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### THE AUDACITY TO SEEK A BETTER LIFE:

Should the European Union Adopt a Human Rights Based  
Approach to Human Smuggling?

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## *Dedications*

*With gratitude to those who went out of their way to help make this thesis a reality: G.M.; J.A.; A.T.*

*'Migration is always a dignity-seeking journey, often taken out of love.'*<sup>1</sup>

## *Abstract*

Human smuggling is a complex phenomenon triggered by a variety of socio-economic and political factors. The clear legal distinction between human smuggling and human trafficking, in reality, is obscure, especially for the most vulnerable. Despite the risks involved, human smuggling is often the only way for those whose rights are grossly unrespected, unprotected and unfulfilled elsewhere to seek dignity and a better life. Whilst the European Union's values theoretically promote all human rights for all human beings, in reality the Union has been adopting an increasingly securitised approach along with a criminalising and highly-polarised discourse— all circumstances which exacerbate existing vulnerabilities and marginalisation among irregular travellers. It is high time that the European Union recognises the overlapping human rights risks for the most vulnerable and adopts a Human Rights Based Approach to human smuggling, as it has for human trafficking. Ongoing international negotiations provide a window of opportunity for the European Union to lead the way of change by adopting a comprehensive and dignifying Human Rights Based Approach for those who need to rely on facilitators to seek a better life.

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<sup>1</sup> Francois Crepeau, 'Rejecting Criminalisation and Externalisation: Moving from Enforced Closure and Regulated Mobility' (2015-2016) *GeoLJ* 115, 123.

## *Abbreviations*

CoE	Council of Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMS	European Centre on Migrant Smuggling
ECtHR	European Court of Human Rights
EU	European Union
HRBA	Human Rights-Based Approach
NGOs	Non-Governmental Organisations
OHCHR	Office of the High Commissioner for Human Rights
UASC	Unaccompanied, Separated and Accompanied Children
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

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## I. Introduction

### A. Introductory Remarks

From an international, and especially a European perspective, human smuggling is currently widely portrayed as a crime against the state, whilst, it can and often does, entail a range of human rights concerns.<sup>2</sup> The following true story illustrates one of many possible scenarios.

The family of M is living in Syria with her husband and three underage children (*minors*) when the civil war breaks out. One night the father is kidnapped from the family home by men in uniforms, and later murdered. The children witness the kidnapping, as a result the eldest daughter becomes terrified by men in uniforms and, most likely, experiences a severe psychological trauma which causes her recurring nightmares and uncontrollable bed-wetting. M decides that her family has no future in Syria and, borrowing money from friends, decides to seek a better life elsewhere by using smugglers to reach their destination.

Initially she resides in Lebanon, then moves to Turkey. However, as she is beginning to settle down in Turkey, her deceased husband's family finds her and demands that the children are brought back to Syria. She turns to the Turkish police for help but is informed that she can receive none because she is an *irregular migrant*. She then decides to quickly move elsewhere, using smugglers to reach the EU by entering Bulgaria. She prefers not to say much about the smuggling process and only shares that it was a long and intense journey, mostly on foot, through a remote mountain area which lasted a whole night. Once in Bulgaria, she is intercepted by a police patrol. Upon stating that her family is seeking asylum, they are taken to a detention facility until her application is initiated, she is told. Her family is later transferred to a refugee camp. They have not been trafficked and they do not receive any protection at this point.

After M and her children are placed in the detention facility, they encounter several challenges. Firstly, some of the staff at the detention facility are wearing uniforms which terrifies the children, the eldest in particular. Secondly, it is a rule at the facility that the toilets are locked after 9p.m. This causes problems for the eldest daughter, who suffers from nightmares and bedwetting, and the other children, who often need to use the bathroom at night. M finds a large plastic bowl inside the room which the children use. However, they, and the other people sleeping in the same room, have to sleep with the smell of human excrements until the bowl is emptied and washed in the morning. What if there had been no bowl? M's situation clearly is far from dignifying. What would have been different, if a Human Rights Based Approach

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<sup>2</sup> See for example, 'Human rights perspectives on the smuggling of migrants' (Event Concept Note 2017) <[https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/CN\\_HumanRightsPerspectivesSmugglingofmigrants\\_ts5.pdf](https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/CN_HumanRightsPerspectivesSmugglingofmigrants_ts5.pdf)> accessed 1 June 2018; Global Alliance Against Traffic in Women, 'FAQ 1: Human Rights in Migrant Smuggling' (Working Paper 2011) <[http://www.gaatw.org/publications/Working\\_Papers\\_Smuggling/FAQ1\\_HumanRightsinMigrantSmuggling.pdf](http://www.gaatw.org/publications/Working_Papers_Smuggling/FAQ1_HumanRightsinMigrantSmuggling.pdf)> accessed 4 June 2018 p 7.

(*HRBA*) were applied to this situation? Is that necessary for people who arrive into the European Union (*EU*) through smuggling?

Almost all migration-related academic literature starts with the premise that migration has always happened and will always happen.<sup>3</sup> Even the 2016 New York Declaration on Refugees and Migrants, ratified by virtually all United Nations (*UN*) States reaffirms that '[s]ince earliest times, humanity has been on the move'.<sup>4</sup> Although this is general knowledge in the migration studies field, the current public discourse and political reality mostly suggest the opposite. Some opinion leaders and, often populist, politicians throughout the EU 'manufacture unease' by frequently referring to migrating populations as a homogenous group which has come to invade and exploit welfare systems, thus seen as posing considerable threats to state security, democracy and fundamental national and/or EU values.<sup>5</sup> Such a narrative often regards *smugglers* as the most unscrupulous organised criminals who make it possible for the *smuggled* to invade the EU in utter disregard for laws and regulations.<sup>6</sup> This polarised portrayal of the smuggling phenomenon is inaccurate and dangerous as it is used to justify a range of measures criminalising administrative breaches, often committed out of necessity, and contributes to a sense of fear which, in turn, triggers hostility, isolation and makes it easier to infringe upon the human rights of those involved in the smuggling process.<sup>7</sup> It must be clarified that in an ideal situation, the smuggling process would not occur as there would be 'safe legal pathways' to reach the EU.<sup>8</sup> However, as currently, the Union has adopted a 'Fortress Europe' security-driven system, 'aimed at repression and [...] minimis[ing] the number of people reaching Europe',

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<sup>3</sup> See, for example, Anne Gallagher, 'Trafficking, smuggling and human rights: tricks and treaties' [2002] 12 FMR <<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/FMR12/fmr12.9.pdf>> accessed 1 May 2018 p 28.

<sup>4</sup> UNGA, New York Declaration for Refugees and Migrants: resolution/ adopted by the General Assembly (3 October 2016) A/RES/71/1 Art 1.

