grand Chamber deemed that no such circumstance had arisen and ordered the case struck out.¹⁹¹ In their dissenting opinion, Judges Ranzoni, Lopez, Guerra, Sicilianos and Lemmens argue that there were in fact ‘special circumstances in the present case relating to respect for human rights as defined in the Convention or the Protocols thereto which go beyond the particular situation of the applicants’ warranting continuation of the examination of the application and that the ‘Grand Chamber should have seized the opportunity to rule on certain principles.’¹⁹² Specifically, the judges noted the Court’s existing case law where it has operationalised the vulnerability of the asylum seeker group for the purposes of

¹⁸⁹ *V.M. and others v Belgium* App no 60125/11 (ECtHR, 7 July 2015).

¹⁹⁰ *ibid* para 162.

¹⁹¹ *ibid*.

¹⁹² *ibid* Dissenting Opinion of Judge Ranzoni & ors paras 1 – 4.

‘assessing whether the threshold of severity justifying the application of article 3 had been attained, a greater degree of vulnerability justifying a lower threshold of tolerance, and in determining the scope of the positive obligations on the State, extreme vulnerability requiring a greater duty of protection.’¹⁹³ However, as outlined in the next section, the vulnerable group concept has been applied inconsistently by the Court since *M.S.S.* As Judge Ranzoni recalls, in agreement with Judge Sajó’s prior dissenting opinion in *M.S.S.*, ‘asylum-seekers may vary in their degree of vulnerability according to their means of subsistence, the type of treatment or persecution of which they have been or are liable to be victims, their age, their family situation or their state of health or their disability.’¹⁹⁴ The Court acknowledged the vulnerability of the applicants in *V.M.* and ‘could have seized on the opportunity to define that concept,’ rather than strike out the case, which is viewed by the dissenting judges as a missed opportunity.

If the Court is to operationalise vulnerability in a manner that is both effective and capable of addressing the concerns expressed by Judge Sajó and others, it will need to fashion an approach to vulnerability that can hone in on the particular needs of individuals within the vulnerable group. In the case of asylum seekers, while vulnerable on account of their shared pursuit of the right to seek international protection – not all members of that group will be able to engage with asylum procedures, or tolerate poor reception conditions to the same degree, a fact that has been explicitly acknowledged by a number of judges in their dissenting opinions. The Court needs to develop a consistent model of vulnerability analysis that can delve deeper than the more superficial group-based approach and isolate the needs of the individual. The following section will outline how the Court is taking some exploratory steps towards this by establishing group vulnerability as the starting point for a finer analysis of individual, particular needs. However, this nascent approach is not without its shortcomings.

¹⁹³ *ibid* Dissenting Opinion of Judge Ranzoni & ors para 5

¹⁹⁴ *ibid* Dissenting Opinion of Judge Ranzoni & ors para 6.

B. Elucidating asylum seeker vulnerability post-M.S.S.: From group-based to particular vulnerability

The ECtHR's initial dealings with vulnerability in the asylum context have revealed two unanswered but equally significant questions that are left ambiguous in the *M.S.S.* judgement. First, are all asylum seekers vulnerable all the time? And secondly, if this is indeed the case, should all asylum seekers be considered equally vulnerable under the ECHR? In other words, where group vulnerability is acknowledged, is there still scope to go deeper and allow for extrapolation of different degrees of vulnerability within the asylum seeker group as envisaged under the dynamic conceptual model of vulnerability? This section will look briefly at post-*M.S.S.* practice to outline the Court's subsequent behaviour in relation to asylum seekers' vulnerability.

In answer to the first question, the Court's subsequent case law suggests that the Court is indeed relying on the *M.S.S.* judgement to uphold the asylum seekers' vulnerability as a group. In *Elkhan Chiragov and Others* the court held that the vulnerability reasoning used in relation to asylum seekers also applies to displaced persons as a group, despite the different context.¹⁹⁵ In *Tarakhel*, the Court makes numerous links to the vulnerable group rationale in *M.S.S.* in finding a violation of article 3 ECHR in the case of a Dublin transfer of an Afghan couple and their six minor children to Italy from Switzerland.¹⁹⁶ In *Aden Ahmed*, citing *M.S.S.*, the Court acknowledged that 'the applicant was in a vulnerable position, not only because of the fact that she was an irregular immigrant and because of her specific past and her personal emotional circumstances [...], but also because of her fragile health.'¹⁹⁷ Furthermore, in *Aden Ahmed*, the Court acknowledges vulnerability arising from the individual health circumstances of the individual, as well as the vulnerability attached to her irregular migrant categorisation. The approach taken in these cases suggests that the Court does not consider group and individual vulnerability to be mutually exclusive and that an asylum seeker's default group-based vulnerability can be aggravated further by personal circumstances. This provides a response to the second question on the issue of whether or not all asylum seekers are vulnerable to the same

¹⁹⁵ *Elkhan Chiragov and Others v Armenia* App no 13216/05 (ECtHR, 14 December 2011) para 146.

¹⁹⁶ *Tarakhel v Switzerland* (n 153) para 118.

¹⁹⁷ *Aden Ahmed v Malta* App no 55352/12 (ECtHR, 23 July 2013) para 97.

extent in the eyes of the Court. Post-*M.S.S.* case law indicates that States, while maintaining the asylum seeker group's overall status as vulnerable, must consider additional factors that might add to the baseline vulnerability by virtue of membership of the asylum seeker group. In other words, States should not consider some asylum seekers vulnerable and others not so, as all asylum seekers are generally vulnerable but those who are more vulnerable than others on account of their particular circumstances may be distinguished within the asylum seeker group.¹⁹⁸

The Court has identified various situations in which an asylum seeker's dual vulnerability on account of vulnerability stemming from their membership of the asylum seeker group, as well as that arising from their personal circumstances has warranted extra protection. For example, in *Aden Ahmed*, the Court considers the applicant to be in a 'vulnerable position' as an asylum seeker firstly but 'also because of her fragile health,' as evidenced in medical documents attached to her case, which had not been taken into account during domestic proceedings.¹⁹⁹ In *Tarakhel*, in addition recognising the applicants' group based vulnerability as asylum seekers, the Court emphasises the need for 'special protection' of asylum seeking children (irrespective of whether they are travelling with family or unaccompanied) 'in view of their specific needs and their extreme vulnerability.'²⁰⁰ In *V.M.*, described previously, where the applicants had requested accommodation while the Dublin transfer procedure was underway, the Court noted their vulnerability as a result of their asylum seeker status but also the presence of particularly vulnerable individuals within that group, which enhances their needs:

If that procedure is not to be deprived of all effectiveness as a result of a refusal to protect the most elementary of rights, the applicants, like the applicant in *M.S.S. v. Belgium and Greece* (§ 251), must be regarded as belonging to "a member of a particularly underprivileged and vulnerable population group in need of special protection". As the Court observed in *Tarakhel*, cited above (§ 119), that requirement of

¹⁹⁸ U. Brandl, P. Czech 'General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?' in Francesca Ippolito and Sara Iglesias Sanchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart Publishing 2015) 251.

¹⁹⁹ *Aden Ahmed v Malta* (n 197) para 97.

²⁰⁰ *Tarakhel v Switzerland* (n 153) para 119.

“special protection” is particularly important when the persons concerned are children. It is an even stronger requirement in the present case, in the Court’s view, given the presence of very young children, including a baby and a disabled child, who were themselves inherently fragile and more vulnerable than adults when faced with deprivation of their basic needs.²⁰¹

The Court’s choice of language such as ‘extreme’ and ‘particular’ suggests that there are different degrees of vulnerability, which may heighten the level of protection required depending on the circumstances at hand. In each of the above-mentioned cases, the State’s obligation to prevent and/or remedy rights violations are enhanced and emphasised by the Court in line with the severity of the vulnerability involved. In *V.M.*, the Court combines the group vulnerability assessment of *M.S.S.* with the particular vulnerability of children in *Tarakhel* to create ‘an even stronger requirement’ on the State to respond to the applicants’ needs.²⁰²

On the other hand, the Court has used the cumulative group and particular vulnerability test set in *Aden Ahmed* in cases where it has considered an applicant vulnerable as per its reasoning in *MSS* but not vulnerable *enough* to meet the threshold of an article 3 violation. For example, in *Mahamad Jama*, a case concerning an asylum seeker’s conditions in detention, the Court acknowledged the applicant’s group-based vulnerability but noted that there were no acute individual vulnerabilities present at the time to set her situation apart from other asylum seekers to warrant special support:

Lastly, while it is true that the applicant, being an asylum-seeker, was particularly vulnerable because of everything she had been through during her migration and the traumatic experiences she was likely to have endured previously (see *M.S.S. v Belgium and Greece* [...]), a state of vulnerability which exists irrespective of other health concerns or age factors, the Court does not lose sight of the fact that the applicant in the

²⁰¹ *V.M. and others v Belgium* (n 189) para 153.

²⁰² *ibid.*

present case was **not more vulnerable than any other adult asylum seeker** detained at the time.”²⁰³ [emphasis added]

The above statement on the applicant’s vulnerability formed part of a wider assessment that resulted in a finding that her detention conditions did *not* reach the threshold of ill treatment. The Court found *inter alia* that the applicant’s living space was relatively satisfactory, that complaints about the temperature in the facilities had been adequately dealt with by the authorities and that NGOs had noted improvements to conditions in the detention facilities overall. The fact that the Court references the applicant’s vulnerability at the end of the assessment suggests that, had she demonstrated some individual vulnerability – as was the case in *Aden Ahmed*, the outcome may have been different. The court has maintained this analysis in subsequent cases to reject claims of article 3 violations.²⁰⁴

In the above examples, the Court is employing vulnerability as a lens through which human rights violations can be screened and State obligations brought into tighter focus. The more layers of vulnerability attached to a person, the lower the threshold required to amount to a Convention violation. Peroni and Timmer describe the concept of group vulnerability as a ‘magnifying glass’, through which ill treatment inflicted on members of that group ‘looks bigger.’²⁰⁵ In this sense, group vulnerability can be seen as the starting point from which States have an obligation to identify and address further vulnerabilities on an individualised basis within that group. Some commentators, however, have cautioned against an exclusive emphasis on particular vulnerability, rather than a rights-based analysis, as a decisive factor in identifying rights violations. Smyth, in criticising the vulnerability assessment in *Tarakhel* from a child-rights perspective, suggests that the same outcome (that reception conditions may reach a violation of article 3 where they are not adapted to the special needs of the asylum seeker child) could have been achieved through the application of relevant human rights norms, such as those contained in the Convention on the Rights of the

²⁰³ *Mahamad Jama v Malta* App no 10290/13 (ECtHR, 02 May 2016) para 100.

²⁰⁴ *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017) para 87.

²⁰⁵ Peroni & Timmer (n 177) 1079.

Child.²⁰⁶ She notes that the focus on the inherent ‘vulnerability’ of the child as a criterion for meeting the article 3 threshold creates a situation where the child receives special protection because they are ‘vulnerable’ and not on account of the rights they should be afforded anyway under child-specific international human rights law.²⁰⁷ The Court may face problems reconciling its ‘extreme vulnerability’ approach in future cases that involve asylum seeking children who do not present as overtly vulnerable, such as ‘an older unaccompanied minor who rationally navigates States’ border controls to get to his/her country of choice.’²⁰⁸ Smyth argues that a more robust analysis of vulnerability in such cases could capture how children could be rendered vulnerable, not just on account of their inherent situation, but because their rights as children are denied.²⁰⁹ Similar issues may arise in cases pertaining to other potentially vulnerable asylum seekers, such as LGBT persons or victims of sexual violence or trauma, who might be expected to present before the authorities in a stereotypical, pre-defined fashion in order to be recognised as sufficiently vulnerable to receive special support. However in many cases, such persons often appear fully resilient. This dilemma exemplifies the tension between the internal and external sources of vulnerability described in Chapter Two, which could be resolved under the dynamic conceptual analysis that can take account of the different sources of vulnerability where appropriate (i.e. the child’s inherent vulnerability due to their age or maturity and external vulnerability generated by a national asylum administration that denies them adequate reception facilities adapted to their age).

Furthermore, the potential value of vulnerability as a conceptual tool that can be used by the Court to measure the extent of human rights violations against asylum seekers (and the corresponding obligations on the State) is somewhat diminished by inconsistent practice. In some cases, the ECtHR has neglected to consider the baseline

²⁰⁶ Ciara Smyth, ‘The Jurisprudence of the European Court of Human Rights relevant to child migrants’ in Bhabha, Senovilla Hernandez and Kanics (eds) *Handbook on Migration and Childhood* (Edward Elgar Publishing: Northampton MA, 2018) 143.

²⁰⁷ *ibid.* Smyth gives examples of relevant rights contained in the Convention on the Rights of the Child that can be used to justify the special protection of child asylum seekers, such as article 22 on the right of asylum-seeking children to appropriate protection and humanitarian assistance; article 9 on the right of the child not to be separated from his or her parents against their will except where it is necessary in the best interests of the child; article 27 on the right of the child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development, and article 3(1) on the right of the child to have his or her best interests given primary consideration in all decisions concerning them.

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

group vulnerability standard set out in *M.S.S.* at all, instead focusing on a specific aspect of the asylum seeker's particular vulnerability. For example the case of *AS* involved an asylum seeker appealing a Dublin Transfer to Italy on the grounds of illness and dependency on family residing in the transferring country for support.²¹⁰ Despite acknowledging the *M.S.S.* vulnerability precedent, the Court for some reason considers the vulnerability of the applicant exclusively on health grounds, as opposed to his asylum seeker status. This resulted in the applicant being subject to the extremely high 'exceptional circumstances' threshold of established general immigration case law on removal in the context of ill-health, where removal constituted a violation of article 3 ECHR in situations where the individual is at the terminal stage of an illness and the receiving State lacks resources to provide adequate treatment.²¹¹ In considering the availability of medical treatment in Italy, the Court found that which was available to be comparable to that being received by the applicant in Switzerland and as such, found no violation of article 3 in the case of removal. The Court did not take into account the difficulties that the applicant might face as a member of a 'particularly underprivileged and vulnerable population group in need of special protection' in accessing medical treatment in Italy in the context of 'serious doubts as to the capacities of the [Italian reception] system.'²¹² While there may have been treatment generally available in the receiving state, no consideration was given to the impact the applicant's status as an asylum seeker with serious health concerns and associated dependency on family members might have had on his capacity to access that treatment, given reports of poor reception conditions in Italy. Had the court applied the same weight to asylum seeker vulnerability as that in *M.S.S.*, perhaps the threshold may have been met by which to prohibit the applicant's transfer. The Court missed an opportunity to coalesce its group-based and individual approaches to vulnerability. Would the threshold have been met if the starting point of the Court's analysis had been on the applicant's membership of a previously acknowledged vulnerable group, before moving on consideration of his specific health-related vulnerability?

²¹⁰ *AS v Switzerland* App no 39350/13 (ECtHR, 30 June 2015).

²¹¹ *N. v the United Kingdom* App no 26565/05 (ECtHR, 27 May 2008); *D. v the United Kingdom* App no 30240/96 (2 May 1997).

²¹² *AS v Switzerland* (n 210) para 36.

Similarly, in the 2016 judgement of *OM* the Court sidesteps any asylum seeker group vulnerability, instead honing in on the applicant's vulnerability as a gay person in detention in finding a violation of article 5(1)(b) ECHR.²¹³ While undoubtedly a positive outcome for the rights of LGBT asylum seekers and vulnerable people in detention more generally (the judgement represents the first instance in which the Court specifically addresses the detention of LGBT asylum seekers), the Court's use of vulnerability diverges from the group-based approach in *M.S.S.* The Court in *OM* held that States should 'in the course of placement of asylum seekers who claim to be a part of a vulnerable group in the country which they had to leave [...] exercise particular care in order to avoid situations which may reproduce the plight that forced these persons to flee in the first place.'²¹⁴ In this case, the individual is an asylum seeker who identifies as a 'member of a vulnerable group by virtue of belonging to a sexual minority in Iran,'²¹⁵ and as such, should not be detained (or indeed, accommodated) with others in an environment that may replicate persecution. Considering that 'asylum seekers who claim to be part of a vulnerable group in the country which they had to leave,' could technically apply to all asylum seekers on account of their affiliation with any one of the Refugee Convention grounds (race, religion, nationality, political opinion or membership of a particular social group), it is unfortunate that the Court refrains from elaborating further.²¹⁶ Is this another way of stating that all asylum seekers are vulnerable, by virtue of the (yet to be proven) risk of persecution they face? Or is the Court saying that only certain groups of asylum seekers can be considered particularly vulnerable depending on the circumstances? Nonetheless, vulnerability in this case is clearly linked directly to the applicant's sexual identity, and the negative perception of that identity by society in his country of origin, rather than broader membership of the asylum seeker group.

Notwithstanding the progressive step forward for LGBT asylum seekers and the provision of more clarity on detention-related obligations, the Court's use of vulnerability in *OM* evokes a more ambiguous concept of vulnerability than that dictated in *M.S.S.* and cases that connect group-based and individual vulnerability,

²¹³ *O.M. v Hungary*: App no 9912/15 (ECtHR, 5 July 2016) para 53.

²¹⁴ *ibid* para 53.

²¹⁵ *ibid*.

²¹⁶ *ibid*.

such as *Aden Ahmed*. Of particular note, the Court in *OM* found that the omission of the State to conduct an individualised assessment of the applicant’s situation before detaining him contravened the obligation for detention not to be arbitrary under article 5(1)(b) ECHR, as his vulnerability on account of his sexual orientation should have been taken into account in any decision to detain.²¹⁷ The need for an individualised assessment is key to operationalising a dynamic approach to vulnerability, and the Court in *OM* accepts that vulnerability is not just a static condition but is something that can find its origin prior to the person’s flight from their home country and may be exacerbated as they progress through their asylum process. In *OM*’s case, any existing vulnerability on account of the risk of persecution he faced in Iran as a gay man was further compounded by Hungary’s arbitrary detention practice. An appropriate assessment of the individual circumstances of his case should have picked up on his sexual orientation and allowed for the appropriate safeguards to be put in place during his detention.

Similarly, the case of *S.M.M.* concerned the detention of a man for two years who ‘had serious mental health problems, making him vulnerable.’²¹⁸ The Court found a violation of article 5(1) ECHR on account of the fact that the State, being aware of the applicant’s vulnerability and length of time in detention, should ‘have been more diligent in pursuing the applicant’s representatives and following up the provision of the expert evidence, especially after a deadline had been imposed, to ensure the necessary “due diligence”.’²¹⁹ Similarly, in the case of *V.M.* described earlier, concerning the prolonged detention of a vulnerable asylum seeker, the Court took account of the applicant’s ‘worryingly long’ detention and her vulnerability as someone suffering from mental health problems, and that both these elements of her situation must have been known by the relevant authorities in finding a violation of article 5(1) ECHR. Again, the Court rules for enhanced obligations in the context of a vulnerable asylum seeker, however these enhanced obligations were linked more to general standards relating to particularly vulnerable asylum seekers in detention, rather than any obligations stemming from the individual’s membership of a ‘particularly

²¹⁷ *ibid* paras 52-54.

²¹⁸ *S.M.M. v the United Kingdom* App no 77450/12 (ECtHR, 22 June 2017) para 82.

²¹⁹ *ibid* para 85.

underprivileged and vulnerable population group in need of special protection,’ as established in *M.S.S.*

This line of cases pertaining to the detention of vulnerable asylum seekers reflects inconsistent behaviour in that they draw out the individual’s vulnerability in the context of their detention, rather than from their membership of the asylum seeker group. In order to draw out individual needs that go beyond the asylum seeker’s general group vulnerability, an identification mechanism, if operationalised at an early point, can flag procedural, reception and other needs, and ensure that a person’s rights are respected throughout the process, including in the context of extraordinary measures, such as detention.

Ultimately, the Court’s asylum case law confirms that some asylum seekers can be more vulnerable than others depending on the circumstances. The Court is hesitant to link its approach to individual vulnerability outlined above to the group construction of vulnerability in *M.S.S.*, in effect establishing two distinct approaches to the same concept. It seems that all the ECtHR needs to do to strengthen its concept of vulnerability (and to become compatible with the dynamic model of vulnerability) is to bridge these two approaches in order to capture both the systemic vulnerability of the asylum seeker group in terms of their legal status and the procedural and substantial safeguards particular to the individual. Until the Court reconciles these two approaches, vulnerability in ECHR asylum law will remain an open-ended concept.

4.3.3 Summary

The ECtHR is nurturing a fledgling concept of vulnerability in its asylum case law, revealing some interesting trends that demonstrate the potential usefulness of vulnerability as a refugee protection concept. On the one hand, States have specific international obligations to the asylum seeker group who are vulnerable on account of their precarious migratory journey and likelihood of having faced trauma, and must take account of this in upholding their human rights obligations. In this vein, the broad group-based vulnerability acts as a safeguard, acknowledging asylum seekers’ unique circumstances in the context of ascribing ECHR protection. On the other

hand, States also have the interrelated obligation to ensure that domestic asylum authorities take account of the specific needs of individual protection applicants, some of whom (as the Court has frequently demonstrated) may be more vulnerable than others due to the exigencies of their particular claim. As under EU law, the onus is placed on national asylum authorities to identify and respond to individual vulnerability in order to comply with ECHR obligations. If the Court's approach to vulnerability is to be mainstreamed and made effective, it will first need to reconcile the two distinct strands of vulnerability analysis that it has created. However, in the meantime, the Court risks undermining the value of any progress made towards a coherent approach to vulnerability by inexplicably straying from its own established standards in practice.

4.4 – Concluding Remarks : The protective potential in distinct but complementary approaches to vulnerability in European refugee law

This chapter has attempted to deliver a comprehensive analysis of how the concept of vulnerability has come to be situated in the European refugee legal framework. As distinct bodies of law, the EU and ECHR regimes have both drawn broadly from approaches to vulnerability in international human rights and refugee law but have each developed unique approaches to the concept. Given the particular relationship between the two bodies, however, these approaches have developed in such a way that they complement rather than contradict one another. It is through this particular relationship that glimpses of the potential for a more nuanced conceptual approach to vulnerability at the European regional level become visible.

Under the development of the CEAS – with interpretative oversight from the CJEU – vulnerability is being treated conceptually as a 'tool' with which national authorities can respond to asylum seekers' 'special needs.' The different instruments of the CEAS, with their specific but inter-related scopes of application, allow for contextualisation of vulnerability in the various components of the national asylum system from provision of accommodation to the various stages of the asylum procedure. However, these developments take place against a backdrop of regional

efforts to maintain a tight handle on migratory flows and vulnerability appears to serve as a bridging mechanism between the security and protection imperatives of EU refugee law. In EU evaluation of the CEAS, vulnerability is a target area for improvement and more harmonised practice. The text of the Stockholm Programme, signalling transition to the second (current) phase of the CEAS, that ‘[a]llowance must be made for the special needs of vulnerable persons’²²⁰ and that ‘strengthening of border controls should not prevent access to protection systems by those persons entitled to benefit from them, and especially people and groups that are in vulnerable situations.’²²¹ Vulnerability plays a distinct role within this dichotomy between security and protection to identify those in need of protection. However, in that context it is easy to lose sight of the protective role vulnerability should serve. The vulnerability provisions in the CEAS are not prescriptive with respect to the method or process by which vulnerability assessment should occur and current State practice is weak and inconsistent. Unless the mechanism by which that identification takes place is more clearly defined, good practice will be *ad hoc* and vulnerability assessment practice in many national contexts will continue to be inadequate to identify the range of needs that may present, or too narrow in that those not deemed ‘vulnerable enough’ will be excluded from protection.

Whereas on-going approaches to vulnerability in EU asylum law are more practical in nature, the ECtHR maintains oversight where EU Member States fail to apply EU law in line with ECHR obligations, or otherwise act in contravention of their human rights obligations with respect to vulnerable asylum seekers. Under this mandate, the ECtHR has been producing a steady line of jurisprudence in recent years revealing that the Court is on the verge of consolidating its own approach to vulnerability. On foot of the pronouncement that all asylum seekers are generally vulnerable due to their shared experience of being members of ‘a particularly underprivileged group’ in *M.S.S.*, the Strasbourg court has established a baseline (notwithstanding some dissent), requiring that authorities take special care when making decisions that could have significant consequences for the wellbeing of the asylum seeker. Against this baseline, the ECtHR in subsequent case law appears to be refining its concept of

²²⁰ European Council ‘The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens’ (2 December 2009) 17024/09 s 1.1.

²²¹ *ibid* s 5.1.

vulnerability by acknowledging that asylum seekers with individual needs, such as children and people with psychological illness can be *especially* vulnerable on top of the vulnerability stemming from their asylum seeker status. Given the general vulnerability of the asylum seeker group, there is a particular obligation on national authorities to identify within that group those who may have particular needs stemming from their personal circumstances. This is in line with the dynamic conceptual framework for vulnerability, which recognises that particular vulnerability exists in tandem with group-based vulnerability and can emerge at any time. Unfortunately, the Court has stopped short of confirming or clarifying the model of vulnerability it is developing; it has avoided opportunities to clarify its judgement in *M.S.S.* under analogous factual circumstances, and has applied the *M.S.S.* approach inconsistently in case law since – using it in conjunction with individual vulnerability in some cases, and omitting to do so in others.

Notwithstanding some remaining conceptual ambiguity and gaps, analysis in this chapter confirms that both the EU and ECHR legal regimes are engaging more meaningfully with vulnerability in connection with asylum seekers. The two emerging concepts in European refugee law are quite compatible with each other as far as the dynamic conceptual framework for vulnerability is concerned. EU law is focused more on consolidating practical steps for national authorities to take in response to vulnerability at every stage of the asylum process. The ECtHR, on the other hand, recognising that traditional approaches to vulnerability (based on rigid classifications linked to social categories) are outdated, is engaging with a more abstract conceptualisation of vulnerability that is capable of isolating individual needs, while at the same time recognising vulnerability stemming from group-based disadvantage and the potential for multiple sources of vulnerability to increase special needs. The question remains, however, to what extent these emerging conceptual approaches (and gaps) are manifest in national practice where their influence is most relevant. Using Ireland as a case study, the following chapters will examine how these regional developments impact upon approaches to vulnerable asylum seekers at the national level. This will allow for deeper analysis of the conceptual challenges raised so far by situating them in their practical context in the national refugee protection system.

Chapter 5 – Situating Vulnerability in the National Asylum System: The Irish Case Study

5.1 - Introduction

The previous chapters have highlighted how the concept of vulnerability plays a significant role in international protection discourse, with profound implications for individuals or groups designated as such. The patterns and trends identified at the international level are also compatible with the dynamic conceptual model for vulnerability assessment defined at the outset of this thesis. Ultimately, however, it is the national authorities with responsibility for receiving asylum seekers and conducting refugee status determination (RSD) procedures that are the first point of contact for the purposes of vulnerability assessment. In the context of conceptual ambiguity at the international level, national asylum decision-making bodies are left with wide discretion to identify and define the impact of vulnerability in a given case, guided by relevant national legislation and policy. It is within national frameworks – operating under the auspices of international human rights and refugee law - where there is the most potential to elucidate what a dynamic, protection-oriented approach to vulnerability might look like.

To address these questions, Chapters Five and Six situate the conceptual themes explored previously within domestic practice. Notwithstanding the wide disparity of procedural standards across EU Member States, the Irish system provides an interesting perspective from which to analyse the potential value of a more nuanced approach to vulnerability. The Irish legal and policy framework governing asylum has recently undergone a number of crucial reforms that present opportunities for exploring disputed concepts relevant to protection. Recent developments have also cast a spotlight on protection pressure points in the Irish system and created a legal and policy space within which dialogue can take place and gaps can be addressed through targeted advocacy and discussion. The result of these developments is a somewhat rejuvenated asylum legal and policy landscape in Ireland, which is more open to analysis, judicial scrutiny and further advocacy. Of particular relevance to the

concept of vulnerability, this chapter will examine the recent overhaul of Irish legislation with the introduction of the International Protection Act (2015), overhauling asylum procedures, and the enactment of the European Communities (Reception Conditions) Regulations (2018) (Reception Conditions Regulations, hereafter).¹

This chapter begins with a brief overview of the Irish asylum system and developments leading to recent reforms. This is followed by analysis of the current legislative and policy framework where it intersects with the concept of vulnerability. This overview of the Irish context sets the scene by laying out the gaps in Irish legislation and policy *vis-à-vis* vulnerability, which is further explored in the analysis of interview findings with practitioners to follow in Chapter Six. As a full disclaimer, it should be recalled that the author was an employee of the Irish Refugee Council for the duration of this doctoral project (between October 2015 and May 2019) and therefore had direct involvement in many of the policy and advocacy activities described in this chapter including the research and drafting of a number policy of materials referenced throughout. Effort has been made, however, to reflect the broader civil society perspective and the activities of other organisations in the Irish asylum and refugee sector where possible.

5.2 - Background to the Irish International Protection System

Ireland can be described as a recent asylum country. Traditionally, it has not experienced the types of large-scale refugee flows received by other European countries, due in large part to its geographic isolation on the outermost fringes of the European continent and lack of exposure to inward migratory movements.² With the exception of a limited number of individuals granted protection under dedicated refugee resettlement programmes,³ spontaneous applications for asylum did not become a prominent feature of Irish legislative and policy debate until recently. Applications for asylum did not arise in any substantial number until the mid-1990s,

¹ European Communities (Reception Conditions) Regulations (2018) SI No.230 of 2018.

² Pia Prutz Phiri, 'UNHCR, International Refugee Protection and Ireland' in Ursula Fraser and Colin J Harvey (eds), *Sanctuary in Ireland, Perspectives on Asylum Law and Policy* (Institute of Public Administration 2003) 115.

³ *ibid* 115-116.

increasing from just 39 applications in 1992, to almost 8000 applications per year throughout the late 90s and peaking at over 11,000 applications in 2003.⁴ In the space of a decade, Ireland went from processing applications in the double-digits, to becoming a destination country of approximately 10,000 annual applications.⁵ In 2012, the number of applications dropped to 982 but gradually climbed again in the wake of the Syrian conflict to a total of 3673 applications in 2018⁶ (approximately 0.5% of the total number of asylum seekers in the EU during that year).⁷

While the figures are low relative to the rest of the EU, the sudden transformation of Ireland into a country of asylum has meant that national standards, legislation and policy formalising the Irish protection system are also relatively new developments. As Mullally has noted, Irish refugee law and policy has developed ‘against a background of significant transnational legal activity’, meaning that Irish law and policy-makers have had a wealth of existing legal sources from which to inform approaches to substantive issues of refugee protection.⁸ In response to the increase in protection applications throughout the mid-90s, there was a scramble to establish a dedicated system for processing applications and provide for the basic needs of applicants while they await a final decision on their case. Ireland’s obligations under the Refugee Convention were first formally codified in the Refugee Act 1996, which did not fully come into effect until 2000. This was subsequently amended in piecemeal fashion to address gaps as they emerged.⁹ That legislation has since been repealed by the International Protection Act 2015, to be discussed in more detail throughout this chapter.

⁴ Steven Loyal, *State Power and Asylum Seekers in Ireland: An Historically Grounded Examination of Contemporary Trends* (1st edition, Palgrave MacMillan 2018) 91.

⁵ While this increase certainly warranted an immediate and systemic response, it should be noted that even at their peak, the number of applications for international protection in Ireland could not be considered large or ‘overwhelming’ by relative standards. The number of applications has fluctuated since 2003, reaching just 938 applications in 2013 before increasing gradually again over the years since. The latest figures put the number of applications for 2019 at just over 2680 and the average annual number of applicants during the last decade sits at 2290 per year. See: International Protection Office ‘Monthly Statistical Report’ (July 2019); Nick Henderson ‘What are the alternatives to our broken Direct Provision system?’ *The Irish Times* (12 February 2019).

⁶ International Protection Office, ‘Monthly statistical report’ (December 2018) [<http://www.ipo.gov.ie/en/ipo/pages/statistics>] accessed November 2019.

⁷ ‘Asylum in the EU Member States - 580 800 first-time asylum seekers registered in 2018, down by 11% compared with 2017’ (Eurostat, News Release, 14 March 2019) [<https://bit.ly/2OMUZeH>] accessed November 2019.

⁸ Siobhán Mullally, ‘Speaking across borders: the limits and potential of transnational dialogue on refugee law in Ireland’ in Hélène Lambert and Guy S Goodwin-Gill, *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 150 - 169.

⁹ Ursula Fraser, ‘The Asylum Procedure’ in Ursula Fraser and Colin J Harvey (eds), *Sanctuary in Ireland, Perspectives on Asylum Law and Policy* (Institute of Public Administration 2003) 81.

In relation to EU asylum law, Ireland also adopts a piecemeal approach to the Common European Asylum System (CEAS), which has had a significant impact on national asylum system developments. As has been alluded to previously, Ireland (together with the UK) negotiated an opt-in / opt-out facility, whereby it has been able to selectively adopt some CEAS instruments and not others.¹⁰ The primary rationale for that decision was to maintain the integrity of the Common Travel Area between Ireland and the UK, however specific political reasons for Ireland’s opt-out of the different instruments and their recasts have since become apparent.¹¹ Of the CEAS instruments analysed in this thesis, Ireland is party to the most recent versions of the Reception Conditions Directive (since 2018) and the Dublin Regulation, and the first phase iterations of the Asylum Procedures Directive and Qualification Directive:

Instrument	Phase One	Phase Two
Reception Conditions Directive	No	Yes (as of July 2018)
Asylum Procedures Directive	Yes	No
Qualification Directive	Yes	No
Dublin Regulation	Yes	Yes

In relation to the ongoing negotiations at EU level for a third recast of the CEAS, while Ireland has not made any solid commitment to either opt-in or out of the next generation of instruments, Ireland has been participating in EU negotiations on the new suite of legislation.¹² With ongoing developments at national level, such as the recent opt-in to the recast Reception Conditions Directive and negotiations around the

¹⁰ Consolidated Version of the Treaty on European Union (13 December 2007) 2008/C 115/01, Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

¹¹ For example, in relation to the decision not to opt-in to the 2011 recast of the Asylum Procedures Directive, Previous Minister for Justice Alan stated that the narrower timeframe of six months within which States would have to deliver a first instance decision ‘could impose additional burdens on the national asylum system if there was a large increase in the number of applications to be examined in the State, especially considering previous increases in the period 2001 to 2003.’ See: Dáil Éireann Debate, ‘Asylum Policy’ (9 July 2013). Also, Alan Shatter, in response to a parliamentary question on the reasons for Ireland’s not opting-in to the Reception Conditions Directive, said that ‘(e)xtending the right to work to asylum seekers would almost certainly have a profoundly negative impact on application numbers.’ See: Dáil Éireann Debates (27 March 2013) vol 798 no 1, 250.

¹² Dáil Éireann Debate, ‘EU Regulations’ (11 May 2017) Response to Parliamentary Question by Tánaiste and Minister for Justice and Equality Frances Fitzgerald [22526/17].

departure of the United Kingdom from the EU, opt-in to the remaining and future instruments is not out of the question.

Against this backdrop of the Irish State’s reactionary response to international protection management, two distinct but interrelated problems threatening the integrity of the newly established asylum system were revealed: systemic delays in the asylum procedures and a system of reception for asylum applicants widely recognised to be unfit for purpose. These problems have driven protection reform efforts in Ireland and understanding their influence on recent developments is important to fully appreciate the challenges faced by vulnerable people navigating the Irish asylum procedure today and opportunities for reform.

5.2.1 Procedural delays

Shortly after establishment, the Irish application procedure became fraught with systemic delays, resulting in some people waiting over five years for a final decision on their application.¹³ As issues increasingly began to emerge in the framework established under the Refugee Act, the *ad hoc* approach to remedying emerging problems through costly and lengthy judicial review processes and legislative patchwork ultimately proved untenable.¹⁴ A particular point of contention in the asylum procedure under the Refugee Act was the fact that the Irish protection system operated, until very recently, under a ‘bifurcated’ procedure. In practice, this meant that applications for refugee status and subsidiary protection were processed *sequentially*, whereby an applicant had to first receive a negative decision on refugee status before repeating the process for consideration of eligibility for subsidiary protection.¹⁵ By contrast, all other EU Member States have operated a ‘single

¹³ Maria Hennessy, ‘The right to work for asylum seekers: Ireland’s prohibition on employment’ (*European Database of Asylum Law*, 25 January 2017) [<https://www.asylumlawdatabase.eu/en/journal/right-work-asylum-seekers-ireland%E2%80%99s-prohibition-employment>] accessed August 2019.

¹⁴ For example, the Law Society of Ireland noted that the ‘volume of litigation in relation to asylum/protection and immigration cases increased dramatically from the year 2000 onwards’ and at one point there were ‘over one thousand cases’ awaiting a hearing date’ on the asylum list, with the average waiting time during that period being between four and five years: Law Society of Ireland, ‘Submission on the Legal Aspects of the Asylum Process – Protection Process Working Group’ (February 2015) 6-7.

¹⁵ Irish Refugee Council ‘Roadmap for Asylum Reform’ (September 2011) [<https://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Roadmap-for-Asylum-Reform3.pdf>] accessed August 2019; Patricia Brazil, ‘Asylum Application Process, Delays and Access to Justice’ (Irish Human Rights

procedure’, meaning that eligibility for both categories of international protection are determined concurrently.¹⁶ While not precluded from conducting two separate procedures as part of the domestic international protection decision-making process *per se*, States are nonetheless required to have regard to *inter alia* the EU law principles of good administration, effectiveness, due process and the right to be heard. In the Irish context, the subsidiary protection procedure was conducted by the Department of Justice, rather than the independent Office of the Refugee Applications Commissioner (ORAC, hereafter) that conducted RSD, without the possibility of an oral hearing or an appeal. In other words, the decision on subsidiary protection was taken on the basis of the asylum file. In response to a preliminary reference from the Irish High Court, the Court of Justice of the European Union (CJEU) stated in 2012 that:

[W]hen a Member State has chosen to establish two separate procedures, one following upon the other, for examining asylum applications and applications for subsidiary protection, it is important that the applicant’s right to be heard, in view of its fundamental nature, be fully guaranteed in each of those two procedures.¹⁷

In response, rather than use this opportunity to introduce a single procedure, the Department of Justice introduced an entirely new procedure for hearing subsidiary protection cases in November 2013.¹⁸ ORAC was given responsibility to process subsidiary protection applications in addition to refugee status applications, and this allowed the appeals body at the time, the Refugee Appeals Tribunal (RAT, hereafter), to hear appeals on subsidiary protection decisions. However, an application for subsidiary protection could only be processed *after* an application for refugee status had been definitively decided. The consequence of this was that people could find themselves spending years in an inappropriate procedure before being channeled into the correct one and receiving a final decision on their case. The CJEU addressed this issue in response to a subsequent referral from the Irish High Court, in the *H.N.* case,

Commission Roundtable - Asylum Process and Direct Provision System Challenges and Solutions from a Human Rights and Equality Perspective, 2010) [<https://bit.ly/2BVLeDS>] accessed October 2019.

¹⁶ UNHCR ‘UNHCR Ireland statement on need for introduction of single procedure’ (14 February 2011).

¹⁷ Case C-277/11 *M. M. v Minister for Justice, Equality and Law Reform* (22 November 2012) OJ C26/9, para 57.

¹⁸ European Union (Subsidiary Protection) Regulations 2013, SI 2013/426.

where it stated that a bifurcated procedure will only comply with EU principles of effectiveness and good administration where it ‘does not give rise to a situation in which the application for subsidiary protection is considered only after an unreasonable length of time.’¹⁹

The CJEU judgements precipitated mounting pressure on the Irish government to address delays. However, the lack of a single procedure was not the only factor contributing to the prolonged period people spend in the Irish asylum system. By 2011, commentators began to link asylum decision-making delays to the high rate of refusals at first instance and the high number of judicial reviews of international protection decisions.²⁰ For example, on the basis of the fact that only 5% of applications decided upon in 2011 were granted a positive final outcome on refugee status, the Irish Refugee Council conducted a systematic review of a cohort of refused applications.²¹ Their findings demonstrated that approaches to decision making were consistently problematic in a number of ways, including that decision makers were applying incorrect standards of proof and misguided approaches to credibility assessment in dismissing protection claims. These findings were supported by the fact that the 2011 grant rate on Irish refugee decisions was less than half the EU average at the time.²²

One knock-on effect of poor-quality asylum decisions, at either first instance or appeal stage, that can contribute to the length of time a person spends in the system is the number of cases that are brought before the Irish High Court for judicial review. Once an applicant has received a decision on their asylum application, they are entitled to apply for leave to challenge that decision at the High Court. However, if leave is granted, the decision-making process stalls until a judgement is delivered. The high number of pending judicial reviews has resulted in significant backlog in

¹⁹ Case C-184/12 *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (08 May 2014) OJ C 202/6 para 57.

