

Chapter 1

Introduction. Between Protection and Harm. Negotiated Vulnerabilities in Asylum Laws and Bureaucracies



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This book started from a common observation: ‘Vulnerability’ is increasingly playing a role in institutional discourses and practices, when developing and implementing policies and measures towards migrants seeking protection (such as refugees and asylum seekers)—and this in a wide array of contexts, which range from organizing asylum processes in countries in the global north and evaluating asylum claims, to selecting refugees for resettlement, and to developing and implementing aid programmes for refugees in first countries of asylum that are also countries in

The authors would like to thank Delphine Nakache, Sylvie Sarolea, and Hilde Lidén, for their comments on an earlier version of this editorial. This book is among the main outputs of the research project “VULNER: Vulnerability under the Global Protection Regime”, an international research initiative that was financed by the EU under the Horizon 2020 work programme and a matching funding from the Canadian Research Council (SSHRC). For three and a half years (beginning 2020—mid 2023), our project gathered research partners from Belgium, Canada, Germany, Italy, Lebanon, and Norway. Field researches were conducted in each of these countries, as well as in Uganda, in selected settlements for migrants in need of protection (such as reception centres for asylum seekers, shelters and community centres that provide assistance to asylum seekers and migrants without a legal status, refugee camps, and informal refugee settlements; we also met with self-settled refugees and asylum seekers, who often live in rented accommodations). More information about the project can be found at www.vulner.eu.

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L. Leboeuf et al. (eds.), *Between Protection and Harm*, IMISCOE Research Series, https://doi.org/10.1007/978-3-031-69808-8_1

the global south.¹ ‘Vulnerability’ can be a criterion that asylum seekers and refugees should meet in view of accessing certain advantages—such as resettlement, specific services in reception facilities and camps (specialised healthcare, housing, etc), or procedural accommodations as part of the asylum process (additional support and delays in preparing the asylum interview, interview by a specially trained public servant, etc) (UNHCR, 2011; Dir 2013/33/EU; Dir 2013/32/EU). ‘Vulnerability’ can also be an overall consideration, to be integrated in transversal ways while designing asylum and migration policies, as well as the norms and guidelines that accompany their operationalisation (UNGA Res 73/195, Objective 7; Council of Europe, 2021). Yet, while attention to the vulnerabilities of migrants seeking protection reflects humanitarian concerns, its concrete effects still need to be considered from a critical perspective. As it plays an increasingly key role in the legal and bureaucratic processes that seek to identify migrants eligible for protection (such as the refugee status) and/or protection services (such as access to housing, food, healthcare, etc), ‘vulnerability’ turns into a selection-tool with implied exclusionary effects that may also cause harms.

The authors of this book sought to investigate the various legal and bureaucratic constructions of migrants’ vulnerability, and the extent to which they reflect migrants’ experiences. We did so from a critical perspective, which sought to acknowledge the structural factors that contribute to create and/or exacerbate vulnerabilities among migrants, such as the broader constraints and obstacles to migrants’ mobility that stem from the architecture of legal migration and mobility regimes, as well as global inequalities. We adopted an interdisciplinary approach, which included the doctrinal and socio-legal study of legal norms and implementing practices by institutional actors in view of revealing legal and bureaucratic understandings of migrants’ vulnerability (1). We then conducted an empirical enquiry into migrants’ experiences of their vulnerabilities—while adopting a grassroot and situated approach, which didn’t depart from a preconceived definition of ‘vulnerability’, but which rather sought to understand how migrants live and experience their vulnerabilities in each context and situation (2). The country cases are located in the global north and in the global south, in view of gaining lessons from a longer standing tradition of mobilising ‘vulnerability’ as a conceptual tool to design and implement humanitarian aid programmes towards refugees in global south countries, such as in Lebanon and Uganda. We thereby sought to overcome the north-south divide in research, without neglecting the different legal, institutional, and geopolitical realities (3). While diverse, because they reflect each country’s institutional, legal, and social specificities, the research results reveal the ambiguities behind the concept of ‘vulnerability’. They invite researchers, practitioners, and

¹ Throughout this editorial, we refer to the divide between the global north and the global south to highlight existing global power divides. But we also refrain from capitalising these expressions so as to avoid essentialising the north-south divide, in ways that would neglect major regional and country differences, and that would falsely present them as two monolithic blocs.

policymakers to tread with caution when mobilising ‘vulnerability’, which flexible understandings give rise to negotiations among the actors involved. The results of such negotiations vary depending on power positions (4).