<sup>5</sup> Even though it is known that a rather small percentage of all internationally displaced persons have applied for asylum in Europe and that migration's impact on 'population trends is short-lived as fertility behaviours rapidly catch up with demographic patterns in host countries'. See, International Experts Panel on Migration and Asylum, 'Call for an International Panel on Migration and Asylum' (2018) <<https://www.iepam.eu/posts/call-for-iepam/>> accessed 30 June 2018; Sara Bellezza and Tiziana Calandrino, 'Criminalization of Flight and Escape Aid' (Report 2017) <<https://crimig.files.wordpress.com/2017/02/kidem-doc-final-2-5-17.pdf>> accessed 30 June 2018, p 10; Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and Sovereign Illusion' in Barbara Bogusz et al, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Hotei Publishing, 2004) 61, 63.

<sup>6</sup> See, for example, Ruben Andersson, 'Why Europe's border security approach has failed – and how to replace it' (Human Security Study Group 2016) <[http://www.securityintransition.org/wp-content/uploads/2016/02/WP08\\_Migration\\_FinalEditedVersion.pdf](http://www.securityintransition.org/wp-content/uploads/2016/02/WP08_Migration_FinalEditedVersion.pdf)> accessed 13 June 2018, p 12.

<sup>7</sup> See, for example, IOM, 'Migrant Smuggling Data and Research: A global review of the emerging evidence base' (Report 2016) <[http://www.regionalmms.org/images/sector/smuggling\\_report.pdf](http://www.regionalmms.org/images/sector/smuggling_report.pdf)> p 10; The Guardian, 'We need a paradigm shift in the way we think about migration' (28 June 2018) <[https://www.theguardian.com/world/2018/jun/28/we-need-a-paradigm-shift-in-the-way-we-think-about-migration?CMP=share\\_btn\\_tw](https://www.theguardian.com/world/2018/jun/28/we-need-a-paradigm-shift-in-the-way-we-think-about-migration?CMP=share_btn_tw)> accessed 30 June 2018.

<sup>8</sup> Roberto Forin and Claire Healy, 'Trafficking along Migration Routes to Europe: Bridging the Gap between Migration, Asylum and Anti-Trafficking' (ICMPD Report 2018) <[https://www.icmpd.org/fileadmin/1\\_2018/Bridging\\_the\\_Gap\\_between\\_Migration\\_\\_Asylum\\_and\\_Anti-Trafficking.pdf](https://www.icmpd.org/fileadmin/1_2018/Bridging_the_Gap_between_Migration__Asylum_and_Anti-Trafficking.pdf)> accessed 29 June 2018, p 62, 63;

OHCHR, 'Protecting the rights of migrants in irregular situations' <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/IrregularMigrants.pdf>> accessed 1 July 2018, p 2.



those who attempt to enter must ‘rely on the help of [...] different people and groups’ and often compromise their own safety in the process.<sup>9</sup> Yet, the EU is increasing its anti-smuggling efforts and funding despite the current results resembling more ‘a politically successful failing policy [...] [which has] produced a series of unintended and even counterproductive effects’, as described further below.<sup>10</sup>

The author of this thesis (*this author*) sees adopting a HRBA to human smuggling within the EU as the best short-medium term approach to ensure a more dignified treatment and avoid further suffering, until a more long-term strategy, which addresses the root causes of irregular migration is implemented. The definition of a HRBA should also be clarified from the outset. It is a comprehensive approach that can be applied to any policy field and is based on *five PANEL principles*: participation; accountability; non-discrimination and equality; empowerment; and legality.<sup>11</sup> This would apply equally to all persons who migrate irregularly via smuggling, regardless of whether they seek asylum. Hence, a HRBA to smuggling is envisioned as a substantial measure which fits into this structure and coincides with the spirit of the international human rights framework.<sup>12</sup> This is elaborated further in the last chapter.

## B. Methodology

This research takes as a foundation the international legal framework on these topics, proceeds with identifying its structure in the EU context and continues onto an academic review of existing literature in the field of human smuggling and human trafficking. However, this thesis focuses predominantly on smuggling. Whilst providing some references and comparisons to trafficking, it does not claim to constitute a full overview of the two phenomena. Rather, the goal is to analyse whether human smuggling could entail grave enough human rights risks to warrant the adoption of a HRBA within the EU. Therefore, the central research question of this thesis is: ‘**Should the EU should adopt a HRBA to human smuggling?**’. This can be fragmented further into several sub-questions: ‘What is the definition of human smuggling?’; How is human smuggling similar and different to human trafficking?’; Does human smuggling raise serious human rights concerns which go against fundamental international and EU values?’; ‘Is a HRBA to human smuggling in the EU desirable?’; and lastly, ‘What could a HRBA to human smuggling potentially include, especially regarding the functions of front-line respondents? This research predominantly aims to prove

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<sup>9</sup> International Experts Panel on Migration and Asylum (n 5); Sara Bellezza and Tiziana Calandrino (n 5) 10.

<sup>10</sup> UNODC, 'Smuggling of Migrants: A Global Review and Annotated Bibliography of Recent Publications' (2011) <[https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling\\_of\\_Migrants\\_A\\_Global\\_Review.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Smuggling_of_Migrants_A_Global_Review.pdf)> accessed 2 April 2018, p 86.

<sup>11</sup> See, *inter alia*, Scottish Human Rights Commission, 'What is a human rights based approach?'

<<http://careaboutrights.scottishhumanrights.com/whatisahumanrightsbasedapproach.html>> accessed 30 May 2018.

<sup>12</sup> A HRBA coincides is in fact based on the international and national human rights frameworks, as stipulated by the principle of legality. See, OHCHR ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ HR/PUB/06/12 p 8.

that a HRBA to human smuggling within the EU is necessary. Yet, the last chapter attempts to suggest possible ways to do that.

Furthermore, this thesis predominantly focuses on the *Balkan route*, and specifically, the East Mediterranean part of it.<sup>13</sup> There are three main reasons for this. Firstly, the East Mediterranean route was among the most popular for irregular entry into the EU in 2015-2017, despite the EU-Turkey deal.<sup>14</sup> Secondly, in academic literature there is a lack of focus on the East Mediterranean route (and the Balkan one as a whole) as scholars tend to have a mostly Western-centric approach.<sup>15</sup> Simultaneously, for the Balkan route, there are indications of a clear link between the increasing number of smuggled persons, within the current EU-wide restrictive migration policies, and the increasing number of persons in danger of being trafficked.<sup>16</sup> Lastly, this thesis is physically written within the Balkan/East Mediterranean social context as the author is a Bulgarian language user, hence having access to resources in Bulgarian as well, and the thesis is supervised by a criminal law scholar and practitioner at the largest university in Northern Greece. Moreover, the thesis is also enriched by insights into the complexity of human smuggling in Greece, acquired through an expert interview with a non-governmental organisation (NGO) operating in the area. Hence, these circumstances are likely to optimise the quality of this thesis' contribution to the current academic debate. Nonetheless, this research is limited from the outset by insufficient data on the topic, and as mentioned above, the Western-centric approach of the existing research.<sup>17</sup> The general lack or unreliable quality of migration data has recently triggered a call, signed by over 500 scholars, for an International Panel on Migration and Asylum, envisioning 'a radical change of paradigm in dealing with migration and asylum, based on a rational, realistic, scientifically informed and humanist approach'.<sup>18</sup> This is also one of the core arguments of the present research paper, aiming to provide a more balanced view of human smuggling within the EU context.