²⁰ For example, Hardiman J noted: ‘Asylum and immigration matters account in turn for a very significant portion of judicial review applications [...] This seems to suggest, though no figures appear to be available, that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications.’ *Meadows v Minister for Justice Equality and Law Reform*, [2010] 2 IR 710 para 755.

²¹ Sue Conlan and others, ‘Difficult to Believe – the assessment of asylum claims in Ireland’ (Irish Refugee Council, 2012) 1.

²² *ibid.*

asylum cases at the High Court. In 2014 the court had just over 1000 asylum judicial reviews pending, which would take an estimated four and a half years to resolve.²³ According to the most recent official figures, the High Court received 530 asylum related judicial review applications in 2018, which still represents a significant number of challenges compared to the number of judicial reviews lodged on other, non-asylum related grounds.²⁴ Of course, while awaiting a decision from the High Court, people remain in limbo. Even where the court *does* rule in favour of the applicant to quash a negative finding of the relevant asylum body, it cannot make a finding on the substance of the person's protection claim, meaning that their application goes back to the relevant asylum body for a fresh assessment, delaying the final outcome further.

5.2.2 Reception conditions and Direct Provision

The other fault line in the newly established Irish asylum system was the system of accommodation and support provided to people in the asylum process. In this respect, Ireland was again an outlier amongst its EU counterparts, having opted out of the Reception Conditions Directive in addition to other CEAS instruments, together with the United Kingdom.²⁵ Ireland has since transposed the Directive into national law in 2018, however prior to that point, the system of accommodating asylum seekers in Ireland – commonly known as Direct Provision – had no statutory basis.²⁶ It is in this context that, together with systemic procedural delays, some of the most problematic elements of the Irish asylum system have become entrenched.

Direct Provision was established as a government scheme, rather than through legislation, with the aim of providing accommodation and subsistence for the increasing number of protection applicants arriving in the State at the time. It became

²³ Ruadhán Mac Cormaic, 'High Court facing 4½-year asylum case backlog, conference hears' *The Irish Times* (June 21 2014).

²⁴ The total number of 'other' (including, for example, applications related to planning, mandamus, or public procurement) judicial reviews received in 2018 was 546, cumulatively. Courts Service Ireland 'Annual Report 2018' (8 July 2019) 57.

[[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C2B4BFC1AFEC7B098025842D00473F25/\\$FILE/Courts_Service_Annual_Report_2018.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C2B4BFC1AFEC7B098025842D00473F25/$FILE/Courts_Service_Annual_Report_2018.pdf)] accessed October 2019.

²⁵ Consolidated Version of the Treaty on European Union (n 10).

²⁶ For a general overview, see: Liam Thornton, 'The Rights of Others: Asylum Seekers and Direct Provision in Ireland' (2014) 3(2) *Irish Community Development Law Journal* 22-42.

official policy in 2000, when the Irish Department of Social and Family Affairs issued administrative circulars intended to provide early guidance in relation to the implementation of Direct Provision and the system of dispersal to accommodation centres around the country.²⁷ The Reception and Integration Agency (RIA) was established shortly thereafter in 2001 under the aegis of the Department of Justice,²⁸ gaining responsibility for ‘planning and coordinating the provision of services to asylum seekers [and] the accommodation of asylum seekers through the Direct Provision system.’²⁹ While RIA carries out the overall administration of the Direct Provision system, the individual centres themselves are sub-contracted out to private actors on a for-profit basis, a practice that has drawn criticism at the national and international levels for effectively allowing the State to side-step accountability.³⁰

Direct provision of services and accommodation was originally accepted by the government as a suitable alternative to granting asylum seekers access to the labour market or permitting them to avail of general social welfare entitlements. Documents and statements made available in recent years indicate that there are at least two key reasons why this was perceived by the government as the most attractive option. Firstly, it is clear that the Government has always been extremely reluctant to introduce a reception system that might be perceived as offering ‘more favourable’ conditions for asylum seekers than those in other countries and thus generating a ‘pull-factor,’ resulting in a further increase in the number of arrivals. Government officials have explicitly cited the alleged pull factor that granting the right to work might generate as a primary reason for opting out of the Reception Conditions Directive in the first place.³¹ Such claims are based not on a solid evidence-base but on hearsay and anecdote.³² Secondly, Direct Provision was established as an

²⁷ Free Legal Advice Centre, ‘One Size Doesn’t Fit All - a legal analysis of Direct Provision, 10 years on’ (November 2009) 16.

²⁸ Department of Justice Equality and Law Reform ‘Annual Report (2001)’ 58.

²⁹ Department of Justice Equality and Law Reform ‘Freedom of Information Section 15 Reference Book’ (2008) Chapter 4.34.

³⁰ Nick Henderson, ‘Opening address to the Joint Committee on Justice and Equality’ (29 May 2019) [<https://bit.ly/2PB1xhp>] accessed October 2019; Nasc, the Migrant and Refugee Rights Centre ‘Submission to the Joint Oireachtas Committee on Justice and Equality on Direct Provision and the International Protection Application Process’ (June 2019) 28-29, [<https://bit.ly/31YXqhU>] last accessed October 2019.

³¹ Alan Shatter (n 11).

³² Indeed, a study conducted by the University of Warwick systematically reviewing research on the impact of labour market access for asylum seekers on numbers of applications for asylum, found no correlation between labour market access and increased numbers. University of Warwick, ‘Access to the labour market as a ‘pull

emergency response to the housing needs of an increasing number of asylum seekers arriving in Ireland at the turn of the millennium, rather than part of a longer-term reception strategy.³³ This was coupled with the general presumption that such accommodation would only be on a temporary basis and a person's application would be resolved as expeditiously as possible under the newly established asylum procedures.³⁴ However, as the previous section demonstrated, this presumption was grievously misguided and as delays in the procedure worsened, conditions in Direct Provision, described below, remained unchanged.

When conceived of as a short-term programme, the Direct Provision system could be acceptable in the context of a *functioning* asylum procedure. People receive basic bed and board (accommodation shared with others, often in repurposed buildings such as hotels, convents or holiday homes, where three meals a day are provided), a medical card, access to school for children, financial assistance to attend medical and legal appointments, and asylum interviews. People also receive a weekly allowance, set in 2000 at €19.60 for adults and €9.60 for children, and which didn't increase at all until 2015.³⁵ However, in the context of a dysfunctional asylum procedure, a situation has emerged in which applicants are living in a highly institutionalised environment with little control over their daily routine or future prospects for an indefinite period of time. Shortly after inception, Direct Provision began to attract the attention of human rights advocates on a range of thematic issues. Independent research has shown that prolonged periods of time living in Direct Provision has resulted in *inter alia* wide-ranging negative impact on children; safety concerns for women and victims of gender-based violence; proliferation of mental health problems; barriers to integration into the local community; reduced prospects for personal and professional development, and enforced poverty and dependency on the State.³⁶ Various

factor' for asylum seekers: What the research shows' (March 2016) [<https://bit.ly/2OimXxu>] accessed November 2019.

³³ Bairbre Ní Chiosáin, 'Dispersal and Direct Provision: A Case Study' (2019) 4(2) *Studies in Arts and Humanities* 33.

³⁴ Dáil Éireann Debates 'Direct Provision: Statements' (30 March 2013).

³⁵ The rate of the Direct Provision allowance for children increased in 2015 to €15.60 and received a further increase together with the adults' allowance bringing them both to €21.60 in 2017. Both were increased again in 2018 to €38.80 for adults and €29.80 for children under the 2019 budget. See: Department of Employment Affairs and Social Protection, 'Budget 2019' [<http://www.welfare.ie/en/Pages/Budget-2019.aspx>] accessed October 2019.

³⁶ See, for example: Liam Thornton, 'Direct Provision and the Rights of the Child in Ireland' (2014) 17(3) *Irish Journal of Family Law* 68-76; Bairbre Ní Chiosáin, 'Ireland and Its Vulnerable "Others": The Reception of Asylum Seekers in Ireland' (2016) 41(2) *Études Irlandaises* 85; Helen Uchechukwu Ogbu, 'Parenting in Direct

international bodies have frequently taken issue with the compatibility of Direct Provision with Ireland’s international human rights obligations. For example, the UN Human Rights Committee expressed concern at the length of time people spend in Direct Provision, the impact of this on the right to family life and the lack of access to an independent complaints mechanism for residents.³⁷ The UN Committee on Economic, Social and Cultural Rights expressed concern at the ‘negative impact of Direct Provision on asylum seekers’ right to family life, their mental health and their children’s best interests,’ calling on the State to enact a more rigorous inspection regime and to make private operators of Direct Provision centres more accountable.³⁸ Regional bodies have also weighed in, with the Council of Europe Commissioner for Human Rights expressing concern at ‘the low degree of personal autonomy asylum-seekers may retain throughout the process.’³⁹

Research on the impact of Direct Provision on different cohorts of applicant with various needs clearly points to a system that exacerbates and even generates mental, social and physical vulnerability. A systematic review of the entire protection process with the aim of informing a plan of action to ensure that Ireland’s new-found protection system complies with international standards, was long overdue. The next section will provide a brief overview of recent developments, which have sought to address the two core problems of procedural delays and inadequate reception conditions just discussed, and the extent to which the overarching goal of a human rights-compliant protection system has been achieved.

Provision: Parents’ Perspectives Regarding Stresses and Supports’ (UNESCO Child & Family Research Centre, School of Political Science, NUI Galway, April 2014); Molly O’Connell, Richard Duffy and Niall Crumlish, ‘Refugees, the Asylum System and Mental Healthcare in Ireland’ (2016) 13(2) *British Journal of Psychiatry* 35; Irish Human Rights and Equality Commission, ‘Ireland and the Convention on the Elimination of all forms of Discrimination against Women – Submission to the United Nations Committee on the Elimination of Discrimination against Women on the Submission of Ireland’s Combined Sixth and Seventh Reports’ (January 2017) 114-119; Muireann Ní Raghallaigh and Maeve Foreman, ‘Transition from Direct Provision to Life in the Community – The experiences of those who have been granted refugee status, subsidiary protection or leave to remain in Ireland’ (Irish Research Council, Irish Refugee Council, Trinity College Dublin and University College Dublin, June 2016).

³⁷ UN Human Rights Committee, ‘Concluding observations on the fourth periodic report of Ireland’ (19 August 2014) CCPR/C/IRL/CO/4, para 19.

³⁸ UN Committee on Economic Social and Cultural Rights, ‘Concluding observations on the third periodic report of Ireland’ (8 July 2015) E/C.12/IRL/CO/3, para 14.

³⁹ Council of Europe, ‘Report of the Commissioner for Human Rights Mr Thomas Hammarberg on his visit to Ireland 26-30 November 2007’ (Strasbourg, 30 April 2008) CommDH (2008) 9.

5.3 - Tools for Reform? The Working Group, the establishment of a single procedure and the introduction of standards for reception conditions

The combined pressure of litigation, international scrutiny and civil society advocacy highlighting deficiencies in both the Irish asylum procedures and provision of accommodation for asylum applicants eventually prompted movement within government towards reform. This section will outline three interrelated but distinct spheres in Irish asylum law and policy where reform discourse and actual change has been most prolific. The following sections will discuss the formation of a Government Working Group that carried out the first systematic review of the Irish asylum system and proposed substantial recommendations for change, the overhaul of the Irish asylum procedures with the commencement of the International Protection Act 2015, and the elaboration of standards for accommodation and supports for asylum seekers through the recent opt-in to the EU recast Reception Conditions Directive. Each of these spheres bears distinct implications for engaging with both the conceptual and practical implications of vulnerability. Understanding how these developments have come to shape the contemporary Irish asylum law and policy landscape is important before we can situate vulnerability and analyse its role in that context.

5.3.1 Multi-stakeholder engagement: The working group on the protection process

In 2014, the Department of Justice and Equality announced the establishment of a ‘Working Group to Report to Government on the Protection Process’ (Working Group, hereafter).⁴⁰ The terms of reference for the Working Group acknowledged the two core problematic areas to be dealt with that have been discussed previously: procedural delays and an inadequate standard of living provided under the system of Direct Provision. On a general level, the Working Group was tasked to ‘[r]ecommend to the Government what improvements should be made to the State’s existing Direct Provision and protection process and to the various supports provided for protection

⁴⁰ Department of Justice and Equality, ‘Working Group to report to Government on improvements to the protection process, including Direct Provision and supports to asylum seekers’ (Statement, 13 October 2014) [http://www.justice.ie/en/JELR/Pages/Working_Group_on_Improvements_to_the_Protection_Process accessed October 2019.

applicants.’⁴¹ More specifically, the group was to recommend actions to be taken toward ‘improving existing arrangements in the processing of protection applications’ and ‘showing greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available.’⁴²

The Working Group was composed of representatives of various government departments, civil society, and the Irish office of UNHCR.⁴³ Parallel to the establishment of the group and its proceedings, the Government was working separately on the General Scheme of the International Protection Bill,⁴⁴ legislation that would replace the Refugee Act 1996 with the aim of streamlining the protection process through the introduction of a single procedure. While the drafting of that legislation was a process distinct from the terms of reference of the Working Group, the group members were nonetheless tasked by the Minister for Justice at the group’s inaugural meeting to make recommendations on how applicants for international protection who were already in the procedure (and hence who would not benefit from any prospective legislation) might have their claims expedited.⁴⁵ The separate reform processes ongoing at the same time caused some tension, bringing to light the opposing viewpoints of different stakeholders, some of whom strongly believed that if the State was serious about addressing systemic issues and preventing future backlogs in the asylum procedure, then the Working Group’s findings should inform the development of legislation reshaping the future asylum procedure.⁴⁶

The proceedings comprising the Working Group process covered three thematic areas: improvements to Direct Provision; improvement to the supports to people in the protection process, and improvements to the existing arrangements for the processing

⁴¹ Department of Justice and Equality, ‘Working Group on the Protection Process, Terms of Reference’ [http://www.justice.ie/en/JELR/Pages/Terms_of_Reference] accessed November 2019.

⁴² *ibid.*

⁴³ The Working Group was chaired by former judge of the High Court Dr Bryan McMahon and its composition included UNHCR Ireland, civil society organisations, represented by key NGOs, one academic and a core group of asylum seekers, while the State representation was led by the Department of Justice with input from other key departments such as the Department of Social Protection and the Department of Children and Youth Affairs. Department of Justice and Equality, ‘Membership of the Working Group’ [http://www.justice.ie/en/JELR/Pages/Membership_of_the_Working_Group] accessed October 2019.

⁴⁴ Department of Justice and Equality, ‘General Scheme for the drafting of the International Protection Bill’ (24 March 2015) [<http://justice.ie/en/JELR/Pages/PB15000080>] accessed October 2019.

⁴⁵ Department of Justice and Equality (n 40).

⁴⁶ For a detailed overview of the Working Group process, see: Ciara Smyth, ‘Chronicle of a Reform Process: The Irish Working Group on Protection’ (2016) 29(3) *Journal of Refugee Studies* 388.

of protection applications.⁴⁷ The work culminated in a substantial report spanning almost 400 pages and adopting 173 specific recommendations (Working Group Report, hereafter).⁴⁸ While the Working Group represents an innovative achievement in multi-stakeholder policy reform efforts, by bringing State and NGOs together in constructive dialogue to identify tangible solutions to entrenched problems, the process was not without its critics and controversy. For example, some members of the Working Group felt that the State was not doing its utmost to cooperate on certain aspects of the deliberations. Indeed, when the Government published the General Scheme of the International Protection Bill midway through the Working Group process without prior consultation from the group members, the Irish Refugee Council was compelled to tender their resignation from the group on the basis of their perception, at the time, that ‘the Working Group is being used to rubber stamp administrative changes that the Department of Justice can then continue to control without parliamentary oversight.’⁴⁹ The resignation of the Irish Refugee Council shone light on perceived weaknesses of the Working Group process, prompting other commentators – NGOs, civil society and political actors alike – to reiterate their view that the Working Group and its recommendations were no more than a Department of Justice smokescreen to avoid implementing radical or meaningful change to Direct Provision and the international protection process.⁵⁰

Notwithstanding some backlash, the full Working Group report was published in June 2015, with an extensive array of detailed, inter-connected recommendations, most with implementation timeframes of six to twelve months.⁵¹ As the first systematic review of Irish practice with regards to every relevant aspect of international

⁴⁷ *ibid* 398.

⁴⁸ Department of Justice and Equality, ‘Working Group to Report to Government Working Group on the Protection Process on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers Final Report’ (June 2015) [http://www.justice.ie/en/JELR/Pages/Working_Group_on_Improvements_to_the_Protection_Process] accessed October 2019.

⁴⁹ Irish Refugee Council, ‘Media Release: Irish Refugee Council resigns from Government Working Group to reform the Protection Process’ (27 March 2015); Department of Justice and Equality, ‘Statement from the Chair Dr McMahon in relation to the resignation of Ms Sue Conlan Irish Refugee Council’ (March 2015) [http://www.justice.ie/en/JELR/Pages/Statement_from_the_Chair_Dr_McMahon] accessed 10 January 2019.

⁵⁰ See: Ruben Hambachachere, ‘I resigned from government direct provision Working Group’ (*Village Magazine*, 13 May 2015); Sinn Féin, ‘Resignation from McMahon Working Group on the Direct Provision system ‘a matter of deep concern’ – Adams’ (27 March 2015); Doras Luimní, ‘Doras Luimni applaud the Irish Refugee Council resignation from Working Group on Direct Provision and Protection process’ (27 March 2015).

⁵¹ Department of Justice and Equality, ‘Chair’s remarks on the publication of the Report to Government’ (30 June 2015).

protection, the Working Group Report represents an important, human rights and evidence-based chronicle of the various pillars of the Irish protection system, its weak points, and exactly what needs to be done to remedy those failings. The report and the information it has brought into the public domain through the multi-stakeholder deliberative process has provided an objective, State-sanctioned benchmark against which the State has in the years since been held to account on points of advocacy, including vulnerability assessment and response, as will be discussed later.

Of course, the true indicator of the success of the Working Group process can only be measured against the implementation of its recommendations. In the year following publication of the report, the Government was silent on any progress, with the notable exception of the passing of the International Protection Act 2015 (and the single procedure) into law by the president on December 30th 2015. As the one-year anniversary of the report approached and little visible change had been achieved, members of the Working Group started to become concerned at the lack of updates from the State.⁵² On foot of mounting pressure, the Department of Justice published two initial implementation progress reports in 2016,⁵³ with the third and final report released in June 2017. The ‘final’ progress report claimed that 169 (or 98%) of the recommendations were either fully implemented or in progress.⁵⁴ A 98% implementation rate would certainly be a resounding success and indeed, some significant developments had taken place since the first implementation report was published. For example, the remits of the offices of the Ombudsman and the Ombudsman for Children were extended to Direct Provision, adding a layer of independence to complaints procedures, and self-catering cooking facilities are being gradually rolled out across the Direct Provision accommodation estate, introducing a modicum of autonomy to the lives of some people in the system. Significantly, the

⁵² Eugene Quinn, ‘Asylum system: Government fails to deliver on promised reform’, (*The Irish Times*, 3 May 2016).

⁵³ The progress report claimed that, of the 173 total recommendations, 91 had been ‘implemented’, 49 were ‘partially implemented/in progress’ and 33 required ‘further consideration.’ The report provided no additional detail with respect to exactly how recommendations had been implemented (or indeed not been implemented), making it impossible to confirm the accuracy of the progress report. Department of Justice and Equality, ‘Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers: Position as at 16 June 2016 in respect of the 173 Recommendations of the Working Group’ (16 June 2016) [<https://bit.ly/31ZTt9>] accessed October 2019.

⁵⁴ Department of Justice and Equality, ‘Report of the Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports for Asylum Seekers 3rd and Final Progress Report on the Implementation of the Report’s Recommendations June 2017’ (June 2017) [<https://bit.ly/2w12bLC>] accessed 10 January 2019.

International Protection Act had come into force at the beginning of 2017, bringing with it the long-awaited single procedure. Commencement of the single procedure is credited as justification for reporting many of the recommendations as ‘fully implemented’, notwithstanding the fact that the single procedure had not been in effect long enough for a viable assessment of its effectiveness to be made.⁵⁵

However, the Department of Justice progress reports provide scant detail on specific actions taken towards achieving the 98% implementation figure. Independent analysis suggested that the government and NGOs had different interpretations of what ‘implementation’ meant. For example, Nasc – an NGO member of the Working Group - published its own systematic analysis of the Working Group report’s recommendations, checking and amending the Government’s finding on each recommendation against the actual experiences of people in the system and information received through information requests to relevant Government departments.⁵⁶ Nasc’s findings contrasted starkly with those of the Government. Their analysis found that only 20 (12%) of the recommendations could be verified as ‘implemented’ and the total implementation rate (including those that could be considered partially implemented, or in progress) was amended to 88, or 51%, a far cry from the government’s stated implementation status of 98%. In their review, while acknowledging significant progress such as the introduction of the single procedure and general improvements to living conditions in some centres, Nasc found overall progress to be slow and piecemeal. They also highlighted, with concern, key recommendations that did not appear to have been progressed in any meaningful form at all, particularly those falling either wholly or in part under the responsibility of government departments outside of the Department of Justice and Equality.⁵⁷ In particular, the lack of a multidisciplinary vulnerability assessment (to be discussed later), increasing delays and backlogs despite the introduction of the single procedure, and only limited improvement in living conditions, pointed to an *ad-hoc* approach to implementation, rather than a holistic, system-wide reform effort.

⁵⁵ *ibid.*

⁵⁶ Nasc, ‘Working Paper on the Progress of Implementation of the McMahon Report, December 2017’ (December 2017) [<https://www.nascireland.org/publications/working-paper-progress-implementation-mcmahon-report-2017>] accessed October 2019.

⁵⁷ *ibid.* 2.

The apparent inflation of the Government's implementation figures also highlights the pervasive issue of a disconnect between the various State bodies responsible for overseeing the functioning of the constitutive parts of the asylum system. The Nasc implementation review states that they and other non-State participants in the working group had joined that process on the understanding that:

...the recommendations that were drafted and agreed to by full consensus by all parties at the table (including Government departments and agencies, NGOs, asylum seekers and UNHCR), would be implemented in full by the Government upon publication of the report in July 2015. This understanding explains the interconnectedness of the recommendations in the report; they were designed to be implemented in full and not partially, to ensure that the overall system would be significantly improved to respect the dignity of asylum seekers throughout the asylum process.⁵⁸

The recommendations were conceived on the condition of their 'interconnectedness' as fundamental components of a functioning asylum system. In other words, implementation of some recommendations to the neglect of others would not lead to the level of reform that some members of the Working Group envisaged. The various government departments with responsibility for different aspects of the asylum system - and even separate units under the same department - do not appear to be engaged in on-going dialogue on the reform process, at least as far as the Working Group recommendations are concerned. Rather, each department has been left to proceed (or not, as the case may be) with implementation at its own discretion, in isolation of any work being done on other key pillars of the reform process by other departments. With the release of the 'final' progress report, there is a concern that key recommendations that have not actually been addressed in practice will be dropped from the Government agenda altogether.

⁵⁸ *ibid* 5.

5.3.2 Asylum procedures: Commencement of the International Protection Act and introduction of the single procedure

The commencement of the International Protection Act 2015 on the 31st December 2016 represents the most significant development in Ireland’s international protection legal architecture since the adoption of the Refugee Act 1996 almost two decades prior. Aside from introducing the long-awaited single-application procedure, the International Protection Act introduces a host of new provisions that redefine key procedural guarantees and substantive entitlements for applicants and beneficiaries of international protection. The General Scheme was published in March 2015,⁵⁹ prompting a number of stakeholders, including Working Group members, to make submissions on its substantive content.⁶⁰ The submissions make a variety of observations and raise concerns related to, *inter alia*, the need for wider application of the best interests of the child principle throughout the process, the lack of a dedicated mechanism for identifying vulnerability and procedural needs, and concern with respect to the restriction of certain rights for protection beneficiaries, such as the inclusion of a narrower definition of what constitutes ‘family’ than was contained in the Refugee Act for the purposes of family reunification. The text of the International Protection Bill was published and presented to the Oireachtas to begin the legislative process in November 2015, with the aim of enacting the bill before the end of that year.⁶¹ Many of the concerns raised in submissions on the General Scheme remained in the text of the published bill. Some NGOs seized this last opportunity to reiterate concerns about the contents of the bill in the hope that there might be scope for influencing the legislative process prior to enactment, warning that the protective

⁵⁹ Department of Justice and Equality (n 44).

⁶⁰ See, for example: UNHCR ‘UNHCR Comments on the General Scheme of the International Protection Bill’ (May 2015); Irish Human Rights and Equality Commission, ‘Recommendations on the General Scheme of the International Protection Bill 2015’ (June 2015); Law Society of Ireland - Joint Committee on Justice, Defence and Equality, ‘Submission on the General Scheme of the International Protection Bill’ (8 May 2015); The Ombudsman for Children, ‘Initial Observations of the Ombudsman for Children on the General Scheme of the International Protection Bill 2015’ (July 2015); Irish Refugee Council, ‘Comments on the General Scheme of the International Protection Bill’ (May 2015); Children’s Rights Alliance, ‘Initial Submission on the General Scheme of the International Protection Bill 2015’ (May 2015).

⁶¹ Department of Justice and Equality, ‘Statement: Minister Fitzgerald publishes International Protection Bill 2015’ (19 November 2015).

potential of the new law risk being undermined by the problematic issues raised previously.⁶²

Despite controversy, the International Protection Act 2015 came into force and the new single procedure became operational on 31 December 2016. The transition to the new system was not as smooth as might have been hoped for, as there were already a significant number of existing applicants who were at various stages of the previous dual procedure whose cases needed to be brought under the new system. The International Protection Act outlines arrangements for transfer of cases that had been lodged under now-repealed legislation to be transferred to the new International Protection Office (IPO, replacing the prior ORAC), which would be responsible for making decisions on protection applications at the first instance.⁶³ The transitional arrangements were complex, defining three different categories of applicant with a case pending at the time of the change in procedures who would be affected by the change.⁶⁴ Those applicants were expected to re-complete a revised ‘Application for International Protection Questionnaire’, which was updated to cover personal information relevant to refugee status, subsidiary protection and the separate, discretionary status of permission to remain (which applicants may apply for on humanitarian and other grounds where they do not meet the criteria for refugee status or subsidiary protection), amounting to over 60 pages in length.⁶⁵

To notify people of the changes, a mailshot was sent to approximately 3000 applicants already in the system who would be affected by the transitional arrangements and to

⁶² See, e.g. Irish Refugee Council, ‘Recommendations on the International Protection Bill 2015’ (November 2015); Immigrant Council of Ireland, ‘Comments on the International Protection Bill 2015’ (November 2015); Nasc, ‘*Recommendations on the International Protection Bill*’ (30 November 2015).

⁶³ International Protection Act 2015, Part 11 - Transitional Provisions.

⁶⁴ The first category pertains to individuals who had lodged an application for refugee status under the Refugee Act but not yet received a first instance decision. People in the first category would have their application returned to the IPO to be re-assessed under the single procedure (i.e. against both the refugee definition and criteria for subsidiary protection). The second category refers to individuals who had already received a negative decision on their refugee status application and had an appeal of the decision pending before the Refugee Appeals Tribunal at the time the new legislation came into force. In this case, the applicant’s appeal was frozen and the applicant was returned to the IPO for a review of their case with respect to grounds for subsidiary protection only. If negative, the applicant’s appeal then resumes as an appeal of both a refugee status and subsidiary protection refusal. The third category refers to individuals who had already received a negative decision on their refugee status application but had a subsidiary protection application pending. In such cases the application was returned to the IPO for review of the case on subsidiary protection grounds only and any existing negative decision on refugee status would remain. See: International Protection Office, ‘Statement to be provided under section 70 (10) (a) of the International Protection, Act 2015], Information Note – Transitional Arrangements, (IPO 12)’ (January 2017).

⁶⁵ The IPO does not make the Application for International Protection Questionnaire publicly available. However, the author has a copy of the questionnaire on file.

their legal representative (if they had one) with detailed information on the new procedures and copies of the new questionnaires.⁶⁶ Not surprisingly, this caused a great deal of confusion amongst many existing applicants (and service providers), who were receiving new questionnaires and being told they would have to present for interview again.⁶⁷ Furthermore, the information provided requested that applicants return the detailed questionnaire ‘if possible, no later than 20 working days’ after receiving it and encouraged them to seek legal advice before doing so.⁶⁸ It was later clarified by the Department of Justice that the 20 working days was not a statutory deadline⁶⁹ but the prospect of having to return for a substantive interview before the International Protection Office was not an easy pill for many applicants to swallow.

The introduction of the single procedure, therefore, certainly did not resolve systemic delays, in the short-term at least. Rather, the transitional arrangements had the converse effect of frontloading delay, by creating a backlog in the scheduling of interviews. While transition cases were being returned to the IPO for assessment under the single procedure, new applicants were still arriving and lodging applications at the border or the IPO. As the IPO came under pressure to assign interview dates to new applications plus approximately 3,000 transitional cases, applicants were faced with extended delays between lodging an application and receiving a date for their substantive asylum interview. Almost a year and a half after the single procedure had come into effect, a new arrival could expect to wait around 19 months upon the lodging of their application before being interviewed.⁷⁰ The waiting time has since been reduced to 15 months for a first instance decision on an application as of June 2019.⁷¹ This means that applicants, at time of writing – almost three years after the enactment of the single procedure – will spend at least 15 months in the asylum process and will remain in the system even longer in the event of an appeal, a rate far

⁶⁶ Response to Parliamentary Question by Minister for Justice and Equality Francis Fitzgerald (21 February 2017) 8719/17 & 8720/17.

⁶⁷ Kitty Holland, ‘Questionnaires cause ‘distress’ for people in direct provision’ (*The Irish Times*, 20 February 2017).

⁶⁸ International Protection Office, ‘Information Booklet for Applicants for International Protection’ [<http://www.ipo.gov.ie/en/IPO/InfoBookletNew.pdf/Files/InfoBookletNew.pdf>] accessed October 2019.

⁶⁹ International Protection Office, ‘Clarification re: deadline for the return of the Application for International Protection Questionnaire (IPO 2)’ [http://www.ipo.gov.ie/en/IPO/Pages/IPO_Questionnaire_IPO_2] accessed, October 2019.

⁷⁰ UNHCR, ‘Crippling delays are the biggest crisis facing asylum-seekers’ (Dublin, 27 April 2018).

⁷¹ Response to Parliamentary Question by Minister for Justice and Equality Charles Flanagan (27 June 2019) 27296/19.

below what is accepted under EU law. The 2005 Asylum Procedures Directive, to which Ireland has opted in, requires that the status determination procedure ‘is concluded as soon as possible, without prejudice to an adequate and complete examination’, and further, where a decision cannot be given in six months, applicants are to be either ‘informed of the delay’, or entitled to ‘information on the timeframe within which the decision [...] is to be expected.’⁷² As it stands, applicants are neither informed of the delay nor given an indicative timeframe for a decision. The recast Asylum Procedures Directive, which Ireland has not opted into, goes further in requiring that States ‘ensure that the examination procedure is concluded within six months of the lodging of the application.’⁷³ Many EU Member States have transposed this deadline into their domestic legislation (with some inserting an even shorter time frame), to ensure expeditious decision-making.⁷⁴ Good practice, therefore, would suggest that cases receive a first instance decision no later than six months after they are lodged.

The IPO, in viewing the transitional delays as a once-off hurdle associated with the lead-in to the new procedures and claiming that ‘the structural causes of delays have been removed with the commencement of the International Protection Act 2015,’⁷⁵ has taken some measures to mitigate the disruption of the additional backlog, which are focused exclusively on speedy processing of cases. For example, in May 2018, the IPO recruited additional members for its case-processing panel to conduct RSD interviews and ‘enable the Irish Naturalisation and Immigration Service (INIS) and the International Protection Office (IPO) to carry out their functions to optimum effect and to assist in the reduction of caseloads.’⁷⁶ Additionally, the IPO, in consultation with the Irish office of UNHCR, issued a policy note for the prioritisation of certain

⁷² Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (2 January 2006) OJ L 326 (Asylum Procedures Directive) art 23 (2).

⁷³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (29 June 2013) OJ L 180/60 -180/95 (recast Asylum Procedures Directive) art 31.

⁷⁴ European Council on Refugees and Exiles, Asylum Information Database, ‘Comparator – Time limits for examining the application’ [<https://www.asylumineurope.org/comparator/asylum-procedure>] accessed October 2019.

⁷⁵ Response to Parliamentary Question by Minister for Justice and Equality Charles Flanagan (12 June 2018) 25425/18.

⁷⁶ International Protection Office, ‘Case Processing Panel: recruitment of additional panel members’ (Website Notice, May 2018) [<http://www.inis.gov.ie/en/INIS/Pages/recruitment-of-additional-case-processing-panel-members>] accessed October 2019.

categories of applicant pursuant to Section 73 of the Act.⁷⁷ The policy permits prioritised scheduling of interviews based on certain criteria, including vulnerability-related grounds (such as age or serious medical need). Anecdotal evidence stemming from Irish Refugee Council casework suggests that prioritisation does result in expedited scheduling for certain applicants within four months.⁷⁸ However, the likelihood of a vulnerable person or an applicant with a well-founded claim being able to benefit from prioritisation is significantly reduced by a) the fact that they will have to explicitly request prioritisation themselves in their application, or in written submissions to the IPO, which is unlikely to occur without legal representation, and b) the extremely high evidentiary threshold required for demonstrating eligibility for prioritisation in most cases (i.e. obtaining a medico-legal report, or the requisite doctor's certificate – if the applicant has access to such services - might take as long as simply waiting for the regular scheduling process).

Furthermore, the International Protection Appeals Tribunal (replacing the RAT under the International Protection Act; IPAT, hereafter), in its 2018 Annual Report, noted a 140% increase in appeals as many of the transition cases that were returned for a first instance decision under the transitional arrangements also returned for appeal, on top of any new appeals lodged.⁷⁹ In anticipation of the increase at the time of the transition to the single procedure, the Tribunal's 2017 report stated that if delays are to be avoided 'it is imperative that the Tribunal is equipped, both with regard to staffing numbers and the availability of Tribunal Members who are trained and experienced in the efficient delivery of high quality determinations of international protection applications.'⁸⁰ The Tribunal's report highlights the important point that a sustainable solution to delays in the decision making process is not just the availability of staff to process cases but also staff who are *adequately trained and competent* to produce high quality decisions and thus reduce the need for lengthy and costly judicial review proceedings. Simply recruiting additional staff and fast tracking certain cases eligible for prioritisation will not produce a protection system that strikes

⁷⁷ Department of Justice and Equality, International Protection Office, 'Prioritisation of Applications for International Protection Under the International Protection Act 2015' (27 February 2017) [<https://bit.ly/2m1Plbi>] accessed October 2019.

⁷⁸ On the basis of the author's casework with the Irish Refugee Council and an interview with the Chief International Protection Officer in the context of this research.

⁷⁹ International Protection Appeals Tribunal, 'Annual Report 2018' (March 2019) 3.

⁸⁰ International Protection Appeals Tribunal, 'Annual Report 2017' (March 2018) 10.

the necessary balance between protection and efficiency. Decision-makers must be adequately trained to make a robust decision that takes into account all relevant facts in an individual case, including the needs of vulnerable individuals.

5.3.3 Reception conditions: Transposition of the EU Reception Conditions Directive and the development of national standards for Direct Provision

The persistence of procedural delays almost two years since the commencement of the International Protection Act means that many people are still spending an inordinate amount of time living in the Direct Provision system. According to latest publicly available figures (which have not been updated since November 2018), the average length of time people spend in Direct Provision is two years.⁸¹ The most significant recent development in the context of reception conditions was the lifting of the prohibition on access to the labour market for asylum seekers. Key among complaints from people spending long periods of time in Direct Provision and central to discourse within the Working Group has been the sense of enforced idleness generated by the prohibition on employment. Section 9(4) of the Refugee Act rendered it a criminal offense for people in the asylum process to enter employment, which was then carried over to section 16(3)(b) of the International Protection Act, despite widespread calls by stakeholders, including the Working Group, to remove the prohibition.⁸² While government did not respond directly to either the Working Group or civil society activism on the right to work, the issue did gain traction before the courts. In parallel with the Working Group deliberations and the enactment of the new law, section 9(4) of the Refugee Act was being challenged through judicial review in the *NHV* case before eventually making it to the Supreme Court.⁸³ The results have implications, not just for the issue of the right to work but for the entire system of providing accommodation and supports to protection applicants in Ireland.

The facts of the *NHV* case pertained to an asylum seeker who had been in the Irish asylum system and living in Direct Provision for six years when he was offered

⁸¹ Reception and Integration Agency, 'Monthly Report November 2018' (2018) 16.

⁸² Irish Human Rights and Equality Commission, 'Policy Statement on the System of Direct Provision in Ireland' (10 December 2014) 19; Working Group Report (n 48) 209-211.

⁸³ *N.H.V. & anor v Minister for Justice and Equality* [2015] IEHC 246; *N.H.V. v Minister for Justice and Equality & ors* [2016] IECA 86.

employment to work in the kitchen of his Direct Provision centre.⁸⁴ He wrote to the Minister for Justice to request permission to accept the offer but that was subsequently refused on the basis of section 9(4) of the Refugee Act. He sought to judicially review the Minister's interpretation of the prohibition on employment, which was refused by the High Court and the Court of Appeal before leave to appeal was granted by the Supreme Court. In its landmark judgment on the case, the Supreme Court held that 'in circumstances where there is no temporal limit on the asylum process, then the absolute prohibition on seeking of employment contained in s.9(4) (and re-enacted in s.16(3)(b) of the 2015 Act) is contrary to the constitutional right to seek employment.'⁸⁵ In finding the prohibition on employment for asylum seekers unconstitutional, the Court provided the State with six months to propose a solution to the prohibition on employment. The State's response to the judgement was to initiate proceedings to opt-in to the EU recast Reception Conditions Directive, which obliges states to, *inter alia*, incorporate provisions on access to the labour market into domestic law.⁸⁶

To oversee the transposition process, the Government established an interdepartmental implementation group with the task of ensuring that the transposing legislation and existing systems already in place comply with the Directive.⁸⁷ The work of the implementation group was shrouded in mystery for the duration of the compliance procedure and requests to view the draft Statutory Instrument that would give effect to the Directive were refused.⁸⁸ Organisations such as the Irish Refugee Council attempted to input to the opt-in process by making recommendations on substantive provisions beyond the right to work, such as the provisions on withdrawal of reception conditions, detention and the need to establish a mechanism for identification of

⁸⁴ *N.H.V v Minister for Justice & Equality and ors* [2017] IESC 35.

⁸⁵ *ibid* para 21.

⁸⁶ Department of Justice and Equality, 'Government agrees framework for access to work for International Protection Applicants' (Statement, 21 November 2017) [http://www.justice.ie/en/JELR/Pages/Access_To_Work_for_International_Protection_Applicants] accessed October 2019.

⁸⁷ *ibid*; Department of Justice and Equality, 'Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) – Briefing Note for Oireachtas Members' (11 January 2018) [<https://liamthorntonblog.files.wordpress.com/2018/01/briefing-note-for-oireachtas-members-reception-conditions-directive-11-1-2018.docx>] accessed October 2019.

⁸⁸ E-mail correspondence with the International Protection Policy Unit of the Department of Justice and Equality, with responsibility for chairing the implementation group (November 2018).

vulnerability.⁸⁹ Notwithstanding some concerns, the Reception Conditions Directive came into force in Ireland through the adoption of secondary legislation in the European Communities (Reception Conditions) Regulations in July 2018 (Reception Conditions Regulations, hereafter).⁹⁰ The statutory instrument turned out to be a comprehensive document, considering in detail the core provisions of the 2013 Reception Conditions Directive and placing them in the Irish context. Many of the provisions in the regulations aligned, more or less, with Working Group and civil society recommendations, actually introducing a number of welcome provisions.⁹¹ Significantly, for the purposes of this study, there is a dedicated provision obliging the State to assess whether an applicant has any special reception needs and to identify vulnerability within 30 days of the applicant having lodged their protection application.⁹² However, the lack of recourse to the link between special reception needs and special procedural needs is a missed opportunity. This latter point will be discussed in more detail in the next section. The regulations also introduce a number of contentious elements to the Irish reception context. Of relevance to this study, the grounds under which an appeal can be made against a decision related to reception conditions are narrow and do not include, for example, a decision made to designate accommodation or transfer someone to a different centre.⁹³ This is problematic given that the regulations are otherwise quite prescriptive in terms of the factors that need to be taken into account in the process of ‘designating’ accommodation, including a person’s special reception needs, the best interests of the child and family unity.⁹⁴ Early signs suggest that the authorities are having difficulty giving practical effect to many of the provisions in the regulations. While the provisions may be robust in law, evidence suggests that the administrative structures are not in place to implement them. For example, regulation 20(3) provides for administrative review of certain decisions to withdraw or reduce reception conditions. However, on the basis of cases

⁸⁹ Irish Refugee Council, ‘Recommendations on the Transposition of the EU recast Reception Conditions Directive (2013/33/EU)’ (March 2018) [https://www.irishrefugeecouncil.ie/wp-content/uploads/2018/03/IRC-Recommendations-on-the-Transposition-of-the-EU-recast-Reception-Conditions-Directive_Final.pdf] accessed October 2019.

