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University of Zielona Góra, Institute for Law Studies  
University of Kazimierz Wielki in Bydgoszcz, Faculty of Law and Economics  
Kenyatta University Public Law Department,  
The Institute for Human Rights at Åbo Akademi University

## **DEATH AND MIGRATION: THE HUMAN RIGHTS PERSPECTIVE**

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### **'Let them in': the road to humanising the EU's asylum policy**

*Dr Sylvie Da Lomba*

*Strathclyde Law School*

The title of this presentation '*Let them in': the road to humanising the EU's asylum policy*' is the title of a research project funded by the Socio-Legal Studies (SLSA) Association. The aim of this project is to investigate whether the activation of temporary protection for persons who have fled the war in Ukraine can prompt a shift towards greater hospitality in the EU's asylum policy in line with its 2020 commitment to 'a *human and humane* approach' to asylum and migration (EU Commission, 2020 New Pact on Migration and Asylum).

The purpose of this presentation is to:

- Situate this project within my thinking on approaches to migration laws and policies (*I use this term in the broader sense to include asylum and migration laws and policies*). The underlying aim and premise of this research is to subvert the state-bounded premise of migration laws and policies, with a view to humanising these policies.
- Outline the theoretical framework that I deploy in this project: ethical vulnerability analysis. The use of this framework, which I have constructed with Dr Saskia Vermeylen (*see article references below*), is grounded in the imperative need to challenge the state-bounded baseline of migration laws and policies. Indeed, ethical vulnerability analysis supports an approach that is anchored in the lived experience, namely an approach that recognises that migration is a fundamentally human

phenomenon.

- Explain how ethical vulnerability analysis shapes this project.

### **1. Subverting the state-bounded premise of migration laws and policies:**

This project builds on research I have conducted with Dr Saskia Vermeulen (also based at Strathclyde Law School) that subverts the state-bounded premise of migration laws and policies, with a view to humanising these policies:

- Da Lomba S. and Vermeulen S. (2023). Ethical vulnerability analysis and unconditional hospitality in times of COVID-19: rethinking social welfare provision for asylum seekers in Scotland. *International Journal of Law in Context*, 19(2), 143-160. [doi:10.1017/S1744552322000192](https://doi.org/10.1017/S1744552322000192)
- Da Lomba, S., Vermeulen, S. (2023). Rethinking vulnerability as a radically ethical device: ethical vulnerability analysis and the EU's "Migration Crisis". *Human Rights Review* 24, 263–288. <https://doi.org/10.1007/s12142-023-00685-5>

In these articles, we subvert the state state-bounded premise of migration laws and policies through the construction of a novel theoretical framework: ethical vulnerability analysis. The distinctive feature of this theoretical framework is that it anchors the political in the realities of the human experience that are migration but also vulnerability.

Why do we need to subvert the state-bounded baseline of migration policies?

- The state-bounded premise makes for violent migration laws and policies – policies that can be deadly violent. It makes for inhumane laws and policies. In a thought-provoking talk, asks whether death has become 'a means of border control' for the EU and its Member States.<sup>1</sup> It is certainly the case that the EU and its Member States bear responsibility for the mounting death toll as people try to reach the EU's territory for safety. Indeed, the construction of a non-entry regime which illegalises 'spontaneous arrivals' (persons who knock at the EU's door 'uninvited' in search of protection), pushes them back and put their lives at risk is anathema to the EU's 2020 commitment to 'a *human and humane* approach' to asylum and migration (EU Commission, 2020 New Pact on Migration and Asylum).

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<sup>1</sup> Violeta Moreno-Lax The EU Non-Rescue Strategy for the Mediterranean: Death as Means of Border Control', *IEMed Barcelona* 22 April 2022.

- Migration laws and policies based on a state-bounded premise do not work because the latter is disconnected from the lived experience. The state-bounded premise fails to recognise that migration is a universal human phenomenon; it is not an anomaly that must be controlled, averted and punished.
- This state-bounded premise makes for very poor laws and policies, which leads to failure and reform impasses. This is apparent in the EU's (failing) attempts to reform the Common European Asylum Policy and its wider asylum policy. The UK Government's current attempts to stop the 'small boats' trying to reach its shores is another example that springs to mind.