Moreover, this thesis seeks to nuance the polarity present in terms of the understanding of the smuggling phenomena by addressing the social and economic inequalities which inherently play a significant role. Vulnerable groups such as women, unaccompanied, separated and accompanied children (*USAC*), asylum-seekers and refugees are increasingly being smuggled worldwide and yet, currently, the general research focus mostly does not reflect upon it.<sup>19</sup> This thesis also acknowledges that, although asylum-seekers are a

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<sup>13</sup> This author also considers the East Mediterranean (Turkey to Bulgaria and Turkey to Greece) and the West Balkan (Greece to FYROM; Serbia to Croatia; Serbia to Hungary) routes together to comprise the *Balkan route*. See also in, *Forin and Healy* (n 8) 22.

<sup>14</sup> *Forin and Healy* (n 8) 12, 22.

<sup>15</sup> UNODC (n 10) 45.

<sup>16</sup> *Forin and Healy* (n 8) 22.

<sup>17</sup> See, for example, UNODC (n 10) 2.

<sup>18</sup> International Experts Panel on Migration and Asylum (n 5); The Guardian, 'We need a paradigm shift in the way we think about migration' (28 June 2018) <[https://www.theguardian.com/world/2018/jun/28/we-need-a-paradigm-shift-in-the-way-we-think-about-migration?CMP=share\\_btn\\_tw](https://www.theguardian.com/world/2018/jun/28/we-need-a-paradigm-shift-in-the-way-we-think-about-migration?CMP=share_btn_tw)> accessed 30 June 2018.

<sup>19</sup> UNODC (n 10) 54; IOM (n 7) 125.

very large group of those smuggled, they are not the only one.<sup>20</sup> Therefore, it focuses more on the general characteristics of human smuggling, whilst seeking to consider the inherent vulnerabilities in the circumstances of all the above-mentioned groups. These vulnerabilities are considered as caused by the circumstances, and not necessarily as inherent. The link to diaspora communities is also briefly considered.

In general, this author takes a multi-disciplinary approach which combines legal analysis, sociological and ethnographical literature reviews, along with a limited discourse analysis of selected part of the public discourse, to provide a more complete account of the subject. Although international human rights practice is still excessively dominated by legal analysis, the multi-disciplinary approach of this thesis reflects the growing recognition that such an approach can substantially improve our progress towards the full and effective realisation of human rights.<sup>21</sup> This author considers a flexible comparative method as appropriate and necessary to account for a more comprehensive analysis of the human smuggling phenomenon's complexities and their human rights implications.<sup>22</sup> This thesis also focuses on the social context of migration facilitation, as it appears to currently be underexplored in academia.<sup>23</sup> In terms of sources, this thesis predominantly uses: international and EU policy and legal documents and related implementation guidelines; existing studies on human smuggling and human trafficking in the above-mentioned academic fields; sources related to the potential uses of a HRBA; and reports of further victimisation of smuggled persons in EU Member States (*MS*).

### C. Terminology

The term *mixed migration* is used to refer to the historical practice of people of different societal positions and with different incentive to migrate in a similar manner (direction, methods, facilitation).<sup>24</sup> Simultaneously, each migrating individual is considered to fall somewhere in the *forced-voluntary continuum* depending on circumstances, such as poverty, armed conflict, persecution, limited economic and/or educational opportunities, and most likely in the future, environmental disasters.<sup>25</sup> This author also interprets seeking a better life in the context of mixed migration and its causes.

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<sup>20</sup> *Forin and Healy* (n 8) 14.

<sup>21</sup> Frans Viljoen and Jehoshaphat Njau (eds), *Beyond the law: Multi-disciplinary perspectives on human rights* (PULP, Pretoria) 307, p 3.

<sup>22</sup> IOM (n 7) 17.

<sup>23</sup> See, for Gabriella Sanchez, *Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research* (2017) 5 *JMHS* 9.

<sup>24</sup> Jørgen Carling, Anne Gallagher and Christopher Horwood, *Beyond Definitions: Global Migration and the Smuggling-Trafficking Nexus* (RMMS 2015) <<https://ssrn.com/abstract=3014244>> accessed 20 May 2018, p 1; *Forin and Healy* (n 8) 14.

<sup>25</sup> *ibidem*; John Borton and Sarah Collinson, 'Responses to mixed migration in Europe: Implications for the humanitarian sector' (Humanitarian Practice Network Paper 2017) <<https://odihpn.org/wp-content/uploads/2017/12/NP-81-web-file.pdf>> accessed 15 May 2018, p 4.

Some literature uses the terms *migrant smuggling* and *human smuggling* interchangeably.<sup>26</sup> This thesis focuses on the role smuggling has in the migratory process, specifically for asylum-seekers and refugees, the latter being those who have received refugee status in one EU country and use smuggling to move to another EU state. Yet, for the purposes of this paper, the term *human smuggling* is predominantly used due to the negative connotation *migrant* is associated with, hence emphasising the inherent human nature of all human beings. Similarly, *irregular traveller* is used to replace *irregular migrant*, where appropriate. This is meant to neutralise the way *migrants* are often portrayed in public discourse as a threat to the Western democratic society, which is used to justify increasing securitisation and criminalisation of migratory policies.<sup>27</sup> Moreover, this thesis refrains from using the term *illegal*. This author considers it contrary to human dignity to refer to someone's 'socio-politically constructed status' as a marker of identity.<sup>28</sup> Instead the terms *illegalised*, *criminalised* and *irregular* are used. Furthermore, gender-neutral terms are used wherever possible without distorting the meaning. Moreover, here the term *smuggling* also excludes the smuggling of goods. By the term *frontline responders*, this thesis refers to anyone who may come into contact with a smuggled person who might have suffered exploitation and/or other human rights abuses. These could be any law enforcement officials, detention centre staff, refugee camp or shelter staff, interpreters, etc.<sup>29</sup>

Due to the restriction in length, this thesis assumes that adopting a HRBA within the EU context would be possible, as has been for trafficking, which, as elaborated below, shares many similarities with smuggling in the way it impacts the most vulnerable. It is predominantly aimed at those who can influence the adoption of a HRBA to human smuggling the most, namely: EU policy makers, MS representatives and civil society organisations. Hence, it only briefly reaffirms the premise that human rights are 'inherent to all human beings who are born free and equal, in dignity and in rights' and hence universal, indivisible and interdependent as confirmed by the outcomes of the 1994 United Nations Vienna Declaration and Programme of Action and does not examine the existing debate between *cultural relativism* and *universalism*.<sup>30</sup>

To acquire an understanding of how the international community perceives human smuggling, one must begin by examining how this phenomenon is regulated by international law. Here it is important to consider its historical developments which have led to the establishment of a legal distinction between human smuggling and human trafficking.

