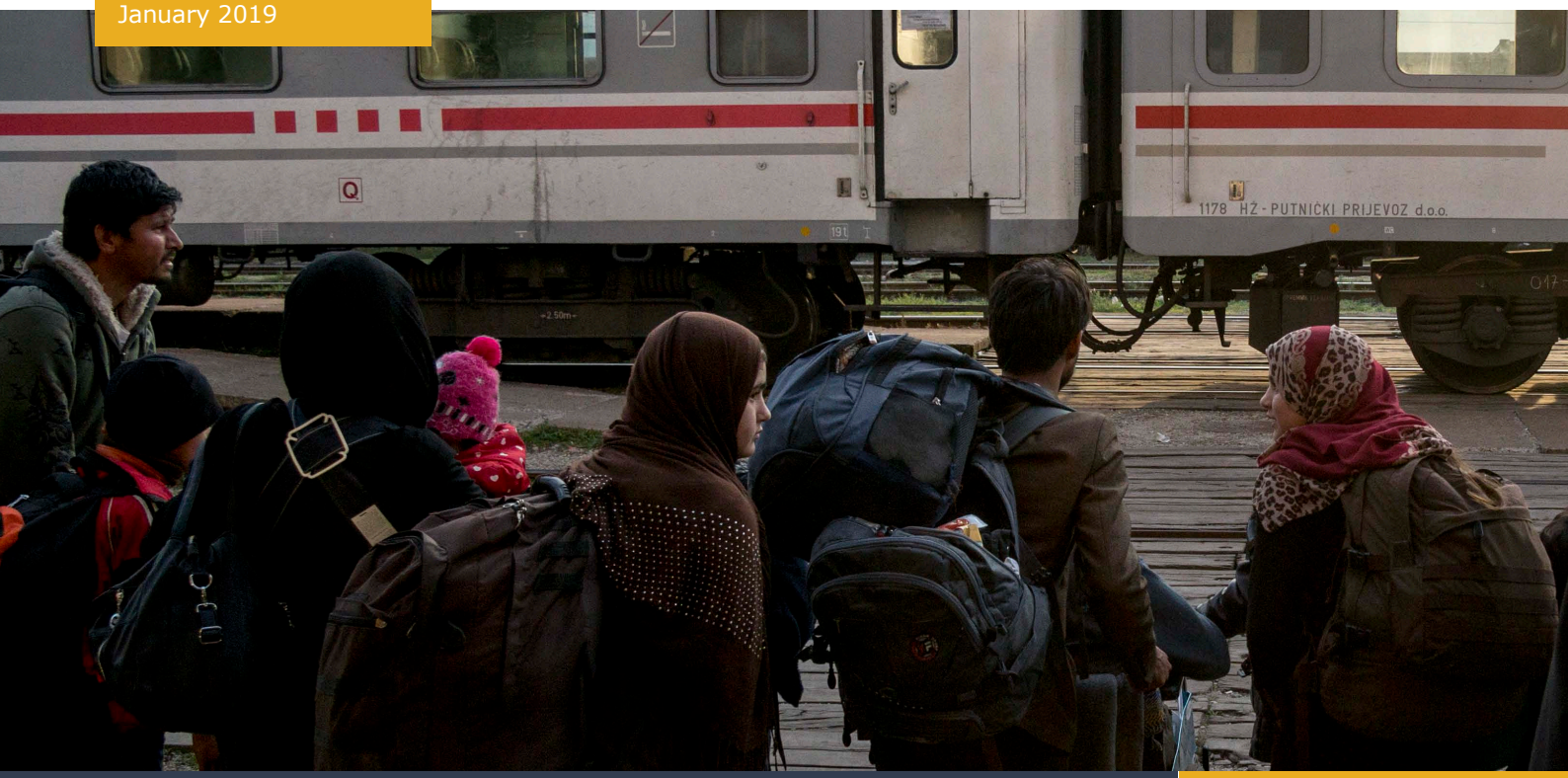
Population & Policy Compact

Policy Brief No. 20
January 2019

Population Europe

THE NETWORK OF EUROPE'S LEADING DEMOGRAPHIC RESEARCH CENTRES



Vulnerability

A Buzzword or a Standard for Migration Governance?