1.1 An Interdisciplinary Outlook on Migrants’ Vulnerabilities

Throughout our research, we provided an empirical study of the consequences of asylum and migrations laws for migrants’ vulnerabilities—that is, how legal and bureaucratic norms and practices may foster, and sometimes even produce, vulnerabilities among migrants seeking protection. We also sought to document and analyse the various legal and bureaucratic norms and processes aimed at assessing and addressing migrants’ vulnerabilities in each context, thereby including an internal perspective on the legal system. We further studied how migrants’ ‘vulnerability’ is constructed and mobilised in the laws and implementing practices of street-level bureaucrats in each field: what are the legal instruments that require state actors to address migrants’ vulnerabilities? Do they define the vulnerabilities that should be tackled and, if yes, how? Which processes do they establish in view of identifying and addressing migrants’ vulnerabilities? How do state actors incorporate specific attention for migrants’ vulnerabilities in their legal reasoning and practices, when implementing legal standards in individual cases?

Our project was thus divided into two main research phases: a first research phase consisted in a doctrinal and socio-legal enquiry into institutional approaches to migrants’ vulnerabilities. It allowed us to establish cross-cutting typologies of institutional uses and understandings of migrants’ vulnerabilities, depending on the legal uses of ‘vulnerability’, and to appraise their respective (dis)advantages. We showed how ‘vulnerability’ manifests itself through a focus on some ‘specific/special’ protection needs, which are often constructed by focussing on personal characteristics (such as gender, age, or health) and without considering how they intersect with other factors and circumstances, which are context specific, nor how they evolve over time. We also showed how ‘vulnerability’ serves as a loose notion, which guides legal reasoning in individual cases (when deciding on asylum applications or identifying aid beneficiaries, for example)—and how such loose understanding of ‘vulnerability’ risks reflecting decision-makers’ affects and conceptions of fairness in ways that are disconnected from migrants’ vulnerabilities, if it is not paired with adequate knowledge of migrants’ life.

A second research phase sought to deepen empirical knowledge on migrants’ experiences of their vulnerabilities. We mobilised ‘vulnerability’ as an analytical tool, to analyse and document migrants’ experiences and social positions. We therefore based ourselves on conceptual understandings of human ‘vulnerability’, as they have been developed in the ethics of care (see, e.g., Fineman, 2008) and in an

abundant literature in the social sciences (see, e.g., Brown et al., 2017; Virokannas et al., 2018; Gilodi et al., 2022). This body of literature shows that, while vulnerabilities may have ontological components and relate to innate characteristics, they are always embodied in specific contexts, where they emerge as part of social interactions—which are themselves the result of broader structural factors that relate to the organisation of society and social inequalities. We thus opted for a situated approach to vulnerabilities, which we refined through the mobilisation of three concepts: agency, intersectionality, and temporality.

These conceptual frameworks were selected based on the intermediary findings of the first research phase. We sought to conduct the empirical research while also complementing legal and bureaucratic understandings of vulnerability, which we found to be often fixed at the time a decision is adopted, focussed on some personal characteristics (such as gender, age, and the health status), and based on stereotypes that convey victimhood and passivity.

‘Temporality’ allowed us analyse experiences of vulnerabilities from a dynamic perspective, which accounts for their evolving nature, including how they are shaped through the passage of time (for example, when asylum seekers are confronted to prolonged uncertainties, see: Brun, 2016; Griffiths, 2014; Jacobsen & Karlsen, 2021). ‘Intersectionality’ allowed us to understand how positions of vulnerabilities are socially embedded, and thus shaped by multiple personal, social, and structural factors, while remaining attentive to their gendered dimensions (Crenshaw, 1991). ‘Agency’ allowed us to lay the focus on migrants’ relationships with laws and institutional practices—including how, despite the constraints they face, migrants mobilise state norms and practices in view of making their own independent life choices (Triandafyllidou, 2017; Carpentier et al., 2021). It allowed us to avoid essentializing migrants as passive victims, without however idealizing their resilience abilities nor obscuring the broader structural factors that contribute to generating experiences of vulnerabilities.