⁹⁰ European Communities (Reception Conditions) Regulations 2018, SI 2018/230.

⁹¹ For the first time, for example, protection applicants (who are eligible for a work permit) have full access to vocational training and there is the possibility to appeal certain decisions relating to reception conditions (including withdrawal or restriction of accommodation and services) to the IPAT. See: Reception Conditions Regulations reg 11(11).

⁹² Reception Conditions Regulations reg 8.

⁹³ *ibid* reg 20.

⁹⁴ *ibid* reg 7.

coming before the Irish Refugee Council’s Law Centre, there appears to be no procedure, nor designated review officer, in place at RIA for reviewing decisions. In the first year of implementation, this resulted in requests for appeal to the IPAT being refused on the ground that the decision was not reviewed by a designated review officer (a step which must be exhausted before an appeal can be accessed) and that therefore there is no decision to appeal.⁹⁵ Similarly, inquiries as to whether a vulnerability assessment had been conducted on clients of the Irish Refugee Council Law Centre, as per regulation 8, who had been transferred to accommodation centres wholly unsuited to their particular reception needs were either not responded to by RIA, or responded to on an *ad hoc* basis in emergency cases after substantial intervention with no reference to the legislation.⁹⁶ This particular issue has already become a point of judicial review at the High Court, which will be discussed in the next section.

On the whole, the fact that Ireland’s reception system now operates on a statutory footing can only be a positive development. Not least because it ekes out new space from which to respond to rights violations and hold the State to account. The Reception Conditions Regulations, provided that early barriers and administrative speed bumps can be overcome, should serve as a useful foundation upon which recommendations set out in the Working Group report can finally be fully realised. To assist in implementing the outstanding recommendations of the Working Group, and now to assist in giving effect to the Reception Conditions Regulations, the Department of Justice established a Standards Advisory Group, consisting of key government departments and NGOs to oversee the development of a set of national standards for Direct Provision centres (National Standards, hereafter). With the primary aim of harmonising conditions across the vastly disparate portfolio of 39 accommodation centres, the advisory group sought to produce a set of comprehensive

⁹⁵ Irish Refugee Council, ‘The Reception Conditions Directive: One Year On’ (July 2019) 28. [<https://www.irishrefugeecouncil.ie/wp-content/uploads/2019/07/RCD-One-Year-On-11-July-2019-Final.pdf>] accessed October 2019.

⁹⁶ *ibid* 17-20.

standards that would be binding on the commercial entities sub-contracted by the Department of Justice to manage Direct Provision centres.⁹⁷

After being put to public consultation in 2018, the final version of the National Standards was published in August 2019.⁹⁸ The standards document sets out over 80 pages of standards and performance indicators across ten thematic areas covering the breadth of issues inherent in Direct Provision accommodation. However, also like the Working Group recommendations and the reception conditions regulations, the value and impact of the National Standards will depend entirely on the extent to which enforcement and implementation of the standards is guaranteed. In its submission to the public consultation on the standards, the Irish Refugee Council, while broadly welcoming the introduction of a set of standards, expressed concern at the absence of any reference to an independent inspectorate identified in the document, encouraging the Government in particular to ensure the establishment of a body with competency to conduct an independent inspection.⁹⁹ The Irish Refugee Council also noted disappointment that the standards are binding only on the private contractors managing the centres, meaning that RIA itself is not subject to scrutiny under them. Furthermore, a few months after the enactment of the Reception Conditions Regulations, critical capacity issues in Direct Provision began to develop, which are likely to hinder the effective implementation of the standards. As of September 2018, the numbers of applicant outgrew the number of available accommodation spaces in Direct Provision centres, resulting in the State having to source temporary accommodation for new arrivals (named ‘emergency accommodation’ by the State, in keeping with its crisis-response ethos on protection issues).¹⁰⁰ Emergency accommodation is provided in hotels and bed and breakfasts, which continue to operate on a commercial basis.¹⁰¹ In the year since this practice began, there are 36

⁹⁷ Caroline Stephens, ‘Developments in the Direct Provision system since the McMahon Report’, in *Beyond McMahon – Reflections on the Future of Asylum Reception in Ireland* (University College Cork Centre for Criminal Justice and Human Rights and Nasc, Research Series, December 2018) 13.

⁹⁸ Department of Justice and Equality, ‘National Standards’ (15 August 2019).
http://www.justice.ie/en/JELR/Final_Standards.docx/Files/Final_Standards.docx accessed October 2019.

⁹⁹ Irish Refugee Council, ‘Submission on the Draft National Standards for Direct Provision Centres’ (3 October 2019) 4.

¹⁰⁰ Response to Parliamentary Questions by Minister for Justice and Equality Charlie Flanagan (06 September 2019) 36442/19 & 36443/19.

¹⁰¹ In one case, asylum seekers were removed from a hotel acting as temporary accommodation in order to make way for a wedding party: Simon Carswell ‘Asylum seekers ‘shipped like cattle’ to make way for wedding, committee told’ *The Irish Times* (19 June 2019).

separate facilities providing emergency accommodation, housing 1531 people, including 290 children.¹⁰² Unsurprisingly, the *ad hoc* nature of emergency accommodation means that standards are even less consistent than in Direct Provision and almost immediately prompted expressions of concern from human rights actors. A particular focus of the concern is that commercial hotels are simply unsuitable to meet the various needs of asylum seekers and reports have so far highlighted concerning issues such as lack of access to healthcare and basic information and legal support, asylum seekers not receiving their weekly financial allowance, complete lack of regard for the best interests of children and no vulnerability assessment taking place at all.¹⁰³ In a November 2019 op-ed, the head of UNHCR’s Irish branch argued that in order to reduce the trend towards reliance on emergency accommodation, there should be less focus on reforming, or abolishing Direct Provision and more on securing a ‘fast and fair determination system,’ so that people would not be spending protracted lengths of time in Direct Provision.¹⁰⁴ Most recently, the Oireachtas Committee on Justice and Equality (a government committee that monitors policy and practice of the Department of Justice and Equality) released a report on ‘Direct Provision and the International Protection Application Process,’ compiled on the basis of over 140 civil society submissions.¹⁰⁵ Focusing predominantly on the Direct Provision system, the report echoed the issues raised over the years that have been highlighted throughout this chapter, concluding that the system ‘is flawed in several respects and needs root and branch reform, preferably replacement.’¹⁰⁶ Among its recommendations is that ‘a more holistic approach is required to identify the needs of individuals who are often extremely vulnerable,’ including the urgent implementation of comprehensive Vulnerability Assessments, to be conducted by appropriately trained and qualified professionals, to assess the needs of individuals entering the

¹⁰² Sorcha Pollak ‘Direct Provision: The controversial system turns 20’ *The Irish Times* (16 November 2019).

¹⁰³ Response to Parliamentary Questions by Minister of State at the Department of Justice and Equality David Stanton (23 July 2019) 34570/19 to 34578/19; Sorcha Pollak, ‘All children must be taken out of emergency accommodation for asylum seekers, council says’ *The Irish Times* (12 July 2019); Joyce Fegan ‘Refugees ‘struggling to access basic services’ in emergency accommodation, says council’ *Irish Examiner* (08 August 2019); Aoife Moore, ‘Infant asylum seeker has no nappies or food, charity warns after touring Direct Provision centres’ *The Independent* (07 August 2019).

¹⁰⁴ Enda O’Neill, ‘We will soon see asylum seekers living in gymnasiums and tents if we don’t do something’ *The Journal* (20 November 2019).

¹⁰⁵ Houses of the Oireachtas, Joint Committee on Justice and Equality ‘Report on Direct Provision and the International Protection Application Process’ (December 2019) [<https://bit.ly/2LOnebi>] accessed December 2019.

¹⁰⁶ *ibid* 3.

protection process.’¹⁰⁷ Renewed calls for reform of the Irish system are clear, therefore, that a focus on vulnerability should be at the heart of any efforts towards a more expedient asylum procedure to ensure that safeguards are in place and decisions are of an adequate quality.

So, while the foundations for a protection-oriented reception system are in place, there remain significant barriers to access to the full range of entitlements and the fundamental problems inherent in the Direct Provision system persist. In fact, the cascade of recent developments have prompted the establishment of a *new* working group in November 2019, which will again review the Irish international protection system although it is unclear how this new group will differ from the 2015 Working Group.¹⁰⁸ New legislation and policy, through the regulations and the national standards, should serve as the tools with which those problems can finally be addressed. However, some issues remain unresolved. For example - as exemplified by the current emergency accommodation response to rising numbers in need of accommodation, the State appears to be leaning more into crisis-based response rather than focusing on more sustainable long-term plans. As noted by the Irish Refugee Council, the State became aware of the impending capacity issues in Direct Provision from at least 2017 but took no advance action.¹⁰⁹ In the chaos generated by this reactive approach to asylum policy, the gap between the distinct but interrelated reception system and international protection procedures in Ireland is widening. A person’s experience in their accommodation environment is intrinsically linked to the extent to which they will be able to engage with the single procedure. However, this interrelationship is not recognised in either the Reception Conditions Regulations or the National Standards. The lack of provision for interlocking the vulnerability assessment in the reception context with a mechanism for identifying special needs in the procedures, is one example of a significant missed opportunity in this regard, which will be discussed in more detail in the following section.

¹⁰⁷ *ibid* 50.

¹⁰⁸ While details are scant at time of writing, Secretary General of the Department of Justice Aidan O’Driscoll briefly referenced the group at a Dail debate in November 2019, stating: ‘The Government has also set up a second group to take a more complete look at direct provision and our whole international protection system. It is made up of a very distinguished group of people and is chaired by Ms Catherine Day. I hope it takes a thorough look at how we handle international protection, direct provision and its alternatives and considers the best course of action.’ See: Joint Committee on Justice and Equality, ‘Debate - Departmental Transformation Programme: Department of Justice and Equality’ (6 November 2019).

¹⁰⁹ Irish Refugee Council (n 99) 9.

5.4 - Situating Vulnerability in a Protection System in Flux: The role of vulnerability in Irish asylum law and policy

While improvements are in train, the terrain for asylum seekers in Ireland remains precarious as the State struggles to come to grips with new legislation and the administrative adjustments required to implement the relevant provisions. There remains ample scope for people to slip through the cracks. The preceding sections have served to outline in detail the legislative and policy context in which the case study for this thesis is based and have described a system that is being tugged back and forth between genuine reform on one side, regression and securitisation on the other, revealing a widening gap between the two sides into which people are likely to fall. The concept of vulnerability is particularly relevant in such a context, as it is people with particular needs who are most at risk of falling through the cracks.

Bringing the discussion back to the primary research question, this section analyses the law and policy discourse that has underpinned recent developments in Ireland through the lens of vulnerability and special needs. This sets the scene for the empirical portion of the study in the next chapter.

5.4.1 Vulnerability in Irish refugee law

Since the enactment of the Refugee Act 1996, asylum law has become a dominant feature of the Irish judicial system. This section assesses how issues of vulnerability have figured into and influenced these legal developments with a view to ascertaining whether, and to what extent, a coherent approach to vulnerability has emerged in Irish asylum law and what role the concept has played.

With the exception of limited provisions relating to the needs of children or families in the context of specific procedures (such as prioritisation, family reunification and the identification of unaccompanied minors, for example), the Refugee Act 1996 contained no reference to the role of vulnerability in the asylum process. The sections most relevant to status determination procedures were concerned primarily with

ensuring that the applicant complied with his or her obligations to cooperate with the process.¹¹⁰ Subsequent amendments to the Refugee Act did little to bring the experience of the applicant to the forefront of proceedings as they were introduced primarily with the aim of speeding up the procedure in the context of mounting delays.¹¹¹ By the time the Working Group had begun its systematic review in earnest there was ample, evidence-based material from which to draw the conclusion that the Irish asylum system in its existing state was detrimental to the wellbeing of asylum seekers and particularly so in the case of individuals with special needs who could be considered vulnerable.

The General Scheme of the International Protection Bill, published in the midst of the Working Group sessions in March 2015, while improving on its predecessor by including explicit reference to vulnerability, only does so in extremely limited circumstances. There is one reference to vulnerability relevant to the status determination procedure in the General Scheme concerning the applicant's substantive interview, requiring that 'the person who conducts the personal interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability.'¹¹² However, no guidance is provided as to when exactly such circumstances should be taken into account or the methodology by which they should be identified. One other provision, at Head 52, in relation to the 'situation of vulnerable persons and children' requires that:

¹¹⁰ Emma Quinn, *Handbook on Immigration and Asylum in Ireland 2007* (Economic and Social Research Institute, Research Series No. 5, October 2008) 52-53.

¹¹¹ The Immigration Act 2003, for example, introduced measures such as prioritised and accelerated procedures for specific types of case (mostly on the basis of a determination of unfoundedness or where the applicant is deemed not to have cooperated in the process); the 'safe countries of origin' principle, whereby applicants from certain 'safe' countries are presumed not to be in need of protection unless they can prove otherwise, and increased duties to cooperate on the applicant, which if unmet, result in the deemed withdrawal of the application. Subsequent amendments also included dedicated provisions on how decision-makers should conduct 'credibility assessment', the process of determining whether or not an applicant's personal testimony is truthful. It introduced a list of grounds upon which negative credibility findings could be made, rather than highlighting the equally relevant circumstances under which a person might be unable to give a credible account of their fear of persecution specifically on account of any vulnerability. Similarly, further amendments stemming from ratification of EU law such as the EU Qualifications and Procedures Directives and the Dublin Regulation, were adopted primarily with a view to streamlining the procedures and incorporating new means by which to erect barriers to accessing the Irish protection system

¹¹² Department of Justice and Equality (n 44) Head 32A, 3(a).

...due regard shall be had to the specific situations of vulnerable persons such as persons under the age of 18 years (whether or not accompanied), disabled persons, elderly persons, pregnant women, single parents with children under the age of 18 years, 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.¹¹³

While the introduction of an open-ended list of who might be considered vulnerable is a useful reference point, Head 52 applies only with respect to the ‘Content of International Protection’ and therefore only persons with a final grant of international protection status can benefit from it. The submissions of several bodies on the contents of the General Scheme expressed concern at the restricted remit of consideration of vulnerability. The Ombudsman for Children, for example, recommended that ‘[c]onsideration should be given to extending the recognition at Head 52 of the specific situation of vulnerable persons, including accompanied and unaccompanied children, to the protection application process.’¹¹⁴ The Irish Human Rights and Equality Commission, in its submission on the General Scheme, called for the Bill to ensure that ‘guarantees of attention to particular vulnerabilities should apply throughout the asylum process, in addition to borders and points of entry.’¹¹⁵ The Commission also recommended that vulnerability provisions in the bill should ‘require the publication of guidelines’ on vulnerable groups ‘to assist officials in their decision-making.’¹¹⁶

The Working Group report, published a few months after the General Scheme of the International Protection Bill in June 2015 emphasised the role of vulnerability in promoting the overall quality of the asylum system:

The lack of early identification and the delivery of targeted supports can have a negative impact on the quality of [the] protection

¹¹³ *ibid* Head 52.

¹¹⁴ Ombudsman for Children, ‘Initial Observations of the Ombudsman for Children on the General Scheme of the International Protection Bill 2015’ (July 2015) 5.

¹¹⁵ Irish Human Rights and Equality Commission (n 60) 10.

¹¹⁶ *ibid*.

application, the length of time they are in the system and their care when in the system.¹¹⁷

Despite frequent reference to the concept throughout, the Working Group report does not actually attempt to define what exactly constitutes vulnerability in the context of the Irish procedure but does link to the provisions of the EU recast Reception Conditions Directive and the recast Asylum Procedures Directive (neither of which the State had signed up to at the time) that outline non-exhaustive categories of vulnerable group from which Irish authorities can take guidance.¹¹⁸ The report made a number of recommendations on the point, including the introduction of vulnerability screening for all applicants, follow-up and referral mechanisms for vulnerable individuals and incorporating other professionals, such as NGOs, legal representatives, health professionals and other frontline workers into the identification process.¹¹⁹

Notwithstanding the recommendations of the Working Group and other actors, the International Protection Bill was published in November 2015, the text of which was substantially the same as that set out in the General Scheme, at least insofar as issues pertaining to vulnerability were concerned. As mentioned already, there was an exceptionally narrow window of opportunity between the publishing of the text of the Bill that November and its signing into law six weeks later during which some NGO actors made prompt comments on the text. Both the Irish Refugee Council and Spirasi (whose role involves providing rehabilitation supports to victims of torture) noted as a critical omission, the failure ‘to include any specific provisions on the early identification and assessment of vulnerable persons within the proposed single procedure.’¹²⁰ Spirasi notes that the Bill depends ‘too heavily on the self-identification of vulnerable applicants which is already problematic in a system that takes more than four years on average to be concluded.’¹²¹ The submission of the Irish Refugee

¹¹⁷ Working Group Report (n 48) 73.

¹¹⁸ *ibid* 127.

¹¹⁹ *ibid* para 3.299, 129.

¹²⁰ Irish Refugee Council, ‘Recommendations on the International Protection Bill 2015’ (November 2015) 3, [<https://bit.ly/2DzLkTj>] accessed October 2019.

¹²¹ Spirasi, ‘Statement on Publication of the International Protection Bill’ (20 November 2015) [<https://bit.ly/2Wli8qG>] accessed October 2019.

Council focuses particularly on the detrimental impact of failure to identify vulnerability at an early stage of the procedure:

...failure to correctly identify the needs of vulnerable persons early in the protection process may mean they are not recognised as being in need of international protection. Other related issues may arise for example linked to late disclosure of protection needs due to trauma and the need for further subsequent applications. Failure to correctly identify any particularly [sic] vulnerabilities of protection applicants early in the procedure is neither of benefit to the individual concerned or the State.¹²²

Despite efforts to provide input, the bill was signed into law with no modification of the text. In the absence of reference to vulnerability in the law, an information request was made as part of this research to the IPO to obtain additional details about internal guidance and responses to vulnerability in the context of the International Protection Act. The response received from the IPO notes that ‘identification of persons with vulnerabilities is part of the IPO’s normal operational business. There is a constant triage process to identify vulnerable applicants.’¹²³ The note further states that vulnerability identification can take place at ‘the IPO Reception’, ‘when key documents such as the IPO 2 (Questionnaire) are being triaged for interview prioritisation purposes’, on ‘the reading of medical reports submitted by applicants’, or ‘at interview stage.’¹²⁴ The note also refers to internal ‘Staff Guidance’ which encourages decision makers to ‘consider the ability of the applicant to present adequately his/her own claim’ when drafting decision reports under Section 39 of the International Protection Act, and also to take ‘into account the individual and contextual circumstances of the applicant’ in assessing the credibility of a protection claim.¹²⁵ The extent to which the impact of this guidance is felt in practice will be explored in the next chapter.

¹²² Irish Refugee Council (n 120) 3.

¹²³ International Protection Office, ‘Quality Assurance and Dealing with Vulnerable Applicants in the International Protection Office – Information Note’ (21 December 2018) 1. (Received through information request December 2018. On file with the author.)

¹²⁴ *ibid* 2.

¹²⁵ *ibid* 5.

Not long after the commencement of the International Protection Act, the State had another opportunity to engage with the issue of vulnerability in domestic asylum legislation. With the decision to opt-in to the recast Reception Conditions Directive, the State became obliged under EU law to incorporate article 22 of the Directive, which requires that national authorities establish a procedure for assessing the ‘special reception needs of vulnerable persons,’ into Irish law. Being a directive as opposed to a regulation of EU law, however, Member States have wide discretion with which to interpret exactly *how* certain provisions are transposed into national law. Guidance as to the mandatory nature of certain provisions can be taken from the language used in the Directive. As detailed in the previous chapter, Article 22(1) requires that Member States ‘**shall** assess whether an applicant is an applicant with special reception needs [emphasis added].’ The use of ‘shall’ confirms that a vulnerability assessment is indeed compulsory. However, the text provides no guidance as to the form the assessment should take other than that it ‘may be integrated into national procedures’ and that it provides support ‘throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation.’ As mentioned in the previous chapter, the lack of guidance in some key provisions of the Directive has led to disparate national practice across the EU, with some Member States interpreting the extent of their obligations to conduct vulnerability assessment more broadly than others. Furthermore, the text of the 2013 Directive applies specifically to vulnerability only in the context of reception conditions, meaning that there is no obligation on Ireland, which has not opted in to the recast Asylum Procedures Directive, to have regard to vulnerability in the context of the international protection application, status determination and other procedures. The Irish Refugee Council, in its recommendations on transposition of the Directive, encouraged the State to adopt an ‘integrated’ vulnerability assessment mechanism that would allow for consideration of both special reception **and** special procedural needs of vulnerable applicants in a single procedure, as encouraged under the recast Asylum Procedures Directive.¹²⁶ This would mirror the recommendations of international bodies such as UNHCR and

¹²⁶ Irish Refugee Council (n 89) 35.

the European Council on Refugees and Exiles on implementation of the EU instruments.¹²⁷

The Reception Conditions Regulations (the Regulations, hereafter) transposing the EU Directive came into force in Ireland in June 2018. For the purposes of the Regulations, a person with special reception needs is a vulnerable person who ‘is a minor, an unaccompanied minor, a person with a disability, an elderly person, a pregnant woman, a single parent of a minor, a victim of human trafficking, a person with a serious illness, a person with a mental disorder, and a person who has been subjected to torture, rape or other form of serious psychological, physical or sexual violence.’¹²⁸ This mirrors the text of section 58 of the International Protection Act, which sets out the requirement to have regard to vulnerability in the provision of the content of protection. Article 22 of the Directive is transposed in regulation 8, which states:

(1) The Minister [for Justice and Equality]—

(a) shall within 30 working days of the recipient [making an application], and

(b) may at any stage after the expiry of the period referred to in subparagraph (a), where he or she considers it necessary to do so, assess—

(i) whether a recipient is a recipient with special reception needs, and

(ii) if so, the nature of his or her special reception needs.

(2) The Minister for Health and the Health Service Executive shall provide the Minister with such assistance as is necessary for the performance by him or her of his or her functions under paragraph (1).

¹²⁷ UNHCR, ‘Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)’ (April 2015) 53; European Council on Refugees and Exiles, ‘Information Note - Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)’ (20 July 2015) 34.

¹²⁸ Reception Conditions Regulations reg 1(5).

The Regulations incorporate the temporal requirements of the Directive by requiring that an assessment takes place within ‘a reasonable’ amount of time after the international protection application has been made and providing for assessment of special needs ‘if they become apparent at a later stage in the asylum procedure.’ However, the use of conditional language in the regulations such as ‘may’ and ‘where he or she considers it necessary’ to assess vulnerability throughout the procedure suggests that subsequent assessments will only be conducted at the discretion of the Minister for Justice. This wording is problematic for two reasons. Firstly, the Directive *requires* that States ‘**shall** ensure that special reception needs are also addressed [...] if they become apparent at a later stage [emphasis added].’ Where special reception needs emerge after the initial assessment has been conducted, the authorities are under obligation to assess the needs of the individual. By definition, it is ‘necessary’ to assess special reception needs as soon as they become apparent under the Directive, and not if the Minister considers it so. Secondly, the wording in the regulation does not suggest that there is any imperative on the State to proactively identify vulnerability later in the process and that the burden is on applicants and their representatives to put it to the authorities that they have special reception needs that require addressing. This would reflect the issues being experienced by legal representatives on the ground, which have involved substantive intervention in order to resolve the situations of particularly vulnerable clients. In their review of State implementation of the Regulations a year after it had come into force, the Irish Refugee Council noted from their casework that it ‘takes enormous resources to make ongoing representations on behalf of a vulnerable person seeking to have their accommodation needs properly met. In the meantime, the vulnerable person may be continually exposed to a seriously distressing situation which exacerbates their condition.’¹²⁹

Finally, regulation 8(2) designates the Minister for Health and the Health Service Executive (HSE – the Irish body responsible for administration of health and social services, distinct from the Irish Department of Health) as responsible for assisting the Minister for Justice and Equality with vulnerability assessment. This would suggest that vulnerability is perceived as primarily a medical concern for the purposes of the

¹²⁹ Irish Refugee Council (n 95) 19-20.

regulations, when in actual fact special reception needs may manifest in a wide variety of subtle ways that would not necessarily become apparent in a basic medical screening, as highlighted throughout this research. Indeed, concern with this interpretation of the legislation was expressed by the HSE in the course of proceedings of the interdepartmental task force overseeing the transposition of the Reception Conditions Directive. In the minutes of one meeting, for example, the HSE stated that ‘the definition of ‘vulnerability’ is difficult and is flawed in the Directive – people have different vulnerabilities at different times. Vulnerability is more than health and medical issues. [...] there needs to be consistency of approach for applicants and the IPO suggested that there needs to be a multi-agency triage at the beginning of the process.’¹³⁰

Elsewhere in the regulations, regard for vulnerability and special reception needs is required in the context of withdrawal or reduction of reception conditions,¹³¹ designation of accommodation facilities,¹³² the right to health care – specifically mental health care,¹³³ detention conditions¹³⁴ and data protection.¹³⁵ The legal obligation to ‘ensure’ that vulnerable people have access to ‘such mental healthcare as is appropriate’, in particular, is noteworthy considering the documented difficulty people in Direct Provision have in accessing local psychological support services. Effective realisation of this provision will require ensuring that people with mental health needs are accommodated in a location with access to mental health services upon arrival. Also, where a person develops mental health difficulties during the process, transfer from the original designated accommodation facility to a centre more appropriate to that person’s needs will be necessary in line with the obligation to address vulnerability arising later in the process, under Regulation 8(1)(b) and the requirement to ‘designate’ appropriate accommodation in line with regulation 7.¹³⁶

¹³⁰ Department of Justice and Equality, International Protection Policy Unit, ‘Implementation Group – Supreme Court Judgement – N.V.H v The Minister for Justice and Equality, Fifth meeting 21 March 2018, Discussion on Draft Regulations and Transposition Table’ (21 March 2018). (Obtained via Freedom of Information request November 2018, documents on file with the author.)

¹³¹ Reception Conditions Regulations reg 6(3)(a).

¹³² *ibid* reg 7(4).

¹³³ *ibid* reg 18(d).

¹³⁴ *ibid* reg 19(9).

¹³⁵ *ibid* reg 24(4).

¹³⁶ Regulation 7(4) requires that the authorities ‘in designating an accommodation centre [...] shall [...] take account of any special reception needs of the recipient.’ Further, regulation 7(5) provides that where special

Given the experiences of practitioners working on the ground with people living in Direct Provision detailed previously, it is unlikely that the administrative structures are currently in place to facilitate the procedures envisaged under the regulations in an appropriate or effective fashion. Continued failure to implement the Directive fully will likely lead to increased litigation and, indeed, the High Court has already passed at least one judgement on a case that involved consideration of the vulnerability provisions of the regulations, albeit somewhat flippantly. The case of *X & anor v. The Minister for Justice and Equality* concerned a mother and child who had been transferred to a Direct Provision centre outside of Dublin, despite the mother's requests that they be accommodated in Dublin due to her history of depression and dependence on relatives in Dublin for emotional and practical support.¹³⁷ The Court was asked whether or not the State had failed to comply with its obligation to conduct a vulnerability assessment within the 30 day deadline provided in Regulation 8(1) of the regulations. In responding, the Court stated:

When the Decision was made the time-limit for the reg.8 assessment had not expired. Whether the Minister acted in breach of reg.8(1) *after* making the Decision [to transfer the applicants] is not relevant to the within application.¹³⁸

The Court's response seems to miss the point. The issue at the core of the question was whether the State had failed to conduct a vulnerability assessment as obliged. The fact that the transfer took place within the timeframe does not negate the obligation on the State to conduct a vulnerability assessment. If anything, the obligation becomes more pronounced in the context of a transfer, as regulation 7(4) requires that, in the designation of accommodation, the State shall 'take account of any special reception needs of the recipient, assessed in accordance with Regulation 8.'

In parallel with national developments, it should also be acknowledged that the on-going development of Ireland's asylum legal framework has not occurred in a human

reception needs are identified later in the process and for the purposes of monitoring that persons needs, the authorities 'may [...] designate a different accommodation centre in respect of the recipient concerned.'

¹³⁷ *X & anor v The Minister for Justice and Equality* [2019] IEHC 133.

¹³⁸ *ibid* para 13.

rights vacuum. The Refugee Act and subsequent asylum legislation has largely developed within the existing framework of the array of international human rights treaties in addition to the Refugee Convention to which Ireland is bound. Having been reviewed under the treaty monitoring bodies on 20 separate occasions,¹³⁹ the committees have taken the opportunity to comment on developments in Irish law and policy with respect to vulnerable asylum seekers on a number of occasions. Without referring to particular cohorts or individuals as vulnerable directly, most of the concluding observations on Ireland make recommendations with respect to the situations of certain groups of asylum seekers who can be considered *de facto* vulnerable (such as the groups discussed in Chapter Three). For example, the particular needs of children in the Irish asylum context have been raised on several occasions. The Committee on the Rights of the Child, in its 2006 Concluding Observations on Ireland, noted with concern that unaccompanied minors do not receive adequate ‘support and protection’.¹⁴⁰ In recommending that the State remedy these issues, the Committee advises the Irish authorities to have regard to the Committee’s General Comment No. 6 on unaccompanied and separated children, which describes unaccompanied children as being in a ‘particularly vulnerable situation.’¹⁴¹ With respect to victims of trafficking in the asylum procedure, the Human Rights Committee expressed concern that victims of trafficking are accommodated in Direct Provision and have inadequate access to appropriate legal advice in the absence of specific trafficking legislation that is compatible with international standards.¹⁴² The system has been found to be inadequate for persons with mental health needs by a number of committees, which have condemned the detrimental impact of delays in the Irish system and reception conditions on applicants’ mental health in particular.¹⁴³

¹³⁹ Office of the High Commissioner for Human Rights, ‘UN Treaty Body Database – Ireland’ [https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=83] accessed October 2019.

¹⁴⁰ Committee on the Rights of the Child, ‘Concluding Observations on Ireland’ (29 September 2006) UN Doc CRC/C/IRL/CO/2 paras 64-65.

¹⁴¹ Committee on the Rights of the Child, ‘General Comment No. 6, Treatment of unaccompanied and separated children outside of their country of origin’ (1 September 2005) CRC/GC/2005/6 para 1.

¹⁴² Human Rights Committee, ‘Concluding Observations on the Fourth Periodic Review of Ireland’ (19 August 2014) UN Doc CCPR/C/IRL/CO/4 para 20.

¹⁴³ See, e.g. Committee on Economic Social and Cultural Rights ‘Concluding observations on the third periodic report of Ireland’ (8 July 2015) UN Doc E/C.12/IRL/CO/3 para 14.

In more recent Concluding Observations on Ireland, the Committees have begun to lean more heavily on explicit use of ‘vulnerability’ as a term with which to strengthen their recommendations. With respect to access to health care services, the Committee on the Rights of the Child expressed concern ‘in particular for children in vulnerable situations’ in Ireland before recommending on that point that the State pay ‘[s]pecial attention to the needs of refugee and asylum seeking children.’¹⁴⁴ In its subsequent 2016 recommendations to Ireland, the Committee on the Rights of the Child again highlighted the needs of refugee and asylum seeking children, expressing concern at the increasing number of children living in poverty and urged the State to have special regard to the situations of ‘children in vulnerable situations, in particular,[...] refugee children.’¹⁴⁵ The needs of refugee and asylum seeking women in Ireland have been raised by a number of different treaty monitoring bodies in the context of their specific mandates. The Committee on the Elimination of Discrimination against Women has urged Ireland to incorporate the needs of ‘marginalized and vulnerable women, including [...] asylum-seeking and refugee women’ into strategic planning on policies to combat and provide redress for violence against women.¹⁴⁶ The Committee on the Elimination of Racial Discrimination noted the enhanced risk of discrimination faced by women ‘belonging to vulnerable groups [...] in particular female [...] refugees and asylum seekers.’¹⁴⁷ The lack of specific procedures in the Irish asylum system to deal with vulnerability more generally has been noted. Most recently, in 2017, the Committee against Torture explicitly recommended that the State ‘establish a formalized vulnerability-screening mechanism for torture victims and other persons with special needs and provide them with care and protection to avoid re-traumatization, including during international protection procedures.’¹⁴⁸ The Committee against Torture’s inclusion of the need for vulnerability assessment in the context of both reception conditions **and** protection procedures is noteworthy given the lack of any mechanism for identification of vulnerability in Irish asylum

¹⁴⁴ Committee on the Rights of the Child (n 124) paras 44-45.

¹⁴⁵ Committee on the Rights of the Child, ‘Concluding observations on the combined third and fourth periodic reports of Ireland’ (1 March 2016) UN Doc CRC/C/IRL/CO/3-4 para 60.

¹⁴⁶ Committee on the Elimination of Discrimination against Women, ‘Report of the Committee on the Elimination of Discrimination against Women on its thirty-second session, Concluding observations on Ireland’ (18 March 2005) UN Doc A/60/38 (SUPP) para 387.

¹⁴⁷ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on Ireland’, (14 April 2005) UN Doc CERD/C/IRL/CO/2 para 23.

¹⁴⁸ Committee against Torture, ‘Concluding Observations on the second periodic report of Ireland’ (31 August 2017) UN Doc CAT/C/IRL/CO/2 para. 12 (b).

procedures. In summary, the vulnerability of asylum seekers in Irish society, either as a group or as individuals whose circumstances require specific measures be taken in order to address their particular needs, is widely recognised in the context of Ireland's human rights obligations at the international level.

The approach to vulnerability that is developing in Irish law seems to be in line with developments at the international level, with pressure from international monitoring bodies going some way towards prompting more comprehensive consideration of vulnerability. In Irish refugee law, vulnerability is emerging as a mechanism to provide access to basic entitlements by identifying people who require additional supports and safeguards in order to avail of their rights. The transposing regulations define a person with special reception needs as a person 'who is vulnerable and who has been assessed [...] as being in need of special guarantees in order to benefit from his or her entitlements, and to comply with his or her obligations.'¹⁴⁹ This definition applies only in the context of reception conditions but it nonetheless demonstrates that the Irish State acknowledges a clear link between vulnerability, special needs and access to basic entitlements that are critical to an applicant's engagement with the asylum process. However, implementation of this fledgling legal framework for vulnerability is weak and there are substantial gaps in critical areas of the system, such as asylum procedures where there is no consideration of vulnerability. To give a sense of how these gaps in legislation are felt by applicants on the ground, the following section examines how research, policy and advocacy has dealt with the issue of vulnerability in Ireland, to date.

5.4.2 Vulnerability in refugee protection policy and advocacy in Ireland

Notwithstanding limited implementation in practice, emerging human rights concerns do appear to be reflected in relevant government policy albeit in an *ad hoc* fashion. The needs of certain groups and vulnerability more generally have gradually become included in substantive policy particularly in the years following the publishing of the Working Group report. Even then, the scope of consideration of vulnerability is limited and implementation measures are difficult to qualify in practice due to lack of

¹⁴⁹ Reception Conditions Regulations reg 1(2)(1)

follow up evaluations of policy. By way of example, the Reception and Integration Agency (RIA) has a series of policy documents that are publicly available on its website.¹⁵⁰ Relevant examples include RIA's 'Child Protection and Welfare Policy and Practice Document'¹⁵¹ and 'Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual and Gender-based Violence & Harassment.'¹⁵² The former, substantially updated in 2018, provides guidance to reception centre staff on recognising child protection issues, stating that:

Children living in Accommodation Centres may be particularly vulnerable for a number of reasons including: Language difficulties; Cultural differences; Dependence on service providers; Previous experience of abuse; Fear of not being believed; Frequent turnover of staff; Fear and uncertainty regarding the future; Their parents may also experience language difficulties or be fearful of authorities.¹⁵³

While the above are all valid contributing factors towards a child's potential vulnerability, the policy focuses on factors inherent to the child and fails to acknowledge vulnerability caused or exacerbated by environmental factors in Direct Provision. Issues such as overcrowding, enforced poverty, lack of privacy, lack of child-suitable play and recreation areas, and mental health difficulties experienced by parents with vicarious consequences for the child have all been among the problems highlighted in evidence-based research as increasing child protection risks.¹⁵⁴ As well as an internal dimension to the child asylum seeker's vulnerability, research in this thesis has demonstrated that there is also an external vulnerability, imposed upon the individual by the environmental structure in which they inhabit. Whether that structure is Direct Provision itself, the application procedures or the asylum system as

¹⁵⁰ Department of Justice, Reception and Integration Agency, 'Policy Documents' [http://www.ria.gov.ie/en/RIA/Pages/Policy_Documents] accessed October 2019.

¹⁵¹ Reception and Integration Agency, 'Child Protection and Welfare Policy and Practice Document for Reception and Integration Agency (RIA), Irish Refugee Protection Programme (IRPP) and Accommodation Centres for persons in the International Protection process under contract to the Department of Justice and Equality' (July 2018).

¹⁵² Reception and Integration Agency, 'RIA Policy and Practice Document on safeguarding RIA residents against Domestic, Sexual and Gender-based Violence & Harassment' (April 2014).

¹⁵³ Reception and Integration Agency (n 151) 16.

¹⁵⁴ Department of Children and Youth Affairs, 'Report of DCYA consultations with children and young people living in Direct Provision' (July 2017) [<http://www.inis.gov.ie/en/INIS/Pages/report-of-consultations-with-children-in-direct-provision-180717>] accessed October 2019.

a whole, the role that the *system* plays in an individual's vulnerability is evident in the wide body of research dealing with children's experiences of Direct Provision and the Irish asylum procedure and this should be reflected in relevant policy material.

RIA's policy on sexual and gender-based harassment makes no reference to vulnerability at all, focusing instead on the procedures in place to address complaints and incidences of sexual or gender based harassment and violence. The document does not acknowledge that some applicants may be at enhanced risk of sexual violence due to their personal or domestic circumstances, or may be unable to access supports or redress mechanisms due to trauma stemming from previous instances of sexual violence or a lack of trust of the authorities. Also of relevance, is RIA's 'Code of Practice for Persons Working in Accommodation Centres,'¹⁵⁵ which applies to staff working in Direct Provision centres (but has not been updated since 2005). While it contains some useful principles related to the identification of vulnerability, such as requiring that staff 'treat each service user as an individual' and 'establish and maintain the trust of the service users', there is no obligation to identify vulnerability and limited practical guidance for reception centre staff to identify and address special needs, as would be required to give practical effect to provisions under the Reception Conditions Regulations.

For its part, the International Protection Office (IPO), which bears responsibility for processing applications and conducting first-instance decision-making, has limited publicly available policy documents.¹⁵⁶ Of relevance, there is a child-friendly information booklet for minors, which provides information on the application process from the perspective of a minor but remains very text-heavy and replete with jargon.¹⁵⁷ The general information booklet for all applicants sets out in detail what an applicant can expect from the process and, in relation to the substantive interview states that IPO officers conducting the interview, will 'take account of any gender-specific information and any *vulnerability that you mention* in your application or

¹⁵⁵ Reception and Integration Agency, 'Code of Practice for Persons Working in Accommodation Centres' (September 2005).

¹⁵⁶ International Protection Office, 'Publications' [<http://www.ipo.gov.ie/en/ipo/pages/publications>] accessed October 2019.

¹⁵⁷ International Protection Office, 'Information Booklet for Unaccompanied Minors/Separated Children who are Applicants for International Protection, IPO 03' (25 May 2017).

during the examination process [emphasis added].¹⁵⁸ This reflects section 35 of the International Protection Act, which requires that the interviewer is ‘sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability.’ However, the information booklet frames the obligation to take account of vulnerability as contingent on the applicant themselves clearly outlining their needs in their application questionnaire or during the interview itself. Similarly, under a section in the booklet on the circumstances where the applicant is disabled or has special needs, the applicant is encouraged to ‘tell the IPO as soon as possible about any special needs or requirements for [the] interview [and] inform the IPO of any special needs on the day [of] application.’¹⁵⁹ There is an assumption on the part of the IPO that before they can be expected to discharge their obligation to make arrangements for vulnerable applicants, the applicant will have had to make those needs explicitly clear in advance. Many applicants with particular vulnerabilities may not be able to fulfil such a requirement without dedicated legal or other professional support. In fact, the information booklet does encourage applicants to seek legal advice to support their application:

When making your international protection application, you are entering a legal procedure. The documents you need to complete and the information you need to provide as part of the application, examination and recommendation/ determination process are central to that process. Therefore, it is **very important that you [...] seek legal advice** as required so that you are in a position to support your application. [emphasis added]¹⁶⁰

Thus, the IPO acknowledges that the application process is onerous for *all* applicants, not just those with special needs, and encourages applicants to obtain legal advice. This disregards the fact that the limited capacity of the free Legal Aid Board (to which applicants are directed within the information booklet) does not allow for

¹⁵⁸ International Protection Office, ‘Information Booklet for Applicants for International Protection, IPO1’ (January 2017) para 4.1.5.