Key messages:

- 'Vulnerability' is increasingly becoming a commonly used term within the legal and policy discourse on asylum and migration. It serves as a tool that guides the implementation of legal and policy frameworks in a way that addresses specific needs and prevents the emergence of new ones.
- 'Vulnerability' has the advantage of contextualizing migration policy, since it draws attention to the concrete experiences lived by migrants, refugees and asylum seekers.
- 'Vulnerability' has hidden exclusionary effects. Such exclusionary effects may become problematic if they amount to a restriction on accessing existing rights.
- There is no common or systematic understanding of the 'vulnerabilities' faced by migrants, refugees and asylum seekers and of their evolution over time, indicating a need for interdisciplinary research.

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› Introduction

'Vulnerability' is an increasingly popular notion across scientific disciplines and also in the policy discourse on asylum and migration. When looking at international migration governance, in the recently adopted '*Global Compact for Safe, Orderly and Regular Migration*', for instance, the emphasis on migrants' 'vulnerability' is noteworthy (Atak et al., 2018). Yet, despite its increasing success within the policy discourse, 'vulnerability' lacks a common and systematic understanding. The notion of 'vulnerability' or 'vulnerable persons' is also used in legal instruments, including the '*Regulations and Directives of the Common European Asylum System (CEAS)*', but there is no exact definition contained in this regulatory framework. Thus, its practical relevance for the development and implementation of the global migration and refugee governance regime remains unclear.

To address this concern, Population Europe organised a High-Level Expert Meeting chaired by Constantin Hruschka (Senior Research Fellow, Max Planck Institute for Social Law and Social Policy) and Luc Leboeuf (Research Fellow, Max Planck Institute for Social Anthropology). The meeting's objective was to discuss the extent to which the notion of 'vulnerability' had any practical relevance: Is it just another 'buzzword' or can it inform the on-going policy debate on new forms of global migration governance? The participants included Isabela Atanasiu (Legal Officer, Directorate General for Migration and Home Affairs, European Commission), Aimie Bouju (Research Scientist, Population Europe Secretariat / Max Planck Institute for Demographic Research), Veronika Burget (External Relations Officer, United Nations High Commissioner for Refugees (UNHCR)), Héctor Cebolla-Boado (Professor, Universidad Nacional de Educación a Distancia), Hernan del Valle (Research Fellow, Harvard University, former Head of Humanitarian Affairs & Advocacy, Médecins Sans Frontières), François de Smet (Director, Myria, Federal Migration Centre), James-Stuart Duffin (CEO, Brent Community Law Centre), Andreas Edel (Executive Secretary of Population Europe / Max Planck Institute for Demographic Research), Marie-Claire Foblets (Director, Max Planck Institute for Social Anthropology), Josephine Liebl (Head of International Advocacy, European Council on Refugees and Exiles (ECRE)), Karen Mets (Senior Advocacy Adviser, Save the Children), Torsten Moritz (General Secretary, Churches' Commission for Migrants in Europe), Sinem Yilmaz (Project Officer, European Network for Migrant Women), and Dominik Zenner (Senior Migration Health Advisor, International Organization for Migration).

› The ambivalent effects of 'vulnerability'

The use of 'vulnerability' by researchers, policymakers and stakeholders to develop and implement the legal and policy framework on asylum and migration entails inclusionary and exclusionary effects. Participants agreed that 'vulnerability' is a useful notion to account for the varied but nonetheless concrete circumstances faced by migrants, asylum seekers and refugees.[1] It may be a helpful tool to adequately identify and address the specific needs of particularly vulnerable migrants. As a participant underlined, the notion of 'vulnerability' acknowledges that those forced to flee and seek protection are exposed to higher risks of enduring human rights violations. It also acknowledges that some are more susceptible to suffering serious harm than are others, to the extent that they may need more immediate and/or specialised support. Unaccompanied children, pregnant women, persons with psychosocial needs or other groups sharing a specific profile may be particularly vulnerable, since they are disproportionately exposed to a variety of risks during their flight. As a consequence, the imprecise meaning of the term 'vulnerability' is further blurred as it may refer to questions of status, as well as to specific personal profiles.[2] In that sense, the term 'vulnerability' highlights the particular disadvantages and weaknesses faced by some at all stages of migration.