Overly idealistic and thus unrealistic?

The very idea of challenging the state-bounded premise of migration laws and policies is often dismissed from the outset as overly idealistic and thus unrealistic. What is the point in contemplating and exploring something that is not going to happen? Migration will continue to be construed as a 'disruptive anomaly' that calls for tough responses. Greater hospitality is not supported by states and their populations, including in EU Member States. This could be loosely described as the 'political pragmatist's objection/argument.

However, a dose of idealism is precisely what we need. As Carens points out, a dose of idealism compels us to concede that 'our institutions and practices may not be all that they should be'.<sup>2</sup> A dose of idealism opens up a space to challenge the entrenched hostile premise of migration laws and policies and presents us with a much-needed theory of change.

I also think that idealism does not stand in opposition to the reality. Rather, what ethical vulnerability analysis seeks to do is to ground responses to migration in the lived experience and place the human at the heart of these responses. Put differently, ethical vulnerability analysis seeks to reconnect migration policies with the reality of our world – present and future. *For example, will erecting higher and higher walls offer an answer to climate change-induced displacement in the near future? I don't think so. What I am sure of, however, is that these walls will cause yet more deaths.*

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<sup>2</sup> Carens, J. H. (1996). Realistic and idealistic approaches to the ethics of migration. *The International Migration Review*, 30(1), 156–170, p. 166. <https://doi.org/10.2307/2547465>

## 2. Ethical vulnerability analysis

Ethical Vulnerability Analysis is firmly anchored in the realities of the everyday that are vulnerability<sup>3</sup> and migration.<sup>4</sup>

Ethical vulnerability analysis builds on Gear's fuller vulnerability analysis<sup>5</sup> - which expands Fineman's state-centric vulnerability analysis – and engages with Levinas's radical vulnerability theory. It further draws on Levinas and Derrida's ethics of hospitality.

Fuller vulnerability analysis:

We take from Fineman's work, her conceptualisation of vulnerability as universal - yet particular - and constant.<sup>6</sup> Ethical vulnerability analysis also draws on Fineman's idea that vulnerability analysis should work towards resilience-building.<sup>7</sup>

However, ethical vulnerability analysis counters Fineman's state-centric approach to vulnerability theory. For Fineman, it falls on the state to distribute resilience-building resources. Importantly, the duty of Fineman's responsive state is essentially owed to its (national) citizens. In her work, she only hints that this duty may extend to 'others to whom [the State] owes some obligation'.<sup>8</sup> Thus, Fineman's responsive state duty would not extend to illegalised migrants/asylum seekers/refugees. It is also the case that Fineman's responsive state is not located within its global setting. In line with Gear's fuller iteration of vulnerability analysis, ethical vulnerability analysis situates the state within our globalised, interlocked and *uneven* world and thus recognises that the state, though a key actor, is one amongst many.<sup>9</sup>

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<sup>3</sup> Fineman, M. A. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism*, 20, 177-191; Turner B. S. *Vulnerability and Human Rights* (University Park: The Pennsylvania State University Press, 2006).

<sup>4</sup> Chetail V. *International Migration Law* (Oxford: Oxford University Press, 2019) p. 16.

<sup>5</sup> Gear A (2013) Vulnerability, advanced global capitalism and co-symptomatic injustice. In: Fineman M, Gear A (eds) *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*. Ashgate, Farnham, pp 41–60.

<sup>6</sup> Fineman, M. A. (2008). The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism*, 20, 177-191; Fineman M, (2010–11) The vulnerable subject and the responsive state. *Emory Law journal* 60(2):251–276.

<sup>7</sup> Fineman M, (2010–11) The vulnerable subject and the responsive state. *Emory Law journal* 60(2):251–276.

<sup>8</sup> Fineman M, (2010–11) The vulnerable subject and the responsive state. *Emory Law journal* 60(2):251–276, p. 256.