¹⁵⁹ *ibid* para 3.10.1.

¹⁶⁰ *ibid* 1.

frontloading of early legal advice and support with the questionnaire or preliminary stages of the process and the vast majority of applicants do not have the financial means to obtain private representation.¹⁶¹

Where an applicant receives a negative decision at first instance, they are entitled to lodge an appeal with the International Protection Appeals Tribunal (IPAT) for a review of the negative decision. The function of the IPAT is set out in the International Protection Act, including the designation of a Chairperson to oversee the functioning of the Tribunal and its members.¹⁶² Of relevance in the context of this review of policy material is the Chairperson's responsibility to issue 'guidelines on the practical application and operation of the [Tribunal's duties under the Act] and on developments in the law relating to international protection.'¹⁶³ To date, the Tribunal has issued 10 guidelines documents, which are publicly available on the Tribunal's website.¹⁶⁴ These guidelines provide interpretative clarity on thematic and specific issues, some of which engage issues of vulnerability. The Chairperson's guidelines on medico-legal reports, for example, explain the role of the medico-legal report in the decision making process by *inter alia* reducing the need for the applicant to have to relive or recall persecution in great detail and accounting for vagueness in the testimony of certain applicants, such as victims of torture, whose 'psychological vulnerability' might render them unable to deliver a coherent account of their claim.¹⁶⁵ The Tribunal guidelines on appeals from child applicants sets as its overarching principle that consideration of the best interests of the child principle must 'fully take into account [...] their particular vulnerabilities, including mental or physical disability and any other particular characteristics or needs brought to the attention of the Tribunal before or during the course of the proceedings.'¹⁶⁶ The document proceeds to give detailed guidance to tribunal members on how they can facilitate the engagement of minor appellants and take account of their needs both in relation to procedure (including, for example, detailed guidance on appropriate

¹⁶¹ Bridget Anderson and Sue Conlan, 'Providing Protection – Access to Early Legal Advice for Asylum Seekers' (2014) 19.

¹⁶² International Protection Act 2015 ss 62-67.

¹⁶³ *ibid* s 63(2).

¹⁶⁴ Department of Justice and Equality, The International Protection Appeals Tribunal, 'Publications' [<http://www.protectionappeals.ie/website/rat/ratweb.nsf/page/Publications-en>] accessed October 2019.

¹⁶⁵ The International Protection Appeals Tribunal, 'Guideline No. 2017/6, Medico-legal reports' (20 April 2017) 3.

¹⁶⁶ The International Protection Appeals Tribunal, 'Guideline No. 2017/5, Appeals from Child Applicants' (20 April 2017) 2.

questioning style and terminology to be used) and substantial consideration (e.g. assessment of the credibility of a child applicant) of the appeal. Further, the guidelines provide that all tribunal members working with minors shall receive regularly updated ‘awareness training on age and gender vulnerabilities’ before they hear appeals from minors.¹⁶⁷ On the basis of publicly available material, the IPAT’s approach to applicants with special needs would appear to allocate the burden of identifying vulnerability more evenly between applicants and the decision maker, in comparison to that of the IPO. Despite the lack of a legislative basis for vulnerability assessment in Irish asylum procedures, the IPO information materials and the IPAT’s guidelines demonstrate that regard for vulnerability is nonetheless required in order to ensure that applicants can fully access their entitlements and engage with the procedures set out under Irish law.

Both the latest strategic planning documents for the IPO and IPAT explicitly link vulnerability to the quality of decision-making, suggesting that vulnerability and special needs does play a significant role in first instance and appeals procedures. The statement of strategy for the Office of the Refugee Applications Commissioner 2016-2018 (prior to the IPO’s establishment), for example, states that a system of quality assurance monitoring has been established in order to achieve the strategic aim of maintaining the ‘highest standard of investigation and decision-making.’¹⁶⁸ The quality assurance system aims to ‘ensure that up to date research information is being used taking into account the requirements of vulnerable applicants such as persons with disabilities, victims of trafficking, unaccompanied minors and victims of torture. Our procedures are also being continually monitored and developed to ensure the requirements of these vulnerable groups are met.’¹⁶⁹ Included amongst performance indicators for achieving ORAC/IPO’s strategic goals are ‘Procedures and trained caseworkers in place to deal with the special needs of vulnerable groups,’ and ‘[f]air and effective procedures in place in relation to vulnerable groups such as unaccompanied minors.’¹⁷⁰ Actions to be taken to achieve goals include ‘[c]ontinue to implement procedures, including ongoing training programmes, to take account of the

¹⁶⁷ *ibid* 3.

¹⁶⁸ Office of the Refugee Applications Commissioner, ‘Strategy Statement 2016-2018’ 22.

¹⁶⁹ *ibid* 24.

¹⁷⁰ *ibid* 23.

special needs of vulnerable groups,’ ‘[s]upport vulnerable applicants insofar as practicable to access and participate in the international protection process,’ and to increase liaison and referral between expert bodies such as UNHCR and TUSLA.¹⁷¹ The aforementioned information request submitted to the IPO (see section 5.4.1) as part of this research attempted to gain additional information as to how the quality assurance process has had an impact on RSD procedures with respect to vulnerable persons. Detail in the response was limited, stating that ‘some recommendations are also reviewed by a Quality Assurance group which is made up of IPO staff members and the UNHCR.’ It also noted that decision makers are ‘provided with Guidance in the form of a QA [Quality Assurance] Checklist approved by UNHCR in the context of the assessment of international protection claims,’ which includes questions dealing with minors, gender specific issues, psychological distress and symptoms of trauma and trafficking issues.¹⁷² On a similar note, the IPAT’s Strategy Statement 2017-2020 has set as a high level goal: ‘Provide a quality service to the highest professional standards.’¹⁷³ In order to achieve this the IPAT will ‘[t]ake reasonable measures to accommodate all participants so that they may participate effectively in a proceeding particularly for children and vulnerable persons.’¹⁷⁴

With regards to training and competency of decision makers, the first phase Asylum Procedures Directive (which Ireland is bound under) states that decisions on asylum applications be taken by authorities whose personnel ‘have the appropriate knowledge or receive the necessary training to fulfil their obligations when implementing the Directive.’¹⁷⁵ The Directive gives no indication of the required frequency or the modalities for such training (the 2013 recast, however, does refer national authorities to the training competency and guidance material of the European Asylum Support Office) but in order for it to be sufficient to assist decision makers fulfil their obligations with respect to vulnerable asylum seekers, such training would need to be comprehensive and frequent. The information note received from the IPO as part of this research referred to ‘Information sessions on vulnerable persons’ delivered by UNHCR to the case processing staff of ORAC but no such session delivered to its

¹⁷¹ *ibid* 25.

¹⁷² International Protection Office (n 123) 9.

¹⁷³ The International Protection Appeals Tribunal, ‘Strategy Statement 2017 – 2020’ (July 2017) 22.

¹⁷⁴ *ibid*.

¹⁷⁵ Asylum Procedures Directive (n 72) art 4(3).

successor, the IPO.¹⁷⁶ The note mentions that the ‘IPO intends to hold further such sessions for IPO caseworkers and Panel Members on this important topic’ but provides no indication of a timeframe or the content for the session. The note also refers to previous specific training on sexual orientation and gender identity-based asylum claims, and on unaccompanied minors and separated children, as well as forthcoming training for IPO staff on anti-human trafficking and victims of torture delivered by UNHCR in conjunction with NGOs and independent experts. The extent to which the current training regime delivered by the decision making bodies actually support decision makers to fulfil their obligations in practice with respect to the special procedural needs of vulnerable applicants will be explored in the interview findings in the next chapter.

Prior to the establishment of any official policies, research and advocacy had long recognised that certain groups in the Irish asylum system were subject to disproportionate disadvantage in accessing their rights and entitlements. Within a few years of the establishment of the asylum procedure and Direct Provision, concerns about the compatibility of the system with the human rights of certain vulnerable groups began to surface. With respect to accommodation conditions for female asylum seekers, for example, the lack of privacy for mothers with children, communal living spaces and exposure to sexual and gender-based harassment began to raise safety and general wellbeing concerns from an early point.¹⁷⁷ The need for additional funding and limited access to key rehabilitative supports was highlighted early on with respect to the vulnerability of victims of torture arriving in Ireland.¹⁷⁸ The particular needs of child asylum seekers (both accompanied and unaccompanied) and the negative implications of communal living on their development was recognised at the outset of the system.¹⁷⁹ On foot of mounting advocacy efforts, the needs of particularly marginalised groups of asylum seekers began to receive attention in government strategies and thematic reports. The 2007 National Women’s Strategy, for example, included women asylum seekers among ‘groups of women who might be

¹⁷⁶ International Protection Office (n 123) 7.

¹⁷⁷ Peter O’Mahony, ‘Supports for Asylum Seekers’, in Fraser and Harvey (eds) *Sanctuary in Ireland, Perspectives on Asylum Law and Policy*, (2003) 140 – 141.

¹⁷⁸ *ibid.*

¹⁷⁹ Samantha Arnold, ‘State Sanctioned Child Poverty and Exclusion – The case of children in State Accommodation for Asylum Seekers’ (Irish Refugee Council, 2012).

described as having special needs, by reason, for example, of their culture, sexual orientation, geographic location, ethnicity, or a disability,’ emphasising that it ‘is essential that all Government policies continue to take into account the needs of members of these groups.’ The first report of the Irish Government-appointed Special Rapporteur on Child Protection, Dr Geoffrey Shannon, in 2007 noted the emergence of ‘new vulnerable groups [...] that require particular attention.’¹⁸⁰ The report draws attention to the intersectional, multi-layered character of asylum seeking children’s vulnerability, referring specifically to separated and unaccompanied children who are ‘particularly vulnerable not only due to their status as children, but also as members of ethnic minorities and immigrants.’ The vulnerability of asylum seeking children has been a recurring feature of the Special Rapporteur’s reports to the Oireachtas up until the most recent, his 11th report, published in 2018.¹⁸¹

It was in no small part due to that early human rights advocacy that the Working Group was convened, whose recommendations first formally recognised the need for a dedicated vulnerability identification mechanism in the Irish system. The Working Group report noted that a lack of regard for vulnerability can have serious detrimental impact on, *inter alia*: a person’s quality of life in State-provided accommodation, their capacity to engage with asylum procedures and the overall quality of the decision-making process. Key recommendations included the need to rollout a multi-disciplinary vulnerability identification mechanism across the system and to increase resources to decision making bodies to ensure they are competent to identify and respond to special needs.¹⁸² However, recommendations regarding vulnerability assessment do not appear to have been progressed. The Department of Justice has reported the key recommendation: ‘The establishment of formal mechanisms of referral in the case of disclosed or diagnosed vulnerabilities to ensure that such persons are provided with appropriate information, health or psychological services and procedural supports,’ as ‘implemented’ in June 2016 and provided no further detail as to the measures taken to give effect to the recommendation. In response to an information request from Nasc, the HSE cited a number of supports that were in

¹⁸⁰ Geoffrey Shannon, ‘Report of the Special Rapporteur on Child Protection - A Report Submitted to the Oireachtas’ (November 2007) 5.

¹⁸¹ See the Department of Children and Youth Affairs, Special Rapporteur on Child Protection for all publications: [https://www.dcy.gov.ie/docs/Special_Rapporteur_on_Child_Protection/2302.htm] accessed October 2019.

¹⁸² Working Group Report (n 48) 129.

place, such as medical screening offered upon arrival, access to a medical card and the existence of child protection policies for Direct Provision.¹⁸³ However, as noted in the Nasc report, all of these supports were already in place prior to the Working Group report, and none of them reflect any progress on a ‘multi-disciplinary needs assessment at an early stage,’ as called for by the Working Group.

Furthermore, NGOs and statutory bodies *continue* to bring the particular needs of certain groups of asylum seekers into the spotlight. For example, the particular situation of asylum seeking women in Direct Provision was raised by the Irish Human Rights and Equality Commission in its report to the UN Committee on the Elimination of Discrimination against Women prior to its review of Ireland in 2017. All of the Commission’s concerns mirrored those raised over a decade prior, such as the inadequacy of Direct Provision for mothers, including supports and lack of nutritious food for young children, access to maternity services for pregnant women and reports of sexual harassment and violence.¹⁸⁴ In the context of Ireland’s review by the UN Committee against Torture in 2017, NGOs raised issues of vulnerability identification and the particular needs of victims of torture. The Irish Refugee Council, for example, highlighted the lack of a multidisciplinary assessment that would address a vulnerable applicant’s special reception and procedural needs and pointed out the impact on the state’s capacity to issue correct international protection status decisions.¹⁸⁵ Spirasi, which works specifically to ensure access to rehabilitation for victims of torture, noted that the Direct Provision system ‘impedes the restoration of independence, physical, mental, social and vocational ability and full inclusion and participation in society, instead creating dependency, enforced destitution, a lack of privacy and obstacles to integration, all of which prevent a person enjoying their right to rehabilitation under the Convention.’¹⁸⁶ Perhaps most telling is the ongoing situation at time of writing with regards to the aforementioned provision of *ad hoc* emergency accommodation, which demonstrates a complete lack of regard on the part of the State for lessons learned and the issues that have been underscored repeatedly

¹⁸³ Nasc (n 56) 27.

¹⁸⁴ Irish Human Rights and Equality Commission (n 36) 115-117.

¹⁸⁵ Irish Refugee Council, ‘Submission to the United Nations Committee against Torture on the Examination of Ireland’s National Report’ (June 2017) 10.

¹⁸⁶ Spirasi, ‘Spirasi’s Submission on Ireland – United Nations Committee against Torture, 61st Session of the UN Committee against Torture 24th July – 11th August 2017’ (June 2017) 3.

by human rights actors for close to two decades. In many ways, despite some positive developments, the Irish system has become even more precarious for vulnerable protection applicants and meaningful reform with a renewed focus on vulnerability must remain on the agenda.

5.5 – Concluding Remarks : Inconsistency between law, policy and practice in understandings of vulnerability in refugee protection at the national level

There appear to be distinct conceptual gaps in understandings of the role of vulnerability across the separate but interrelated areas of Irish asylum law, policy and practice. In asylum law, provision is gradually being made for recognition of vulnerability in most aspects of the asylum process *except* the application procedures, where such recognition is especially important to enable an applicant to engage with the process and receive a fair hearing. In the absence of any clear legal requirement on the decision maker to identify vulnerability, the burden is on the applicant to make their needs known. This is at odds with government policy, where it appears that different government agencies broadly accept that vulnerability does impact on the asylum seeker's ability to engage with asylum procedures. The strategic aims of the decision-making authorities and development of national standards for Direct Provision recognise the need to consider vulnerability and the special needs of particular groups, as well as the need to modify institutional structures in order to facilitate *access* to procedures and supports throughout the asylum system. However, independent research and advocacy demonstrates that long-standing human rights issues persist with significant gaps between developments in law and policy, and practice. Civil society and independent human rights actors have been instrumental in holding the State to account, sparking ongoing reforms and ensuring and bringing the gaps between policy and practice - particularly with respect to vulnerability - into the spotlight.

To explore the extent of these gaps, why they persist and how they might be addressed - the following chapter will interrogate the interaction of law, policy and

practice in the Irish national asylum system in more detail by engaging directly with practitioners who have direct experience working with asylum seekers at all stages of the refugee status determination process in Ireland. This will provide an opportunity to examine in greater depth the patterns and thematic issues drawn out from the theory and doctrinal analysis, and the gaps between law, policy and practice in the Irish asylum system.

Chapter 6 – Understandings of Vulnerability in National Refugee Law, Policy and Practice: The perspectives of practitioners in the Irish context

6.1 - Introduction

There appears to be a gap between vulnerability as an emerging concept in Irish legislation and policy on the one hand, and the reality in practice on the other. However, due to a lack of existing research, it is unclear how these emerging approaches to vulnerability in international and domestic law and policy play out on the ground. It is worth noting that the experiences of key actors involved in the refugee status determination (RSD) process, who play a crucial role in bridging the gap between law, policy and the practical needs of applicants, are absent from the debate on vulnerability. Bearing in mind the conceptual ambiguity at the international level, it is arguably from the experiences and perceptions of decision-makers, legal representatives and relevant NGOs that the clearest understanding of the impact of vulnerability and its potential value can be gleaned.

Acknowledging the conspicuous absence of the practitioner's voice from the discourse on vulnerability in international protection, this chapter will shift the focus of analysis to the experiences of key actors involved in the asylum process. The aim is to build on the trends that have been charted throughout this thesis to explore how vulnerability might be further clarified and operationalized in the national asylum system. To that end, this chapter will present the findings from in-depth, qualitative interviews with practitioners in the Irish asylum system and analyse those findings through the lens of the key questions guiding this thesis:

- 1. How does vulnerability manifest on the ground in the Irish asylum procedure? (Who is vulnerable and what makes an applicant vulnerable?)*
- 2. What value does vulnerability identification bring to the national asylum system?*

The first question is dealt with in Section 6.2, where four trends are relayed. These trends relate to how practitioners identify and respond to vulnerability, the challenges they face and where these approaches align or contradict the elements of the dynamic conceptual framework for vulnerability. Section 6.3 explores the role of vulnerability assessment on the national asylum system and sets out the value that the concept brings to the experience of the applicant but also the capacity of the practitioner to do his or her job effectively. Section 6.4 summarises the key findings from the interviews in order to set the scene for Chapter 7, which will reconcile the interview findings with the primary research question of this thesis by setting out whether and how the dynamic conceptual framework could be actualised in the national RSD procedure.

Before addressing these questions in detail, the remainder of this section elaborates on the methodology provided in Chapter One by briefly providing some relevant background information to set the context for the empirical component. This includes an exploration of the specific methodological approach and rationale; a profile of the interview respondents; the approach to data analysis, and an acknowledgment of some limitations posed by the qualitative approach employed.

6.1.1 A comment on the methodological approach to the qualitative interviews: Why the need for empirical research with practitioners?

The previous chapter drew attention to the Irish State's reluctance to explore in any substance the possibility that addressing vulnerability might actually contribute to a better quality, more effective asylum procedure. Whatever the reason the State is unwilling to engage with vulnerability, without an understanding of how issues associated with the concept manifest in practice, it is impossible to propose a framework for change. Analysis of legislation and policy can only go so far and, in the absence of existing research, an examination of what is happening at the coalface of the asylum decision-making process is required to fill the existing knowledge gap. Given the need to step outside of the doctrinal space of available law and policy material, adoption of a qualitative component to this research was deemed appropriate and necessary to address remaining information gaps and analyse the emerging legal concept of vulnerability in refugee law against the reality on the ground. In the early

stages of this research project it was agreed between author and supervisor that that qualitative interviews with asylum seekers themselves was neither appropriate, nor necessary to achieve the aims of this research. This was for a number of reasons.

From a conceptual standpoint, the approach to this thesis has been broadly informed by feminist socio-legal literature and methodological theory, where there has been ample discussion of the ethics of interviewing marginalised groups. That discourse has shaped consideration of the positioning of the vulnerable subject in the research process for this thesis. Bearing in mind critique of assumptions of ‘cultural neutrality’ and dynamics of power in qualitative research regarding vulnerable groups, Harding highlights the responsibility of the researcher to ‘strategize about how to use their expertise and resources to conceptualize and articulate social relations in both the categories articulated by the groups studied and also in, paradoxically, the kinds of disciplinary and institutional languages that can be heard by public policy makers.’¹ In strategising about how best to take advantage of the unique research setting of this thesis and the resources made available under the Irish Research Council’s employment-based scheme, the choice was made not to engage with the ‘vulnerable’ subject at all. While there is certainly value to be gained from engaging directly with marginalised groups and giving them a voice in public discourse, that value must be balanced against what is already available in scholarship and elsewhere. As DeVault and Gross emphasise in the context of qualitative feminist research, ‘feminist researchers should avoid using interviews – especially with women in vulnerable and marginalised social locations – as a way to learn things that could be gleaned from available sources.’² They state that interviews either with or about vulnerable subjects should do more than ‘stimulate contemplation’ but that the resulting knowledge should be ‘applicable to the worlds’ that marginalised groups inhabit.³ This resonates with the current state-of-play in Irish socio-legal research where – as demonstrated in the previous chapter - there is an abundance of direct engagement with asylum seekers themselves, which has proved invaluable in stimulating dialogue but has also brought limited or piecemeal tangible change to the circumstances of

¹ Sandra Harding, ‘Feminist Standpoints’ in Sharlene Hesse-Biber, *Handbook of Feminist Research: Theory and Praxis* (SAGE Publications 2012) 54.

² Marjorie L DeVault and Glenda Gross, ‘Feminist Qualitative Interviewing: Experience, Talk, and Knowledge’ in Sharlene Hesse-Biber, *Handbook of Feminist Research: Theory and Praxis* (SAGE Publications 2012) 206.

³ *ibid* 228.

those interviewed. As a counterpoint to focusing exclusively on the vulnerable subject, DeVault and Gross note the value in qualitative research that can ‘explore the lives and actions of the powerful,’ in order to ‘map discursive contexts and ‘regimes’ of ruling.’⁴ Given that this research is seeking to clarify the role and impact of an ambiguous legal concept in the RSD process, it makes sense to concentrate the focus of inquiry on those with the ‘power’ in that process. In other words, the stakeholders who have significant influence on the outcome of RSD can share valuable insight into the challenges in the application of the relevant standards but also the opportunities for reconceptualisation of out-dated norms.

Zambelli makes a compelling argument for reform of the way RSD is conducted that situates the decision-maker at the heart of that process. She states that in order to develop approaches to RSD that can capture the psychological, cultural and sociological elements of an asylum claim, in addition to the legal aspects, there is potential value in focusing not just on ‘structural’ reform but on ‘micro-reform’ by honing in on specific aspects of the ‘refugee / host State encounter.’⁵ In particular, space can be created for facilitating as full and as accurate an account of the refugee claim as possible by focusing on the role of the decision maker and ensuring that they ‘are alert to the psychological, medical, cultural, and institutional factors that could adversely affect a refugee claimant’s testimony.’⁶ While it is true that the decision maker must have some degree of multi-disciplinary competency, to expect them to have the range of expertise to address the different facets inherent in refugee experience is perhaps unrealistic. While agreeing with Zambelli’s focus on the role of the decision-maker in stimulating reform, it is suggested in this thesis that in engaging with vulnerability (which requires a degree of multi-disciplinary competency) the focus should be extended to *all* practitioners engaging with the applicant throughout the RSD process. A qualitative component was therefore deemed necessary to capture the diversity of experience that different practitioners can bring to the RSD process. In their monograph on ethnographic approaches to asylum determination in Europe, Gill and Good describe the core distinction between doctrinal study of the strict letter

⁴ *ibid* 209.

⁵ Pia Zambelli, ‘Hearing Differently: Knowledge-Based Approaches to Assessment of Refugee Narrative’ (2017) 29(1) *International Journal of Refugee Law* 10.

⁶ *ibid* 36.

of law and policy, and empirical ethnographic research, which captures the particular disconnect between policy and practice that this thesis is attempting to bridge:

Legal scholars are concerned with teasing out the ‘correct interpretations of general legal abstractions’ in particular cases [...]. By contrast, the ethnographic approach to law is descriptive, and inherently comparative and relativistic. Their [ethnographers’] analyses seek to set these [legal] concepts and practices within a broader socio-cultural context.⁷

The value of incorporating an ethnographic approach into a traditionally legal field of inquiry allows for findings of doctrinal research to be examined in more depth in their social or cultural environment. The benefits of incorporating a social perspective in doctrinal analysis is that it provides an ‘interface with a context within which law exists,’ allowing research to document how people experience law in their daily life.⁸ Chapters Three and Four of this thesis have undertaken a doctrinal review of relevant international, European and Irish law and policy to chart the development of vulnerability across the different levels of refugee law. However, the utility of doctrinal analysis in developing an understanding of a particular legal concept is restricted by the extent to which that concept has been developed in legislation, jurisprudence or legal scholarship. This study has shown so far that while vulnerability is emerging as a prominent legal concept, European asylum case law and scholarship is inconsistent and the concept has yet to be considered in great detail in Irish asylum law or academia. The doctrinal analysis in this study has brought value by clarifying the legal framework and outlining patterns and trends where vulnerability is emerging, highlighting points of convergence with the aspects of the dynamic conceptual framework extrapolated from the literature. However, in order to clarify the extent to which the dynamic model is genuinely compatible with the reality on the ground, a different approach is required. This chapter aims to probe in-depth the conceptual inconsistencies and normative gaps that have been identified throughout this thesis by examining those findings in practice and further exploring

⁷ Nick Gill and Anthony Good, *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Socio-Legal Studies, 2019) 15.

⁸ Sally Wheeler and P.A Thomas, ‘Socio-Legal Studies’ in DJ Hayton (ed), *Law’s Future(s)* (Oxford, Hart Publishing, 2002) 271.

the value of vulnerability through the experiences of ‘professional actors’ responsible for applying the relevant legal standards throughout the asylum process.

Understanding the impact of vulnerability on a practical level requires an appreciation of the range of actors involved in the system, and their various roles. While Zambelli rightly emphasises the influence of the dynamic between the asylum seeker and the State on the outcome of a claim, the reality is more complex than that. Gill and Good describe the multifaceted network of professionals who can be involved at any stage of the status determination process:

Asylum procedures involve complex interactions between different professional actors (administrators, judges, lawyers, doctors and other ‘experts’, public service interpreters, and so on), regulated in complex ways by national and international legislation; by the rules of procedure developed by or for different bureaucracies or court systems; by the ethical codes of the professional bodies to which these actors belong; and by the unwritten conventions that have arisen through their day-to-day interactions.⁹

With a more expansive understanding of the range of actors taking part in RSD in mind, the value of obtaining the perspectives of practitioners for the purposes of this study is three-fold. Firstly, those with responsibility for applying policies, and ensuring that the correct legal standards are adhered to are naturally best placed to reflect on how and whether those standards are actually being implemented on the ground. Practitioners can shed light on how gaps in law and policy manifest in practice, how these gaps shape an individual’s experience of the international protection application process and ultimately the outcome of the status determination procedure. Introducing a qualitative component to this research allows for in-depth examination of the ‘gaps and variances between policy and legislation as they are written down and as they are practised.’¹⁰ Secondly, first-hand experience of the inner-workings of the asylum procedures can help distil a clearer understanding of

⁹ Gill and Good (n 8) 18.

¹⁰ *ibid* 21.

what vulnerability actually means in practice and shed new light on answers to questions such as who is vulnerable, what makes someone vulnerable and to what extent are understandings of vulnerability and gaps in law and policy reflected in reality. Thirdly, and perhaps most importantly, professionals working in asylum have invaluable practical insight that can help inform the construction of a richer, more nuanced and - most crucially - realistic reconceptualisation of vulnerability as a legal and practical concept. Instead of focusing solely on the needs of applicants, as discourse on vulnerability is wont to do, qualitative engagement with practitioners provides an opportunity to consider the needs of the people responsible for RSD and the application of the relevant legal standards. Key actors who ultimately define what vulnerability means in practice, such as decision makers, legal representatives and support workers, are brought into the spotlight and provided with an opportunity to discuss how the current formulation of law and policy with respect to vulnerability helps or hinders them in their work. Practitioners can also provide key insight into institutional structures or behaviours that perpetuate gaps, as well as the adjustments that may be required to facilitate a more holistic approach to vulnerability beyond codification in law and policy. Highlighting the important role that various stakeholders play in the asylum decision-making process shifts responsibility for identifying and addressing vulnerability away from applicants and redistributes the burden more evenly amongst stakeholders actively engaged in the process. Acknowledging how practitioners can ameliorate or even generate vulnerability is an important step towards the reduction of stigma.

6.1.2 Profile of research participants

An applicant's overall experience of the asylum process depends to a considerable extent on the wide variety of different professional actors, or practitioners, that they come into contact with as part of the RSD process. The term 'practitioner' has been chosen to refer to the respondents in this research for two primary reasons. Firstly, the term reflects the *diversity of actors*, including those outside of the legal profession, who are actually involved in contributing to a high-quality status determination process. While the State authorities are the final arbiter in the first-instance decision-making process, the State is not the sole body with the capacity to

exert influence on the process and its decisions are often made on the basis of material presented by the various supporting professionals involved. In addition to those whose roles are clearly defined in asylum legislation, such as first instance decision makers and members of appeals bodies, other actors have key roles to play. Legal representatives, medical professionals, psychosocial support workers and NGOs actively involved in advocacy on asylum issues are all involved in the application of asylum law and policy and as such constitute core elements of a functioning and fair asylum system along with the State decision makers.

Secondly, the term captures the fact that asylum practitioners are *individuals* who bring to the process diverse subjectivities, personal biases and expertise that can affect the outcome of a case. Various factors can affect an applicant's capacity to engage with the process, such as the personality and comportment of individual practitioners: whether it is a decision maker's aggressive tone in an interview that causes an applicant to withdraw and become unable to deliver their personal account, or a lawyer's rapport with an applicant that helps them to disclose sensitive information about their case. As Gill and Good emphasise, 'each of the actors we might identify as being involved in asylum determination is capable of *acting upon* that process.'¹¹ In the absence of clear policy or jurisprudence, assessment of vulnerability is conducted almost exclusively on the basis of the practitioner's own professional, social and cultural experience, and often requires making judgement calls outside of their sphere of expertise. In this respect, the individual practitioner plays as much (if not more) of a role in defining vulnerability as the applicant does.

23 individual practitioners working in various capacities within the Irish international protection system were interviewed as part of the empirical component of this study. Respondents were sourced primarily through networks developed during the author's time working as Legal Officer with the Irish Refugee Council's Independent Law Centre under the Irish Research Council-funded employment-based PhD programme. Efforts were made to obtain as wide a geographical representation of participants as possible by reaching out to organisations in parts of the country outside of Dublin. Given that asylum applicants are dispersed throughout the country shortly after arrival in Ireland, their level of access to key support is largely contingent on their

¹¹ *ibid* 19.

geographic location, which is often rural or isolated. Formal interview requests¹² explaining the background to the research were sent to senior staff at relevant government departments as well as to NGOs and individual practitioners working in the sector. The resulting pool of respondents spans a wide range of professional areas, all of whom interact with the asylum procedure on a regular basis and are likely to encounter vulnerability in the course of their work. The interviewees can be divided into four broad categories according to the function they exercise in the asylum process: decision-makers, legal representatives, policy advocates and medical or psychosocial support workers.

The first category is the cohort of **decision makers** (five respondents) who are directly responsible for conducting status determination procedures both at first instance and appeals stage. It should be noted from the outset that despite repeated efforts to engage directly with caseworkers of the first instance decision-making body, the International Protection Office (IPO), access was refused on grounds of confidentiality and data protection.¹³ This is in spite of the fact that the information note accompanying the interview requests explicitly states that interview questions respect the confidential nature of the asylum process and do not probe the details of specific cases. Nonetheless, a single interview was granted with the Chief International Protection Officer who oversees the work of the IPO and its processing panel. Information requests were submitted to obtain information on the IPO's approach to vulnerability in lieu of direct interviews with caseworkers. The other decision makers who participated in this research included members of the International Protection Appeals Tribunal (IPAT), who are responsible for reviewing appeals of first instance decisions of the IPO. The interview request was sent to the Chairperson of the IPAT who, in turn, forwarded the request to all the tribunal members who responded on a voluntary basis.

The second category encompasses **legal representatives** (10 respondents) who advocate on behalf of asylum seekers. This category includes State-funded lawyers working out of the Legal Aid Board's International Protection Unit, NGOs and

¹² See Annex I to this thesis.

¹³ E-mails on file with author.

independent law centres which provide legal representation and advice to asylum seekers, and private lawyers. While all of the respondents in this category share as a common feature the fact that they are working on behalf of the applicant, their level of engagement with applicants varies significantly depending on the resources available to them to conduct their work. For example, while any applicant may have access to the Legal Aid Board,¹⁴ the extent to which they are provided with dedicated support often depends on capacity within the Board’s International Protection Unit. On the other hand, independent law centres – such as that of the Immigrant Council of Ireland and the Irish Refugee Council – provide dedicated, tailored legal advice, albeit with fewer clients due to limited funding and resources.

The third category of respondent covers NGOs and professionals whose roles are predominantly focused on **policy and advocacy** work (six respondents), rather than direct engagement with the asylum procedures. While not strictly ‘practitioners’ *per se*, the input of this category is important as they often act as intermediary between the State and applicant on specific thematic issues with a view to shaping reform and promoting the appropriate standards. NGOs such as Nasc¹⁵ and the Childrens’ Rights Alliance¹⁶ were contacted for input as they have a demonstrable history of conducting evidence-based research and advocacy on behalf of asylum seekers, even though neither organisation provides legal representation to people in the asylum process. They do, however, regularly engage directly with applicants and other stakeholders for the purposes of targeted research projects, and both organisations were represented on the 2015 Government Working Group on reform of the Irish asylum system and the Direct Provision Standards Committee. As such they have direct insight into multi-stakeholder dialogue on contentious issues, including vulnerability. The Irish branch of UNHCR was also interviewed given the office’s general responsibility to ensure that Irish procedures are in line with international standards and its involvement in inter-agency groups such as the Working Group and the Standards Committee. Also included within this category of respondent is the head of the

¹⁴ Legal Aid Board, Civil Legal Aid and Advice for International Protection Cases: [<https://www.legalaidboard.ie/en/our-services/legal-aid-services/services-for-international-protection-applicants/services/international-protection-process/the-international-protection-process1.html>] accessed October 2019.

¹⁵ Nasc, migrant and refugee rights centre: [<https://www.nascireland.org/>] accessed October 2019.

¹⁶ Childrens’ Rights Alliance: [<https://www.childrensrights.ie/>] accessed October 2019.

International Protection Policy Unit of the Department of Justice and Equality, responsible for chairing the inter-departmental taskforce leading the transposition of the Reception Conditions Directive into Irish law.

The fourth category of respondent comprises practitioners who operate outside of the strictly legal sphere of the asylum system but nonetheless provide a professional service that is crucial to ensuring that people have effective access to and are fully able to engage with proceedings. This category includes **medical and healthcare professionals and psychological support workers** (two respondents). The individuals interviewed here include representatives of the State agency, the Health Service Executive's Social Inclusion Unit, which focuses on provision of early medical and psychological care to newly arrived asylum seekers.

6.1.3 Structure of the interviews

Given the broad range of expertise of the interview respondents, a predetermined set of interview questions would not have provided the flexibility required to engage with the core issues in-depth. Therefore, the interviews followed a semi-structured format in order to facilitate open dialogue and also to allow for the fact that specific questions might apply to certain practitioners but not others (for example, medical professionals are unlikely to be aware of relevant legal standards). Maintaining the line of inquiry threaded throughout this study so far, each interview covered four thematic areas of discussion.¹⁷ The first section of the interview provided practitioners with the opportunity to introduce themselves, their role in the asylum system and give an initial overview of how they understand vulnerability in the context of their work. The second section of the interview schedule introduced questions that centred on the key question of 'Who is vulnerable?' This section included questions designed to examine the conceptual and practical tools and methods employed by practitioners to assess vulnerability. The third thematic area of discussion addressed the second core question underpinning this thesis: 'What is the value of vulnerability?' Questions posed to respondents under this section of the interview sought to ascertain the impact of vulnerability in the asylum procedure by examining the consequences of scenarios

¹⁷ See Annex II to this thesis for the interview format.

where vulnerability is or is not identified. This section also examined the impact of vulnerability on the practitioner and their capacity to ensure a high standard in their work, for example, by exploring the extent to which gaps in legislation and lack of policy guidance on vulnerability raise challenges for the practitioner. The fourth and final thematic component of the interview drew together key elements of discussion to explore what changes need to be implemented; whether that involves legislative reform, updated policies or practical support such as additional resources, funding or training. The findings from this final component of the interviews inform the basis for Chapter Seven, which proposes what vulnerability assessment under the dynamic conceptual framework might look like in national practice. All respondents were provided with opportunities to provide any additional information that might not have been covered under the questions asked.

6.1.4 Processing the qualitative data

Due to the relatively manageable number of interviews conducted,¹⁸ each interview was manually transcribed and analysed. The findings were then categorised according to the thematic areas covered by the interview format, which were colour-coded for ease of distinction, and compiled in a Microsoft Excel document.¹⁹ All quotes pertaining to the thematic issues discussed were compiled in the Excel database, which was then analysed to identify commonalities and trends within each category. The quotes eventually selected to be used in this thesis are those which are deemed most illustrative of a particular pattern or trend, or which otherwise provide useful insight into the relationship between law, policy and practice in the Irish asylum system.

6.1.5 Limitations of the empirical research

Before delving into the results of the interviews it is worth issuing a few brief disclaimers to set the parameters of the findings and outline the scope of their contribution to this research.

¹⁸ While only 25 interviews were conducted, the raw data comprised approximately 17 hours of audio and over 300 pages of transcriptions, all of which is on file with the author.

¹⁹ Database with findings, as well as all transcripts, on file with author.

Firstly, it's important to reiterate that a respondent pool of 23 practitioners is not representative of all practitioners acting in the asylum system and this thesis does not purport to present the empirical findings as such. As already mentioned, the purpose of the interviews is not to conduct an exhaustive review of all actors involved in asylum procedures. Rather, the interviews were designed to provide a qualitative space for practitioners who represent distinct but interrelated components of the domestic asylum machinery to reflect on questions relating to vulnerability that stem from emergent trends at the international and European levels. This thesis argues that an understanding of the experiences of practitioners and their first-hand knowledge of how vulnerable applicants engage with national asylum procedures is a necessary ingredient in the development of law and policy towards a more dynamic approach to vulnerability. However, that information is noticeably absent from European and international discourse on the issue. Therefore, inviting practitioners to situate international trends and developments in their individual practice and experience allows for a richer examination of the extent to which those patterns resonate on the ground.

Another potential gap in the empirical component of this research, as mentioned previously, is the lack of direct input from first instance decision-makers. Given that the majority of the issues this thesis addresses relate directly to the experiences of vulnerable asylum seekers during preliminary RSD procedures, the perspectives of those who operate those procedures at the IPO would obviously have been a welcome inclusion. Unfortunately, on the basis of the IPO's confidentiality policies, access to individual decision-makers was withheld.²⁰ Some compromise was offered, however. For example, the Chief International Protection Officer, who is responsible for general oversight of the IPO's functions and ensuring that decision-making is conducted in line with appropriate standards, offered to be interviewed, albeit subject to a number of conditions. Audio recording was not permitted, the questions to be asked were to be submitted in advance of the interview and another senior Department of Justice official was also present during the interview. In other words, the IPO set the parameters of the interview. This resulted in a significantly different

²⁰ E-mail correspondence on file with author.

dynamic to that of the other interviews and restricted flexibility to pursue lines of inquiry. The interview was nonetheless a useful exercise in understanding the IPO's position on key conceptual issues related to RSD and confirmed many of the findings of the review of law and policy set out in the previous chapter. Other efforts were taken to fill the gap left by the IPO's wider absence from the interviews. For example, as mentioned in the previous chapter, information obtained through two separate information requests made under Freedom of Information legislation (to the IPO on quality assurance and the International Protection Policy Unit on the transposition of the Reception Conditions Directive into Irish law) provided valuable insight into thinking within State agencies with respect to vulnerability. Data from these requests will be used to supplement the interview analysis where appropriate.

6.2 - Who is vulnerable and how does vulnerability manifest in the protection process?

A primary aim of the empirical portion of this research is to understand the extent to which the theoretical critiques of vulnerability and trends emerging with respect to the concept in the international legal framework play out in practice in the national asylum procedure. As a starting point, this section will look exclusively at the issue of *who is vulnerable and how vulnerability is perceived* by practitioners operating within the national asylum system. The findings from interviews with Irish practitioners suggest that the macro-level lack of clarity in theory and in international law and policy has contributed to a conceptual struggle that individual practitioners tasked with identifying and responding to vulnerability are facing. This conceptual struggle manifested through four trends that emerged from the contributions to this research. These will be discussed in the following pages.

6.2.1 Subjective vs objective approaches to identification of vulnerability

One of the fundamental challenges associated with identifying vulnerability is the tension between the desirability of an objective, clear-cut legal understanding of the concept that can be set out definitively in law or policy, and the need to tap into the

empathic nature of vulnerability that is intrinsic to human experience. This tension is acute in the RSD context, where the role of practitioners is to situate the subjective human experience within a set of objective legal criteria. Many of the respondents in this research indicated that they depend on either objective legal and policy material or their own subjective experience in coming to conclusions with regards to a person's vulnerability or particular needs. When asked how vulnerability arises in their work and how they identify it, practitioners often referred to guidance in law and policy that references specific groups that typically feature in vulnerability discourse:

We do take guidance I suppose from those particular categories [that] are outlined for us, [...] people who show signs of trafficking, people who claim to be victims of torture, people who from your own experience, are traumatised just from their behaviour in the consultation and their general unwillingness to discuss any aspect of their claim or when they do they become obviously upset... where the person is just obviously distraught.