However, the use of 'vulnerability' to tailor the protection to the specific needs of some migrants, refugees and asylum seekers also has hidden exclusionary effects. All of them are vulnerable, to some extent (App. No. 30696/09 M.S.S. v. Belgium and Greece ECHR GC 21 January 2011 at para. 251). Vulnerabilities have multiple and complex sources and may affect every asylum seeker in a differentiated way depending on the context and on their personal characteristics and resources, including their ability to develop coping and resilience strategies. Experts in our meeting underlined that focusing extensively on the specific vulnerabilities of certain groups is particularly problematic when access to pre-existing rights is restricted only to those deemed vulnerable. In the context of asylum, some participants feared that 'vulnerability' may be used to justify restricting access to certain rights. As argued by Torsten Moritz, references to 'vulnerability' may have the effect of rendering 'acceptable the unacceptable'. It may feed a narrative justifying the restriction of some rights to those identified as 'particularly vulnerable', thus allowing for more restrictive policies towards 'non-vulnerable' or 'less vulnerable' persons. Some participants also highlighted that the distinction between the 'particularly vulnerable' refugees and the 'non-vulnerable' ones has permeated the public discourse and seems to have replaced the traditional distinction between 'refugees' and so-called 'economic migrants'. Hernan del

Valle claimed that 'vulnerability' is a double-edged sword: It acknowledges that persons with special needs are exposed to specific risks, but it may also be used as a tool to limit State protection and to undermine the existing protection framework.

› 'Vulnerability' lacks a common understanding within the EU

The dialogue in the meeting highlighted that the definition of 'vulnerabilities' and of 'vulnerable groups' is often imprecise and varies depending on the legal and policy instruments. With respect to EU law and the CEAS, various directives provide a definition of 'vulnerable persons', which may, for example, have special reception needs or need special procedural guarantees. Still, there is no consistent or exhaustive category of 'vulnerable persons' across EU directives. In addition to these imprecisions regarding the definition of the vulnerabilities, the terminology used by the EU directives evolved through different phases of legislative harmonisation. New terms have emerged, such as persons 'in need of special procedure guarantees' or 'with special reception needs', but it remains unclear what precisely the relation is between 'special needs' and 'vulnerability'. For instance, in the last reform of the CEAS directives in 2016, the European Commission proposed to replace 'vulnerability' with 'special reception needs' (COM, 2016, 465 final of 13 July 2016). This approach represents a shift from a categorisation among refugees, migrants and asylum seekers (who is 'vulnerable'?) to a procedural approach (how are vulnerabilities being addressed?). 'Vulnerability' then becomes a screening tool that allows for improved identification of the individual needs of asylum seekers, potential returnees and beneficiaries of international protection.

These inconsistencies have led to disparities among domestic legal regimes regarding who constitutes vulnerable asylum seekers. As highlighted in an ECRE report (2016, p. 16), asylum seekers with mental disorders, for example, are recognised as vulnerable under Polish and Italian national law, but not under French and Spanish law. Victims of human trafficking are considered vulnerable in the context of the asylum procedures in Belgium and Greece, but not in Ireland or Croatia. EU Member States seem to apply their own understanding of the concept of 'vulnerability'.

› Stakeholders assess vulnerabilities with their own criteria

Similarly, stakeholders define their own criteria when identifying vulnerable populations. Organisations use different assessment strategies when they describe 'vulnerable groups'. Some prefer to define clear categories, for instance based on group membership, while others prefer to work with a blurred notion which allows for flexibility in their action.

As an example, the UNHCR uses the concept of 'vulnerability' in its resettlement programme and has established predefined categories of vulnerable persons that are eligible for resettlement, such as refugees with legal and/or physical protection needs (threat of refoulement), victims of torture, persons with medical needs, children, adolescents, girls and women at risk (UNHCR, 2011, p.171ff.). Médecins du Monde uses another approach. In 2015, the NGO created a '*European network to reduce vulnerabilities in health*' that works with migrants and asylum seekers, among others. Even if the concept of 'vulnerability' is prominent, the network does not specifically use the concept 'vulnerable groups', which, in their view, tends to ignore the multiple dimensions of vulnerabilities that individuals may have (Médecins du Monde, n.d.). The network adopts a more vague approach and prefers the concept of 'vulnerabilities in health'. By not using categorisations like the UNHCR, it allows for more inclusive analyses of both structural (e.g. legal barriers to access to healthcare), as well as individual factors (e.g. social isolation) of vulnerabilities.