<sup>9</sup> Gear A (2013) Vulnerability, advanced global capitalism and co-symptomatic injustice. In: Fineman M, Gear A (eds) *Vulnerability. Reflections on a New Ethical Foundation for Law and Politics*. Ashgate, Farnham, pp 41–60.

For example, it is imperative that enquiries into the EU's asylum and migration policies take account of power imbalances and wealth inequalities between EU Member States and (some) third countries.

Radical vulnerability theory:

Ethical vulnerability analysis engages with Levinas's idea of radical vulnerability to bring about the radical ethical turn that is required to make ethical vulnerability analysis a theory that subverts their state-bounded baseline of migration laws and policies and thus fundamentally humanises these policies. Ethical Vulnerability Analysis turns to Levinas' radical vulnerability analysis to make migration laws and policies *see* the vulnerability of the Other – the stranger who shows up unannounced -, which releases an ethical responsibility towards the Other.<sup>10</sup> Levinas uses the trope of the naked face of the Other to signify that, when we encounter the vulnerability and destituteness of the Other, we have no other option but to respond to the needs of the person who is facing us.<sup>11</sup> Critically, for Levinas, our responsibility towards the Other exists prior to the promulgation of any moral rule, policy, law or sovereignty of the state. The strength of our responsibility towards the Other brings about a transformative ethical shift that redirects the course of migration laws and policies, including the EU's, from hostility to hospitality. Critically, our responsibility towards the Other renders migration laws and policies accountable by the Other.

Ethics of Hospitality

Ethical Vulnerability Analysis engages with Levinas and Derrida's ethics of hospitality to consolidate our responsibility towards the Other.

From a Levinasian and Derridean perspective, the problem with current migration laws and policies, including the EU's, lies with their having erased any trace of the vulnerability of the Other, which makes for laws and policies that are oblivious to the migrant experience and support restrictions to hospitality – if not outright hostility. This is apparent in the EU's

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<sup>10</sup> Levinas E (1969) *Totality and Infinity*, translated by Alphonso Lingis. Duquesne University Press, Pittsburgh.

<sup>11</sup> Levinas E (1969) *Totality and Infinity*, translated by Alphonso Lingis. Duquesne University Press, Pittsburgh, p. 245-246.

push backs and reliance on agreements with countries such as Turkey, Libya and, more recently, Tunisia - notwithstanding these countries’ poor human rights records.

Levinas’s ethics of hospitality tells us that our responsibility towards the Other calls for an unconditional welcome. In this respect, Derrida points out that, the moment unconditional hospitality is turned into migration laws (what Derrida calls ‘hospitality laws’), a hostile space is being created – a space with its own rules and norms that no longer offers unbounded hospitality to the guest.<sup>12</sup> Hospitality is only extended to the stranger who meets the requirements of the ‘host’s’ (conditional) hospitality laws’ (migration laws). Ethical vulnerability analysis recognises this paradox, what Derrida refers to as the aporia between conditional and unconditional (absolute) hospitality. Rather than construe this aporia as an unsurmountable obstacle, ethical vulnerability analysis sees in unconditional hospitality the ethical compass that must shape migration laws and policies: absolute hospitality may never be achieved but sets the aim that migration laws and policies must pursue. It follows that the political becomes accountable to the demands of the ethics of hospitality.

### **3. ‘Let them in’: the road to humanising the EU’s asylum policy:**

My working hypothesis for this project is that:

- The EU cannot uphold its responsibility towards asylum seekers and refugees without offering them hospitality; and
- Practicing hospitality requires that ‘we let the Other in’.

At the core of my project is the idea that humanising of the EU’s asylum policy requires that the ‘right to enter’ the EU’s territory – admission to the EU’s territory - be (re)instated as its baseline.

As I mentioned at the start of this talk, this project interrogates whether the activation of temporary protection for persons who have fled the armed conflict in Ukraine can prompt a shift towards greater hospitality in the EU’s asylum policy and contribute to its humanising. With this in mind, the project explores:

- The recognition of admission to the EU’s territory as the foundation of access to international protection in the context of temporary protection for refugees from

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<sup>12</sup> Dufourmantelle A (2013) Hospitality – under compassion and violence. In: Clavier T (ed) The conditions of hospitality: ethics, politics, and aesthetics on the threshold of the possible Fordham University Press, New York: Press, pp 13-23, p. 15.