- *Legal Representative Seven (Legal Aid Board)*

The above practitioner touches upon the potential value of interspersing a subjective approach with objective categorisations. She draws on her personal experience and empathy to supplement policy guidelines by identifying 'people who from [her] own experience' might be vulnerable. This draws attention to the fact that even where guidance on the types of vulnerability is set out in law or policy, this may be insufficient in and of itself to capture the range of needs that may present on an individual basis. Initial assessment of an asylum seeker's application requires a degree of competency on the part of the practitioner to go beyond what is provided in law and to observe subtle signs such as body language, withdrawal or general behaviour that might signify the presence of less visible vulnerability.

I don't know how effective a particular guideline might be in that regard [for identifying vulnerability] but I think there are certain situations where you have to, perhaps, trust in the decision maker to make their own judgement call in the moment.

- *Decision Maker One (International Protection Appeals Tribunal)*

One benefit of having groups with particular needs clearly defined is that organisations can set aside dedicated resources and expertise to process those types of cases, particularly those that arise on a regular basis. Some services, such as the State-funded Legal Aid Board have dedicated teams who deal exclusively with cases related to victims of human trafficking and unaccompanied minors whose particular needs are accounted for in specific legal provisions and substantial national guidance.²¹

We have separated children, the children that are in the care of Tusla. And we also have children who are not recognised by Tusla as under 18. ... when somebody comes in and says they're under 18, we treat them as under 18. In the case of the victims of human trafficking, in the Legal Aid Board, we only take referrals from the Gardaí [he police]. So it's only if they've been identified first by the Gardaí that we meet them.

- *Legal Representative Five (Legal Aid Board)*

The benefit to the practitioner is that these categories of vulnerable applicant are easily identified at an early stage in the process due to clearly defined national procedures incorporating the expertise of a multitude of actors through systems of referral. The burden of responsibility for identification of vulnerability on the individual practitioner in these cases is lessened. For example, in the case of the Legal Aid Board solicitor above, they become involved after vulnerability has been identified at the point of application and appropriate referrals have been made to key support services. This allows the legal representative to devote more time to addressing the substantive elements of the case, which is crucial in an environment where capacity is stretched and valuable consultation time is already limited.

²¹ For example, with respect to the needs of human trafficking, the Criminal Law (Human Trafficking) Act 2008 (as amended) sets out the different categories of exploitation for human trafficking and the rights and entitlements of victims where identified. National strategies and policies have been established in the framework of a national anti-human trafficking campaign. Multi-stakeholder networks of referral exist for responding to the needs of trafficked persons in the Irish context. See, e.g. Department of Justice and Equality, *Trafficking in Human Beings in Ireland Annual Report (2017)*. With respect to unaccompanied minors, where a practitioner suspects that an individual might be an unaccompanied minor, section 14 of the International Protection Act allows for suspected minors to be brought under the care of the Child and Family Agency. Upon referral, unaccompanied minors are given an initial, multidisciplinary assessment to capture immediate needs which will inform the development of a tailored care-plan and whether or not making an asylum application is in the child's best interests.

On the other hand, some respondents drew attention to the challenges associated with using objective group-based criteria to identify those with the greatest need and to whom special support or protection should be provided. In the contexts of resettlement and reception conditions in Ireland, for example, the existence of vulnerable groups in law and policy streamlines the process of distributing support to those deemed most in need. However, with respect to the asylum seeker group as a whole, whose members could all arguably be vulnerable for a multitude of reasons, the issues associated with the categorical approach were noted:

We met with the HSE for the [Direct Provision] Standards and we had been talking about vulnerable people like everyone knows what that means and the HSE raised the question "How do you define vulnerability?" because it can be so broad and asylum seekers as a group, without legal status, makes them vulnerable. But then there's people who would be more vulnerable but then you look at the categories in the Reception Conditions Directive and there is single parents but a single parent with children, that could actually make the parent more resilient. And they're not necessarily vulnerable, so it depends, it really is individual circumstances and that goes for all categories. So it really is a difficult concept.

- *Policy / Advocacy Practitioner One (UNHCR)*

As raised in the literature, a consequence of using vulnerability as a means to determine eligibility for additional supports or entitlements is the creation of a somewhat artificial hierarchy of vulnerability within the asylum process. Certain groups have a greater chance than others of being granted resettlement to Ireland, or being granted more favourable reception conditions depending on how vulnerability is construed in relevant law and policy. The ultimate problem with conceptualisation of vulnerability as a tool by which to measure 'need' against objective criteria is that it leads to the exclusion of groups who do not meet those criteria but may still have need. For example, LGBT refugees are considered vulnerable for the purposes of selection for resettlement to Ireland but are not considered vulnerable in Irish

legislation governing reception conditions or asylum procedures.²² Other examples include persons with disabilities and mental disorders, single mothers and pregnant women, who are considered vulnerable for the purposes of reception conditions²³ and accessing rights and entitlements after protection has been granted²⁴ but not during the actual status determination procedure itself.

While the existence of pre-determined criteria and categories in law and policy might mitigate the vulnerability of groups that meet those criteria, this may conversely *increase* the vulnerability of groups excluded from those lists who consequently face an additional layer of scrutiny in demonstrating their needs. For example, the needs of LGBT asylum seekers, whose vulnerability is recognised in European law²⁵ and has been widely documented in research and advocacy on the Irish context,²⁶ are not highlighted in Irish asylum law or policy. The conceptual challenges this poses to practitioners in identifying their needs was evident from the interviews:

Other classes of vulnerable appellants that I've dealt with... I think there's a growing number of... how will I tag them...'gay' claims for want of another description. [...]. It kind of is [on the basis of an individual assessment]. And I mean, I do my best, in line with the role that I'm asked to carry out to keep an absolutely open mind. But what I have found with all the classes of vulnerable appellant [...] the one I find most difficult to approach is an appeal where sexual orientation is at the core of the claim because in my experience a minority of those claims tend to be credible.

- *Decision Maker One (International Protection Appeals Tribunal)*

LGBT asylum seekers are not necessarily vulnerable on account of objective inherent characteristics but more because decision makers and other practitioners struggle to come to terms with the complexity of their specific protection needs. In the absence of

²² UNHCR, 'Resettlement Handbook' (2011), 198.

²³ European Communities (Reception Conditions) Regulations 2018 reg 2(5).

²⁴ International Protection Act 2015, s 58(1).

²⁵ For example, the recast Asylum Procedures Directive in its preamble considers that certain applicants 'may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity.'

²⁶ For example, see: Irish Refugee Council, 'IRC Submission on the National LGBTI Inclusion Strategy' (10 January 2019); LGBT Ireland 'LGBT Ireland Oireachtas Submission on LGBT+ Asylum Seekers in Direct Provision' (29 May 2019); Evgeny Shtorn 'LGBT asylum seekers face double isolation' (*Irish Examiner*, 12 June 2019).

any legislative or policy guidance, the above practitioner admits that he struggles to process claims on the basis of sexual orientation and treats them with a higher degree of scrutiny. His statement about credibility also raises additional questions that merit further exploration. Where applicants are unable to deliver a consistent account of their fear of persecution due to a lack of awareness or inappropriate approaches to interviewing employed by decision-makers, is that individual not vulnerable on account of the particular difficulty they face articulating their testimony? In circumstances where practitioners are conditioned to respond to the needs of specific groups by legislation and literature extolling the vulnerability of those groups on the basis of broad classifications, the needs of groups who do not fit the classic vulnerable archetype tend to be disregarded. Single men are arguably at the bottom of the vulnerability hierarchy and treated with the highest level of scrutiny as they are often perceived as members of society that are sufficiently capable, such as heads of families or even combatants when coming from a conflict situation and therefore often deemed less in need of protection or special support.²⁷

My own personal opinion is that young men are almost - due to the way the categories have been done in the EU asylum *acquis*... young men are actually more inherently vulnerable because they are more likely to receive detention in different countries.

- *Policy / Advocacy Practitioner Two (UNHCR)*

Due to their absence from group-based vulnerability provisions, single men are often less likely to be able to demonstrate eligibility for special assistance and are more likely to fall through the cracks and become unable to avail of the supports they require to access asylum procedures or basic rights and entitlements. Some decision makers, through experience, recognise gaps in vulnerability assessment that reinforce these essentialising qualities. In Irish law, children who are included as dependents on

²⁷ For example, the findings of qualitative research on the experiences of Syrian refugee men in Lebanon conducted by UNHCR and the International Rescue Committee found that ‘the lack of clear evidence regarding vulnerabilities of Syrian refugee men reinforces a misperception that they face no or minimal vulnerabilities compared with other demographic cohorts’, which can have the dual consequences of lending ‘unwarranted force to generalizations about the vulnerability of women and children’ and ‘leaving the very real vulnerabilities faced by refugee men (as well as other underserved groups) unrecognized and, therefore, not addressed.’ UNHCR & International Rescue Committee, ‘Investigating protection gaps, needs and responses relevant to single and working Syrian refugee men in Lebanon’ (January 2016); See also: Lewis Turner, ‘Who will resettle single Syrian men?’ (2017) 54 *Forced Migration Review* 29.

applications with their parents or guardian, for example are not provided with an opportunity to provide their own account of persecution, effectively rendering them ‘invisible’ in the asylum process.²⁸ This gives rise to potentially serious protection concerns:

Accompanied children, I think, are a vulnerable group whose vulnerability is not highlighted because it's assumed – “You're with your parents so it's fine”. I had a case [appeal] recently where the daughter had been raped but no one really wants to hear from the young girl because no one wants to retraumatise her. [...] And the father did most of the talking in her [preliminary] interview. And I was like “What!? You had a medical interview about a rape and the male caregiver’s there?” I mean, he could have raped her! [...]

What I should have done from an empowerment point of view was at least exclude the parents from the room for five minutes and said “This is also your life, this is also your case [...] is there anything you want to say?” [...] But **unless that empowering space** is there for someone who is as vulnerable as this rape victim who has been completely silenced... And I consider myself a very progressive leftie human rights lawyer, but that was something that I have now caught just from my own self-awareness. What am I not catching? That I am not picking up on?

- *Decision Maker Two (International Protection Appeals Tribunal)*

An overly prescriptive approach to categories of who is and is not vulnerable diminishes the *space* in which individuals that are presumed not to be vulnerable can make their particular needs known. Simply acknowledging at the outset that there might be more to vulnerability than what is described in limited law and policy guidance allows for assumptions to be set aside and sets the scene for a more nuanced assessment of an individual’s needs:

²⁸ Catherine Cosgrave and Liam Thornton, ‘Immigration and Asylum Law’ in *Making Rights Real for Children: A Childrens’ Rights Audit of Irish Law* (Childrens’ Rights Alliance, 28 July 2018) 175.

I suppose, bringing it back to the vulnerability thing again, when someone comes in you go, "Tell me anything", nothing will surprise me anymore. Because you've heard it all. [...] You'd hear enough of these stories and plenty of people tell you about compassion fatigue too but your experience on the job is what gives you the ability to know black from white, to recognise vulnerability. It's almost hard to quantify that tangibly, y'know? You're looking at: Are they on medication? What are they telling you? Or what are they not telling you? Based on what you know from their story. **The whole vulnerability thing in a nutshell is: Are they able to get their story across. Are they able to get their information across?**

- *Legal Representative Four (Legal Aid Board)*

The above practitioner links vulnerability to capacity, which aligns with the components of the dynamic conceptual framework, by asking the question: What does the person *need* in order to fully engage with the asylum process? Irish asylum legislation supports the idea of vulnerability as being intrinsically linked to 'need.' The Reception Conditions Regulations describe a person with 'special reception needs' as someone 'who is vulnerable and who has been assessed [...] as being in need of special guarantees in order to benefit from his or her entitlements, and to comply with his or her obligation[s].'²⁹ Similarly, section 58 of the International Protection Act states that 'due regard shall be had to the specific situation of vulnerable persons' in ensuring access to the rights and entitlements for those who have received a positive decision on their application. However, in reality in the Irish context, potential for broader interpretation of vulnerability is stymied by a failure or inability on the part of practitioners to look beyond objective vulnerability categorisations. Some practitioners attempt to overcome this barrier by creating a space (either literally by adjusting the environment, or figuratively by modifying the way in which they interact with the applicant) for disclosure and identification of need. Those who try to override the conceptual limitations of rigid vulnerability classifications do so by employing a subjective analysis of the case that draws upon their own experience and empathic competencies to identify needs that are at first

²⁹ European Communities (Reception Conditions) Regulations (2018) reg 2(1).

invisible or unspoken. Many respondents in this research referred to having recourse to their own professional judgement, feelings, empathy or ‘common sense’ in order to pick up on clients’ special needs that are not initially apparent:

They [the asylum seeker] might not say it themselves, they might not articulate it but you can feel that they've become downtrodden, or they've become apathetic, or they're in despair... and sometimes when you're dealing with a person like that, they might not bring out their story themselves. So you have to, I suppose, adapt your questioning in a sensitive way, if you can, to try and bring out the details from them.

- *Decision Maker Three (International Protection Appeals Tribunal)*

Understandably, the objective nature of legislation renders it unable to capture the intangible, subjective qualities of vulnerability that may only be apparent to the individual practitioner who possesses the appropriate competencies. Formal guidelines for the identification of vulnerability can only go so far and an effective asylum procedure requires having a degree of faith in the individual practitioner’s capacity to reach beyond their professional training. However, a number of practitioners noted that the abstract nature of these skills and that subjective capacity to recognise vulnerability is not something that can be easily taught or set out in guidance. It is something that each individual approaches through the prism of their own experience:

[Vulnerability is identified on the basis of] individualised assessment and of course, kind of what you read yourself, through sort of various specialist books in relation to dealing with, I suppose, vulnerable applicants. [...] I think guidance would be beneficial but I think a lot of it is, when you come across vulnerable applicants, I think you either are able to recognise it [vulnerability] or you're not. I don't know how much training can get someone who's not able to recognise when someone is vulnerable to the point where they will recognise it.

- *Decision Maker Three (International Protection Appeals Tribunal)*

The subjective element of recognising vulnerability is something that stems not necessarily from professional training but tends to be intrinsic to the individual. While it is difficult to impart these qualities upon a practitioner, the respondents in this research suggested that the relevant skills could be developed over time if institutional structures are adjusted in such a way that encourages practitioners to look beyond legislation when assessing vulnerability.

There's a kind of an empathy you need with clients as well. I think you can encourage it but it's hard to train it in and you know you will get people... some people are suited for this kind of work and some people are not... but you need a system to encourage people who are interested in this kind of work and who have the basic skills and are willing to learn. I think if proper training is provided, absolutely you can mould very effective service providers who are able to identify vulnerable clients or who are at least knowledgeable about services people should access.

- *Legal Representative Two (Legal Aid Board)*

At this point, some conclusions can be drawn from the interview findings in relation to the role of both objectivity (categorical approaches to vulnerability in asylum law) and subjectivity (individual capacity for recognising emotive or environmental signs of vulnerability) in recognising vulnerability in asylum casework. Each approach has its respective positive and negative attributes. Clear reference to vulnerable groups in law and policy allows for frameworks to be established so that, when identified, vulnerable applicants are quickly referred to key supports and necessary safeguards can be put in place. However, this approach is inflexible and ultimately leads to the exclusion and further marginalisation of groups or individuals who do not meet objective criteria. On the other hand, practitioners can mitigate exclusion by approaching each case through the lens of their own subjective experience and expanding on existing provisions in law and policy. As this skill is deeply personal, it is difficult to standardise and practice is likely to be inconsistent between practitioners. There is clear consensus amongst respondents in this research that practitioners who are encouraged and supported (through training, mentoring or other means) to supplement the application of legislative provisions with a more holistic,

empathic approach to identification of vulnerability feel most confident that they are able to address the needs of their service users.

6.2.2 Sources of vulnerability: inherent and external sources of vulnerability

The second conceptual theme arising from discussions relating to identification of vulnerability is connected to understanding exactly what gives rise to vulnerability in the first place. When questioned about the definition of vulnerability and vulnerability-causing factors in the context of asylum, responses from practitioners could be grouped into two distinct source categories that echo Mackenzie's taxonomy described earlier in Chapter Two: vulnerability that stems from inherent personal characteristics and circumstances, and vulnerability linked to the person's external environment or surroundings.

You're dealing with people who are vulnerable for loads of different reasons. Partly from the trauma they've experienced, partly by their age, partly by the complete ignorance [in the system].

- *Legal Representative 11 (NGO)*

Persons with inherent vulnerabilities are likely to have arrived in a country of asylum with those traits and may require support to meet their particular needs and to prevent existing issues from worsening. External vulnerability on the other hand, as described by participants in this research, often exists as a result of systemic failings that are the responsibility of the state to resolve. The case in practice, however, is that non-state practitioners must often step in and fill the gap. Both of these sources, if left unchecked, can equally inhibit an individual's capacity to engage fully with the asylum process. Participants referred to the difficulty of identifying vulnerability when there is no real clarity on what exactly it is that vulnerable people are supposed to be at risk of:

I previously worked for a boss who hated the word 'vulnerable'. She said it's "Vulnerable to something. Vulnerable *per se* is a meaningless word." And anytime I wrote it in any briefing, she would mark it out and ask "So

vulnerable to what?""[...] It's vulnerable to what? So, vulnerable to exploitation? Like children are vulnerable to re-trafficking? Vulnerable groups are vulnerable to pressure from the people supporting them? I would say vulnerable to re-traumatisation is a meaningful statement. Because anyone asked to recall their past trauma can be re-traumatised.

- *Decision Maker Two (International Protection Appeals Tribunal)*

Without knowing what it is people are vulnerable to practitioners struggle to both identify vulnerability and put in place measures to address it. Corroborating the critique in the theory, many practitioners argued that to state that an individual is simply vulnerable on account of a specific characteristic lacks substantive or practical meaning unless it is clear exactly what negative outcomes a vulnerable person is at heightened risk of. As the above respondent states, some asylum seekers may be 'vulnerable to re-traumatisation.' If the practitioner becomes aware (through their objective and subjective analysis of the case) that an individual is at risk of being re-traumatised, they can put in place measures to lessen the chances of that happening. Vulnerability here gains meaning when it is associated with a specific outcome that should be avoided. If we apply this formulation to the broader area of international protection and the host of rights that should be available to an applicant within that system, then a person becomes vulnerable when their access to those rights is restricted. The extreme consequence where vulnerability goes unaddressed is that capacity to participate in the asylum procedure is reduced, the applicant receives a negative decision on their protection claim and they are returned to a country where they face persecution. Feedback from respondents in this study supports this view that asylum seekers become vulnerable where an aspect of their specific experience reduces their capacity to engage fully with the asylum procedures.

In my opinion, [a vulnerable person is] somebody who needs extra support, whatever that support is. So, for us, you could say then that every person who applies for asylum is vulnerable in the sense that they need us, legal representation, and then they may have other particular vulnerabilities like, do they need counselling? Do they need to be referred to the Irish Refugee Council? Do they need extra assistance filling out a

questionnaire because we can only give them the hour and a half or two hour consultation? Do they need someone to actually sit down and write it with them? Each of those being a vulnerable... characteristic.

- *Legal Representative Seven (Legal Aid Board)*

If we reconsider vulnerability as ‘inability to engage’ with the different aspects of the asylum system, then a clear problem is defined and it becomes possible to identify the causes, or sources of that problem. Vulnerability then becomes less abstract and easier to mitigate by the individual practitioner. A victim of torture, for example, may be vulnerable to re-traumatisation if an inappropriate approach to interviewing is taken by a decision-maker, which would make it very difficult for them to cooperate with the process. Where this particular need is recognised, steps can be taken to reduce the associated risk and increase their chances of having a fair hearing. It is through this lens of vulnerability as a barrier to engagement with the asylum process that practitioners identify inherent and external sources of vulnerability. Firstly, people can be vulnerable on account of broad objective characteristics that are defined in national legislation and policy, such as age or gender but are nonetheless personal, often immutable characteristics of the individual:

If I was going to say categories of vulnerable people, I would say children, elderly, victims of torture, victims of trauma or any kind of violence, in particular sexual violence.

- *Decision Maker One (International Protection Appeals Tribunal)*

Inherent vulnerability may also be connected to less overt features of a person’s experience, such as undisclosed mental health problems, trauma from torture or sexual and gender-based violence, or difficulties associated with a person’s sexual orientation.

Where we don’t get it [vulnerability identification] are the undisclosed victims who are ashamed of their rape, whose husband doesn’t know about the rape, who has never told anyone about the rape, not even her lawyer... We don’t see those [vulnerabilities]. I’ve probably had people

before me who have had undisclosed sexual violence. The example I always give as well is, having a male client - a kid from Afghanistan, a female solicitor and a male interpreter. Three consultations later, one day the male interpreter is sick [...] a female interpreter comes in. The kid, who is like 16, has a breakdown in the corner of the room, discloses that he has been raped twice. On his knees, rocking in the corner of the room. I've never seen someone have a dissociative meltdown that bad. So, me and the solicitor are there looking at each other going ... "Holy f*ck, we're not trained to deal with this!" No-one had ever asked that kid what his gender preference was ...

- *Decision Maker Two (International Protection Appeals Tribunal)*

Less overt vulnerability poses challenges for the practitioner because often the asylum seeker is unable or unwilling to disclose their needs. The practitioner often has to rely on their subjective experience and competencies to identify signs that might prompt additional consultation and questioning, or create that aforementioned 'space' to facilitate disclosure. However, once vulnerability is identified, practitioners can take the necessary steps to reduce the negative impact of that vulnerability and prevent the type of incident exemplified above, whether by adjusting information-gathering approaches or referral to more appropriate supports:

Part of our pre-questionnaire consultation is information-gathering and we have this kind of questionnaire of our own that we fill out. And one of the parts is about medical issues, so we would be asking people like "How are you feeling? What are your medical needs? Do you need to talk to somebody?" And also like if people are getting upset in the consultation when they talk about their stories, we ask them "Well, have you gone down for your screening, have you talked to your GP yet in Baleskin? Are you having trouble sleeping? Do you think you need to talk to someone?"

- *Legal Representative Seven (Legal Aid Board)*

In addition to inherent vulnerability, many practitioners acknowledge that aspects of the process that can be described as ‘external’ to the asylum seeker’s personal circumstances might also create vulnerability or further-entrench existing issues. As noted by Makenzie, these external sources are usually systemic in nature or are a feature of the individual’s environment or surroundings.³⁰ With regards to reception conditions, for example, the geographic isolation of many Direct Provision centres can have a significant impact on an asylum seeker’s access to crucial support services that are necessary for both their wellbeing and ability to input to the protection process.

We know very well that when people are moved from Dublin, it’s very difficult for them to access psychology services, in particular. It’s a lottery. If they stay in Dublin, they can continue to work with us...

- *Support Worker One (Health Service Executive)*

Lack of access to crucial supports, combined with the extended length of time people inevitably spend in Direct Provision, ultimately means that symptoms of trauma such as anxiety, stress or depression become compounded. By the time someone is scheduled for their substantive interview with the International Protection Office, often over a year after they have arrived in the State, their capacity to deliver a coherent testimony is significantly reduced. Late disclosure of vulnerability can add further complications. As one tribunal member noted in the case of disclosure of sexual violence for the first time at appeal stage: ‘[in cases where] rapes were not disclosed at first instance. [...] That can raise a credibility issue.’ Where a decision-maker may not be aware of the external factors contributing to a person’s failure to disclose information pertinent to their protection claim, this may be perceived as a lack of cooperation, as opposed to a lack of capacity, on the part of the applicant.

In terms of do I think that they’re vulnerable within the system, quite apart from their ability to express the substance of their claim, I’m not so sure on that. I haven’t really given that much thought to be quite honest. I

³⁰ Catriona Mackenzie, ‘The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability’ in Catriona Mackenzie and others (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 38-39.

mean, I don't know for example whether there are issues within Direct Provision; I don't know how they're housed. That doesn't tend to come up at appeal hearings.

- *Decision Maker One (International Protection Appeals Tribunal)*

The above statement exemplifies the disconnect between the constituent components of the asylum system. While it is not necessarily the responsibility of appeals tribunal members to be *au fait* with the details of the applicant's accommodation situation or the failings in the asylum reception system, where such failings nonetheless inhibit access to medical or legal support, a broad knowledge of reception deficiencies arguably enhances the overall fairness or effectiveness of the procedure. It should also be noted that where a decision maker is unaware of information relevant to the person's particular needs, this is often because the applicant does not have a legal representative who can elicit and present such information on their behalf. Similarly, conditions in Direct Provision may give rise to security or safety concerns for the individual that may intensify vulnerability where special reception needs are not identified or acknowledged in the designation of accommodation:

Well, when I met him [client in the asylum process] he was very vulnerable and he experiences - because he's obviously gay and one of the things about being gay in the Direct Provision system is that if you're from Zimbabwe, you're sharing a room with men from Zimbabwe. So there's bullying, there's all that stuff.

- *Support Worker One (Health Service Executive)*

In the absence of systematic vulnerability assessment, in cases like the above, where a gay man is accommodated with other men from the same cultural environment that the person is fleeing will at best be deeply uncomfortable for the individual, or in the worst case scenario it may effectively replicate the persecutory environment from which they fled in the first place. Similar scenarios may occur for other applicants, such as victims of gender-based violence who might require accommodation in a women-only facility.

Applicants may also become susceptible to external sources of vulnerability in the asylum procedures themselves. Feedback from practitioners demonstrates that in the lack of any legal obligation to assess procedural needs, the onus is very much on applicants themselves to raise any special needs at the outset of the process. This may be difficult or impossible to do if they do not have support from a lawyer or their particular needs inhibit them from doing so:

Literacy is an issue. And there's the other vulnerable group. People who, to an extent, in terms of understanding the process... Not that they're not intelligent. I was with a couple from Afghanistan today, most competent, intelligent people but they have no formal education. And their ability to understand the process and the changes now and the new interview for subsidiary protection and refugee status [with the transition to the International Protection Act] is limited. [...] So they would be vulnerable in the sense of ignorance. Not lack of intelligence.

- *Legal Representative Nine (Independent Practitioner)*

Without any formal mechanism in place at the outset of the asylum application process to identify vulnerability, the needs of people such as the above couple who may otherwise present as fully capable, often go unmet. For applicants with limited or no literacy skills, this poses significant challenges in a system where some of the most important aspects of the application process is conducted on paper and one is expected to complete a detailed 60-page questionnaire and access legal aid and other supports on the basis of printed material provided at the point of application. There is a high chance that those applicants will be unable to obtain or understand information necessary to ensure that they are in a position to do their protection application justice. Similarly, access to information and capacity to interact with the procedure is significantly impacted by inconsistency in the quality of interpretation services provided by the state:

I think the language barrier for some is huge. I speak French and I have had occasion to kind of stop proceedings. I had one occasion where the

applicant was asked something precise like “When did this happen?” She had said the day, the month and the year and only the year was translated.

- *Legal Representative One (Independent Practitioner)*

This corresponds with existing research that highlights gaps in provision of interpretation services.³¹ Relaying a full and accurate account of one’s claim for protection is crucial to ensuring a successful outcome. However, where the system fails to provide adequate support to people with particular procedural requirements such as access to information for illiterate applicants, or quality interpretation services where there is a language barrier, the ability of the applicant to communicate their case is drastically reduced.

Practitioners also described the particularly precarious circumstances of individuals impacted by vulnerability arising out of a combination of both inherent and external sources. In general, many respondents acknowledged the wide-ranging nature of disadvantage experienced by people in the asylum process, often by virtue of their position of relative disempowerment within Irish society:

... and there’s the intersectionality of ethnic minorities around racism, who are more likely to be carrying a mental health [issue], who are disempowered financially, who can’t work, who are excluded from society, who are more likely to be carers of multiple children... y’know... all these intersectional vulnerabilities compounded by the fact that they are treated so badly throughout the process.

- *Decision Maker Two (International Protection Appeals Tribunal)*

As established in the European jurisprudence, all asylum seekers are automatically in a situation of disadvantage once they flee their country of origin due to their lack of State protection and precarious legal status throughout their journey and in their country of asylum. Practitioners responding here noted that default state of disadvantage can be compounded further where needs stemming from multiple

³¹ Crosscare Information and Advocacy Service ‘Do you speak English? A study on access to interpreter services in Public Social Welfare Offices in Ireland’ (2018) 6.

sources overlap. This intersectional quality to vulnerability is characterised where an individual might have one or more needs arising out of their inherent and external personal circumstances, such as their personal experience of persecution but are also impacted by systemic failings that may exacerbate those needs:

I have a guy – he’s post-polio syndrome and he is homosexual and his claim is linked to both. And he had problems here in the [Direct Provision] hostel in Ireland. That is a guy who is vulnerable. Now the guy is out in UCD doing a science course, he doesn’t have any cognitive issues, but you couldn’t say he’s not vulnerable. The guy has to come into the room with braces on him and crutches and he’s also telling you he’s homosexual and there are often issues in the hostels here [with homophobic behaviour]. [...] Someone in RIA puts him miles down the country when he needs to be based in Dublin for access to Spirasi, or access to medical care treatment... what are you putting this guy down in Athlone for? And why are you putting him on the second floor of the hostel? That’s a kind of vulnerability: Is there practical stuff?

- *Legal Representative Four (Legal Aid Board)*

The man in the above case could be described as having particular needs on account of inherent vulnerability arising from both his medical condition and sexual orientation. By failing to account for the man’s medical needs in assigning him a room on the second floor of a Direct Provision centre that is geographically isolated from medical support services, and by leaving him at risk of homophobic bullying, there is a heightened risk of the man’s physical and mental wellbeing deteriorating. The State is creating additional layers of external vulnerability that may inhibit his capacity to participate fully in the asylum procedure and secure the appropriate outcome in his case. The above example demonstrates the crucial role the practitioner plays in removing some of those layers.

The feedback from respondents in this research indicates that vulnerability cannot be understood as stemming exclusively from a person’s categorisation or membership of a particular group. Similar to Mackenzie’s taxonomy of different sources of

vulnerability, vulnerability in the national asylum system can arise out of the protection applicant's personal experiences, be caused or exacerbated by external, systemic factors, or an accumulation of different sources. The mechanism for identifying vulnerability in the national asylum system, therefore, must have capacity to recognise these different sources.

6.2.3 Dependency on additional resources and support to assist with identification

Many practitioners who engaged with this study indicated that, irrespective of their levels of experience or confidence in dealing with issues of vulnerability in their casework, effective vulnerability assessment is often dependent on the availability of resources to facilitate and inform analysis. Evidence from this research suggests that by increasing investment in resources, practitioners are better able to identify special needs at an earlier stage in the process and, in turn, decision makers are able to deliver more accurate decisions. On the basis of the interview responses, 'resources' for the purposes of identifying vulnerability in the asylum process can be divided into two categories. They can refer to internal resources, such as availability of qualified personnel, tools for capacity building, or funding, or they could be external resources such as outsourcing expert input or support on a case.

With respect to the first category, practitioners cited the importance of regular, ongoing training to ensure that they can remain abreast of developments in the ever-shifting legislative and policy environment of international protection. Staff of the Legal Aid Board, the International Protection Appeals Tribunal and the International Protection Office (on the basis of conversation with the Chief International Protection Officer), in particular, noted the value of ongoing training for their organisations whose staff may not necessarily have in-depth experience with cases dealing with issues of vulnerability or intercultural sensitivity.

More can be done [to build personal capacity]. Training is always good. In fairness, we had UNHCR training last November. [...] We had a 3-day training course with UNHCR that was exclusively just [Legal Aid] Board staff. Every year – putting my management hat on for a second - we

would have this Proper Management Development System, which would help identify every staff member's training needs. And obviously, you're talking about their career development and everything else, what's keeping people motivated but you're also looking at what's required for the job. There's a huge amount of on-the-job training people can do.

- *Legal Representative Four (Legal Aid Board)*

Both the IPO and the IPAT, while they require prospective recruits to have a legal background or a qualification to practice as a lawyer, don't have an explicit requirement for staff to have experience working with refugee law or vulnerable persons.³² Some organisations attempt to fill this potential knowledge gap by inviting external experts, such as UNHCR, to deliver training on specific thematic issues.³³ As mentioned above, the Legal Aid Board also implements internal professional development policies, to identify training needs or areas where staff might feel they need additional support. Staff of the IPO also receives training on specific thematic issues. According to information obtained through information request, UNHCR has previously provided 'an information session to staff of the then Office of the Refugee Applications Commissioner (ORAC) on how to deal with vulnerable persons.'³⁴ No indication was given as to when or how often this training occurred or to its content. The note mentions that the 'IPO intends to hold further such sessions for IPO caseworkers and Panel Members on this important topic.' No information was provided regarding when or by whom these sessions will be delivered. The IPO has however received training on specific issues since the International Protection Act has come into force. While not engaging the concept of vulnerability more broadly, the information note added that '[l]earning from the [quality assurance] process is fed back to IPO staff and Panel members through their teams. UNHCR also meets staff and Panel members and specific follow up training is also provided as required having

³² Information received on the basis of interview discussions. See also: Irish Naturalisation and Immigration Service & International Protection Office, 'Information Note – Case Processing Panel Member' (June 2018) [<http://www.ipo.gov.ie/en/IPO/Case%20Processing%20Panel%20Information%20Note.pdf/Files/Case%20Processing%20Panel%20Information%20Note.pdf>] accessed November 2019 (copy also on file with author).

³³ In 2018, as part of national RSD quality initiatives, UNHCR has conducted 'multi-agency training in a number of additional areas, including on asylum claims related to Sexual Orientation and Gender Identity to staff at the IPO and IPAT.' See: UNHCR, 'Ireland Factsheet, January – December 2018' (December 2018) [<https://www.unhcr.org/en-ie/5d8dcacd4.pdf>] accessed November 2019.

³⁴ International Protection Office, 'Quality Assurance and Dealing with Vulnerable Applicants in the International Protection Office – Information Note' (21 December 2018) 1. (Received through information request December 2018. On file with the author.)

regard to lessons learned.³⁵ Practitioners noted throughout the interviews that the value of any training they receive is undermined by its *ad hoc* delivery, non-compulsory nature and a high turnover of staff within the international protection sector, which makes retaining any specialist knowledge within organisations a challenge.

I only get this [vulnerability identification] because I represented refugees for five years [...] now I'm a Tribunal Member. My "training" was working in the area for 8 years before... we need more [...] guidance and training. It's just, with training, the turnover is so high in this sector. People need the same training every couple of years. It's *ad hoc* [and] you can't really plan for it. If you're not there for the one child training, you will not get another one for approximately five years. [...] Tribunal Members are trained for four days at the beginning. It's compulsory but you don't take it in. [...] And some of them have never done refugee law before. [...] So to get to grips with that and all the other stuff around sensitivity and vulnerability... it's just a big ask.

- *Decision Maker Two (International Protection Appeals Tribunal)*

In the absence of a consistent programme of training or professional development, the above tribunal member relies on her own skills developed over the course of many years to respond to complex casework issues. As she notes, new tribunal members who might not come from an international protection, or even an immigration law background are faced with the dual challenge of familiarising themselves with the application of an entirely new area of law along with the interpersonal demands of working with people who may be suffering from trauma or other conditions linked to their flight from their country of origin.

A common refrain amongst practitioners is that developing interpersonal and intercultural sensitivity is crucial to identifying vulnerability and particular needs amongst asylum seekers. A comprehensive training programme is a good start but the *ad hoc* approach to training currently employed in Ireland means that many

³⁵ *ibid* 10.

practitioners must rely on their specific experience to identify vulnerability and handle complex client needs. In the absence of training opportunities or resources for implementing comprehensive training programmes, some organisations have sought to capitalise on in-house expertise:

The two solicitors that work in the trafficking unit gave us training on identifying victims of trafficking, so a lot of the training comes from within the organisation. Just from people who have been working there for years and years.

- *Legal Representative Seven (Legal Aid Board)*

The Legal Aid Board, which has dedicated units to deal with particular types of case where special needs are likely to arise, ensures that those staff are given the opportunity to impart their specialised expertise to other practitioners who might be the first point of contact for the organisation's service users. The Legal Aid Board's caseworkers, for example, often meet with clients for an initial consultation before the solicitor responsible for the case does. Internal training from lawyers with special expertise enables caseworkers to identify vulnerability at the outset and ensures that when solicitors do meet with their clients, they are adequately prepared so as to make best use of limited consultation time. Given the difficult subject matter many practitioners process on a daily basis and the associated risk of vicarious trauma, one respondent noted that she ensures that all induction of new staff includes consideration of self-care as a matter of priority:

I have done, largely out of my own initiative, whatever training is actually available. I've done things like go to the Dublin Rape Crisis Centre training on working with a vulnerable person who has experienced sexual trauma and that's got nothing to do with working with an asylum seeking woman but it is providing you with skills not only to facilitate disclosure by your clients so you can then serve their best interests but it gave me coping mechanism tips for like, not taking on board that information. Healthy tips that could be incorporated into professional training as well at an early stage. When I do induction training, either with new staff or

interns, I will say to them “Some of the content that you are going to read on that file is going to be disturbing and I don’t expect everyone to have the stomach to deal with that, but there are a couple of things that you can do, which is to realise that you’re going to do something constructive for that person – you’re not just hearing that information for no purpose. [...] So there’s all of these things but I certainly would have been given no training about that, whether it was in the Kings Inns first of all, or as solicitor training, to deal with that.

- *Legal Representative 11 (NGO)*

Many of the issues that asylum practitioners are likely to face will require skill sets that are outside of their specific area of expertise. The above practitioner compensates for this by ensuring that staff attend trainings with organisations on developing skills and competencies in areas that might be outside of the legal framework but nonetheless cover issues that are relevant to the asylum context. A practitioner who is unable to process or appropriately engage with upsetting or disturbing information is least likely to be able to identify and respond to vulnerability.³⁶ Some organisations such as the Legal Aid Board and IPAT also have internal guidelines, as well as some publicly available policies, that set out some standard operating procedures, including how to identify and respond to the specific needs of some vulnerable groups. A number of practitioners noted that they would have recourse to this guidance as a starting point when engaging potentially vulnerable clients:

Where do we get our guidance from? There’s the Circular on Legal Services, but it doesn’t really say what is a vulnerable client, it just says what we do with people who are vulnerable. [...] When we meet for a pre-questionnaire consultation, we have a checklist: [reading from document] “Confirm whether presence of vulnerability indicators, e.g. Trafficking;

³⁶ A UNHCR study on mental health and wellbeing of its staff, for example, noted that 38% of respondents in the study who work with UNHCR’s people of concern exhibited risk factors for secondary traumatic stress: UNHCR, ‘Staff Well-Being and Mental Health in UNHCR’ (Geneva, 2016) 83. See also: Helen Baillot, Sharon Cowan and Vanessa E Munro, ‘Second-Hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context’ (2013) 40(4) *Journal of Law and Society* 509; Ranit Mishori, Imran Mujawar and Nirmal Ravi, ‘Self-Reported Vicarious Trauma in Asylum Evaluators: A Preliminary Survey’ (2014) 16(6) *Journal of Immigrant and Minority Health* 1232; Lin Piowarczyk et al., ‘Secondary Trauma in Asylum Lawyers’ (2009) 14(9) *Bender’s Immigration Bulletin* 263.

Domestic Violence; Torture and refer to services.” And then we fill out this [separate] document after the consultation and we have to go through normal things like, for example, specific requests for the interview, like if the client is female, does she require a female IPO officer or any interpreter.

- *Legal Representative Seven (Legal Aid Board)*

Internal guidelines, however, where they deal with vulnerability do so *after* needs have already become known and do not provide any indication of how they should be identified. For example, as the above respondent states, the Legal Aid Board employs a ‘checklist’ approach to confirm at the initial consultation whether the applicant presents signs of conditions that might cause vulnerability. However, if the practitioner is not trained or qualified to identify those signals, or the applicant is unable to express their needs, they go unrecognised. Similarly, the IPAT has its own guidelines, such as on the use of medico-legal reports, which provide interpretative assistance to decision makers who already have expert medical evidence before them.³⁷ However, if a victim of torture or ill-treatment has not been able to access legal advice or other support prior to their appeal, they are unlikely to be able to obtain a medico-legal report and benefit from the procedural leeway granted by such evidentiary support. There is a general presumption in the guidance available to practitioners that the applicant will have already accessed the relevant supports in order to make their needs known.

Another related issue is the fact that many applicants may have already progressed far along into the asylum procedure with unmet needs before they actually meet practitioners who can put those guidelines into practice:

There was one [client] in particular who was in a bad psychological and physical state when she attended here first. And she had already been to the IPO, for example, to make her application for asylum. She’d already

³⁷ International Protection Appeals Tribunal, ‘Guideline No: 2017/6, Medico-Legal Reports’ (20 April 2017) para 4.3. The guideline states: ‘Trauma and psychological vulnerability as a result of Torture may result in vagueness or inconsistencies in the Appellant’s account, and complete accuracy of an account is not to be expected by victims of Torture.’

been in the accommodation centre for a number of weeks. And as I say, she turned up here in a bad state, so where are all the services that should be kicking in before she gets here?