Through the combination of research methodologies from legal positivist, socio-legal, and socio-anthropological studies, we developed analyses that do not limit themselves to mobilising ‘vulnerability’ as a conceptual tool for radical criticism of asylum and migration laws and policies. Rather, we sought to refine our critical approach while considering and evaluating state practices that are aimed at reducing vulnerabilities among migrants—including by revealing how such practices may sometimes have adverse effects and cause harm. By duly considering the current uses and mobilisations of ‘vulnerability’ by institutional actors when operationalising legal and bureaucratic norms in individual cases, as well as their consequences for migrants’ experiences, we developed a grounded thinking on the promises, challenges, and pitfalls, of mobilising ‘vulnerability’ as a conceptual tool for asylum and migration governance. We thereby showed how important it is for institutional actors to adopt a situated approach to the vulnerabilities of migrants seeking protection when operationalising the norms that are aimed at protecting them.

1.2 A Situated Approach to Vulnerabilities

When analysing migrants' experiences of their vulnerabilities in this book, we adopted an approach based, first of all, on what has been called a 'situational' view on vulnerability, namely an approach that emphasises how vulnerability is externally induced rather than inherent (Martin, 2023, 24): it is the context that makes certain individuals more susceptible to harm. Vulnerability of individuals and groups change, in forms and degrees, over time and the interpretation of 'situational vulnerability' may be different depending on people's location. As Martin phrases it, individuals who are "rendered vulnerable in certain situations or contexts become a vulnerable population that should be afforded special protection and additional attention" (Martin, 2023, 22). Also Rogers et al. (2012) stress that vulnerability can arise from personal, social, and environmental situations, including abuse and socio-political oppression. They come back to this definition in their well-known classifications including inherent, situational, and pathogenic vulnerability.

As an example of this type of vulnerability, we may consider the study by Few and Rosen (2005) on women enduring abusive intimate partner relationships. They argue vulnerability results from a culmination of risk factors overpowering protective factors, and they distinguish two subcategories of situational vulnerability: life-circumstance stress and life-stage stress. Women who are feeling weak and powerless for other external circumstances (troubles with family of origin, lack of job, etc.) might be more prone to accept abusive partners. Likewise, the same may happen to women in a life stage when they feel social pressure to be in a couple, have children, etc. In other words, "women [may] find themselves in certain contexts that increase the likelihood that they will stay in abusive relationships" (Few & Rosen, 2005, 268).

Policies and legislation are also to be looked at from such a vulnerability perspective. In some cases, one may find that policy and legal frameworks *increase* situational vulnerabilities., such as austerity or restrictive social policies being criticized for increasing vulnerability to poverty and other social risks of some populations in comparison to others. For instance, Koldo Casla (2021) applies the concept of situational vulnerability to the issue of social rights in the UK, underscoring the negative effects of tax and welfare cuts on social protection for some groups. This viewpoint echoes the UN Special Rapporteur's critique of the UK's 'punitive, mean-spirited' approach towards its vulnerable population (Statement by Philip Alston of 16 November 2018).