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<sup>26</sup> See, *inter alia*, Sanchez (n 23) 11.

<sup>27</sup> Crepeau (n 1) 116.

<sup>28</sup> Sara Bellezza and Tiziana Calandrino (n 5) 12.

<sup>29</sup> Forin and Healy (n 8) 11.

<sup>30</sup> UNGA, Vienna Declaration and Programme of Action (12 July 1993) A/CONF157/23 Art 5; Urban Jonsson, *Human Rights Approach to Development Programming* (UNICEF) 210, 14.

## II. Human Smuggling- Legal Framework and Implementation

### A. Relevant International Legal Instruments

Human rights are unconditionally tied to the very existence of all human beings and are enshrined in, first and foremost, the UN core human rights treaties.<sup>31</sup> Those smuggled or otherwise with irregular status are rights-bearers whose presence must be acknowledged by the state and allowed to claim those rights.<sup>32</sup> Moreover, the 2016 New York Declaration for Refugees and Migrants, which was unanimously adopted by all UN MS, holds that States must protect the human rights, human dignity and safety of migrants at all times, regardless of their status.<sup>33</sup> All states have an obligation to respect, protect and fulfil the human rights of anyone within the State's jurisdiction.<sup>34</sup> Even though, as a starting point, 'all human beings have all human rights', distinct groups have been legally categorised due to the particular vulnerability they are facing in their distinct situation, for example: refugees, trafficked persons, smuggled persons, etc.<sup>35</sup> Although this distinction is not supposed to be hierarchical,<sup>36</sup> this thesis argues that what has indeed been created is a hierarchy of vulnerable legal groups facing distinctive vulnerabilities.

The 1951 Convention Relating to the Status of Refugees (*Refugee Convention*) establishes the refugee's legal status and contains the *non-refoulement* provision, which prohibits the forcible return or expulsion of anyone with a refugee status.<sup>37</sup> Although regular migrants, irregular migrants, refugees and asylum-seekers are different legal categories, they 'often move and live in similar physical spaces and are likely to have similar human rights needs'.<sup>38</sup> People who migrate often pass through several legal categories during the trip, especially when the route is dangerous and long.<sup>39</sup> In addition to the core international human rights treaties and the Refugee Convention, it is important to mention the 2000 UN Convention against

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<sup>31</sup> These are the: 1966 International Covenant on Civil and Political Rights; 1966 International Covenant on Economic, Social and Cultural Rights; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 2006 Convention on the Rights of Persons with Disabilities; 2006 International Convention for the Protection of All Persons from Enforced Disappearance. See, *inter alia*, OHCHR, 'Migration and Human Rights: Improving Human Rights-Based Governance of International Migration' (2012)

<[https://www.ohchr.org/Documents/Issues/Migration/MigrationHR\\_improvingHR\\_Report.pdf](https://www.ohchr.org/Documents/Issues/Migration/MigrationHR_improvingHR_Report.pdf)> accessed 10 May 2018, p 15.

<sup>32</sup> OHCHR (n 8) 1.

<sup>33</sup> New York Declaration (n 4) Art 41; OHCHR, 'Differentiation between Regular and Irregular'

<<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/RegularAndIrregular.pdf>> accessed 10 May 2018.

<sup>34</sup> OHCHR (n 8) 1.

<sup>35</sup> OHCHR (n 31) 14; OHCHR (n 33) 1.

<sup>36</sup> OHCHR (n 31) 14.

<sup>37</sup> UNGA, Convention Relating to the Status of Refugees, (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 Art 33; Jonsson (n 30) 112, 113.

<sup>38</sup> OHCHR (n 31) 19.

<sup>39</sup> *ibidem*.

Transnational Organized Crime,<sup>40</sup> to which the Protocol against the Smuggling of Migrants by Land, Sea and Air (*Anti-Smuggling Protocol*)<sup>41</sup> and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (*Anti-Trafficking Protocol*)<sup>42</sup> are attached. Moreover, Anti-Smuggling Protocol applies insofar as international human rights law and, particularly, the Refugee Convention, are not compromised.<sup>43</sup> The two Protocols are at the core focus of this chapter.

The approach chosen at the international level, was to create two separate protocols simultaneously, in order to make the negotiations process easier.<sup>44</sup> The first proposal for an anti-smuggling legal instrument was initiated by Austria, whilst, the one for trafficking came from Italy.<sup>45</sup> Anne Gallanger, an Office of the United Nations High Commissioner for Human Rights (*OHCHR*) representative at the time of negotiations for the two protocols, personally remembers the talks around the trafficking definition and its relation to prostitution as ‘battles [...] [which] served to distract NGOs from broader human rights concerns, in particular those related to the Anti-Smuggling Protocol’.<sup>46</sup> According to her ‘[t]he prospect of a legal separation between (technically consensual, incidentally exploitative) human smuggling on the one hand, and (never consensual, always exploitative) trafficking on the other was generally considered to be a good thing’ and ‘that these [Anti-Smuggling Protocol] negotiations had never really been about human rights.’<sup>47</sup>

The final text of the Anti-Smuggling Protocol has three explicit objectives, namely: combating migrant smuggling alongside; promoting international cooperation whilst; protecting smuggled migrants’ rights.<sup>48</sup> Although the latter is indeed included, and States are under the obligation to preserve and protect the human rights of migrants especially if smuggling endangers their rights, it is merely the last goal, signifying its order of priority.<sup>49</sup> In contrast, the Anti-Trafficking Protocol’s final draft, recognising the primary need for

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<sup>40</sup> *ibid* 15; UNGA, United Nations Convention against Transnational Organized Crime (adopted 8 January 2001, entered into force 29 September 2003) 2225 UNTS 209.

<sup>41</sup> UNGA, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507 (*Anti-Smuggling Protocol*).

<sup>42</sup> UNGA, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

<sup>43</sup> *Anti-Smuggling Protocol* (n 41) Art 19; See also, European Parliament Directorate General for Internal Policies, ‘Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’ (Policy Department C: Citizens’ Rights and Constitutional Affairs Study 2016) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)> accessed 18 May 2018, p 32, 33.