- *Legal Representative Two (Legal Aid Board)*

Things being noticed on appeal, there's a couple of things that strike me... there's a question mark often about the stage at which someone enjoys legal representation. And I think, certainly on the basis of appeals that come before me, they don't always have representation at, I suppose, what's now known as the section 35 stage [the first-instance interview].

- *Decision Maker One (International Protection Appeals Tribunal)*

Late identification or disclosure of vulnerability links in with the second category of resource that practitioners in this study referred to, that of access to external expert support and evidence. Many practitioners noted that external support is instrumental to their analysis of an individual's particular needs. For example, medico-legal reports from doctors and NGOs, such as Spirasi, that specialise in working with victims of torture are important tools for decision makers and legal representatives who want to substantiate personal accounts of torture without subjecting the applicant to a potentially re-traumatising line of questioning in the interview:

I think that from a decision-maker's point of view, having, well ideally, expert evidence but any evidence from a professional who works in the field relevant to the claims of vulnerability is helpful. [...] There's a claim that I accepted just recently, a Zimbabwean claim, where there was a Spirasi report and I accepted the reason offered, that it was only as a result of counselling that the appellant felt able to disclose a fairly traumatic rape.

- *Decision Maker One (International Protection Appeals Tribunal)*

Such expert evidence can mean the difference between a refusal and a grant of an application, however it is not often readily available. Obtaining supporting documentation is often contingent on several factors, including early identification of

vulnerability for which additional support is required, which in turn depends on early access to medical and legal advice. While all applicants are entitled to register with the Legal Aid Board for support, the extent to which applicants are able to avail of this in practice at the outset of the application process is uncertain:

It seems to be, from observing the appeals that come before me, that [appeal stage] is the point at which legal reps get around, if you like, to obtaining or procuring such reports [expert evidence]. I don't think they are always available to the first instance decision makers.

- *Decision Maker One (International Protection Appeals Tribunal)*

There are a number of potential reasons why people might not access external support services upon first lodging their application. While applicants *are* provided with information by the IPO, which includes information on their right to register for legal aid, this is embedded within a detailed information booklet accompanying the standard application questionnaire.³⁸ For people with literacy or cognitive difficulties, as described earlier, understanding or accessing legal aid on the basis of convoluted information booklets may not be feasible in practice. Furthermore, as most applicants are transferred to Direct Provision centres in rural parts of the country shortly after arrival, accessing services that are typically clustered in urban centres such as Dublin is a challenge:

You see it very much depends on where people are living. People in Cork City have got Nasc [migrant advocacy NGO]... I think there's a church-based organisation in Waterford. There's not much down in Kerry at all. There used to be a resource centre but I do not know if that is still operative.[...] The Legal Aid Board used to have clinics and used to have an office in the old Office of the Refugee Applications Commissioner but that's not operational anymore. [...] When the numbers started dropping, our services were cut back and that hasn't been re-established. We used to do information clinics in all the hostels and that's how the word spread

³⁸ Irish Naturalisation and Immigration Service, International Protection Office, 'Information Booklet for Applicants for International Protection' (2017) 14.

and that's how our services were advertised. That doesn't happen so much anymore so we're really reliant on the IPO telling people.

- *Legal Representative Ten (Legal Aid Board)*

In the absence of a formal screening mechanism spearheaded by the authorities at the outset of the asylum procedure, pressure mounts on non-State practitioners to identify vulnerability. Some practitioners noted the substantial strain caused by this additional layer of responsibility to make a judgement call that often requires skills that lie outside of their professional training:

Sometimes even you just might not pick up on it straight away, if someone's not very clear. It does put pressure on you, you want to get the best for the clients but it's just a lot of pressure to kind of make the call. Do I think a person is vulnerable? Do I think they can do an interview? To know what supports to send them to and sometimes there just aren't [supports in place].

- *Legal Representative Eight (Legal Aid Board)*

In the context of the challenges noted above with regards to early identification and access to services, many practitioners have become reliant on the development of informal, *ad hoc* networks composed of different organisations with various areas of expertise that deliver services to asylum seekers. Understandably, some practitioners do not feel confident advising service users on issues that do not fall within their area of professional capacity:

I have to be very aware that I'm a legal professional, my background is in law, not psychology, not anything else. And I suppose that really played into what we do here, and what I do here because the main role, I find, in dealing with vulnerable clients is identifying what vulnerabilities there are and referring to services.

- *Legal Representative Seven (Legal Aid Board)*

Lawyers are not equipped to provide medical or psychological counselling to clients and, *vice versa*, medical or psychosocial practitioners are not qualified to provide asylum seekers with advice or information on asylum procedures. In acknowledging this, a number of respondents in this study noted the value of having access to a practitioner network as a method of identifying and responding to vulnerability:

Typical sources of referral are going to be our other partners in the wider sectors so whether it's the Irish Refugee Council or the Mercy Law Resource Centre [housing and homelessness support NGO] [...] On the domestic violence side of things, we've had a long relationship with Women's Aid and the refuges and stuff, so cases sometimes come from there. They're usually through gatekeepers.

- *Legal Representative 11 (NGO)*

In this sense, internal resources (or lack thereof) for vulnerability identification can be supplemented through recourse to a network of different organisations making referrals and feeding into aspects of the case relevant to their specific expertise. Where an applicant comes into contact with an organisation that provides a specific service and a separate need becomes apparent, the network can be activated and a person can then be referred elsewhere within the network. The different practitioners involved remain in dialogue to ensure that holistic support is provided. The obvious issue with this approach to vulnerability identification is that it can only begin once the service user comes into contact with the competent service provider. On the basis of feedback from practitioners, it appears that the State authorities are not as proactive as civil society organisations in capturing basic needs and making referrals for tailored support:

It does seem like [the authorities] don't seem to have any eye towards vulnerability at all. I mean, it is completely possible for someone with severe mental health issues to never be diagnosed during the course of their application and never to get any assistance because they might not choose to go to a doctor. We had referred one case to the Irish Refugee Council [...] she had really, really severe, unquestionably severe mental

health issues. I think she was in a psychiatric hospital when her decision letters issued and did not have the chance to appeal them. There was no solicitor to pick that up. Which was just shocking. No one made the case, no one looked at that and said, “This is wrong and we’re going to argue it.” There was no one looking out for her.

- *Policy / Advocacy Practitioner Three (NGO)*

A consensus emerging from interviews with both representatives of the decision-making authorities and independent practitioners is that responsibility for identifying vulnerability increasingly seems to be falling to non-State actors in the absence of a formal identification procedure at the outset of the process. The fact that independent organisations are developing their internal capacity to identify vulnerability and building relationships with other actors to respond effectively to asylum seekers’ needs is overwhelmingly positive. The flip side to this however, is that positive practice is not systematic and is very much dependent on variables such as funding (that is often part or wholly provided by the State, an issue that will be discussed in the next chapter), geographic location of services and the competencies of individual practitioners, as well as the capacity of the applicant to identify and access specific supports themselves. Furthermore, given the absence of a streamlined system of referral, asylum seekers access support services at different stages in the application process depending on their particular circumstances. Evidence from these interviews suggests that vulnerable applicants are less likely to access services early in the process, if at all. The lack of a proactive, formal approach to identifying vulnerability within the IPO, given that it is the first point of contact for *all* asylum seekers in Ireland with the asylum process, appears to be a significant gap that must be bridged so that people can access the range of supports available to them in the system.

6.2.4 Concluding Remarks: Vulnerability as a multi-dimensional concept

The interviews provided an opportunity to bring to light various facets of vulnerability that exemplify exactly why it is such a difficult concept to define and operationalize in practice at the individual level in the context of RSD. Interview findings support the broad theoretical critiques that traditional, inflexible approaches to vulnerability

over-reliant on group-based approaches described in Chapter Two ultimately fail to capture the range of needs intrinsic to individual human experience. These failings are laid bare in the asylum process through the experiences of individual practitioners (including State decision makers) who are left to shoulder the burden of responding to vulnerability in the absence of conceptual clarity or a formal approach to vulnerability assessment. However, in the absence of comprehensive legal or policy guidance, practitioners have developed their own understandings of vulnerability through the lens of their particular expertise and many devise innovative mechanisms to respond to the needs of their service users. This proactive approach reveals elements of compatibility with the multi-layered, multi-dimensional dynamic conceptual framework underpinning this research.

The overarching conclusion to be drawn from the interviews overwhelmingly supports the assertion underpinning the dynamic conceptual framework that vulnerability is not a static condition that can be affixed on the basis of homogenous criteria. If applicants can become vulnerable to different things at different points in time depending on their individual circumstances, vulnerability needs to be flexible to account for changes that occur in a person's life. From the analysis of law and policy, and findings from interviews with practitioners as to their understandings of vulnerability, this chapter confirms that vulnerability as it is currently presented in refugee law and policy could be described as rigid and one-dimensional. Consideration of vulnerability in the national system under the auspices of current law and policy is restricted to specific homogenous groups, is unable to adapt to individual needs or changes within those groups and is of limited value to practitioners who work with asylum seekers with a wide range of needs. A reconceptualisation of vulnerability is undoubtedly needed.

In order to formalise a potential solution that is in keeping with the theoretical framework guiding this research, it is argued here that in order to be reconceptualised as a dynamic concept, vulnerability should be understood as 'multi-dimensional.' This encapsulates the range of factors that contribute to vulnerability in reality, and which are difficult or impossible to capture succinctly in law or policy. Such factors include the various sources of vulnerability, diversity in the profile of the individual

practitioner and the temporal quality of vulnerability that sees it fluctuate in intensity over time depending on individual circumstances. The interviews demonstrate that when practitioners employ a dynamic approach (that is, they are able to engage consideration of these different components in their assessment of vulnerability), vulnerability becomes less of an abstract concept and more of a heuristic tool that practitioners can use to support people throughout the RSD process. The following synopsis of the interview findings form the basis of the argument for a conceptual shift towards a more multi-dimensional approach to vulnerability that renders the concept more dynamic and thus more valuable from a practical standpoint:

(i) The current legal and policy framework only supports an objective approach to vulnerability identification on the basis of group categorisations that are set out in limited law and policy. The danger of this is that it creates the possibility that those who do not meet objective criteria may not have their needs identified. Furthermore, in the absence of a formal vulnerability assessment mechanism, even those who do come under objective vulnerable group criteria may go unrecognised. Many practitioners noted that they usually have to supplement these narrow provisions by having recourse to their own subjective experience to identify signs of undisclosed needs. However, the extent of practitioners' subjective capacity relies on a range of qualitative factors including professional experience, interpersonal competencies and organisational opportunities and support for on-going professional development, such as training. Individual practitioners seem to overcome gaps by employing a combination of objective and subjective approaches to vulnerability identification.

(ii) When vulnerability in the asylum context is reframed as inability to engage with the procedures due to either inherent or external sources, vulnerability becomes linked to a clear problem that is possible to resolve. Vulnerability becomes less abstract, making it easier for practitioners identify particular needs. This also deflects stigma away from the concept as vulnerability is no longer exclusively tied to the individual and practitioners and authorities are prompted to look for institutional sources of vulnerability as well as those linked to a person's individual characteristics.

(iii) Evidence from this research strongly suggests that where practitioners (government and civil society alike) operate as part of a network, they are better able to identify and respond to vulnerability early and effectively. Law and policy on vulnerability needs to recognise the vital roles different practitioners play in identifying and addressing asylum seekers' needs and the inter-stakeholder relationships that are necessary to facilitate referral and minimise duplication of resources.

(iv) The trends outlined by practitioners in this chapter accept that vulnerability is not a fixed status, as suggested by law and policy, but rather a temporal condition that increases or decreases over time on a continuum, depending on a person's circumstances at a given moment. A multi-dimensional understanding of vulnerability recognises that vulnerability affects people differently over time and allows practitioners to recognise their role in reducing layers of vulnerability.

(v) Many practitioners acknowledged that intersectionality significantly influences the impact of vulnerability on the individual. Law and policy as currently formulated does not recognise the countless ways in which different sources can overlap and compound vulnerability, which means that many needs may go unmet. A multi-dimensional conceptualisation veers away from the traditional approach of ascribing a single vulnerability 'label' and towards a concept that recognises every person's needs as relative to their particular circumstances and environment, which may generate multiple sources of vulnerability.

6.3 - What is the Value of Vulnerability in National Refugee Status Determination procedures?

This section will explore dominant themes emerging from the interview findings that relate to the impact of vulnerability once it has been identified. Analysis focuses primarily on the value that identification of vulnerability brings to the asylum seeker's experience of the procedure but also looks at the impact it has on the practitioner's capacity to fulfil their professional obligations. The findings will serve two purposes:

Firstly, feedback from practitioners will fill a gap in current understanding on the impact of vulnerability in RSD at the national level, which has yet to be substantively addressed in jurisprudence or scholarship. Secondly, evidence from the interviews will help justify whether or not the development of a more dynamic framework for vulnerability identification and response is ultimately of benefit to the State and the asylum seeker.

6.3.1 Capacity to engage with procedures and access to protection

Vulnerability – when it is identified - informs not just how practitioners interact with applicants but also how vulnerable individuals gain access to those key services provided by practitioners in the first place. Vulnerability has the potential to shape a person’s experience of critical aspects of the application process, including legal representation, their attendance at the IPO or IPAT and the level of additional support received throughout the process.

If you can identify when somebody is vulnerable it informs how we interact, how your legal representation is provided, as well as the adjudication in the IPO. [...] I suppose as well, establishing or identifying the vulnerability as early as possible to get additional support... whether you want to refer them to the MRCI for extra help, or talk to the solicitor about whether we need a Spirasi referral... whether it's just to get them to Spirasi for counselling... as much as the medico-legal report, sometimes, the counselling is important.

- *Legal Representative Two (Legal Aid Board)*

In a resource-tight environment, vulnerability can be used by practitioners as a tool with which to allocate time and personnel capacity. Recognising that unaccompanied children, for example, are far less likely to understand the asylum process and its consequences, some practitioners – such as those from the Legal Aid Board above - allow for more time to be spent with those applicants. Similar provision is made for applicants who don’t fit neatly within group-based vulnerability criteria but for whom other individual needs are present, such as applicants who are illiterate and require

focused support to complete the detailed application questionnaires and other administrative tasks:

I've had a couple of clients who were completely illiterate. And in that case, I will bring in the client. We'll meet for an extended consultation [...]. In both cases, it was someone who also didn't speak English, so we needed an interpreter. So what happens is, the interpreter might read out the question and the client would answer. The interpreter would interpret into English and then I would write it into English.

- *Legal Representative Seven (Legal Aid Board)*

In addition to enhancing access to procedures, vulnerability can have a significant influence on the mechanics and format of those procedures. When identified, vulnerability can permit adjustment of the structure of the interview, including the conduct of the interviewing officer, the line of questioning used and the arrangement of the interview space. Some applicants may not be in a position to request these provisions independently, either because they do not have the capacity to communicate their requirements, or they are not aware that they are entitled to request such rights in the first place. A third party, such as legal representative, can play a crucial role in this regard:

I suppose modifying the environment for a vulnerable person can be either... you know... the guy with physical needs should be on the ground floor. Somebody who has a cognitive impairment, there's ways and means of asking the questions, whether it's avoiding the recall. In a way, you could look at it one way and say that's setting the bar a bit lower in terms of the benefit of the doubt, or you can say, actually no, it's just about being a bit cleverer and fairer to the person getting their story across. That's how I would look at it.

- *Legal Representative Four (Legal Aid Board)*

Making special provision for vulnerable applicants is not about 'making it easy' for some applicants over others. We can recall the link between vulnerability and substantive equality as noted in relation to the function vulnerability serves in the

international human rights system, whereby vulnerability identification can serve as lens with which to magnify disadvantage and inequality within a group. As the above practitioner states, providing additional support to vulnerable asylum seekers is about levelling the playing field in terms of bringing applicants who are at a particular disadvantage in relation to some element of their personal circumstances up to the same level of engagement as is expected of all applicants.

In cases where an applicant is particularly vulnerable, practitioners may attend an interview with their client. Legal representatives are permitted to attend interviews but only for observational purposes and may not intervene unless in exceptional circumstances.³⁹ They may however address any issues that arise during the interviews in follow-up legal submissions and their very presence at the interview can provide emotional support to the applicant or ensure that the decision maker is adhering to the appropriate standards and the applicant can engage fully with the process:

But also the fact that you're there, your sheer presence, I can't think of any other way to put this... but it would put the interviewer on their best behaviour. How they would... the tone... just little things like being able to say "That's 25 minutes now, a break might be a good idea." Little things like that and you'd learn these things from experience, in terms of how... if you'd be dealing with someone who would be vulnerable, whether it's because of something they experienced in relation to their refugee claim or something they experienced in relation to their life, they might... emotions might get the better of them when they are recounting their story. So you would impress on ... maybe have a chat with the interviewer beforehand about how they might go about asking the questions.

- *Legal Representative Four (Legal Aid Board)*

Early identification of vulnerability sets the tone for the person's overall experience of the asylum procedure and allows practitioners to determine the resources that should be set-aside in a given case. It also enables practitioners to ensure that the applicant is

³⁹ International Protection Act 2015, s 35(6).

adequately prepared for their interview but also that the decision maker is furnished with all of the relevant information and materials required to ensure that the assessment of the claim is as comprehensive as possible and the appropriate standards are applied:

Written submissions might highlight [vulnerability]. We might be a little more sensitive if someone's a victim of trauma. Occasionally we've had people not give evidence because the vulnerability was flagged in advance.

- *Decision Maker Two (International Protection Appeals Tribunal)*

Recognition of vulnerability can result in decision-makers giving more latitude with respect to the benefit of the doubt or the line of questioning used in relation to specific elements of a case where substantial documentation has been submitted in advance. However, this will depend on how soon after the application has been lodged that vulnerability has been identified and the relevant submissions made to the IPO. Vulnerability identification in the asylum context is a time-sensitive issue. Value is dependent on it being picked up at as early a stage as possible in the asylum procedure. The earlier it is identified, the earlier that practitioners are able to develop a response plan, which might involve assigning appropriate caseworkers, scheduling additional time for an appointment, making submissions to the authorities or reaching out to relevant referral organisations:

From our perspective, the earlier we could meet with the client the better, so we could make our own assessment... we'd have some conversations with the HSE, who's the guardian [of the unaccompanied minor], before the interview. There might be things we have to set up here ourselves, maybe a female caseworker is best, a paralegal to deal with them. Maybe they want a female interpreter. Maybe there's ... y'know, they'd have to get in touch with us in terms of our diary... we might have to clear a good part of the morning for this.

- *Legal Representative Two (Legal Aid Board)*

Consistent timeliness of vulnerability identification and response is entirely contingent on a formal identification mechanism being in place, which – as the previous sections demonstrated – is not the case in the Irish system. Therefore, while vulnerability certainly adds value in terms of facilitating engagement with the procedures for those who are deemed to be in need of additional support, value is minimised the later in the process that vulnerability is identified, if at all. Evidence from this research indicates that in the absence of a more holistic conceptualisation of vulnerability assessment, those who do not display overt vulnerability are especially at risk of disengaging from the system altogether:

...one [Direct Provision] centre we visited [...] I spoke with him during the visit and he seemed unassuming and quiet. But he did appear to have some sort of mental health issues. We just spoke to the person on the day and that was fine. And then after the visit, the person called. They had been expelled from the centre. And when we looked into the case, it seemed like there had been very difficult behaviour – violent behaviour – at the centre. I think there was substance abuse as well. But we wouldn't have predicted that on the day. So he got in touch with us because he was made homeless [...] But what we found with him, and it has been similar in other cases, is because of his mental health issues he wasn't engaging with a solicitor, he wasn't progressing his asylum application, it wasn't being pursued.

- *Policy / Advocacy Practitioner One (UNHCR)*

The man in the above case, due to the fact that he presents as 'unassuming and quiet,' is unlikely to have raised any vulnerability flags upon lodging his application at the IPO, despite the fact that he clearly has acute psychological needs. His vulnerability was not identified and no consideration was given to his psychological state in designating his accommodation centre. The response to his particular vulnerability, when it did eventually manifest later on in overt aggressive behaviour, was to 'expel' him from his accommodation centre resulting in him falling out of the process completely (a practice which has since been deemed unlawful by the CJEU in the *Haqbin* case described in Chapter Four). Consequences can be severe for applicants

who disengage from the process. In the event that an applicant does not attend their substantive asylum interview, section 38 of the International Protection Act deems the applicant to have failed to cooperate with the process and a decision may be made on his or her case on the basis of whatever information is already available to the IPO (such as the application questionnaire). This means that the applicant will have no opportunity to respond to issues on their case, such as negative credibility findings made against him or her. The fact that the man in the above case was also homeless means that he would not have been able to receive correspondence from the asylum authorities or make submissions appealing any decisions made against him.⁴⁰ As a single, seemingly capable adult male, he also would not have satisfied the vulnerable group criteria set out in law and policy. He was unable to benefit from any value associated with vulnerability identification.

Vulnerability clearly has value as a device for equalising the disadvantaged applicant's access to services and support and engagement with asylum procedures. It allows legal representatives and support workers to allocate time and resources to cases where assistance is required most, and it allows them to ensure that the applicant is adequately prepared for their substantive interview. For the decision maker, vulnerability signals how best to approach and structure the interview in order to obtain the required information and also how best to avoid putting the applicant at further risk. Again, good practice is *ad hoc* and ultimately any value that vulnerability can bring will depend on a range of factors including, in particular, the experience and competency of the practitioner and whether or not the vulnerable applicant is able to access services in the first place.

⁴⁰ Section 16(3) of the International Protection Act requires that all applicants notify the Minister for Justice and Equality immediately in the event of a change of address. A primary reason for this is due the fact that all documents related to the person's international protection application are delivered to them (or their legal representative, if they have one) by post under section 5 of the International Protection Act. If a person becomes homeless, unless they can furnish the Department of Justice and Equality with a surrogate address for correspondence, they will not receive any updates in relation to their claim and risk falling out of the system.

6.3.2 Vulnerability identification as a tool to promote well-being in the asylum process

With long delays in the processing of asylum applications in the Irish system and potentially years spent living in Direct Provision, asylum seekers are at significant risk of developing physical and psychological health difficulties. In the worst-case scenario, as numerous recent cases have shown, long periods in the asylum process combined with no access to adequate support can exacerbate problems and lead to potentially fatal consequences.⁴¹ When discussing the function of vulnerability, practitioners noted that in addition to facilitating access to the procedures, identification of vulnerability also signals risks tangential to the core of the asylum claim but that require prompt intervention, such as medical or psychological issues. With respect to issues that are immediately recognisable, all applicants who choose to avail of Direct Provision may access a voluntary health screening process at Baleskin Reception centre, where asylum seekers are housed temporarily upon lodging their protection application and can receive treatment or referral for any immediate medical needs:

Depending on what might come up for the client, they may display a particular history, physical health, emotional, psychological, whatever. Then we will kind of prompt, suggest, reassure [...] and if they're consenting to it, we'll make a referral to somebody else on the team. That could be [the psychologist], it could be the GP [general practitioner - doctor], the social worker, or whatever. It could be to a community-based organisation that works with [specific groups], it could be Ruhama [NGO that works with victims of human trafficking], it could be Outhouse [LGBT support NGO], it could be anything.

- *Support Worker Two (Health Service Executive)*

⁴¹ See e.g.: Seán McCárthaigh, 'Mother's suicide bid sparks lock-in by asylum seekers' *The Times* (26 April 2019); Eoin English, 'Death of asylum seeker with heart condition should be 'clarion call' for reforms' *The Irish Examiner* (18 April 2019); Jack Power, 'Friends of trans woman who died in direct provision celebrate her life' *The Irish Times* (3 August 2018); 'Woman in direct provision centre took her own life' *The Irish Examiner* (27 January 2017).

The existing screening is an important mechanism that can allow for immediate identification of manifest health concerns and referral to specialist support. However, the screening cannot be understood as the holistic vulnerability assessment envisaged in the CEAS directives, or the dynamic conceptual model for vulnerability, as it is voluntary and only open to people who choose to avail of Direct Provision and is geared more towards responding to serious medical needs. It does not capture the needs of those who choose to live outside of the system or do not avail of the screening due to reasons of incapacity or trauma. Furthermore, the screening is a ‘once-off’ procedure that is delivered shortly after lodging a protection application and before a person is transferred elsewhere in the country for permanent accommodation.⁴² Therefore, the value of the screening is limited in that it is unable to capture physical or mental health concerns that may arise months or years later in the process.

At the beginning [...] we wrote letters, we advocated, we kind of overstretched. It was easier at the beginning to say to RIA, "Please hold this person in Baleskin because they need to attend psychologists." Now that's not the case. It's very difficult. And now, basically, I have to justify it. So, at the moment - I don't know how many people I'm seeing in Baleskin, say 10 people but I'm holding one person. And it is because he has got acute post-traumatic stress disorder. So that means that those other people can be transferred at any time and the next time I'm in Baleskin they're going to go "Ah, so and so was transferred."

- *Support Worker One (Health Service Executive)*

Previously, where someone had an acute medical condition that required they remain in Dublin for access to supports, a member of the Baleskin clinical team would be

⁴² According to the website of the Reception and Integration Agency: ‘Health Screening is made available in our Reception Centre to all asylum seekers on a voluntary and strictly confidential basis. Screening covers Hepatitis, TB, HIV, immunisation status and any other ailments or conditions that the medical officers feel require further investigation and/or treatment. Screening staff also check the vaccination needs of the resident and their family. Arrangements are in place in various parts of the country to offer this service to those who did not avail of it in Dublin. The outcome of any medical tests undergone by an asylum seeker will not affect their application for a declaration as a refugee in any way.’ [http://www.ria.gov.ie/en/RIA/Pages/Medical_FAQs] accessed November 2019. However, research has noted that not all applicants are able to avail of the health screening at the reception centre and access to such support diminishes significantly once people are dispersed to Direct Provision centres around the country. See: Royal College of Physicians in Ireland, ‘Migrant Health- The Health of Asylum Seekers, Refugees and Relocated Individuals: A Position Paper from the Faculty of Public Health Medicine’ (June 2016).

able to informally request that the person is not transferred from Dublin. However, this has become more difficult in recent years as accommodation capacity in Direct Provision has become stretched and the threshold for granting a stay of transfer has increased exponentially. In the absence of a legislative, formal vulnerability assessment process, people with acute health needs and other vulnerabilities easily slip through the initial health screening. If people register with the Legal Aid Board upon arrival and are fortunate enough to have a preliminary consultation with a caseworker or solicitor early, they may be linked in with a network of key supports in Dublin. However, this network is lost if they are transferred to another part of the country:

What often happens is somebody lands, they make their application, either at the airport or the IPO. They take up the offer of accommodation, they go to Baleskin. There they're waiting for removal. They get linked up with all these services and then they get sent to Kerry or Mayo and then there's nothing - the same service isn't available.

- *Legal Representative Seven (Legal Aid Board)*

It is often in this context, after people have been transferred to remote parts of the country, that their physical or psychological state deteriorates, they become withdrawn and in some cases drop out of the system altogether. After people have been transferred, it is up to legal representatives and other support practitioners to step in, provided applicants are able to access those services or make their needs known:

... clients come in with various needs and in various stages of trauma... So you're dealing with all sorts of issues. So, you've got medical, psychological and other supports that they might more immediately need to be dealing with, so I'm putting them in contact with the sexual violence centre, with Nasc, with yourselves [the Irish Refugee Council], depending on where they live. So, I'm putting them in touch with support services and you'd often link in with their doctor as well to see what the scenario is.

- *Legal Representative Two (Legal Aid Board)*

While it is fortunate for people who are able to access legal representatives or other support and tap into a referral network, this puts undue strain on organisations that are at full capacity delivering the services they are already mandated to provide.

Identifying and responding to medical or psychosocial vulnerability does not necessarily come within the remit of practitioners whose responsibility is to provide legal advice. Private practitioners are not under any obligation to respond to vulnerability and may not make referrals unless they are being paid to do so. The Legal Aid Board maintains an external panel of private solicitors to whom international protection cases are outsourced.⁴³ Private lawyers who participate in the scheme are bound to comply with relevant standards, such as those set out in the International Protection Act, which contains no obligations with regards to vulnerability identification in the asylum procedure.

Furthermore, private practitioners on the legal aid scheme are paid fees on the basis of legal representation they provide at specific stages of the application process, so there is little incentive to provide additional support that falls outside of their billable work.⁴⁴ Often, not-for-profit practitioners are left to pick up the slack where private practitioners are unable or unwilling to provide referral support or assistance with issues pertaining to vulnerability that fall outside of the strict ambit of the person's international protection claim:

I suppose the level of care. When you're talking about the need for people to have legal aid... or like, proper legal advice at the start of their application, I think that's where the difference comes in. There's a difference between when someone's application is 'properly' held by the Legal Aid Board and when somebody goes to the Private Practitioner's Panel. Because the difference is huge.

- *Policy / Advocacy Practitioner Three (NGO)*

⁴³ Legal Aid Board, 'Private Practitioner Scheme – International Protection', [<https://www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/international-protection/>] accessed May 2019.

⁴⁴ The terms and conditions of the Legal Aid Board's private practitioner panel outlines the billable support a practitioner may provide, including provision of questionnaire and pre-interview advice, representation before the appeals tribunal, permission to remain applications, adjournments and call backs. Legal Aid Board, 'Terms and Conditions' [<https://www.legalaidboard.ie/en/lawyers-and-experts/legal-professionals-in-civil-cases/international-protection/terms-and-conditions/>] accessed November 2019.

Anecdotal evidence of the quality of such outsourced panels, while boosting capacity, run contrary to the good practice identified in this research. Where different organisations are able to work together as part of a network to provide a holistic level of support, dialogue is maintained between the different actors working on a single case and duplication of resources is avoided and continuity of care is maintained:

With those types of [vulnerable] clients, it's important to keep that conversation to one person, so they're not bumping around between different people.

- *Policy / Advocacy Practitioner Three (NGO)*

Consistent dialogue between actors is particularly important for ensuring that where a person is referred to a different practitioner, they can be fully briefed on relevant aspects of the person's case, where appropriate. This avoids scenarios where the applicant is forced to recall and share traumatic events repeatedly to various practitioners in the process. This network and continuity of care should not just incorporate non-State actors. The decision-making authorities should also be apprised of developments in a given case (with the applicant's consent). For example, efforts can be taken to prevent re-traumatisation during the interview, arguably the most stressful point for an asylum applicant where they are expected to recount in detail personal events contributing to their fear of persecution. Many practitioners, including decision makers, referred to efforts taken to reduce the risk to individuals of re-traumatisation during the interview:

A certain amount of stuff can be done on the papers and you can say that we've sat down with them, we've built up a rapport with them, this is what they've told us their instructions are. We don't think it's in the client's best interests [if a certain issue is raised]. If this is pushed at interview, I suppose we're alerting you to it and if it is pushed and we get a negative, we'll be judicially reviewing it!

- *Legal Representative Seven (Legal Aid Board)*

If it is in the applicant's best interests not to address certain topics during an interview, then supporting documentation being submitted in advance of an interview is critical. Where an applicant is not able to express this wish themselves either in their initial application questionnaire or in writing to the IPO in advance of their interview, the role of supporting practitioners is crucial to ensure that the interviewing officer is able to facilitate the interview appropriately and the protection of the applicant's psychological wellbeing is kept to the forefront of proceedings:

I've been asked in appeal hearings to take a Spirasi report at face value as evidence of that [rape] having occurred. Or at a minimum, I've been asked to... if I want to question in relation to the substance of what is alleged to have happened, that I take care on that. Also, I've been asked to ensure that the presenting officer also take care and I've generally been happy to accede to that.

- *Decision Maker One (International Protection Appeals Tribunal)*

In circumstances where the decision maker does not have information on the risk of re-traumatisation in a case, an applicant might withdraw when questioned about a topic, which can be perceived as avoidance and raise credibility issues. In addition, being forced to recall traumatic incidents in a highly pressurised environment can cause their mental health to deteriorate further and they become unable to give a coherent account of their fear of persecution, which could result in a negative decision. Decision-makers have a duty to explore relevant events in a case, which will likely include traumatic incidents. If discussing a particular incident is likely to retraumatise an applicant and this is not picked up or put to the decision maker in advance of an interview or hearing, then the decision maker will have a duty to address that issue if it is material to the case, unless it becomes clear during the course of the interview that the line of inquiry is having a visibly negative impact on the applicant.

The State has a responsibility to ensure that the asylum procedure upholds people's right to an adequate standard of health if people are to have a reasonable prospect of restarting their lives after a decision has been granted, irrespective of whether that

outcome is positive or negative. A more proactive approach to vulnerability can assist the State to meet this obligation.

6.3.3 Effective procedures and improved quality of decision-making

The previous sections have outlined the value of effective vulnerability identification for the applicant. Feedback from the research also strongly suggests that early identification of vulnerability can be of value to the State by enhancing the overall fairness and effectiveness of asylum procedures. Particularly in the context of a newly-reformed system that is struggling to overcome a legacy of delays, prompt identification of vulnerability and establishment of the appropriate safeguards can enhance the efficiency of asylum procedures by ensuring that all actors involved are adequately prepared, contributing to high quality decisions at first instance and reducing the number of unnecessary appeals.

In the current system, as previously outlined, protection applicants are faced with challenges from the point of lodging their application due to a lack of access to clear information as to their rights, entitlements and the range of services they can access if they need support. Applicants with special needs who require assistance understanding or receiving information on their rights, where they are illiterate or have a cognitive impairment that restricts their capacity to understand the written information provided upon arrival, are particularly susceptible to misinformation. In the absence of early identification and clearly defined networks of referral for those with particular needs, people are often left to fend for themselves in terms of accessing supports. This places an undue burden on practitioners to respond to particular needs that might be outside of their area of expertise:

There's a lot of myths and misinformation with no proper legal advice. Sometimes, I have to explain the system to people. Because they are vulnerable and they already have to deal with going to the Mater [hospital] because they have HIV and this and that and they don't understand the asylum process and the questionnaire...

- *Support Worker One (Health Service Executive)*

As well as the significant personal toll this may take on the applicant, failure to identify and respond to vulnerability at an early stage in the process can exacerbate dysfunction and delays in the asylum system itself. When vulnerability is identified early on in the process, there is a greater likelihood that the applicant is channeled through the appropriate procedures, receives the relevant support and has the best chance at receiving a correct decision at the earliest possible instance. Many of the practitioners in this study noted a distinct connection between early response to vulnerability and the speed at which the case is processed.

Sometimes you can have a situation where a client is almost aging out and you really want them to have the benefit of the fact that they're under 18 and we're finding this more and more, that we're writing... this is even pre-interview, we're writing to the IPO saying "Can you kindly schedule this interview as soon as possible". [...] I find the IPO good when we ask them to prioritise and there's a particular case... I find that they actually do take it out of that pile, or whatever, and they do prioritise it. So there - and we're not on the same side as such - there is cooperation there. They understand we're all doing our jobs.

- *Legal Representative Five (Legal Aid Board)*

As previously noted, Irish asylum law and policy facilitates the prioritisation of scheduling applications for certain categories of applicants, including those who may be considered vulnerable, provided such applicants are identified and their grounds for prioritisation submitted to the relevant authority as soon as possible. Swift identification of those applicants can allow for the scheduling of interviews to be appropriately fast-tracked. The value of a clearly defined network of practitioners working in collaboration with regard to vulnerability response again comes into sharp relief, as the extent to which applicants are channelled through the complex process in line with specific procedural guarantees in practice often depends on the support the applicant receives from an individual lawyer or other practitioner. For those who don't receive support and are not otherwise made aware of the specific guarantees to which they are entitled, the consequence can be that they spend an undue length of

time being channeled through an inappropriate procedure before their specific needs are identified and the mistake is realised:

I'll give you another example of a guy who stumbled into the office, an acutely vulnerable individual who already had a DO [deportation order] for five years at that stage [...] had applied for asylum as a minor and it was not until they had been through that entire process and five years after a DO that somebody was identifying "I think you're Stateless" and having to make an application to revoke a DO at that very late stage. And like, this person now missed their entire youth effectively." And they are not an isolated case.

- *Legal Representative 11 (NGO)*

As the above case demonstrates, in some circumstances the asylum procedure isn't necessarily the appropriate legal channel. However, where an individual is not aware of their rights or does not have capacity to obtain appropriate support or legal advice, vulnerable migrants often succumb to misinformation and end up in the asylum process by default, having been directed there by a member of the public or a civil society organisation with the best of intentions. The likely outcome, unless the person's particular needs and a more appropriate legal avenue are identified, is that the person proceeds through the asylum process and ultimately receives a negative decision on their application, likely after several years due to appeals proceedings, because they are not a refugee.

I could see at that stage the merits of an early legal advice intervention because any clients who had the benefits of consultations prior to making an application either cut straight to the chase in making the actual application that they needed to make or didn't end up applying for protection when it didn't meet their needs...

- *Legal Representative 11 (NGO)*

The value of vulnerability assessment conducted at the outset of the process is not just that it ensures that the applicant has their immediate needs responded to but it also

ensures that the correct legal provisions and procedures are applied and that the individual is in the correct process to begin with. The value for the State and practitioners, therefore, is obvious in that the existing case backlog is not further exacerbated and resources are not wasted, such as through misplaced provision of State legal aid.

Unless they [vulnerable applicants] happen to stumble into the early legal advice clinic of the Irish Refugee Council, or a similar cohort, they're not [being identified]. I'll give you an example. Ruhama just contacted me there in relation to a woman who they have identified as being acutely vulnerable. Non-EU, Eastern European, suspected trafficking indicators all over the place but by the time they'd already met her, she'd already applied for international protection in a language [she doesn't understand]... doesn't know what she has actually put in and then she is being referred through the Legal Aid panel to have a first instance appointment with a solicitor who is one of their new recruits on the panel, who has barely heard the word refugee and starts talking about an appeal...

- *Legal Representative 11 (NGO)*

In addition to ensuring the efficient use of time and resources, early identification of vulnerability and response to needs ultimately ensures that the applicant is fully able to engage with the asylum process and submit an application that is representative of their protection claim. Early response to special procedural or other needs opens up the vulnerable individual's access to the appropriate referral network and can ensure that he or she is equipped with the requisite capabilities to put forward the fullest account of their claim. Early identification also allows for practitioners to adequately prepare the case, so that the applicant is enabled to give a full and accurate testimony during their substantive interview but also to ensure that the decision-maker is able to prepare in advance the appropriate questions and avoid lines of questioning that would be inappropriate or otherwise contribute to the applicant's stress or vulnerability. In some cases, practitioners may accompany the applicant to their substantive interview, to ensure that the interviewer adheres to the appropriate

standards, or simply to provide a degree of moral support to the applicant so that the process is not perceived as entirely antagonistic or interrogative.

I would have attended with what we would have regarded as 'vulnerable', whether there was an emotional vulnerability there, or whether it was a psychological vulnerability - there might be some class of cognitive impairment there that we thought they might not be able to get their story across... or because they might have emotional issues that they might benefit from the moral support... just "You're on my side right?" Just having somebody there.

- *Legal Representative Four (Legal Aid Board)*

A number of respondents noted the value of their presence at substantive interviews as ensuring that the applicant is best able to respond and the decision maker follows an appropriate line of questioning. This form of 'protection by presence' ensures that the interviewer fully discharges their due diligence to fully research the case and examine the relevant elements. Even where the examiner fails to explore a relevant line of inquiry during a substantive interview, the attending practitioner is able to address any gaps, inconsistencies or points where the applicant was unable to do themselves justice either on the spot during the interview, or subsequently in follow-up legal submissions.

You would intervene, obviously, if something was blatantly not going well.... You could offer assistance. You'd be surprised. I remember once, the difference between *mère* and *père*... My Leaving Cert French was enough to change it for them. But an interview could have gone down the wrong route for 10 minutes because an interpreter and the interviewer misheard *mère* for *père*, for example. And you have to be staying alert for little things like that. Little details. But primarily then at the end to make submissions, country of origin information submissions and there's sort of a standard submission that we would make that we would seek a more liberal application of the benefit of the doubt.

- *Legal Representative Four (Legal Aid Board)*

The involvement of practitioners at all stages of the asylum procedures, in particular their attendance at the substantive interview and engagement in subsequent legal submissions prior to and following the issuance of decisions also plays a critical role in identifying maladaptive approaches to decision making with respect to certain categories of asylum applicant. Identification of recurring issues and subsequent advocacy can lead to reform initiatives such as the establishment of policies or dedicated training programmes for decision makers on vulnerable groups. Indeed, the IPO's internal quality assurance process provides an opportunity to identify and respond to the needs of vulnerable groups. UNHCR, who feed into that process through their supervisory role can support the State to ensure that decision making quality is of an adequate standard with respect to vulnerable groups where concerning trends are identified.