Both assessment methods have their strengths, but are questionable. On the one hand, approaches focussing on legal definition (refugees, victims of human trafficking) or an individual's membership in a group (e.g., women, children) may obscure the fact that, within these groups, vulnerability may vary drastically (IOM, 2017, p.3). It may also downplay the ability of certain individuals to cope with their vulnerabilities. On the other hand, the more vague approaches may similarly pose practical issues when identifying individual circumstances that trigger the need for assistance.

› The hidden exclusionary effects of the term 'vulnerability'

'Vulnerability' has an added value within the policy discourse on asylum and migration in that it brings contextualization. However, policymakers, researchers and stakeholders should be aware that it also has hidden exclusionary effects. Because every migrant, asylum seeker and refugee can be viewed as vulnerable to some extent, a focus on 'vulnerabilities' necessarily implies a choice to favour some 'vulnerabilities' over others. Moreover, whereas 'vulnerability' can be a useful tool to guide the individual assessment of the specific needs of individual persons, it should not replace it. For these reasons, the notion adds to the on-going policy debate on new forms of global migration governance, as long as it is not used to restrict

access to the existing rights of migrants, asylum seekers and refugees. Still, the lack of a clear definition has several consequences. In the EU, national legislators tend to have their own understanding of what vulnerabilities are. This creates protection gaps: One vulnerable group may be protected by the asylum law of one European country and not recognised as such in a neighbouring one. For stakeholders working on vulnerable groups, this implies that stakeholders define their own criteria.

› A need for interdisciplinary research

Experts agreed that a more systematic understanding of the vulnerabilities of migrants, asylum seekers and refugees is needed to prevent courts, municipalities, civil society and other actors from applying their own understanding inconsistently. Therefore, there is a need for a better understanding of the evolution of vulnerabilities over time, in all phases of the migration experience. The absence of a clear definition of 'vulnerable migrants' indicates a need for a more comprehensive analysis of vulnerability. Social scientists, who have studied vulnerable populations for a long time, can provide lawyers valuable insights when working with vulnerable groups. Interdisciplinary collaboration could help define 'vulnerability' and solve all related difficulties regarding its application in national law and the assessment of vulnerable populations. In this regard, there is a lack of research on the subject, particularly from a quantitative point of view. Too little data is available on vulnerable migrants and existing data is not openly and widely shared. Adequate statistical infrastructures would allow researchers to understand the consequences of risk factors, in all phases of the migration experience.

Interdisciplinary collaboration between social scientists and lawyers may help to counteract the lack of a definition of 'vulnerable migrants' and provide more comprehensive analyses of the vulnerabilities as they are lived and experienced by migrants, refugees and asylum seekers, including the coping strategies and the way such strategies are adapted within and in response to the relevant legal framework, as well as of their evolution over time.

› Policy recommendations

- When using the notion of 'vulnerability', policymakers and decision makers should be aware of its hidden exclusionary effects, as well as of the necessity of evaluating needs that are caused by 'vulnerabilities' on an individual basis.
- Policymakers should support interdisciplinary research and the production of quantitative data to allow for a better understanding of vulnerabilities as they are concretely lived and experienced by migrants, refugees and asylum seekers, and their evolution over time, as well as to assess the effectiveness of existing policies.

Footnotes

[1] This Policy Brief uses the terms 'migrants', 'refugees' and 'asylum seekers' in the sense defined by the International Organization for Migration (https://www.iom.int/key-migration-terms).

[2] This could be considered a 'dual vulnerability' due to the conditions of their migration (e.g. asylum seekers) and their group membership (e.g. children).

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Imprint

Publisher: Max Planck Society for the Advancement of Science on behalf of the collaborative network "Population Europe"
Technical Coordination: Aimie Bouju, Emily Lines
Layout: The Brettinghams GmbH, Berlin
Photo Credit (Cover Page): ©BalkansCat – iStock
Print: Newprint blue GmbH, Berliner Str. 13-14, 10715 Berlin
ISSN: 2512-6164
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This Policy Brief received funding from the project "The Challenges of Migration, Integration and Exclusion. Wissenschaftsinitiative Migration der Max-Planck-Gesellschaft (WiMi Project)", financed by the Max Planck Society.