Ukraine, and

- Whether this recognition can offer a route to humanise and reform of the EU’s asylum policy.

The hospitality extended to refugees from Ukraine is in sharp and troubling contrast with the treatment reserved to refugees and asylum seekers from outside Europe. The swift activation of temporary protection brought home the fact that access to international protection demands access to the ‘host’s’ territory. To put it differently – using more legal phraseology –, the triggering of temporary protection shows that there can be no access to international protection without admission to the territory of a state where the right to seek asylum can be exercised. *At this juncture*, I would like to stress that I do not see the EU’s temporary protection framework and its activation in response to displacement from Ukraine as ‘hospitality incarnate’; it is not. For example, those who have fled Ukraine are treated differently depending on their nationality and immigration status, and not all are beneficiaries. It is also the case that the very nature of temporary protection makes it problematic.

However, in my view, the reconceptualisation of ‘the right to enter’ the ‘host’s’ territory as the baseline of humanised migration laws and policies is grounded in ethical vulnerability analysis’s affirmation of our responsibility towards the other. Importantly, international law has long recognised that there can be no asylum - protection - without hospitality and thus admission to the ‘host state’s’ territory. International law has long accepted that the refugee experience means that ‘illegal’ journeys may be inevitable. As the law of nations emerged, Grotius recognised the natural duty to offer hospitality to strangers as legal foundation of the right to asylum.<sup>13</sup> Grotius theorised that ‘the duty of hospitality gave rise to a right of *innocent* passage which could be forced by *foreigners provided* they had a “just cause”’.<sup>14</sup> ‘Grotius had in mind those who had fled from religious persecution and were seeking a new place to live’.<sup>15</sup> Importantly, the notion that admission is critical to protecting

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<sup>13</sup> de Wilde, M. (2017). Offering Hospitality to Strangers: Hugo Grotius's Draft Regulations for the Jews. *Tijdschrift voor Rechtsgeschiedenis*, 85(3-4), 391-433, p. 396. <https://doi.org/10.1163/15718190-08534P01>

<sup>14</sup> Chetail V. *International Migration Law* (Oxford: Oxford University Press, 2019) p. 25.

<sup>15</sup> de Wilde, M. (2019). Seeking Refuge: Grotius on Exile, Expulsion and Asylum. *Journal of the History of International Law*, 20(4), 471-500, p. 495. <https://doi.org/10.1163/15718050-12340094>

refugees ‘survived’ the affirmation of the government immigration power caused by the consolidation of the sovereign state and the ideas of national sovereignty and territorial integrity.<sup>16</sup> Vattel, as he softened Pufendorf and Wolff’s more absolutist understandings of the state’s power over the admission of *foreigners*,<sup>17</sup> argued that necessity – though construed narrowly - yielded ‘a right to illegal entry’. The international refugee protection regime developed in the aftermath of the Second World War recognises that refugees should not be penalised for their ‘illegal’ entry (or residence) as this would frustrate access to international protection (Article 31(1) 1951 Convention relating to the Status of Refugees).

In lieu of conclusion, I would like to make some very brief comments on how ethical vulnerability analysis relates to international human rights law and international refugee law when it comes to humanising the EU’s asylum policy, and migration laws and policies in general. It is commonly argued that full compliance with these provisions will make for (more) humane policies. I agree that international human rights law and international refugee law have a critical role to play in this regard, but we must acknowledge that the hostility entrenched in the state-bounded baseline of migration laws and policies curtails these bodies of international law’s humanising potential. States’ full compliance with international human rights law and international refugee law combined with hospitality-sensitive reading of the states’ international obligations constitute a vital step in the right direction; such developments, however, – though vital - cannot by themselves make for truly hospitable migration laws and policies that are accountable by the Other.

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<sup>16</sup> Chetail V. *International Migration Law* (Oxford: Oxford University Press, 2019).

<sup>17</sup> Chetail V. *International Migration Law* (Oxford: Oxford University Press, 2019) p. 28-31.