So the quality work involves many different areas. Both assistance with practical, operational matters in the first instance, for example. Also, doing reviews of decisions where possible. And then also in terms of training, we would specifically focus on some areas where there may have been a key request from the IPO. So, say for example, we've carried out multi-agency child protection training, which we will do again this year. [...] Another group that arose was asylum claims related to sexual orientation, gender identity. So we brought in an external consultant to carry out training there... to specifically assist with how such cases should be dealt with. Both at first instance and at tribunal level.

- *Policy / Advocacy Practitioner Two (UNHCR)*

More consistent and systematic identification of vulnerability doesn't just help ensure the availability of procedural safeguards for the applicant but also potentially reinforces the overall integrity of the asylum system. Identifying the specific needs of an applicant at an early stage in the process helps ensure that the appropriate checks and balances are in place so that the applicant is adequately supported to convey their claim but also that the adjudicator is provided with all of the relevant material required to assist them make a fair and accurate decision on the case. In line with provisions that already exist in law and policy, a more systematic and strategic

response to vulnerability can result in a more streamlined decision making process, with more accurate decisions at first instance, reduced need for unnecessary appeals and judicial reviews and a healthier asylum system.

6.3.4 Concluding Remarks: The value of vulnerability as a legal and practical concept in the national asylum system

Having analysed the views of practitioners on the issue of the value added of vulnerability as a legal and practical concept in the national RSD process, a number of commonalities can be identified with respect to the value that vulnerability as a legal and practical concept can bring to the asylum system:

- (i) Early identification of vulnerability ensures that applicants with specific procedural needs are referred to appropriate support at the outset of the asylum process and the relevant provision can be made to ensure their full engagement with the asylum process.
- (ii) Many respondents view vulnerability as a tool with which to rectify disadvantage in the asylum system, describing the concept as a lens through which to level the playing field for applicants who require additional support to engage with their entitlements in the asylum system;
- (iii) Practitioners noted the connection between systematic identification of vulnerability and the overall well-being of applicants. Vulnerability assessment is not just a procedural tool but also a critical component of a system that ensures that the physical and psychological health needs of the applicant are met, which in turn ensures that they do not fall out of the system and are able to engage with their asylum application. Early vulnerability identification also ensures timely connection to a support network from the outset of the application procedure, maintaining continuity of care and reducing the need for the individual to bounce from practitioner to practitioner in search of support, which wastes resources and may delay the asylum process.

- (iv) Vulnerability identification is also of distinct value to the State. Where vulnerability is identified early in the process, there is a greater likelihood that the applicant will be channelled through the appropriate procedures, will put forward a robust application with the support of legal representation and other supports, and the decision maker will be adequately prepared to issue an accurate first instance decision. Where vulnerability assessment is systematised, there is potential for reduced delays as the need for unnecessary appeals decreases with higher quality decision-making.
- (v) The value of vulnerability weakens the later in the process it is identified, particularly in the case of persons who have already received a first instance decision on their application or who have been in the process for many years with particular needs going unmet.

While vulnerability as a more nuanced concept brings clear value to the asylum system, all of the above findings are subject to a number of caveats that must be addressed if their value is to be realised in the national asylum system within a more dynamic conceptual framework. The next chapter links the findings from the interviews with the overarching conceptual framework informing this thesis. Set against the findings from the international legal framework and the conceptual issues raised in the literature, Chapter Seven explores how the dynamic conceptual framework for vulnerability can be applied in the Irish context. This may also offer lessons for analogous national contexts in Europe and further afield.

Chapter 7 - Implementing the dynamic approach to vulnerability assessment in national asylum procedures

7.1 – Introduction

Through analysis of the experience of practitioners, the previous chapter revealed patterns with respect to approaches to vulnerability on the ground that show the promise of a shift towards the dynamic conceptual model of vulnerability. However, gaps with respect to the understanding and formulation of vulnerability at the international level also appear to trickle down to the national context. The final component of the empirical interviews provided practitioners with the opportunity to reflect on some of these patterns and to respond to the systemic and conceptual challenges of implementing vulnerability assessment in a way that avoids the ambiguity and negative connotations of the concept.

The next section outlines the constituent components of the dynamic vulnerability assessment mechanism. Drawing on consensus from the practitioner interviews in line with the trends highlighted in international and European law and policy throughout this thesis, it identifies the core components and steps that need to be taken at the national level to actualise that mechanism in practice. However, the research has also demonstrated that such a conceptual shift cannot happen overnight. As any meaningful reform requires careful legislative, policy and practical adjustment, the chapter will close by drawing out some of the key challenges that will need to be overcome in order to embed a more nuanced approach to vulnerability in national asylum systems. While identified specifically in the Irish context, the challenges are largely structural in nature and grounded in the same normative framework governing asylum systems in other countries, so the lessons learned here should be directly applicable throughout Europe and beyond.

7.2 - Defining the dynamic vulnerability assessment mechanism

Respondents in this research acknowledged the fact that vulnerability is in the emergent stages of being assimilated into Irish and regional asylum law, and accepted that the authorities do respond to vulnerability through the adoption of policies on an *ad hoc* basis in response to the needs of specific groups. However, it was also noted that implementation of those provisions is not systematic (if implemented at all) and that without the existence of a dedicated mechanism for methodical identification of and response to vulnerability, people with particular needs inevitably fall through the cracks in the system.

One of the big failings is that sometimes some of the really, really, really vulnerable people, because they're not able to articulate their vulnerability or because it doesn't come across so obviously, that they just kind of slip through the net and they just go through the motions without any form of support or psychological support or network, or even being able to talk to people... and I think that's a big, big failing.

- *Decision Maker Three (International Protection Appeals Tribunal)*

However, defining exactly what shape the vulnerability assessment mechanism should take remains a major challenge. It is evident from the ambiguity of the European courts' jurisprudence that while States have an obligation to identify and respond to vulnerability, prescribing a clear modality by which that assessment should take place is not so straightforward, nor necessarily desirable given the nebulous nature of vulnerability and the disparate approaches to refugee status determination (RSD) from one country to the next. Indeed, the feedback from practitioners on the ground corroborates the findings from the legal analysis, in that it would not appear possible to define a 'one size fits all' modality for vulnerability assessment:

I mean, you need multiple assessments for multiple things. And they also need to happen at multiple times. So it's about multiplicity, really, first and foremost. I think you need a physical and mental health assessment, at initial stages but then at the intervals following on from that.

- *Policy / Advocacy Practitioner (NGO)*

Conversation with practitioners strongly suggests that vulnerability assessment for the purposes of RSD must not be a rigid, once-off mechanism but rather an on-going *process* that is interwoven throughout the asylum application procedure from the point of intention to seek asylum until a decision on the application is reached.¹ Practitioners corroborated the findings from the earlier analysis of policy and practice, claiming that the procedures currently in place for identifying vulnerability are largely insufficient. In current practice, the onus is on the vulnerable applicant to articulate his or her particular needs upon lodging their application at the International Protection Office (IPO). The existing voluntary medical screening in place at Baleskin reception centre ultimately fails to systematically identify or respond to the range of procedural needs people present with. Where good practice has been noted in the interview findings, it is on an individual case-by-case basis and *ad hoc*.

You would imagine that it should be a formal process but it's not. It's on an individual case by case basis – which is what most of the stuff is, you know?

- *Support Worker Two (Health Service Executive)*

The notion of vulnerability assessment as a 'process' fits neatly within the dynamic conceptual framework's presentation of vulnerability as a fluid concept, rather than a static label as it is currently conceived in Irish asylum law and policy. When practitioners are conscious of the need to identify vulnerability on a continuum, running in tandem with the application procedure, rigid or ambiguous legal provisions

¹ Arguably, as section 58 of the International Protection Act provides for 'due regard' to be had for the situation of vulnerable persons with respect to the 'content of protection', vulnerability assessment does not end with the issuance of a final decision on a claim, at least in the case of those who are granted international protection status, and is a key component of the integration process for recognised refugees and beneficiaries of subsidiary protection as well.

can be interpreted in a way that engages with the core elements of the dynamic concept of vulnerability. This section will highlight consensus amongst practitioners illustrating the key features of what this more fluid approach to vulnerability assessment as a systemic process should look like in practice.

7.2.1 Shared responsibility: Vulnerability assessment as part of a multi-stakeholder, multi-disciplinary response

A common question posed by a number of practitioners that is central to reconceptualization of vulnerability is the issue of *who* exactly is responsible for the identification of vulnerability in the asylum process. The applicable law provides a starting point, by placing the overarching obligation on the State. For example, within the EU, the recast Reception Conditions and Asylum Procedures Directives state that ‘Member States shall’ take into account or assess the special needs of vulnerable applicants.² In the Irish context, the recently adopted Reception Conditions Regulations require that the Minister for Justice and Equality ‘shall’ assess whether an applicant has special reception needs.³ This responsibility was also acknowledged in discussion with the head of the International Protection Policy Unit (responsible for overseeing the development of law and policy on asylum matters) who also acted as chair of the task force responsible for overseeing transposition of the legislation:

[Regarding the vulnerability provisions in the recast Reception Conditions Directive]: Our legal advice said that “Member States shall provide the necessary resources”... so, that’s a good pressure on us.

- *Principal Officer (International Protection Policy Unit)*

However, while the primary responsibility to identify or implement vulnerability assessment lies with the State, that is not to say that responsibility should lie exclusively with a single government department or agency, nor does it preclude the

² Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (29 June 2013) OJ L. 180/96 -105/32 art 21; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (29 June 2013) OJ L. 180/60 -180/95 art 24.

³ European Communities (Reception Conditions) Regulations (2018) reg 8.

Government from outsourcing responsibility for technical elements of the assessment to non-State actors supported by the necessary resources.

I think the assessment of vulnerability should be shared. Between the different stakeholders. The IPO are the primary one, aren't they? And then I would think the legal advocates for the client and then whoever the client would consent to include, had they disclosed something voluntarily themselves to an interdisciplinary team - so that could be a psychologist, it could be the nurse, or doctor... whoever... Can you capture vulnerability in one assessment done by one particular discipline or officer, or whatever you call them? I think you can but I think there should be scope built within it for collaboration with others.

- *Support Worker Two (Health Service Executive)*

Indeed, feedback from this research suggests that while vulnerability assessment should be State-led, if it is to be as comprehensive as envisaged under the dynamic model, it must facilitate engagement with non-State practitioners to meet technical needs and bolster capacity. Practitioners recognise that a range of expertise is required to respond adequately to vulnerability and that assessment is beyond the scope of the duties of government officers who register asylum applications. While that first point of contact upon registration is a crucial opportunity to identify vulnerability early, the State should link in with other actors where specialised support is required. Such arrangements already exist. There is a wide range of NGOs already delivering core services to asylum seekers and refugees under EU and government funded schemes,⁴ and there are partnerships such as the aforementioned panel of private practitioners who are outsourced by the Legal Aid Board support on international protection cases. In addition, a mobile health unit supported by the Health Service Executive (HSE) provides medical outreach clinics to asylum and refugee reception facilities.⁵ So, while not explicitly recognised as part of a formal response to a legal obligation to

⁴ For example, many of the key services provided by NGOs who engaged with this research are funded under funding schemes such as the Asylum Migration and Integration Fund, which is open to proposals from civil society organisations on an annual basis and disbursed to successful candidates by the Irish Department of Justice and Equality: Department of Justice and Equality, '2019 AMIF Open Call (AMIF)' (7 October 2019) [<http://eufunding.justice.ie/en/eufunding/pages/2019-amif-open-call-amif>] accessed November 2019.

⁵ Safetynet Primary Health Care, 'Services – Mobile Health and Screening Unit' [<https://www.primarycaresafetynet.ie/services>] accessed November 2019.

identify vulnerability, *ad hoc* partnerships and services through which vulnerability can be identified do already exist.

The need for a multi-disciplinary response to vulnerability in the Irish system was first posited in the 2015 government Working Group report, which recommended that ‘the existing voluntary health screening service should be reviewed and strengthened to provide a timely comprehensive multi-disciplinary needs assessment for applicants.’⁶ However, the report did not expand on what a ‘multi-disciplinary needs assessment’ would look like in practice and, as noted previously, the State has, as of yet, failed to satisfactorily implement many of the Working Group recommendations, including those related to vulnerability. Findings from the interviews, however, provide some indication as to how that multi-disciplinary assessment can be operationalised in practice, as will be discussed next.

7.2.2 Implementing vulnerability assessment as a multi-stakeholder triage

Following publication of the Working Group report and subsequent sporadic commentary around the poor implementation of the report’s recommendations, there was little substantive discussion related to vulnerability in the Irish asylum context. The State’s 2018 decision to opt-in to the Reception Conditions Directive provided a fresh opportunity to engage with vulnerability, placing the concept squarely on the Government’s agenda as part of the drafting process for the transposing legislation. Debate around the transposition of the Directive into Irish law provided a rich substantial basis for discussion with respondents on the legal significance and consequences of the concept for the Irish asylum system. In particular, it provided an opportunity to tease out what a multi-disciplinary vulnerability assessment and its implementation might look like in practice.

While there is already a tacit acknowledgement of the role that different actors can and often do play in the assessment of vulnerability in the Irish context and various pieces of a multi-disciplinary network are already in place, these relationships need to

⁶ Department of Justice and Equality, ‘Working Group to Report to Government Working Group on the Protection Process on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers - Final Report’ (June 2015) 196.

be formalised in order to close gaps and draw the constituent pieces together to create a coherent and comprehensive assessment process. For example, the Irish Government's deliberations on transposition of the Reception Conditions Regulation into national law provide useful insight. Findings from information requests submitted to government and the interview responses indicate that the need for a multi-disciplinary approach to vulnerability assessment was at the core of inter-agency discussion on the transposition of the directive into Irish law. Discussion with the head of the International Protection Policy Unit of the Irish Department of Justice and Equality, who was charged with overseeing the interdepartmental task force driving the transposition process, shared details of frank interdepartmental discussion that took place on the question of what implementation of a multi-disciplinary vulnerability assessment could look like in practice, highlighting State insecurity with the concept:

So, we're looking at some kind of triage system. Some kind of a triage system that would now go beyond the medical [screening currently in place]. Now, I'm getting all kinds of flags with people going, "I'm not trained in this area", and that's true. And we don't expect an amateur assessment either. But is there some way that we can create a space that, if nothing else, tells people "Any time you can tell us. We're going to record the fact that we've raised certain issues with you or that you've indicated maybe yes or no in certain areas and you bring that with you to the next stages.

- *Principal Officer (International Protection Policy Unit)*

The above quote not only confirms that vulnerability is more complex than what can be discerned from a medical screening, but also shows some trepidation on the part of government representatives to engage with the concept due to the perceived resources and competencies required to conduct an effective assessment. It also reveals a misconception within government that responsibility for assessing vulnerability should fall to a single department. However, conceiving of vulnerability assessment as a 'triage' is an interesting suggestion and not conceptually far-removed from the shift towards vulnerability assessment as a dynamic 'process.' The notion of a triage

response is compatible with the essence of the dynamic model, given its capacity to embrace the temporal nature of vulnerability, respond to its various sources and the general function of a triage to identify and prioritise cases for which there is the greatest need for extra or specialised support. A triage, by its very nature, also requires dialogue and input from different actors depending on the needs at hand and the stage in the process the individual is at. Clearly conceptualising vulnerability as a shared burden in law and policy would assuage governmental fear of a single department being burdened with the task of vulnerability assessment. However, as a rapid response system, a triage can only function effectively if it is embedded at the first point of contact between the asylum system and the vulnerable individual. In Ireland, that point is currently at the International Protection Office, after people have arrived in the country. Referring to a current gap in the system between the asylum seeker's entry at the port and them making their own way to the International Protection Office to lodge their protection application, the head of the International Protection Policy Unit noted the heightened possibility of vulnerable persons' needs going unmet or of them failing to lodge an application at all:

Personally, I believe we should radically overhaul what happens when people arrive in ports and airports. I think the offices should be there. [...] And I think people should fully engage there. I find it extraordinary that they're let through [immigration] and [told] "Oh, by the way there's directions to Mount Street [location of International Protection Office]". I'm on a mission [...] to see can we have a presence so that people get access to all of that stuff, all the information about their status and everything, and indeed go through a part of the [vulnerability assessment] process at first instance.

- *Principal Officer (International Protection Policy Unit)*

The above highlights another component of the system that needs to be addressed if vulnerability assessment is to function as a streamlined process from the outset. In Ireland, an asylum seeker's first point of contact with the authorities responsible for asylum is often *after* they have passed through immigration at the port of entry, when they have made their way to the International Protection Office to lodge their

application. While they have been trained generally on international protection issues,⁷ the immigration authorities at the border may not be fully competent to identify or respond to vulnerability or make the appropriate referrals. Given the lack of publicly available information from the Department of Justice on access to the territory for asylum seekers,⁸ it is possible only to speculate on the experiences of vulnerable asylum seekers who have been unable to articulate their intention to apply for asylum and who were refused entry. If, as the above quote suggests, there could be scope for some sort of procedure at the point of entry this would need to be established in conjunction with all of the necessary safeguards that are embedded in the Common European Asylum System for applications at point of entry and border crossing points.⁹ The above quote could also be interpreted as implicitly referring to some form of immigration detention at Dublin airport, which has been in the pipelines in the Irish system for some time.¹⁰ If that is the case, again, EU asylum law contains explicit safeguards with respect to detention, especially in the case of detention of vulnerable persons.¹¹

In this context, a consistent channel of communication between the International Protection Office and the border management authorities (separate departments both falling under the aegis of the Department of Justice and Equality) is essential to ensure that people are able to access their rights. However, at the moment that flow of information does not seem to be in place.

I think it is absolutely time and long overdue that we link in protection with immigration on that service [identification of vulnerability at point of contact]. But I think it should be a substantive service. I think there should be legal advice there. I think there should be a medical situation

⁷ Asylum Information Database, 'Country Report: Ireland 2018' (March 2019) 43.

⁸ Committee against Torture, 'Concluding observations on the second periodic report of Ireland' (31 August 2017) CAT/C/IRL/CO/2 paras 11-12.

⁹ The recast Asylum Procedures Directive, for example, requires that Member States ensure that persons held at border crossing points have access to information, interpretation and legal support in relation to making an application for international protection, should they require. Recast Asylum Procedures Directive (n 2) art 8.

¹⁰ See: Response to Parliamentary Question by Minister for Justice and Equality, Charlie Flanagan (29 March 2018) 14724/18; Cormac O'Keefe, 'Dedicated Immigration Detention Facility Due to Open at Dublin Airport' *The Irish Examiner* (12 June 2019).

¹¹ The recast Reception Conditions Directive sets out conditions and safeguards for the detention of vulnerable persons, including that their physical and mental health is of primary concern and their conditions are closely monitored for the duration of the detention. Recast Reception Conditions Directive (n 2) art 11.

there. And I really do believe when you [the immigration authorities at point of entry] say “Go through the gates” that people should go through with at least an understanding of where they are and what their next stages are.

- *Principal Officer (International Protection Policy Unit)*

While initial reports on practice since the adoption of the Reception Conditions Regulations do not evidence the existence of any multi-agency triage,¹² the fact that more nuanced consideration of vulnerability and the various actors involved is on the agenda of policy-makers and legislators is a welcome step. The need to link together different agencies on vulnerability assessment does not apply only to the border and asylum authorities. As mentioned previously, vulnerability assessment must be a cross-stakeholder, as well as multi-disciplinary process. This means that in addition to engaging external expert practitioners, the State needs to ensure that there is an open flow of information related to protection, where appropriate. This reduces the likelihood of someone falling out of the system or having his or her needs go unmet. This temporal aspect of vulnerability will be discussed in the following section.

7.2.3 Vulnerability assessment on a continuum: Ensuring capacity to identify vulnerability throughout the process

In addition to screening upon arrival, for the multi-stakeholder triage modality to comply with the various components of the dynamic vulnerability model, it must be capable of identifying vulnerability later in the process – such as special needs that have gone unnoticed, or new vulnerabilities that arise while awaiting a final decision on the application. Respondents in this study raised some potential solutions to this issue that could ensure that vulnerability assessment is able to maintain a high level of responsiveness and effectiveness at all stages of the process. Again, speaking of reception conditions, the link between a person’s experiences in accommodation facilities and their capacity to engage with the asylum procedures is drawn into relief.

¹² ‘Ireland failing international obligations by neglecting to carry out vulnerability assessments of asylum seekers’ (Irish Legal News, 9 July 2019) [<https://bit.ly/36xwwRD>] accessed November 2019.

The HSE was seconded in there [the then Office of the Refugee Applications Commissioner]. They were nearly like a link person for people like us working on the ground with clients, or GPs or anybody else. That role is no longer in there. I would have argued at the time [...] that they could have prevented a lot of hassle and a lot of inconvenience for themselves and the clients and for hostel [Direct Provision] managers if they had kept that person in there. Even just as somebody who could come out and visit somebody.

- *Support Worker Two (Health Service Executive)*

The above respondent reflects on prior practice in the Irish system at a time when asylum application numbers were at a peak, whereby the Irish health service had a presence at the point of application to conduct a basic needs assessment. This practitioner reflects on the value of having a multi-agency, multi-disciplinary presence at the point of application. The additional suggestion of a focal point who can go ‘out and visit’ or conduct outreach clinics to accommodation centres on a systematic basis provides a very practical link between the initial assessment at the point of application and the need for subsequent monitoring, in line with the temporal component of the dynamic model. As described in Chapter Five, a somewhat similar ‘linking’ mechanism is already being developed in the context of the newly-issued National Standards for Direct Provision, by way of a designated ‘Reception Officer’ who is trained to support residents and to liaise with external agencies in relation to their needs.¹³ This function could potentially address the existing gap between vulnerability assessment at the point of application and the remainder of the asylum process:

I think the vulnerability screening [envisaged in the RCD] will be very valuable, provided that information is shared [between relevant stakeholders and practitioners]. And that’s something in the Standards that we’re looking at, is the sharing of information... but I do think there has to be somebody down in the centre, like, if RIA make a

¹³ Department of Justice and Equality, ‘National Standards’ (15 August 2019) 10 [http://www.justice.ie/en/JELR/Final_Standards.docx/Files/Final_Standards.docx] accessed October 2019.

dispersal, what we would like to see is – we’re calling them a Reception Officer – and that officer makes sure that they’re linked in, so that they get the referrals, they monitor them but also they can make recommendations to say that “Well, you’ve dispersed them here but we don’t have the supports for them. They’re in a remote location, they need to be closer to Dublin or closer to Cork, so that they can access services.

- *Policy / Support Practitioner One (UNHCR)*

The above comment from a representative UNHCR’s Ireland office recognises the need for on-going capacity to respond to special needs as they arise. A dedicated Reception Officer could serve as a useful link between the initial steps in the triage process (such as an assessment of procedural needs conducted at point of entry, which is followed by a general health screening) and subsequent stages of the asylum procedure. The final Direct Provision Standards document, published in August 2019, requires that a Reception Officer is present in each accommodation centre. A ‘Reception Officer’ is defined in the standards as a ‘suitably qualified and trained member of staff in each accommodation centre, whose main duties and responsibilities are to receive information arising from vulnerability assessments for each resident; to liaise with relevant services regarding the needs of the residents and to report to the appropriate authorities.’¹⁴ Among the Reception Officer’s duties, they must be ‘proactive in identifying the special reception needs of residents on an ongoing basis’¹⁵ and are responsible for ‘ensuring linkages with local healthcare providers, schools, legal service providers, family and child support agencies, trauma counselling and other specialist Services, NGOs and other civil society groups including religious organisations, where appropriate and in line with vulnerability assessments and the identified special needs of residents.’¹⁶ The Standards effectively situate the Reception Officer as the lynchpin in the multi-disciplinary framework for vulnerability assessment after an applicant has entered the asylum process and been designated long-term accommodation for the duration of the asylum process. The notion of a vulnerability ‘focal point’ in the asylum system is not dissimilar from

¹⁴ *ibid* 14.

¹⁵ *ibid* 64.

¹⁶ *ibid* 67.

mechanisms that already exist in international refugee law. With regards to unaccompanied minor asylum seekers, for example, both the 2013 Asylum Procedures and Reception Conditions Directives require that unaccompanied minors are assigned a ‘representative’ who is responsible for ensuring that the minor is enabled to ‘to benefit from the rights and comply with the obligations provided for’ in the law and must have the ‘necessary expertise’ to fulfil that duty.¹⁷ Guidance could be taken from positive State practice in this regard to inform the establishment of a vulnerability ‘focal point’ in the national asylum system.

Overall, the Direct Provision Standards represent a strong multi-stakeholder commitment to improving conditions for all applicants in the Irish asylum system and, at face value, introduces innovative initiatives for identifying special needs throughout the asylum process and not just at the outset. The success of the Standards, however, will be subject to further teasing out of some of the details and ensuring the document’s full implementation across the Direct Provision estate. This will require full cooperation and buy-in from other government agencies involved in the asylum system and not just RIA who oversee the Direct Provision system. Some concerns raised by NGOs in the public consultation phase of the Standards’ drafting process remain relevant, including the fact that the lack of an independent oversight mechanism for Direct Provision casts a shadow over their effectiveness.¹⁸ Furthermore, the standards do not represent a catch-all solution, as not all applicants avail of Direct Provision accommodation and not all those who do avail of Direct Provision access the initial medical screening at the preliminary reception centre, which flags immediate needs that can influence dispersal to more long-term accommodation throughout the country.

There are a lot of filters. Some people go through Direct Provision. In Baleskin [preliminary reception centre], they are invited to screening. It’s a voluntary thing. That’s another filter. I think it’s 80% of people that go.

¹⁷ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (29 June 2013) OJ L 180/60 -180/95 art 25 (1); Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (29 June 2013) OJ L 180/96 -105/32 art 24(1). See generally: Ciara Smyth, *European Asylum Law and the Rights of the Child* (Routledge, 2016) 96–137.

¹⁸ Irish Refugee Council, ‘Submission on the Draft National Standards for Direct Provision Centres’ (3 October 2016) 16.

And then, it's only people that either disclose a problem, or that the nurses pick up a problem. But there could be other people that are not talking and we don't know [if they have any special needs].

- *Support Worker Two (Health Service Executive)*

It is probably impossible to develop a vulnerability assessment that is capable of capturing the needs of every individual who passes through the asylum system. However, setting out in policy a robust, inter-connected system bridging the procedural and accommodation elements of the asylum system with space for non-State actors to intervene is a strong start.

Recent developments in Irish law and policy have laid the groundwork for a more nuanced approach to vulnerability assessment in the Irish asylum system and the responses from practitioners in this research suggest that there is substantial will to engage with vulnerability as a concept in a more meaningful way. This section has demonstrated that while there is considerable compatibility between the dynamic concept of vulnerability and the contemporary asylum framework in Ireland there remain some challenges with respect to full implementation. The following section will set out those practical and conceptual challenges that will need to be overcome if the dynamic model of vulnerability assessment is to be operationalised in the Irish (or any) national context.

7.3 - Challenges to Implementation of the Dynamic Model of Vulnerability Assessment in Practice

The following sections will flag key conceptual and practical barriers to implementation of the dynamic conceptual framework for vulnerability assessment that became evident through the legal and policy analysis in this thesis, and which were corroborated through interviews with practitioners. Although proposing substantial solutions to these specific challenges is beyond the scope of this thesis, the purpose of flagging them here is to inform future research and to provide a starting

point for the purposes of any attempts to employ the findings of this thesis in the context of future law or policy development.

7.3.1 Stretched capacity in the context of scarce resources

Practitioners noted that the scarcity of the necessary resources constitutes a significant barrier to the effective coordination of vulnerability assessment. Insufficient funding of core services, lack of qualified practitioners and high staff turnover in specialised sectors due to high pressure and limited practical or emotional support for overburdened service-providers renders the stability of the current system precarious – a difficult platform upon which to propose reforms.

We could do with way more. That's the fourth floor [management, who deal with] funding, resource issues. And what's happened in the last couple of years is because you're spending a lot more time in consultations with client. A large part of your work is the written submissions in support of applications – early legal advice – whatever you want to call it. Because that's another issue. If a caseworker's going in... they're tired, they're not alert themselves, they're going “F**k it, I've only got an hour for this, better rush through it.

- *Legal Representative Four (Legal Aid Board)*

The above quote from a caseworker at the Legal Aid Board highlights two separate but interrelated issues connected to the scarcity of resources – in particular funding – that pose challenges not just for identification of vulnerability but also for ensuring a decent quality of service provision and an effective asylum system overall. Firstly, as mentioned in the previous chapter, there are few practitioners to deal with the needs of an increasing number of cases, particularly in the State-funded services such as the Legal Aid Board¹⁹ and decision-making bodies where capacity is especially stretched for devoting the amount of time required to deal with complex cases. The problems

¹⁹ According to the Legal Aid Board's latest available Annual Report, of the 2,406 people who applied for International Protection in 2017, 1358 (56%) requested legal aid: Legal Aid Board, 'Annual Report' (2018) 27 [https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/lab-annual-report-2017-english-version_.pdf] accessed November 2019.

are even more acute for smaller civil-society organisations which play a crucial role in plugging systemic gaps where expert support is needed but are even more reliant on diverse funding sources for their sustainability. Secondly, practitioners noted a direct correlation between under-resourced services, high staff turnover, inability to maintain or develop institutional knowledge and capacity to identify vulnerability.

I think financial resources [are needed]. We could all, I'm sure, list out numbers of cases that we'd love to have resources to do things for them. We've identified them. As I say, I really don't think [vulnerability identification is] the problem. [...] It's like, every minute of every day is taken up. And that's leaving aside calls and the things that come in and all the rest of it. The people who want to be seen and all the rest. And we don't have enough caseworkers. It's just an impossible task, really.

- *Legal Representative Six (Legal Aid Board)*

Demand for practitioners to provide various important services outweighs the capacity to ensure that newly recruited practitioners are adequately trained or competent to identify and respond to vulnerability. Respondents shared examples of how some practitioners working in the asylum sector lack the competencies required to even engage with fundamental principles of refugee law, let alone the needs of vulnerable asylum seekers.

There's more need for qualified people and people with real experience, as opposed to a lot of these people who have just gone into it because in Ireland we haven't had a history, prior to 2000, of a big influx. So it's kind of like an "industry" that took up since then. You've a lot of people, including legal practitioners, who go into it because they said "Ok, there's a few bucks to be made."

- *Decision Maker Two (International Protection Appeals Tribunal)*

Asylum seekers who avail of State-provided services have no say in the matter of who handles their case, whether that is the Legal Aid lawyer representing them, the decision-maker processing their claim (although applicants can make special requests

regarding the gender of the decision-maker),²⁰ or the medical or psychosocial support they engage with. So the reality in the Irish context, at time of writing, is that there is a lack of a core contingent of adequately experienced staff (at least to respond to the particular exigencies of vulnerability in the asylum context) in key services. The Legal Aid Board, for example, while undoubtedly a critical service for the functioning of the asylum system, is oversubscribed in terms of service-users and understaffed by both solicitors and caseworkers. Legal Aid Board staff from branch offices throughout the country who were interviewed as part of this research all shared similar perspectives. As well as reducing the overall quality of the legal service asylum seekers receive, some practitioners expressed concern that being channeled through an over-stretched legal service, with a high turnover of staff and limited capacity for provision of dedicated support, can actually exacerbate vulnerability.

Since I've been here, so many solicitors have left. People [asylum applicants] have been to three or four solicitors, same with the caseworkers, so it's not great. I'm off again at the end of the month and you feel for the people because you do build up a relationship with them and that adds to vulnerability because somebody has to tell their whole story again.

- *Legal Representative Six (Legal Aid Board)*

To meet needs, some institutions have resorted to outsourcing expertise. As mentioned previously, the Legal Aid Board for example, has established the Private Practitioners Panel – outsourcing practitioners to handle a backlog of cases. Similar practice exists in the International Protection Office, where the cohort of first instance decision makers is composed primarily of an external panel of legal practitioners.²¹ The result of such practice is that case-processing capacity is increased but the quality of services that applicants receive in some instances is questionable:

²⁰ The Information Booklet provided to international protection applicants states that the IPO 'will take account of any gender-specific information and any vulnerability that you mention in your application or during the examination process.' International Protection Office, 'Information Booklet for Applicants for International Protection (IPO1)' (2017) 16.

²¹ Irish Naturalisation and Immigration Service, International Protection Office, 'Information Note – Case Processing Panel Member' (May 2018).

You've no choice who your file is farmed out to. And I think that's really problematic in the context of the large number of applications that are put on the panel [Legal Aid Board Private Practitioner Panel] with minimal training, who are doing this stuff for the first time. And some of them are really good lawyers [...] in family law but they don't know anything [about refugee or asylum law].

- *Legal Representative 11 (NGO)*

A key issue with outsourcing human resources relates primarily to those *ad hoc* practitioners' lack of training or experience on the specific needs of refugees and asylum seekers. Chapter Five noted the discrepancy between the State's obligations to ensure that asylum practitioners are adequately trained under the relevant EU law provisions (not to mention the States' own Working Group recommended a consistent programme of training to meet quality needs in RSD, including that such a programme be prescribed in law)²² and a haphazard approach to training in practice. Indeed, the previous chapter outlined how practitioners articulated adequate training on key principles of refugee law and the multidisciplinary needs of asylum seekers as a crucial element of effective vulnerability identification. However, the extent to which practitioners are adequately trained is entirely contingent on both availability of funding for regular training courses, institutional will to maintain a regular programme of training and the extent to which a consistent pool of trained practitioners can be maintained against the high turnover in the sector due to the current practice of outsourcing on a temporary basis to meet immediate capacity gaps.

Training only gets you so far and a lot of it is about implementation of training. It's a difficult question. [...] Our quality work in general really helps identify the training needs. But it also requires the resources of the authorities when you're in a situation where there's actually quite a lot of backlog at the moment. And I think as well you need go beyond [the] focus on knowledge. I think it's really important that some skillsets are

²²Department of Justice and Equality, 'Working Group to Report to Government Working Group on the Protection Process on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers Final Report' (June 2015) 116-117.

dealt with early on and that can be through mentoring. So there are different tools available.

- *Policy / Advocacy Practitioner Two (UNHCR)*

There is a delicate balance to be struck between responding to identified training needs and ensuring that there is capacity in place to respond to demands on service providers. Isolating a solution to this particular dilemma, in a resource-stretched environment where the political focus is on reducing application numbers poses a significant challenge to the implementation of the dynamic vulnerability assessment model. As a way forward, some respondents highlighted the need for innovative approaches to professional development and retention of qualified practitioners in the asylum sector. As noted in the above comment from UNHCR and acknowledged earlier, there is potential value in maximising in-house expertise to ‘mentor’ or provide training to inexperienced staff. This does not necessarily replace the need for external training on specialist topics but would be a cost-effective way of leveraging institutional experience and knowledge to build capacity. With respect to both training needs and the need for additional capacity support, respondents suggested that the State could tap into the considerable expertise built-up in civil-society organisations.

Maybe that’s the answer. More involvement from NGOs visiting the reception centres. NGOs should be able to get the people with good qualifications and capacities to go in [...] It’s possible that NGOs could visit the centres a bit more. Obviously with collaboration with the Government and permission and all that. There’s a lot more that could be done by the people. [...] I think maybe the early screening. I would think there could be more NGO involvement in sort of identifying things.

- *Legal Representative Four (Legal Aid Board)*

Ireland, like many European countries, has an abundance of civil society organisations that are dedicated to providing specialist support and addressing gaps in service provision. Many NGOs, however, also operate within a precarious funding

environment,²³ which States could potentially ameliorate while addressing their own capacity issues by working more closely with civil society organisations. In the context of vulnerability assessment, tapping into a network – such as the aforementioned multi-disciplinary network – could at least provide a platform for dialogue on addressing capacity barriers to the identification of special needs. Political buy-in to this and other innovative solutions will, however, depend on a shift in attitude towards the gaps and an appreciation of the value to be added by incorporating a more dynamic approach to vulnerability assessment in policy making. This related challenge will be discussed in the next section.

7.3.2 Need for an institutional ethos shift

As highlighted in Chapter Five, the Irish response to increasing numbers of applications for asylum can be characterised by a reliance on crisis-response rather than a more forward looking approach to the development of a robust asylum system. This reactive practice is exemplified throughout this thesis, including the aforementioned outsourcing of practitioners on a temporary basis to process asylum applications; the State's recent practice of accommodating people in inadequate hotels on a 'temporary' basis due to Direct Provision accommodation centres being full,²⁴ and the speedy adoption of asylum law without permitting scope for scrutiny or input from human rights bodies or experts. Respondents in this research corroborate this general sentiment:

The idea, I think, for a long time was that “Oh, that whole refugee thing has gone away, we don't have to worry about it so much, y'know? We'll just have it [the Legal Aid Board International Protection Unit] as a small little bit of our service and it will all work out fine.” But it is very clear that there is this need, very much, for some sort of support. Now, there's

²³ In the Irish context NGOs are heavily dependent on EU funding, such as the Asylum Migration and Integration Fund (AMIF). However, that fund is managed and disbursed by the Department of Justice and Equality, and the activities of potential beneficiaries must align with Ireland's National Programme on AMIF. The result is a highly competitive environment for NGOs working in the refugee protection space and a lack of sustainability for key services or projects as thematic priorities for AMIF funding can change from one funding cycle to the next. See: Department of Justice and Equality, 'What is AMIF' (2019) [<http://eufunding.justice.ie/en/eufunding/pages/what-is-amif>] accessed November 2019.

²⁴ 'Over 1,500 asylum seekers living in emergency accommodation' (*RTE*, 1 November 2019) [<https://www.rte.ie/news/ireland/2019/1101/1088102-asylum-seeker-figures/>] accessed November 2019.

the Refugee Council, Immigrant Council of Ireland, NGOs and so on who are working in the field but to have a dedicated legal service such as we have is a great thing and it should be encouraged and promoted. And hopefully they will because the numbers are only going one way at the moment.

- *Legal Representative Two (Legal Aid Board)*

Current practice of reactive response rather than proactive engagement to identify and pre-empt escalation of issues creates an environment that is not conducive to more nuanced and comprehensive vulnerability assessment. Rather, it contributes to the fragmentation of the asylum sector, where different actors are operating in isolation of (and occasionally in competition with) each other.

My own view has been, I think the system I've had so far, it evolved out of crisis. I think people need to remember that, that when people were sleeping on benches around Dublin and there was substantial numbers then, an unprepared State did the best they could. And they have stuck on bits since.

- *Principal Officer (International Protection Policy Unit)*

The above from a principal asylum policy maker reinforces the notion that the Irish asylum system emerged and continues to develop out of 'crisis', and rather than comprehensive re-evaluation of the system's functioning in the face of new challenges, legislative amendments and policies have been 'stuck on' to plug gaps. We see this with the extensive patchwork of amendments of the Refugee Act 1995 before its repeal by the International Protection Act 2015. In such a context, identifying innovative solutions is a challenge. In order for a shift towards a more nuanced approach to vulnerability to take place, the inherent value of vulnerability as a conceptual tool needs to be explicitly understood by the relevant State and non-State actors and accepted as an intrinsic component of a functioning asylum system. However, some practitioners have noted that, notwithstanding the broader cultural inertia, there is a lack of leadership within organisations to push for change, which

certainly hinders the recognition of vulnerability as a practical concept that can improve the quality of RSD and the overall state of the asylum system:

There's a kind of an empathy you need [...] you need a system to encourage people who are interested in this kind of work and who have the basic skills and are willing to learn, I think [...] absolutely you can mould very effective service providers who are able to identify vulnerable clients. But what happens culturally in offices is it depends if you have someone with that frame of mind or not already there in a position to influence others.

- *Legal Representative Two (Legal Aid Board)*

Ultimately, organisations (both State and civil society) will need to recognise the impact of vulnerability on their work from the inside out and situate the concept amongst their strategic priorities. For that to happen, more systematic dialogue and exchange of information needs to occur between the different actors responding to vulnerability in the context of their specific area/s of expertise. In contrast, the current fragmented system actually creates protection gaps for vulnerable asylum seekers, as they move out of the remit of one governmental department and into the remit of another:

RIA can't accommodate him because of his behaviour but there's no communication with another department to say "Can you look at this case and resolve it because he can't be returned to his country of origin?" He was uncooperative, so that made it hard for the authorities to engage but I do think it would be good to have some – like a caseworker – making sure people are engaging with the process so that they're not here for so long.