<sup>44</sup> Anne Gallagher, ‘The New UN Protocols on Trafficking and Migrant Smuggling- Preliminary Analysis’ 23 (2001) HRQ 975, 981.

<sup>45</sup> *Gallagher* (n 44) 983.

<sup>46</sup> Global Alliance Against Traffic in Women, ‘Smuggling and Trafficking: Rights and Intersections’ (2011) <[http://www.gaatw.org/publications/Working\\_Papers\\_Smuggling/WPonSmuggling\\_31Mar2012.pdf](http://www.gaatw.org/publications/Working_Papers_Smuggling/WPonSmuggling_31Mar2012.pdf)> accessed 10 May 2018, p 36.

<sup>47</sup> *ibid* 36, 37.

<sup>48</sup> European Parliament Study (n 43) 23; *Anti-Smuggling Protocol* (n 41) Art 4.

<sup>49</sup> UNODC (n 10) 7.

victim protection, stipulates that State Signatories may, additionally, provide for measures allowing recognised trafficking victims to remain in the host country, temporarily or permanently, whilst considering ‘humanitarian and compassionate factors’.<sup>50</sup> Hence, a human rights element in these negotiations was included, albeit with secondary importance to the goal of fighting the trafficking offence on an international level.<sup>51</sup> Moreover, the existence of two separate instruments, namely the Anti-Smuggling Protocol and the Anti-Trafficking Protocol, makes it possible for some states to ratify one and not the other. Indeed, the Anti-Trafficking Protocol has 173 State Signatories and 117 State Parties,<sup>52</sup> whereas the Anti-Smuggling Protocol has 146 State Signatories and 112 State Parties.<sup>53</sup> Does that mean that one is generally considered more important than the other? Or does it mean that States have more interest to be parties to the Anti-Trafficking Protocol than to the Anti-Smuggling one? Are such nuances also detectable at EU level? The following sections provide considerations related to these questions.

## B. Definitions: Comparing Human Smuggling and Human Trafficking

To understand more about the differences between the way the two phenomena are perceived, one must first examine the respective legal definitions within the Protocols and how they have been incorporated at the EU level. This section also explores several factors, which are important for the understanding of the present conception of both smuggling and trafficking, namely the circumstances surrounding both policies and their respective evolution. Moreover, the role of EU law enforcement agencies relevant to human smuggling and trafficking is briefly considered as well. Lastly, the importance of human dignity within the whole discussion are considered as central to the HRBA concept.

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<sup>50</sup> Perhaps with a cautious approach to avoid giving states an excuse not to ratify the text. Anti-Trafficking Protocol Art 7; *Gallagher* (n 44) 992.

<sup>51</sup> *Gallagher* (n 44) 992.

<sup>52</sup> UNTC, '12. a Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' (2018) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-a.en.pdf>> accessed 30 March 2018.

<sup>53</sup> UNTC, '12. b Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime' (2018) <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12-b.en.pdf>> accessed 30 March 2018.

1. According to the Anti-Smuggling and Anti-Trafficking Protocols

a) *The UN Anti-Smuggling Protocol*

The UN Anti-Smuggling Protocol uses the term *migrant* and defines *smuggling* as ‘the procurement in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.<sup>54</sup> This definition has several key elements: procurement; financial or other material benefit; illegal entry of a person; into a state signatory to the Protocol where that person is neither a national, nor a permanent resident. *Illegal entry* is characterised as ‘crossing borders without complying with the necessary requirements for legal entry into the receiving State’.<sup>55</sup>

The Protocol covers ‘offences [which] are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences’.<sup>56</sup> The Protocol does require States to take ‘all appropriate measures [...] to preserve and protect the rights of [smuggled] persons [...] in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment’ and to protect smuggled persons from violence.<sup>57</sup> This legal text also requires ‘appropriate assistance’ to be afforded to smuggled persons whose ‘lives or safety are endangered’ and to account for ‘the special needs of women and children’.<sup>58</sup> Those who have been smuggled are regarded as *smuggled migrants*.<sup>59</sup> The Protocol explicitly states that migrants ‘shall not’ be liable for having been smuggled.<sup>60</sup> However, it requires states to criminalise ‘through legislative and other measures’ the following acts: smuggling of migrants; ‘producing’, ‘procuring, providing or processing’ fake or altered travel documents; or enabling a smuggled person to remain in the country without the necessary documents.<sup>61</sup>

Most importantly for this thesis, aggravating circumstances in relation to smuggled persons are considered those that: ‘endanger, or are likely to endanger, the lives or safety’; or ‘entail inhuman or degrading treatment, including for exploitation’.<sup>62</sup> Whilst the Protocol’s definition of smuggling does not include exploitation, such is foreseen as possible and regarded as an aggravating circumstance. Coercion here is

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<sup>54</sup> Anti-Smuggling Protocol (n 41) Art 3(a).

<sup>55</sup> *ibid* Art 3(b).

<sup>56</sup> *ibid* Art 4.

<sup>57</sup> *ibid* Arts 16(1)-(3).

<sup>58</sup> *ibid* Arts 16(3)(4).

<sup>59</sup> See, *ibid* Art 18.

<sup>60</sup> *ibid* Art 5.

<sup>61</sup> *ibid* Art 6(1).

<sup>62</sup> *ibid* Art 6(3).



deemed to be on the periphery of human smuggling, which is discussed in the following sub-chapters, while it is legally considered to be central in the human trafficking definition.

b) *The UN Anti-Trafficking Protocol*

The *human trafficking* definition has notable differences in comparison to that of smuggling. The UN Anti-Trafficking Protocol defines ‘trafficking in persons’ as the:

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation<sup>63</sup>

Exploitation is then further defined as ‘at a minimum’ involving any of the following: ‘exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’.<sup>64</sup> In other words, this detailed definition contains three main groups of elements. Firstly, the *action* element: recruitment; transportation; transfer; harbouring; or receipt of persons. Secondly, it is necessary to establish some degree of coercion, which is the *means* element used to gain control over somebody else. This could be through: the use of force (*violence*); the threat of force (threat of *violence*); abduction, fraud, deception, abuse of power; abuse of a vulnerable position; the giving or receiving of payments; the giving or receiving of benefits. For children however, these factors are irrelevant as they are not considered to have the legal capacity to give consent.<sup>65</sup> Secondly, it is necessary to establish that the *intention or purpose of the exploitation*: prostitution of others; other forms of sexual exploitation; forced labour; forced services; slavery; practices similar to slavery; servitude; or the removal of organs.<sup>66</sup> Thus, human trafficking is any behaviour combining the three elements together: an action; for any of the means for any of the intentions or purposes outlined above.<sup>67</sup>

Regarding legal status, those who are trafficked have the status of *victims* whereas those smuggled are regarded as *smuggled migrants* with extremely limited protection against subsequent torture, inhumane and

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<sup>63</sup> Art 3(a) Anti-Trafficking Protocol.