Similar discussions have been elaborated in the field of health studies and medical research, where 'vulnerable' patients are excluded from research protocols, with consequent dilemmas on what it means to protect them or cause them harm (Schrems, 2014). In fact, even organizations such as the Council for International Organizations of Medical Sciences (CIOMS) have declared that it is important to overcome the tendency to "label entire classes of individuals as vulnerable" (Council for International Organizations of Medical Sciences, 2016, 57). Coming to the rights of refugees and asylum seekers, some supranational and national legal

instruments have incorporated a situational approach to vulnerability, which state actors must follow when implementing them. This is the case with the *EU Directive 2011/36 on preventing and combating the trafficking in human beings*, which defines the ‘position of vulnerability’ in relation to trafficking taking into account the contextual factors rendering a person vulnerable to forms of abuse and exploitation and leaving them without any concrete and real alternative (Palumbo & Sciarba, 2018). Furthermore, attention to the situational dimension of vulnerability can be found in recent case law of the European Court of Human Rights (ECtHR), such as the landmark decision *Chowdury and Others v Greece* of 2017 concerning the case of undocumented migrant workers from Bangladesh who were exploited in the agricultural sector in Greece, and whose vulnerable position was evaluated by the European Court of Human Rights (ECtHR) by adopting a situational approach—as discussed in VULNER Research Report 1 from the Italian team (Marchetti & Palumbo, 2021, 17–18; App. 21,884/15 *Chowdury v. Greece* ECHR 30 March 2017). Such approach is also commonly used by the ECtHR, when assessing whether suffered ill-treatments reach the level of severity required to be qualified as inhumane and degrading, and thereby prohibited under art. 3 of the European Convention on Human Rights (ECHR) (see, e.g., App. 7334/13 *Mursic v. Croatia* ECHR GC 20 October 2016, at para. 97).

Unfortunately, some important instruments in migration policy still fail to adopt a situational approach to migrants’ vulnerabilities. The EU New Pact on Migration and Asylum (COM, 2020, 609final) lays the emphasis on ‘vulnerable groups’, and it thereby seems to adopt a ‘group-based approach’ to identifying vulnerabilities—which also stems from the current EU Directives on asylum and the domestic legislations implementing them (Marchetti & Palumbo, 2021, 18). Such an approach based on making up ‘lists of vulnerable groups’ has been heavily criticized for homogenizing assumptions about social groups, not taking into consideration internal differences between subjects belonging to what can be from the outside seen as a salient social category. It may run the risk of stigmatization for members of these groups, whilst missing out on those who might need special protection, despite not falling in any of them.

This book will show that an essentialised conception of vulnerability—as something that inherently belongs to some categories of individuals or groups—has many failures. A very rigid view on a list of conditions associated with spotlight vulnerabilities is blind to the complexity of forms and dynamics of vulnerability, including to those that can be seen as ‘new’ or ‘emerging’ vulnerabilities, as they are described in this volume and the many national reports of the VULNER project. Accounting for the rights of refugees and asylum seekers also needs to be cast in the specific historical, political, and socio-economic context of the country of arrival, but also country of transit and origin of the migrant persons under consideration. The same person will not be subject to threat or stress factors in all countries, or even in different places of the same. All these contextual elements are of course particularly difficult for institutions to grasp. They may change quite rapidly, sometimes not yet officially acknowledged by the public and international audience, sometimes being open to different interpretations, etc. Yet we tried to argue that

adopting a “situational approach” is really the extra mile that needs to be done towards the full protection of these people’s rights—and this, in each of the context we studied and analysed, be it to access protection services or get a protection status in the north, or again to access aid in the south.

Lastly, we view our research on this matter as an example of ‘situated knowledge’ (Haraway, 1990). In the second chapter of this book, we discuss the implications of considering research on refugees and asylum seekers as an example of situated knowledge. We question the ‘positionality’ of every single perspective involved into it, namely considering the differences between the views produced from the standpoint of migrants, of judges, legal experts, social workers, practitioners, and finally our own perspective as researchers on the ethical dilemmas for investigations in this field.

1.3 Researching Across the South-North Divide

This book aims to contribute to a very small body of work encompassing studies on refugees and protection seekers across the global south and north. The book is based on a multi-case study with countries representing different national refugee regimes in seven countries located in the global north (Belgium, Canada, Germany, Italy, and Norway) and in the global south (Lebanon and Uganda). While the global south countries are in the minority of the cases analysed in the book, we nevertheless argue that an essential contribution of this book is that it brings together case studies from different national and regional realities—yet still sharing the geopolitical reality of an international refugee- and migration regime.