- *Policy / Advocacy Practitioner One (UNHCR)*

While there may have been grounds for re-evaluating or reducing the reception entitlements of the man in the above case in line with relevant standards, his asylum application is nonetheless ongoing and the State has obligations to prevent destitution

and inhumane living conditions for people in the asylum process. The Reception and Integration Agency should link the individual in with other services better-equipped to deal with his needs, particularly if he is vulnerable, and should notify the International Protection Office of his living situation to ensure that his case is followed-up on. For this reason, open and consistent dialogue between actors involved in the asylum system is a core component of a functioning vulnerability assessment process. Communication between stakeholders is key to reconceptualising vulnerability and its role in the asylum process because it is in such a shared forum that the value of vulnerability can become embedded in mindsets, policies and processes. Improving channels of dialogue doesn't just provide a platform for troubleshooting but it also allows concepts such as vulnerability to be interrogated and their role in law and policy to be better defined from a multidisciplinary perspective. Some practitioners in this research, however, expressed concern that this will be a challenge as the State does not place value on vulnerability assessment in general:

If you look at it [current approaches to vulnerability in asylum], it's not too dissimilar to other aspects of the State where you have people who don't have training in how to deal sensitively with, say, victims of domestic violence. So, it doesn't surprise me that there isn't something like that [in the asylum context] because it's not something the State necessarily has placed value on.

- *Policy / Advocacy Practitioner Three (NGO)*

Others connected this entrenched reluctance within the State to implement recommendations for reform to a perception that making the system more person-centric would generate a pull-factor, attracting more asylum applicants to an already overburdened system. This is not unsurprising as such a perception has informed previous policy choices, such as the decision not to opt-in to the Reception Conditions Directive at first.

I do think the system is built with all these obstacles so people either give up or they are deterred to come in. There's no political will. [...] But then, for all that to happen [a shift towards a more person-centric

system], for all those beautiful things, you have to kind of start from scratch. I think there's a culture of "We don't want them here, they're scroungers."

- *Support Worker One (Health Service Executive)*

While it appears that any progressive response to vulnerability from the top-down will depend on a degree of institutional introspection on the part of the State, it should be acknowledged that recent developments in the Irish system that have been highlighted throughout this thesis demonstrate that there is a degree of multilateral appetite for reform. The Government-led Working Group, for example, has demonstrated that a multi-stakeholder deliberative process can yield innovative results and reform recommendations (notwithstanding challenges to implementation). Certainly, discussion stemming from the drafting of the Reception Conditions Regulations has indicated a fledgling willingness to engage with vulnerability on a conceptual level:

So, the vulnerability debate is open. It's probably more open than it's ever been before. It's more holistic in its view. We're looking at the broader concepts. The "how to" is evasive still in certain areas but [...] we've moved from "I can't do that because we're not trained to" to "I could do this bit if you do that bit" Which I think is quite positive. [...] So, we have to be - if we're really going to be sincere about vulnerability - is to have the confidence to have the conversation. And that's all the actors, including the applicants, in it.

- *Principal Officer (International Protection Policy Unit)*

For the above mentioned 'conversation' to occur and for any cultural shift to take place within the national asylum sector, there will need to be leadership from within State institutions and civil society to raise awareness and push for a conceptual approach to vulnerability that recognises the value it can bring to the asylum decision-making process.

7.3.3 Further development of law and policy

This thesis has explored how developments in international refugee and human rights law *vis-à-vis* vulnerability are trickling down to policy and practice at the national level. However, as elucidation of the concept is in its nascent stages at the international level, gaps exist in domestic law and policy. Practitioners highlight two areas which must be addressed to establish a legal and policy space conducive to adoption of the dynamic approach to vulnerability assessment.

Firstly, practitioners noted how Ireland's piecemeal adoption of some asylum legal and policy instruments has created a robust protection framework in some areas but left glaring gaps in others. The absence of vulnerability in law and policy governing asylum procedures is particularly problematic for legal practitioners responsible for adjudicating and helping asylum seekers navigate that system.

I think, without a doubt, Ireland should just opt-in [to the entire package of Common European Asylum System instruments] and it would be very helpful. Does the Asylum Procedures Directive have all the answers to the difficult areas? No. But would be helpful – at least we could pull out our folder and go “What does it say here? What guidance am I given?” And of course it would help.

- *Decision Maker One (International Protection Appeals Tribunal)*

From the legal practitioner's perspective – especially for those who lack training or experience working with vulnerable individuals – the existence of legal provisions setting out obligations on the relevant authorities to identify and respond to vulnerability can guide practice. In particular, with respect to the Common European Asylum System (CEAS), transposing the full suite of instruments would act as a starting point towards bridging the currently distinct laws on asylum procedures and reception conditions. This is particularly important considering that vulnerability preventing an applicant's engagement with asylum procedures often stems directly from inadequate or inappropriate reception conditions.

If this [transposition of the Reception Conditions Directive] works, I'm personally willing to go and look at others. Other Directives. Why are we spending our time as the last rock, soon to be the very last rock in Europe out there, defending our bespoke system, where at least we can rely on European norms?

- *Principal Officer (International Protection Policy Unit)*

The above quote resonates in the context of ongoing CEAS reforms at EU level together with the climate of uncertainty at time of writing surrounding the ongoing negotiations on the United Kingdom's exit from the EU.²⁵ As touched upon in Chapter Five, a primary factor in Ireland's original involvement in the opt-in/opt-out facility was the potential consequences that EU immigration measures might have on the Common Travel Area that Ireland shares with the UK and the associated need to align with British immigration and asylum policy to preserve the integrity of that bilateral arrangement.²⁶ With Brexit, Ireland will need to decide whether or not to reorient itself more closely with the rest of the EU and opt-in to the remaining (and future) instruments of the CEAS, or whether it will maintain its piecemeal approach in alignment with British policy on asylum. The previous quote suggests that there may be appetite, within the Irish asylum institutions at least, to fully harmonise with the rest of the EU on asylum.²⁷ Regardless, given that Ireland will become one of the only remaining outliers on EU asylum policy (with Denmark), the Government is likely to come under increasing pressure from the EU to harmonise with the rest of the EU on the CEAS after Brexit. This would bring Irish domestic law on asylum procedures (where there is currently no obligation to assess vulnerability) in line with the law on reception conditions (where there is now a requirement to identify special reception needs, notwithstanding the challenges to implementation described previously). Overall, recent developments indicate an expansion of the Irish legal and policy space for deeper consideration of vulnerability. However, the second issue that can be

²⁵ European Parliament, 'The future relationship between the EU and the UK in the field of international protection following the UK's departure from the EU' (November 2018); Irish Refugee Council, 'The Reception Conditions Directive: One Year On' (July 2018) 39.

²⁶ Cathryn Costello, 'EU Asylum Law and Policy' in Ursula Fraser and Colin J Harvey (eds), *Sanctuary in Ireland, Perspectives on Asylum Law and Policy* (Institute of Public Administration 2003) 28.

²⁷ Previous government officials have also stated in official fora that the possibility for further adoption of the CEAS is not out of the question and it should be recalled that Ireland is actively involved in ongoing negotiations on phase three of the CEAS. See, for example: Dáil Éireann Debate, 'Pre-European Council Meeting, Statement from the Taoiseach' (12 December 2018) vol 976 no 5.

extrapolated from both the interview findings and jurisprudence at the European level is that adoption of more holistic vulnerability provisions in law and policy, while crucial for laying the legal and policy foundation, do not necessarily equate to implementation in practice. As can be seen with the failure to implement the recommendation of the Working Group for a multi-disciplinary vulnerability assessment, and the current lack of implementation of the vulnerability assessment called for in the Reception Conditions Regulations over a year after their adoption, robust provisions in law and policy are not sufficient to satisfy obligations to vulnerable applicants. Similar reports suggest that incorporating a comprehensive approach to vulnerability into the international protection framework is meaningless if the required steps are not taken to ensure that those provisions are upheld and applied. The suggestions made throughout this thesis, and the recommendations to follow in the next chapter, offer a starting point for future research and advocacy efforts to connect law and policy with implementation.

7.4 – Concluding Remarks : Moving beyond conceptualisation towards implementation

In depth exploration of the definition and value of vulnerability has reflected a general consensus that a more nuanced conceptualisation of vulnerability in the national asylum system is required and practitioners were prompted to consider what that might look like in practice. Recurring themes emerging from doctrinal analysis of the international and European legal frameworks, in conjunction with findings from interviews with practitioners at the national level have allowed for the structure of that dynamic assessment to be sketched out.

As assumed by the conceptual framework underpinning this thesis, the constituent components of that assessment align with the requirements of the dynamic model of vulnerability assessment. Practitioners were in agreement that vulnerability assessment, in order to be meaningful, should be a **process**, interwoven throughout the asylum procedure with three core components: A multidisciplinary network; a triage approach and a mechanism to identify vulnerability on a continuum. Recognising the range of expertise required to adequately identify and respond to

vulnerability, that process must be a shared burden, engaging the expertise of a **multidisciplinary network** of State and civil society actors. To make vulnerability assessment more practical and less abstract, it can be usefully conceptualised as a **form of triage**, comprising a number of steps from the beginning to the end of the asylum process, rather than a once-off screening or rudimentary checklist exercise at the outset of the process. Finally, for the triage modality to function effectively, capacity must be introduced to ensure that vulnerability can be identified on a continuum, when and where it occurs. Respondents noted how designated officers (located in Direct Provision centres, or the International Protection Office) could act as a **vulnerability focal point**, identifying vulnerability and linking in with the relevant actor in the multi-disciplinary network to ensure adequate response to needs.

However, while the shape of the dynamic vulnerability assessment may be clearer, a number of interlinked practical and conceptual challenges remain. Firstly, while vulnerability is further up on the asylum reform agenda than ever before, many practitioners pointed to the **scarcity of resources**, such as insufficient funding and lack of expertise, as a key barrier to effective realisation of a more nuanced model. If the potential long-term benefits of investment in vulnerability assessment were recognised, resources could be allocated in a more meaningful way. However, the second challenge: the prevailing approach to dealing with international protection through a **crisis response ethos**, rather than engaging in forward-looking strategic protection planning, means that the institutions involved do not place value on vulnerability assessment as a key component of a more efficient and fair asylum system. There is a need for strong leadership within State and civil society organisations to push for change. This is not withstanding positive legal developments, such as the adoption of the Reception Conditions Regulations, which bring vulnerability into the spotlight. However, as the third challenge identified from the analysis of the interviews and Irish context demonstrates, **incorporation of vulnerability provisions into national law** is not holistic – leaving major gaps in core areas of the asylum system – and implementation is weak, as a result of the current ethos and resource constraints. These challenges must be addressed as part of comprehensive reform efforts in order to create the space within which to implement the dynamic model of vulnerability assessment.

Chapter 8 - Conclusion

This thesis has attempted to determine whether a reconceptualisation of vulnerability is required in order to ensure that the needs of vulnerable asylum seekers are accommodated within national refugee status determination (RSD) procedures. Reaching a conclusion has involved conducting two sub-inquiries in parallel. First, it was necessary to clarify the function of vulnerability in the refugee protection context in order to develop the normative framework for the study. Secondly, the study establishes a conceptual approach to vulnerability that more accurately reflects the range of experiences asylum seekers bring to national asylum systems and better equips the practitioner to respond to particular needs in the asylum process.

This concluding chapter brings together key findings and offers some reflections on the outcomes of the above inquiries. Section 8.1 will discuss lessons learned with respect to the function of vulnerability in international refugee law. Section 8.2 will provide an overview of the dynamic conceptual approach to vulnerability proposed as an alternative model and summarise the reasons why that reconceptualisation is necessary to ensure asylum seekers can engage effectively with RSD procedures. Section 8.3 will draw the study to a close by setting out some potential future directions that research and advocacy could take in order to build on findings in this thesis and incorporate this new approach into practice.

8.1 – The Function of Vulnerability in International Refugee Law

One of the primary reasons for conducting this research was that, while vulnerability as a concept is proliferating in refugee law and policy, there is limited clarity as to its meaning or the value it adds to RSD procedures. Drawing from existing theoretical scholarship, Chapter Two outlined the dangers associated with this conceptual fuzziness. Vulnerability as a legal tool emerged out of a need to draw a distinction between those in need of additional support and those who are not, resulting in the traditional approach to vulnerability that involves segmenting the population into

‘vulnerable group’ categories. The contemporary reality is not so black and white and scholars have noted that the group-based approach carries many negative connotations: it is stigmatising as it perpetuates notions of dependency and victimhood; it imposes a false homogeneity on the vulnerable group, rendering it difficult or impossible to extrapolate individual needs from within the group as all members are deemed vulnerable on account of an affixed group-based criteria, and it is also exclusionary, as those who do not fit into prescribed groupings are deemed not vulnerable *enough* to require special support. However, notwithstanding these dangers, the concept holds value for protection purposes. By moving away from a preoccupation with vulnerable groups and more towards an understanding of vulnerability as universal and generated by a variety of sources, we can begin to appreciate vulnerability as a fluid state, fluctuating in concert with human experience. This shifts the focus away from an understanding of vulnerability as a ‘label’ and something that must be ‘defined’ and towards a focus on the factors that create or exacerbate vulnerability, including structural or State sources. In this sense, vulnerability can be used as a heuristic tool with which practitioners can more easily identify individual needs within a diverse group, such the asylum seeker and refugee group.

Through doctrinal analysis in Chapters Three and Four, the practical value of vulnerability was revealed at both the international and European levels, where vulnerability is emerging as a tool by which to measure the extent of States’ obligations towards certain individuals. The UN treaty bodies, for example, are increasingly employing vulnerability analyses to determine the scope of States’ international human rights obligations towards groups and individuals in positions of distinct disadvantage. Standards deriving from this practice are then transferred into international refugee law by interpretation of Refugee Convention obligations through the lens of the relevant human rights norms. Similar practice is occurring at the European level. In EU law, vulnerability is employed in the Common European Asylum System (CEAS) as a conceptual tool with which States can identify the ‘special needs’ of vulnerable asylum seekers. While the CEAS instruments define vulnerability according to lists of specific groups, those lists are not exhaustive and States are also required to ‘assess’ vulnerability in the contexts of reception conditions

and asylum procedures. However, ambiguous wording in the CEAS instruments has contributed to inconsistent and weak State implementation of those provisions. This is where the European Court of Human Rights has stepped in to respond to situations where States have failed to provide special support for vulnerable asylum seekers under EU law, in contravention of their obligations stemming from the European Convention on Human Rights. Despite perhaps confusing matters further by ascribing all asylum seekers as a ‘particularly vulnerable group’ in the *M.S.S* case, the Court has since been trying to refine its approach by identifying individuals who, in addition to the general vulnerability associated with membership of the asylum seeker group, are also particularly vulnerable on account of their individual circumstances. The Court still has some way to go before reconciling its group-based and individual approaches to the vulnerable asylum seeker. This study has demonstrated that both bodies of European law are taking different paths towards the same conceptual role for vulnerability: to identify asylum seekers at heightened risk of human rights violation and who require additional support in order to engage with national asylum procedures and access rights.

Analysis of Irish law and policy developments with respect to vulnerability in Chapter Five and of the empirical interviews with practitioners in Chapter Six corroborated the findings from the doctrinal analysis and provided deeper insight into the function and value of the concept at national level. Practitioners noted that while vulnerability is acknowledged to a degree in Irish and European asylum law and policy, this is often insufficient to respond to the needs of individual asylum seekers on the ground. Respondents in this research agreed that there needs to be a paradigm shift in the way vulnerability is situated in the national asylum framework. Practitioners emphasised that vulnerability is a critical feature of the asylum process and not just something that can be dealt with at the point of application or on an *ad hoc* basis. Vulnerability is a reflection of the individual asylum seeker’s capacity to engage with the RSD process and is often exacerbated or even generated by the system they inhabit. In the Irish context this is exemplified by inadequate reception conditions and a decision-making process that is beset with delays, neither of which are responsive to applicants with particular needs. The clear sense left by the interviews is that vulnerability should serve as a mechanism to ‘level the playing field’ for asylum seekers who find

themselves at a particular disadvantage in terms of engaging with the system. When conceived of in this way, vulnerability adds value to the national asylum system: it enhances applicants' access to the asylum procedure; it ensures the wellbeing of the applicant while they are awaiting a decision on their claim and it improves the overall quality of RSD by increasing the fairness and efficiency of decision-making.

However, many practitioners noted how narrowly vulnerability is construed in existing law and policy and, in the absence of guidance, they often depend on their own subjective skills and competencies to identify vulnerability. Many practitioners noted how the existing legal and policy framework leaves much space for misinterpretation of the concept, or no acknowledgement of vulnerability at all. This understanding of vulnerability as a holistic, multi-disciplinary and inevitable feature of the asylum process has not yet been fully embraced in the refugee law regime but practice – as exemplified by international and European jurisprudence – is moving in a more progressive direction. The international human rights bodies and the European Courts, while adhering to 'vulnerable group' categorisations, are beginning to recognise that vulnerability manifests differently on a case-by-case basis, stems from various sources and increases or decreases in severity depending on the individual circumstances at hand. Most importantly, there is wider recognition, at all levels, of the role that States have to play in identifying, responding to and often creating vulnerability. In order to systematise and embed these progressive trends in RSD, an alternative framework for conceptualising vulnerability and guiding practice at the national level is required. On the basis of the findings from this research, the proposed alternative is outlined in the following section.

8.2 – The Dynamic Conceptual Approach to Vulnerability as a Model for Reform

While the function of vulnerability in the refugee protection context has been made somewhat clearer, this study has also demonstrated that operationalising vulnerability in a way that adds value is a challenge due to its abstract nature. However, trends in international and European jurisprudence indicate that not only is a

reconceptualisation of vulnerability needed but it is already taking place, albeit gradually. What is missing is a clear framework guiding practitioners at the national level to implement international standards on the ground. This thesis has proposed a conceptual framework for vulnerability that could guide advocacy and policy efforts towards implementation of a more nuanced approach to vulnerability assessment and response.

Key critique of the traditional approach to vulnerability is centred on its static nature and reliance on rigid labels to categorise people in need of special protection. In order to overcome the stigmatising nature of that approach, this thesis has argued that vulnerability must be understood as ‘dynamic.’ Drawing from literature on vulnerability theory, Chapter Two identified three core elements that this more nuanced – dynamic – approach should embody in order to add value to the refugee protection context and RSD in particular. First, as a foundation, vulnerability should be understood as an inevitable feature of human experience that affects us all to varying degrees depending on our individual circumstances. While this preserves existing approaches to vulnerability that focus on group-based categorisation, it also widens the space for analysis of vulnerability on an individual level, recognising that persons within a group may have individual needs not related to membership of that group. It also allows for recognition of vulnerability in individuals who do not associate with any group. Secondly, this reconceptualised model must recognise that there are various sources of vulnerability that can overlap and accumulate, altering the severity of vulnerability. These may be inherent or immutable characteristics of the individual, or they may be external sources stemming from the structural environment the refugee finds him or herself in at any stage of the RSD process. Finally, vulnerability in the RSD context must be understood as limited or restricted capacity to engage with asylum procedures. Therefore, response to vulnerability requires capacitating the individual to avail of their right to seek asylum by facilitating effective access to asylum procedures on an equal footing with less vulnerable applicants.

While jurisprudence and practice is *ad hoc* and often inconsistent, findings from the doctrinal and empirical analysis in this thesis support the notion of vulnerability as a

dynamic concept. For example, Chapter Three highlighted how the treaty monitoring bodies recognise, on a case-by-case basis, that vulnerability affects individuals differently depending on their specific circumstances; that the severity of vulnerability may increase or decrease where sources of vulnerability overlap or intersect and that these sources may be inherent to the individual and/or externally generated by structural factors or State action (or inaction). Significantly, once vulnerability is identified the threshold for rights violations is lowered and the obligations on States to protect those rights increases. In international refugee law, UNHCR, in its RSD Handbook, has recognised that all asylum seekers can be considered vulnerable due to their precarious status and lack of State protection. This group-based vulnerability is expanded upon in UNHCR guidance, which draws on corresponding developments in international human rights law to recognise the need for specific safeguards and protection for individuals within the asylum seeker group. Chapter Four outlined how, at the European level, the CEAS contains provisions corresponding directly with the different elements of the dynamic framework. For example, the Reception Conditions and Asylum Procedures Directives contain enumerated lists of vulnerable groups but these are non-exhaustive, allowing for inclusion of vulnerable persons not recognised in those lists. The recast Directives recognise that vulnerability fluctuates over time, requiring that special needs are assessed not just at the outset of the asylum procedure but also where they become apparent ‘at a later stage’ of the asylum process. Furthermore, the CEAS links vulnerability with capacity to access the right to seek asylum, defining asylum seekers with special needs as persons ‘whose ability to benefit from the rights and comply with the obligations provided for in [the CEAS] is limited due to individual circumstances.’¹ However, the obligations on Member States are not prescriptive and national asylum authorities are left with wide discretion to devise their own method of identifying vulnerability, which has led to diverse interpretations of the concept and in some cases, no acknowledgement of vulnerability at all. This is where the European Court of Human Rights (ECtHR) may step in, reinforcing the requirement that States consider the vulnerability of all asylum seekers given their precarious positions but also to be sensitive to the specific needs of individuals who may be more or less vulnerable in specific circumstances.

¹ Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L 180/60 -180/95 art 2(d).

Similarly, at the national level, findings from the empirical portion of this research set out in Chapters Six and Seven indicate that practitioners acknowledge that a more nuanced approach to vulnerability is required. However, progressive trends identified at the international level, while beginning to emerge in Irish law and policy, are not yet reflected fully in practice. In this gap vulnerability is often only responded to on an *ad hoc* basis or where the person's particular needs are especially apparent.

Practitioners noted how guidance on responding to vulnerability is scarce and existing legislation and policy is of limited use. Therefore, they often rely on their years of professional experience, additional training and external expert support in order to identify and respond to vulnerability. The elements of the dynamic conceptual approach were evident in the interviews with practitioners, who recognised the various sources of vulnerability and often have to go to additional effort to identify vulnerability outside of rigid group-based categorisations in law and policy.

The findings from the theoretical, doctrinal and empirical components of the research offer some guidance as to how the dynamic approach to vulnerability assessment should be implemented in practice, set out in Chapter Seven. Firstly, the research has demonstrated that vulnerability cannot be clearly defined in law or policy, nor is this necessarily desirable. Rather, law and policy should recognise that vulnerability assessment is a multi-disciplinary process and responsibility for identification and response (while lying primarily with the State) should not rest with an individual practitioner. The findings indicate that dynamic vulnerability assessment requires access to a network of experts who are in dialogue and can identify vulnerability in their professional capacities as legal representatives, psychosocial support workers, advocates or decision makers. Ideally, such a network would be formalised in policy (if not in law) and could be accessed by all practitioners working in asylum. Secondly, the national vulnerability assessment mechanism should be recognised in policy as a triage process that is an intrinsic component of the national asylum procedure and not an optional measure. In other words, vulnerability assessment needs to be embedded within the system so that there is an opportunity to identify vulnerability at every point of contact with the asylum procedure, including providing space for the individual to disclose particular needs (such as at point of registration and application, dispersal to reception facilities, the asylum interview, the appeal procedure, etc.).

Finally, in order to give effect to the triage process, there needs to be capacity to respond to vulnerability as and where it arises. Recognising that responsibility for assessment need not lie exclusively with the State, this could be addressed by identifying a ‘vulnerability focal point’ who would have a presence at reception facilities and / or points of application to identify needs and ensure that the appropriate referrals are made by linking in with the aforementioned vulnerability network.

In summary, this research has determined that a reconceptualisation of vulnerability is indeed required, which necessitates adjustment of law, policy and practice. However, law and policy makers need not start from scratch in implementing reform. Progressive approaches to vulnerability at the international level are already taking place and gradually trickling down to the national asylum system. While international practice is not without its shortcomings, a coordinated effort on the part of stakeholders using the dynamic conceptual framework as a guide may help to harness positive developments in approaches to vulnerability in national RSD procedures.

8.3 – Future Directions

While this study has delineated the structural foundations of a more holistic approach to vulnerability assessment, the scope of the research has been quite broad. In many ways this thesis serves as a chronicle of the role vulnerability has come to play in refugee protection across the levels of international, regional and national asylum law and policy almost as much as it has served to conceptualise a more nuanced approach to vulnerability in RSD practice. In that sense, whilst the thesis has clarified the normative and conceptual framework for vulnerability in RSD, it has also revealed how implementation of that framework in practice faces significant but not insurmountable challenges. These could be addressed through a combination of targeted research and advocacy across the international, regional and national levels of refugee law and policy, building on the findings of this thesis. This final section will offer some suggestions for potential directions that research and advocacy could take.

At the universal human rights level, this thesis has demonstrated in Chapter Three that vulnerability is being interpreted and operationalised in an increasingly progressive manner by the human rights treaty monitoring bodies whose standards are then incorporated into Refugee Convention soft law by UNHCR. However, while the link between international human rights and refugee law has become a feature of customary international law, the role of vulnerability within that relationship is tentative and less explicit. Vulnerability is construed differently in international refugee policy and guidance material depending on the thematic issue at hand. For example, in UNHCR's RSD Handbook, all asylum seekers are considered to be in a situation of vulnerability,² but in other refugee protection domains, UNHCR tends to lean more into the traditional stereotyping approach described in Chapter Two that focuses predominantly on vulnerable categories. For example, vulnerability is a key criterion for determining a refugee's eligibility for resettlement and UNHCR's Resettlement Handbook singles out women and girls, children, elderly, persons with disabilities, ethnic minorities and lesbian, gay, bisexual and transgender people for special attention.³ While these groups undoubtedly have particular needs, UNHCR inevitably falls into the trap of reinforcing the essentialising qualities of vulnerability and promoting the assumption that other presumably 'capable' refugees (such as single adult men) do not require special protection. Similar divergent approaches to vulnerability can also be found in various other policies of UNHCR such as its latest strategic planning document⁴ and its guidance material on registration of refugees,⁵ which refer to 'vulnerability' and 'special needs' assessment as a priority activity but do not actually describe what that assessment entails or what vulnerability means in the protection context. The Global Compact for Refugees was agreed in 2018 after substantial UNHCR-led intergovernmental negotiations to enhance and guide international solidarity in the face of contemporary refugee protection challenges. Significantly, with respect to key areas of the Compact, it refers to the need to 'engage and seek input from those with diverse needs and potential vulnerabilities including girls and women; children, adolescents and youth; persons belonging to

² UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' HCR/1P/4/ENG/REV. 3 (December 2011) para 190.

³ UNHCR, 'Resettlement Handbook' (July 2011) 182-201.

⁴ UNHCR, 'Strategic Directions 2017 – 2021' (16 January 2017).

⁵ UNHCR, 'Guidance on Registration and Identity Management' (2018) [<https://www.unhcr.org/registration-guidance/>] accessed December 2019.

minorities; survivors of sexual and gender-based violence, sexual exploitation and abuse, or trafficking in persons; older persons; and persons with disabilities.’⁶ While this list is – as per usual – not exhaustive, the traditional delineation of vulnerable categories effectively limits the needs of those who are not considered to have ‘potential vulnerabilities’ from consideration. As States inevitably draw on UNHCR soft law documents in the development and implementation of national asylum systems, legislation and policy, they also inherit the conceptual ambiguities in that material. As mentioned in Chapter Five, for example, Ireland draws on UNHCR guidance in prioritising vulnerable RSD cases under the International Protection Act and Ireland selects refugee candidates who have been cleared for resettlement by UNHCR on the basis of, *inter alia*, vulnerability criteria. The impact of UNHCR’s soft law guidance on the national refugee protection environment is not to be underestimated. There is a piece of work to be done, therefore, on consolidating and clarifying the role of vulnerability in international refugee law and soft-law material. UNHCR (and its Executive Committee), as supervisory body of the Refugee Convention, could usefully take the lead on this work and disentangle the position of vulnerability as a concept in international refugee law. UNHCR could do this, with the support of academic research such as that contained in this thesis or future research as proposed above, by developing a specific policy paper, guideline or Executive Committee Conclusion harmonising its overarching position *vis-à-vis* vulnerability. It should be noted that the Global Refugee Compact itself calls for the establishment of a ‘global academic network [...] to facilitate research, training and scholarship opportunities which result in specific deliverables in support of the objectives of the global compact.’⁷ As the input of those with ‘potential vulnerabilities’ is critical to achieving the objectives of the compact, an early task for the global academic network could be to further clarify and consolidate the meaning of vulnerability in international refugee law and policy.

At the European level, as outlined in Chapter Four, the Court of Justice of the European Union (CJEU) and ECtHR are taking separate paths towards the same goal of remedying gaps in EU Member States’ practice with respect to vulnerable asylum

⁶ ‘Report of the United Nations High Commissioner for Refugees’, UN Doc A/73/12 (Part II) (13 September 2018) para 51.

⁷ *ibid* para 43.

seekers. However, while European States have an obligation to identify vulnerability, there is no prescriptive guidance as to how this should be done, the resources required or how to respond to special needs. The consequence of this is clear from preliminary comparative research showing that practice with respect to vulnerability assessment is divergent.⁸ While the fate of the 2016 recast CEAS proposals is uncertain, the negotiations surrounding their development acknowledge that vulnerability is (or should be) central to EU asylum policy. Following the recent EU elections and reconstitution of the European Parliament, there is an opportunity to address gaps with respect to vulnerability, irrespective of whether CEAS negotiations pick up from where they left off, or a new negotiation process begins. As mentioned in Chapter Four, the European Asylum Support Office (EASO) has developed a series of tools to guide Member States' implementation of the CEAS, many of which include reference to identification of special needs and vulnerability. However, as with UNHCR, EASO has yet to take a principled position on the matter and identification of special needs and attribution of meaning to vulnerability is ultimately left to the discretion of individual Member States. EASO has already demonstrated that the issue of vulnerability is of key relevance to proper CEAS implementation, as exemplified in its recent establishment of a 'vulnerability expert network.'⁹ While there is little publicly available information on the scope of the network's remit, it would seem well placed to affirm the function of vulnerability in the CEAS and provide conceptual clarity and practical guidance on the modalities for conducting vulnerability assessment. Absent from this thesis is a comparative analysis of EU Member State law, policy and practice with respect to vulnerability assessment. EASO, under the aegis of its vulnerability network, could commission such research (which could be funded through EASO, a broader EU fund such as the Asylum Migration and Integration Fund, or through joint cooperation with UNHCR), drawing out good practice that could be used to guide and harmonise implementation of the dynamic approach to vulnerability throughout the EU.

⁸ European Council on Refugees and Exiles, 'The concept of vulnerability in European asylum procedures' (August 2017).

⁹ EASO, 'EASO Vulnerability Expert network: kick off meeting, 25-26 April 2018' (April 2018) [<https://www.easo.europa.eu/kick-off-mt-vulnerability-expert-network>] accessed November 2019.

Further clarification of the role of vulnerability in international and regional refugee law and policy will set a strong bedrock upon which robust national approaches to vulnerability can be developed. However, as demonstrated in Chapters Five to Seven of this thesis, the national context presents its own unique challenges that will need to be overcome. While this thesis has focused exclusively on the Irish asylum system, the analysis has identified some practical and conceptual challenges that will likely resonate with other national contexts. For example, in the current global political climate that prioritises securitisation over protection, Irish asylum institutions are concentrating available resources on processing asylum decisions as quickly as possible. Theoretically there is nothing wrong with prioritising or processing cases within a reasonable timeframe. However, the relevant procedural safeguards, including effective vulnerability assessment, must be in place to ensure an adequate quality of decision-making. In order to comply with international and European obligations but also to guarantee a high overall quality of RSD, the State must allocate resources towards the establishment of a more comprehensive approach to vulnerability assessment, such as the dynamic model. This could be done by making more funding available to the relevant NGOs, free legal aid services and under-resourced State departments (such as the Health Service Executive's Social Inclusion Unit in Ireland, which provides the initial health screening upon arrival) all of which provide crucial services that otherwise would not exist. One of the reasons the Irish State has not expanded funding opportunities for these services – as deduced from the research findings - is because it does not necessarily place 'value' on vulnerability as a key component of a fully functioning asylum system. Situating vulnerability at the core of the asylum system will require an overarching ethos shift towards an approach that is more proactive and less driven by crisis-response. It will also require strong leadership from within institutions and organisations to push for innovative change.

To that end States should support dedicated research that clearly outlines and demonstrates the value of vulnerability as a conceptual tool for the State as well as for the individual applicant. In addition to harnessing lessons learned from good practice examples from other similarly-situated countries that might be obtained from regional comparative analysis as described above, there is a need for dedicated analysis of asylum decisions that could yield useful insight into the value of vulnerability for the

quality of national RSD. Such research could confirm the findings in this thesis indicating that robust vulnerability assessment leads to accurate decisions at an earlier stage by drawing correlations between the outcomes of cases where vulnerability was identified and those where it was not. Unfortunately, access to first instance decisions (in the Irish context, at least) is restricted. Such a piece of research, however, should be State-resourced and could be commissioned within the remit of existing mechanisms, such as the ongoing quality assurance procedure conducted with UNHCR, or in the context of the newly established working group that will review the Irish asylum process in 2020. In the event that access to decisions held by the government is refused, an academic body or NGO could obtain consent to review the casefiles of independent law centres and private practitioners representing asylum seekers.

Finally, the dynamic conceptualisation of vulnerability should be reflected in law and policy. While opting-in to the remaining CEAS instruments should provide the foundation (in the Irish context), all EU Member States can provide clearer guidance for the relevant authorities on how and when vulnerability should be identified, in line with the core elements of the dynamic model described here. Additional policy material could be developed to give substance to existing legal provisions on vulnerability. For example, policy can be developed that outlines more clearly how vulnerability should be 'assessed' by elaborating on the constitution and operating procedures of the dynamic model's 'vulnerability network', or by clearly setting out the terms of reference for the 'vulnerability focal point/s' proposed in Chapter Seven of this thesis. The State could look to regional examples, such as the EASO Vulnerability Expert Network as a model to guide implementation of the dynamic approach in national RSD. Of course, for any of the above to occur, there needs to be constructive dialogue between stakeholders. Such an initiative in the Irish context would not be out of the question, as multi-stakeholder dialogue has driven previous reform efforts such as the Working Group and the Direct Provision Standards Committee. It is hoped that this research will go some way towards stimulating similar discussion with a view to ensuring that conceptual approaches to vulnerability enhance rather than limit refugee protection at the national level, throughout Europe and in international refugee law.

8.3.1 Summary of recommendations

International Level

- Additional research should be carried out with a view to ascertaining the impact of international refugee soft law material and guidance *vis-à-vis* vulnerability in practice at the regional level (through analysis of the jurisprudence of the European courts, for example) and at the national level;
- UNHCR should take steps to clarify its own its position with regard to vulnerability. It could do this by commissioning research resourced by itself or by tapping into the new Global Academic Network established under the Global Refugee Compact.

European Level

- EASO should support research that provides conceptual clarity and practical guidance to EU Member States implementing the vulnerability provisions contained in the CEAS, in line with the broader standards outlined in this thesis (such as ECtHR jurisprudence and international human rights law). For example, in-depth comparative analysis of EU Member States' approaches to vulnerability assessment could be used to identify examples of good practice in line with the dynamic conceptual model.

National Level

- States must allocate resources towards the establishment of a more comprehensive approach to vulnerability assessment in line with domestic legislation and international obligations.
- Research demonstrating the value of vulnerability should be carried out at the national level, for example, through analysis of first instance RSD decisions with a view to demonstrating whether or not there is a correlation between vulnerability assessment, higher quality decisions and reduced asylum processing delays.

- States should develop policy material consolidating international standards and good practice examples from other jurisdictions with a view to guiding asylum authorities' implementation of legal provisions on vulnerability in line with the dynamic conceptual approach.

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Annex I – Interview Participant Information Sheet

Doctoral Research Study - Participant Information Sheet

You are being invited, as part of a doctoral programme being carried out at the School of Law at the National University of Ireland Galway, to participate in an interview for research purposes. This information sheet is intended to provide you with the relevant details about the study which will help you make an informed decision on whether or not you would like to be involved. If you are satisfied that you fully understand the purpose of the study and agree to take part, you will be asked to sign a Consent Form. If there is anything that you are not clear about, I will be more than happy to answer any queries at the contact details provided below.

Research Subject:

The experiences of practitioners and stakeholders working with ‘vulnerable’ persons in the Irish international protection process.

Context and Objective of the Study:

Existing research has demonstrated that certain cohorts of asylum seekers with special needs, or who might be considered particularly vulnerable, face specific difficulties navigating international protection procedures. If vulnerable asylum seekers’ special needs are not identified and addressed as early as possible in the protection process, it may not be possible for them to engage with procedures, or to accurately and fully articulate their claim. This may result in an erroneous refusal of their application and subsequent lengthy appeals proceedings, which come at great financial cost to the State and human cost to applicants themselves.

Broadly-speaking, there is no consolidated definition of the concept of vulnerability in the international protection context despite vulnerability carrying significant weight in judgements of the European Courts and the term’s ubiquitous presence in international and domestic policy documents on asylum and immigration. In Ireland, there exists no formal mechanism for identifying vulnerable applicants or special procedural needs in the Irish international protection process, nor are there publicly-available guidelines for those working with vulnerable asylum seekers in Ireland. Using the Irish context as a case study, this research aims to capture the experiences of professionals who work with asylum seekers, in both a support and decision-making capacity, in order to identify the needs of *both* vulnerable asylum seekers and the practitioners who work with them to ensure a fair and accurate determination of their claim. The findings will help inform recommendations for the development of procedural safeguards for vulnerable asylum seekers, with an aim to ensuring an efficient and protection-oriented status determination process in line with Ireland’s international obligations. This outcome will bear dual-benefit: for the Irish State, in terms of reducing erroneous negative decisions and thus the need for expensive and lengthy appeals and judicial review proceedings; and for

international protection applicants themselves, who will be afforded a speedy determination on their application and the opportunity continue to live their lives in safety and dignity as soon as possible.

Your involvement:

As mentioned above, this research is focusing on the experiences of professionals working with asylum seekers navigating the Irish international protection process in order to ascertain the extent of the difficulties faced by protection applicants with particular vulnerabilities, as well as the needs of those who work with such persons in their professional capacity. The intention is not to cast a critical eye over the work of any organisation or body involved in the international protection status determination process but rather to generate a snapshot of the reality for vulnerable asylum seekers, as informed by the experiences and needs of practitioners and stakeholders working with them.

If you decide to take part, you will be asked to sign a consent form. You will be free to withdraw your participation at any time and without reason if you wish. If you agree to take part, you will be invited to meet with me to discuss your experience of the Irish international protection system on the basis of pre-defined semi-structured interview questions . The interview will be held in a location convenient for yourself, and will be audio-recorded subject to your consent. The duration of the interview should be no longer than 30 to 40 minutes.

Confidentiality:

If you agree to participate in this study, all information that is collected from you during the course of the research programme will be kept strictly confidential and will not be shared with anyone else. The information collected throughout this study will be stored and presented in such a way that protects your identity. If at any point you choose to withdraw your participation, any information gathered will not be used. Recorded interviews will be transcribed for analysis and will be stored securely for a minimum of 5 years (as required by NUI Galway research ethics data retention policy), after which the data will be destroyed.

If you have any concerns or complaints about this study and wish to contact someone independent and in confidence, you may contact the Chairperson of the NUI Galway Research Ethics Committee, c/o Office of the Vice President for Research, NUI Galway – ethics@nuigalway.ie

Many thanks again for taking the time to consider sharing your expertise as part of this study. If you have any questions about the study, concerns, or require clarification on any point that remains unclear, do not hesitate to contact me:

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PhD Candidate – School of Law, NUI Galway
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Annex II – Interview Format

Interview Questions

Luke Hamilton – PhD Candidate, Irish Refugee Council / NUI Galway School of Law

1. Introduction

- Can you provide a brief self-introduction and overview of your work?
- Could you provide an overview of how vulnerability as a legal and/or practical concept comes up in your professional capacity?

2. Identification of vulnerability

- Who might be considered vulnerable in the context of your work?
- What makes them vulnerable in your opinion?
- Could you give some examples of how vulnerability has arisen in the context of your casework/role?
- How do you identify vulnerability among the people you work with?
- Are there any resources (either internal or otherwise) that help you identify vulnerability?
- Is vulnerability assessment a feature of your work?
 - if so, what format does it take?
 - if not, is a formal assessment something that might benefit your work?
- Is there any internal guidance within your organisation on identifying vulnerable asylum seekers?
- As part of your work, do you receive training on identifying vulnerable individuals?
 - **If so**, could you provide an overview of the training – i.e. content, who conducts it, is it compulsory, frequency, etc

- **If not**, do you feel such training would benefit your work?

3. Impact of vulnerability

- In your experience, how does vulnerability influence a person's capacity to engage with the asylum process?
- Could you share any examples (within the confines of anonymity) of where identification of vulnerability has had a positive impact on a person's case?
- Are there any examples of where unidentified vulnerability has had a negative effect on someone you have worked with, or hindered your own work?

4. Steps for change

- What in your opinion are gaps in Irish law or policy that you think need to be filled in order to address the needs of vulnerable asylum seekers, as well as your own needs as a practitioner?
- Do you think the existing legal framework is sufficient to meet the needs of vulnerable asylum seekers?
- Are there any resources that might help you identify or address the needs of vulnerable people in your work as a practitioner?