<sup>64</sup> *ibidem*.

<sup>65</sup> Conny Rijken and Eeffe De Volder, ‘The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings’ (2009) 25 Conn JIL 49, 51; UNODC, ‘The Role Of ‘Consent’ in The Trafficking in Persons Protocol’ (2014) <[https://www.unodc.org/documents/human-trafficking/2014/UNODC\\_2014\\_Issue\\_Paper\\_Consent.pdf](https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf)> accessed 1 June 2018, p 21.

<sup>66</sup> See Luke Butterly, ‘Trafficking v. Smuggling; Coercion v. Consent: Conceptual Problems with the Transnational Anti-Trafficking Regime’ (2014) 2 UK LawStudentRev 46, 47; UNODC, ‘Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime’ (second part) <[https://www.unodc.org/pdf/crime/legislative\\_guides/03%20Legislative%20guide\\_Trafficking%20in%20Persons%20Protocol.pdf](https://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf)> accessed 12 June 2018, p 268.

<sup>67</sup> UNODC (n 66) 268.

degrading treatment or violence as a result of their status. In contrast, protection for those who have been trafficked includes the following accommodations for the victim: protecting their privacy and identity; ensuring they are informed about court proceedings and have the opportunity to express their views during those; they have the opportunity to seek compensation for damages; their physical safety would be ensured while on the territory of a State Party; determining their nationality and permanent residence and ensuring that they can obtain the necessary documents to return; and to facilitate that return whilst ensuring their safety.<sup>68</sup>

However, the two Protocols also have similarities as both the traffickers and the smugglers are regarded as being involved in criminal activities and hence are liable, regardless of whether they are natural or legal persons.<sup>69</sup> Legal liability according to the Anti-Smuggling Protocol extends to those who procure and facilitate irregular travel and/or falsify identity documents for these purposes in order to enable irregular entry into the territory of a State Signatory.<sup>70</sup> Moreover, the Protocol stipulates that people who migrate irregularly should not be prosecuted solely for that, although State Signatories may nevertheless have the right to prosecute the irregular crossing of their national border.<sup>71</sup>

To summarise, regarding legal liability there are several similarities. In both Protocols, those who are the object of the conduct, are not liable for the illegal crossing of state borders. However, also in both Protocols, those who have more control over that process, the smugglers or the traffickers, respectively, are liable to be charged with an offence as laid down in the domestic laws of State Parties. Now that the legal distinction at the international level has been clarified, the following sub-section explores the Union's position.

## 2. The EU's Definition of Human Smuggling

The EU's policy on human smuggling, hence influencing the definition, gained momentum following several notable events: the 1999 Tampere European Council; the then European Community's involvement in the 2000 Palermo Convention and the Anti-Smuggling Protocol negotiations and the French Presidency's legislative proposals regarding human smuggling, which eventually led to the adoption of the 2002 Facilitators' Package.<sup>72</sup> The key legal documents on human smuggling in the EU are the 2002 Directive on common definition of offence of facilitation of unauthorised entry, transit and residence and the 2002 Framework Decision on penal framework to prevent the facilitation of unauthorised entry, transit<sup>73</sup>

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<sup>68</sup> *ibid* 282; Anti-Trafficking Protocol (n 42) Arts 6, 8.

<sup>69</sup> Anti-Smuggling Protocol (n 41) Art 6; Anti-Trafficking Protocol (n 42) Art 5; UNODC (n 66) 273.

<sup>70</sup> Anti-Smuggling Protocol (n 41) Art 3.

<sup>71</sup> Anti-Smuggling Protocol (n 41) Arts 5, 6; Tolu Ogoru and Salome Kigbu, 'Human Trafficking and Human Smuggling: The Distinction and Legal Implications' (2015) 6 *BeijLR* 224, 228.

<sup>72</sup> European Parliament Study (n 43) 24.

<sup>73</sup> *Forin and Healy* (n 8) 25.

However, the EU's efforts to address human smuggling were most notably enhanced by the Facilitators Package, adopted in 2002.<sup>74</sup> The latter includes two legal instruments, namely: Directive 2002/90/EC,<sup>75</sup> establishing a common definition of the offense of facilitation of unauthorised entry, transit and residence; and Framework Decision 2002/946/JHA,<sup>76</sup> reinforcing the penal framework to prevent human smuggling by providing minimum standards for sanctions.<sup>77</sup> Even though the EU is also a party to the Anti-Smuggling Protocol,<sup>78</sup> its definition is different from the one in the Protocol. The Facilitator's Package Directive requires MS to penalise those who 'intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the[immigration] laws of the State concerned' (unless done for humanitarian assistance) and anyone who 'for financial gain intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the[immigration] laws of the State concerned'.<sup>79</sup> In contrast, as mentioned above, for sanctioning the procurement of irregular entry or residence, the Anti-Smuggling Protocol requires 'a financial or other material benefit'.<sup>80</sup> The humanitarian assistance exception regarding smuggling came as a result of lobbying from civil society organisations during the Facilitators Package negotiations due to fears of prosecution for assisting non-EU nationals.<sup>81</sup> Hence, eventually MS were granted discretion whether to include the humanitarian assistance exception in their national laws or to sanction such practices as well.<sup>82</sup> However, due to the limited scope of this thesis, the humanitarian exception is not be elaborated on any further.

The EU Facilitator's Package does acknowledge that it shall apply without prejudice to the *non-refoulement principle* contained within the Refugee Convention and its Protocol.<sup>83</sup> Yet, literature reviews suggest that the risk of human rights being disregarded in anti-organised crime efforts is heightened.<sup>84</sup> Although not explicitly mentioned in the Facilitators Package, the EU does acknowledge the duty to protect irregular migrants' right to life, right not to be tortured or treated in an inhumane or degrading manner, right to be

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<sup>74</sup> See EU Commission, 'Migrant Smuggling' <[https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/facilitation-irregular-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/facilitation-irregular-migration_en)> accessed 10 June 2018.

<sup>75</sup> European Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328.

<sup>76</sup> European Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328.

<sup>77</sup> EU Commission (n 74).

<sup>78</sup> See European Council Decision 2006/616/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community [2006] OJ L262.

<sup>79</sup> European Council Directive (n 75) Art 1; EU Commission (n 74).

<sup>80</sup> European Parliament Study (n 43) 26.

<sup>81</sup> *ibidem*.

<sup>82</sup> *ibidem*.

<sup>83</sup> *ibid* 33.