The south-north divide may be understood as a constructed divide between the global south and north. By adopting the vocabulary of south-north, we risk to further cement that reality. However, the divide is present in scholarship and policies on forced migration and migration studies more generally. Some even go as far as to say that a divide is necessary because the different realities in north and south make theories from the global north inappropriate in the context of the global south (Nawyn, 2016). While we suggest that there is a need to distinguish between different levels of theory in this discussion, in this book, we do not support the view and proposition that the global south and north require different theories. The case studies in this book share a common methodological, conceptual, and theoretical basis. This helps us to capture and synthesise findings that may be helpful to shed light on longer standing tradition of mobilizing vulnerability to decide on how to allocate scarce resources as part of humanitarian aid programmes and differing asylum regimes, and to evaluate these norms and practices by confronting them to migrants’ lived experiences of their vulnerabilities in each field.

Research on migration and refugees is often rather policy driven and selected themes, conceptualizations and methodologies reflect specific policy- and geopolitical interests (Bakewell, 2008; Black, 2001; Chimni, 1998; Stierl, 2020). This entanglement of research and policy interests has contributed to scholarship that replicates

the north-south divide. In many ways, Europe, North America, and Oceania are promoting policies on migration and refugees aimed at minimizing the movements towards their territories: keeping people close to their countries of origin. On the other hand, the major refugee-hosting countries in the global south, such as Uganda and Lebanon, show varying willingness of accommodating refugees on their territories as a temporary solution.

The chapters in this book demonstrate that countries in the global south and north share a history that can partly explain why these countries are differently situated in the geopolitical reality for individuals seeking protection. For example, Uganda and Lebanon are positioned in the regions of refugee-reproducing countries and their considerations include regional stability and relationships with neighbouring countries. Another critical divergence is the difference in numbers: Lebanon, for example, is the country in the world hosting the most refugees per capita (if you do not count the island-state of Aruba). Combined with a deep financial and political crisis, the context in which refugees are hosted in Lebanon impact on the vulnerability of the individual protection seekers. Following from these differences, the global north and south clearly represent different bureaucratic contexts where vulnerability assessments as part of humanitarian aid programmes dominate in Lebanon and Uganda, while vulnerability assessments as part of the asylum procedures are more dominant in the countries in Europe and North America.

Despite these differences, we maintain that the case studies in the book must be read and understood as part of the same geopolitical reality. We thus suggest that there is a need to see the case studies relationally across the south-north divide to understand better how the divide is maintained and reflected in policies and experiences of protection. This relationality could be understood both vertically and horizontally.

Vertically—between local and global actors and norms—the book and its case studies help to unpack the ways in which interactions between local, national, regional, and global frameworks shape how legal and bureaucratic frameworks operate and how the process of seeking protection is experienced and navigated. Hence the case studies are contextualized from their national reality but situated in international frameworks.

The case studies may also be read for their ‘horizontal relationality’. Our understanding of ‘horizontal relationality’ is inspired by Cindy Katz’ (2001) conceptualization of globalization as topography: We analyse at similar scales the experiences of similar categories of people and the meanings produced in similar documents and frameworks in different country-contexts. If we read the world as concentric circles on a map, one circle may represent protection seekers in different countries who are connected by their reality of seeking protection. Likewise, the judges, social workers, aid workers, and others we interviewed who are assisting protection seekers, describe similar experiences, struggles and perspectives. This situatedness, as we exposed in our previous section, across case-countries is then a clear justification for the study in multiple countries across countries in the global south and north.

We are interested in the specific ways in which the use of vulnerability operates in particular places and how those particular places are connected horizontally.

Relationality can be understood and read through the chapters as shared experiences and observations across the seven contexts. By approaching the cases through the lens of ‘vulnerability’ we asked the same questions across the seven country cases: How does the law assess, address, shape and produce the vulnerabilities of the protection seekers?