<sup>84</sup> See IOM (n 7) 127.

protected against violence and as witnesses or victims of crimes.<sup>85</sup> Even though the European Court of Justice (*ECJ*) has also clarified that such protection does encompass irregular migrants as well,<sup>86</sup> in practice, as it is argued further in this thesis, such protection may be limited or non-existent. In addition to what has been outlined above, it is interesting to note that the definition of the possible sanctions within the Facilitation Directive is different from that in the Convention implementing the 1985 Schengen Agreement.<sup>87</sup> The latter obliges MS to impose ‘appropriate penalties’ whereas the former demands ‘effective, proportionate and dissuasive criminal sanctions’ which may be supplemented by other measures such as deportation and confiscation of means of transport.<sup>88</sup> This shows an evolution in the definition in the general direction of more legal certainty and foreseeability. Recent legislation has also reflected these developments as, for instance the EU Victims’ Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU) which is addressed subsequently.<sup>89</sup>

### 3. The EU’s Definition of Human Trafficking

The EU Anti-Trafficking Directive 2011/36/EU (*EU Anti-Trafficking Directive*)<sup>90</sup> includes in its definition of trafficking also ‘exploitation for forced begging, for criminal activities, for the removal of organs, for illegal adoption and for forced marriage’; provides for safeguards for children trafficking legal proceedings and specifically requires MS to establish long-term measures for unaccompanied minors, who have been trafficked.<sup>91</sup> These amendments are deemed to reflect a shift in the understanding of human trafficking as a migration issue, instead of primarily an issue of organised crime as it was previously thought.<sup>92</sup> This is also reflected in the more recent EU primary sources of law: the Founding Treaties, namely the Treaty on the European Union (*TEU*) and the Treaty on the Functioning of the European Union (*TFEU*).<sup>93</sup> An indication of a common efforts to combat human trafficking as a form of organised crime which affects immigration policy can be found in the TFEU.<sup>94</sup> Moreover, the EU Charter of Fundamental Rights also prohibits the practice of human trafficking.<sup>95</sup> Nonetheless, according to the conclusions of the EU-funded

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<sup>85</sup> C 311/13 *O Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (ECJ, 5 November 2014) para 49; European Parliament Study (n 43) 37.

<sup>86</sup> European Parliament Study (n 43) 37.

<sup>87</sup> *ibid* 25.

<sup>88</sup> *ibidem*.

<sup>89</sup> European Parliament and Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315.

<sup>90</sup> EU Anti-Trafficking Directive 2011/36/EU

<sup>91</sup> *Forin and Healy* (n 8) 32, 33.

<sup>92</sup> *Rijken and De Volder* (n 65) 54.

<sup>93</sup> Consolidated Version of the Treaty of European Union [2012] OJ C326; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326

<sup>94</sup> Art 79, 83(1) TFEU.

<sup>95</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326, Art 5(3).

Challenge project, it is not the protection for those who migrate that is driving the increasingly criminalising approach to migration.<sup>96</sup> Hence, it is apparent that developments at the Union level have also been recent and, as is discussed below, continue to evolve.

#### 4. Relevant EU Legal Instruments, Policies and Authorities

Thirteen years after the adoption of the Facilitators Package, the 2015 EU Agenda on Migration came into force, which brought the former under a common umbrella with other legal and policy instruments.<sup>97</sup> Some would say that the goal was to manage migration in a better way, through a new policy on legal migration and strengthening the common asylum policy, complemented by attempts to make irregular travel less viable by increasing efforts against human smuggling.<sup>98</sup> Nevertheless, this belief is questioned further in this thesis. In the same year and as complementary to the Agenda on Migration, Union adopted a five-year Action Plan Against Migrant Smuggling (*The Action Plan*) within the framework of the Common Security and Defence Policy (CSDP).<sup>99</sup> The Action Plan aims to ‘set[...] out concrete actions to counter and prevent migrant smuggling, while ensuring the protection of the human rights of migrants’ and as complementary to the general efforts to ‘address the root causes of irregular migration’.<sup>100</sup> The Action Plan acknowledges human trafficking as a ‘different yet interlinked crime’ and stipulates that ‘in [human smuggling], migrants willingly engage in the irregular migration process by paying for the services of a smuggler in order to cross an international border, while in [human trafficking] they are the victims, coerced into severe exploitation which may or may not be linked to the crossing of a border’.<sup>101</sup> It also stipulates that it is a challenge to detach these intertwined phenomena as ‘persons who start their journeys in a voluntary manner are also vulnerable to networks of labour or sexual exploitation’.<sup>102</sup>

The Action Plan has four main points which are briefly outlined below. Firstly, ‘enhanced police and judicial response’ aiming to ‘to disrupt the business model of criminal groups and bring the perpetrators to justice’ through a ‘multi-agency approach’.<sup>103</sup> Secondly, ‘improved gathering and sharing of information’ to enhance knowledge on ‘modus operandi, routes, economic models of smuggling networks, on links with

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<sup>96</sup> Lidia Isabel Estévez Picón, ‘Criminalising Hope: human rights implications of the criminalization of irregular immigration in EU member states and the EU’ (2012) <[https://globalcampus.eiuc.org/bitstream/handle/20.500.11825/123/EMA\\_AwardedTheses\\_2010\\_2011\\_Lidia\\_Isabel\\_Estevez\\_Picon.pdf?sequence=1&isAllowed=y](https://globalcampus.eiuc.org/bitstream/handle/20.500.11825/123/EMA_AwardedTheses_2010_2011_Lidia_Isabel_Estevez_Picon.pdf?sequence=1&isAllowed=y)> accessed 20 April 2018, p 53, 54.

<sup>97</sup> Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions: A European Agenda on Migration COM (2015) 240; *Forin and Healy* (n 8) 24.

<sup>98</sup> *Forin and Healy* (n 8) 24.

<sup>99</sup> See EU Commission (n 74).

<sup>100</sup> Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: EU Action Plan against migrant smuggling (2015 - 2020) COM (2015) 285, 2.

<sup>101</sup> *ibid*, fn 4.

<sup>102</sup> *ibidem*.