The discussion on vulnerability helped us to think across the divide. An important contribution of the book is thus to help to analyse the particularity of each country-situation but at the same time connecting realities across geographical distance and power divides. The chapters show that shared across all countries is the ambiguity inherent in the concept of vulnerability and how it is embedded in legal and bureaucratic frameworks. A common understanding of vulnerability is that it is difficult to understand and pin down into a specific language and interpretation: It is about a language and concept that is always open for interpretation in legal reasoning and policy discussions. Also shared across the case studies is the experience of displacement and the production of vulnerability that takes place in the protection regime. Hence, the analysis shows that the cases we have studied are clearly intertwined, but they are also fragmented.

1.4 Negotiated ‘Vulnerabilities’

This book is divided into three parts. A first one sets the scene, with two chapters seeking to unpack the conceptual and social dynamics surrounding the negotiated meanings of ‘vulnerability’. A first chapter highlights the transformations of ‘vulnerability’ as it travels across the ethical, analytical, legal and bureaucratic conceptual frameworks—where it is used with different purposes, and where it receives different explicit and implied meanings. A second chapter underlines the need to consider each actor’s positionality when identifying and analysing their understandings of migrants’ vulnerabilities, and how this shapes their actions.

A second part addresses the uses and mobilisations of ‘vulnerability’ as part of refugee regimes in the southern countries under study. A first chapter focusses on Lebanon. It tracks down the meanings of vulnerability among institutions and legal and bureaucratic frameworks that protect, assist, and govern refugees in Lebanon. It also analyses the various ways in which Palestinian and Syrian refugees negotiate meanings of vulnerabilities in their encounters with those institutions and frameworks. A second chapter analyses the Ugandan refugee regime. It shows how, in the ‘whole-of-society’ and polycentric governance approach that characterises the country’s refugee regime, ‘vulnerability’ has become a key concept to identify the mandates of each actor and coordinate their actions—while failing to address broader deficiencies, such as a lack of consistent and long-lasting solutions that would empower refugees to overcome their vulnerabilities. A third chapter zooms into resettlement processes, which benefit the most vulnerable refugees in the south, and who are offered protection in the north. Comparing resettlement practices and

policies from Canada and Norway, it discusses the competing political considerations and rationales behind the humanitarian focus on the most vulnerable.

A third part focuses on the northern countries under study. Chapters 2 and 3 consider the main components of refugee regimes, which contribute to generate experiences of vulnerabilities among asylum seekers. The first chapter builds on the Italian case study to demonstrate the impact of accommodation standards on the vulnerabilities lived by migrants. It thereby illustrates the capacity of asylum systems to tackle some vulnerabilities, whilst overlooking or even fostering others. The second chapter takes Belgium as a case-study to highlight how, combined with precarious legal statuses, long asylum processes contribute to feelings of disempowerment among asylum seekers, thereby exacerbating their vulnerabilities. Chapters 4, 5, and 6 discuss the consequences of increased attention to migrants' vulnerabilities as part of the asylum system. Chapter 4 analyses the administrative guidelines in Canada, which assist decision-makers to provide procedural accommodation(s) for vulnerable individuals who are going through Canada's inland refugee status determination process. It highlights the challenges that asylum seekers face in asserting or 'proving' vulnerability and thus eligibility for procedural accommodations. Another concern is the discretion exercised by decision-makers, both in terms of acknowledging vulnerability and in terms of determining what, if any, procedural accommodations are appropriate. Based on the German case-study, the fourth chapter shows how intricate institutional settings can foster inconsistent practices among the state actors, when numerous ones are involved at federal and state level without strong coordination mechanisms. Taking example from Norway, the fifth chapter questions the ambivalence of dedicated attention to asylum seekers' vulnerabilities, when it takes place against a background of increasingly restrictive asylum and migration policies.

The book thereby contributes to a grounded thinking on the consequences of increased reliance on 'vulnerability' when designing and implementing asylum and migration policies. It shows how 'vulnerability' receives different meanings and uses depending on the actors involved, leading to constant negotiations with indefinite consequences. It also reminds that, whereas 'vulnerability' may first appear as a concept with strong protective dimensions, its conceptual ambiguities and negotiated uses also contribute to perpetuate the deficiencies of the refugee regimes in which it becomes embedded.

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