<sup>103</sup> *ibid* 2.

trafficking in human beings [...]',<sup>104</sup> *inter alia*, through 'monitoring of pre-frontier area for early identification of smugglers and prevention of irregular departures of migrants, including through the use of Frontex tools, such as Eurosur' intensifying support to Europol for identifying smugglers' web-based recruitment and for collection of Eurostat data.<sup>105</sup> Thirdly, 'enhanced prevention of smuggling and assistance to vulnerable migrants' which, most notably, comprises: improving smuggling-associated risk-awareness through developing a 'counter-narrative in the media, including social media to uncover their lies, with the involvement of diaspora communities in the EU'; awareness-raising campaigns with a preventative goal in third countries; possibly revising Directive 2004/81/EC depending on its impact assessment outcomes; developing guidelines for border and consular authorities; evaluating the Schengen Information System framework to reduce irregular migration, make returns more effective and 'to ensure a dignified and humane return, in line with the EU Return Directive'; and opening readmission negotiations with irregular migration origin countries.<sup>106</sup> Lastly, strengthening third state partnerships through funding projects and EU cooperation platforms to support the local authorities' efforts to combat smuggling.<sup>107</sup>

Linked to the Agenda on Migration and enacted in September of the same year, is the temporary EU Emergency Relocation Scheme which *de facto* tried to decrease the demand for smuggling.<sup>108</sup> The two-year Relocation was planned to redistribute a total of 160,000 asylum-seekers from Greece and Italy according to predetermined quotas to the 15 participating countries of relocation.<sup>109</sup> When it expired in 2017, it became clear that only around 30% of the quotas were met, which meant only 33, 154 people relocated in the rest of the EU.<sup>110</sup> Shortly after that, in March 2016, the EU-Turkey Deal was signed with the goals, supposedly, to distrust the smuggler's business model and find an alternative for those who wish to migrate. It provided for: the return of all irregular travellers crossing from Turkey to Greece; the resettlement of one Syrian within the EU for every Syrian returned to Turkey; Turkey to take steps to prevent irregular migration; once the latter is sufficiently and sustainably reduced, to activate a 'Voluntary Humanitarian Admission Scheme'.<sup>111</sup> While the EU Commission is developing partnerships with neighbouring countries on migration management, anything is hardly ever done for improving domestic human rights institutions' capacity to protect the people in those EU neighbouring states.<sup>112</sup> The EU-Turkey Deal is heavily criticised

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<sup>104</sup> *ibid* 4.

<sup>105</sup> *ibid* 5, 6.

<sup>106</sup> *ibid* 6-8.

<sup>107</sup> *ibid* 10.

<sup>108</sup> *Forin and Healy* (n 8) 25.

<sup>109</sup> *ibidem*; UNHCR, 'EU Emergency Relocation Mechanism' (2018) <<https://data2.unhcr.org/en/documents/details/62510>> accessed 18 April 2018.

<sup>110</sup> UNHCR (n 109). Some countries fulfilled their entire quota (Ireland, Norway, Liechtenstein, Luxemburg, Malta, Finland), whilst some accepted under 10% of the quota (Poland, Hungary, The Czech Republic, Austria, Bulgaria, Croatia).

<sup>111</sup> *Forin and Healy* (n 8) 25.

<sup>112</sup> *Crepeau* (n 1) 118.

for delegating and exacerbating the issue.<sup>113</sup> While it represents a research topic of its own, this author sees such a strategy as hardly being beneficial for addressing smuggling-related human rights concerns. In comparison, the success of the Emergency Relocation Scheme can be seen as having mixed success, by providing safe transportation to relocated asylum-seekers, it spared tens of thousands of smuggling instances which could have easily involved some degree of exploitation. Therefore, for the future deliberations on addressing smuggling and the human rights violations often associated with seeking asylum in an irregular situation, this relatively small-scale success should be kept in mind.

a) *Enforcement Authorities and Operations*

Operational cooperation on tackling human smuggling is conducted through the EU Policy Cycle for Serious and Organised Crime, the EU law enforcement agency (*Europol*), its Internet Referral Unit as well as its affiliated European Migrant Smuggling Centre (*EMSC*).<sup>114</sup> Together these mechanisms aim to increase monitoring and cooperation both online and on the ground.<sup>115</sup> Moreover, at sea, the CSDP EUNAVFORMED Central Mediterranean Operation SOPHIA aims to prevent, intercept, and dispose of smuggling vessels, inside and outside the EU, and the European Border and Coast Guard Agency (*Frontex*), help patrol the EU's external border, collects data on smuggling routes and practices.<sup>116</sup> Other agencies with supportive functions in addressing human smuggling include 'CEPOL, Eurojust, the European Asylum Support Office (*EASO*), the Fundamental Rights Agency (*FRA*) and the European Maritime Safety Agency (*EMSA*)'.<sup>117</sup> Further sub-sections examine the role of the EMSC in more detail.

It is often suggested that both smuggling, and trafficking are forms of organised crime carried out by (transnational) hierarchical criminal networks.<sup>118</sup> As outlined thus far, reducing such activities is within the mandate of (international) security organisations such as UNODC, Europol, Interpol, and national law enforcement agencies which also deal with organised illegal dealing with drugs, human organs, etc. However, this author sees such a generalisation as oversimplifying the complexity of this phenomenon because, as discussed in upcoming chapters, forms of facilitation and the intentions behind carrying them out may differ significantly. This would be the case, especially for humanitarian assistance by NGOs, on which there is significant legal uncertainty due to the currently optional nature of this smuggling exception

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<sup>113</sup> See, for instance, Child Protection Hub for South East Europe, 'The EU-Turkey Statement on Migration: developments & challenges' (2016) <[http://childhub.org/en/system/tdf/library/attachments/eu-turkey\\_deal\\_article.pdf?file=1&type=node&id=24470](http://childhub.org/en/system/tdf/library/attachments/eu-turkey_deal_article.pdf?file=1&type=node&id=24470)> accessed 18 April 2018, p 1.

<sup>114</sup> See EU Commission (n 74).

<sup>115</sup> *ibidem*.

<sup>116</sup> *ibidem*.

<sup>117</sup> *ibidem*.

<sup>118</sup> For example, see Philip Reichel and Jay Albanese (eds), *Transnational Crime and Justice* (2edn, SAGE) 576, 6.

and the, consequently, inconsistent implementation of that exception by different MS.<sup>119</sup> However, this itself is a very complex and nuanced topic of its own and falls beyond the scope of this thesis.

### b) *Policy on Smuggling*

The importance of smuggling for the EU is apparent, as the ‘fight against migrant smuggling’ is among the policy priorities of the EU Agenda on Migration.<sup>120</sup> However, as the Framework Decision was adopted under the former EU third pillar, the powers of the Commission and the ECJ to monitor EU MS’ implementation were limited until December 2014, causing the lack of data on the implementation of the Package.<sup>121</sup> However, that is also beyond anything this thesis could elaborate further.

In the context of both trafficking and smuggling, it is important to elaborate on the Victims’ Directive.<sup>122</sup> In theory, it represents a significant improvement of the level of protection for irregular travellers as its protection is not conditional on administrative status.<sup>123</sup> It enshrines six main types of victims’ rights, namely: the right to support; the right to participate in criminal proceedings; the right to protection and to individual assessment; the right of victims’ family members; the right to understand and be understood; and the right to information.<sup>124</sup> Most notably for the rights of smuggled persons, the Victims’ Directive provides for free-of-charge, confidential support to those who have suffered a crime without a duty to report that.<sup>125</sup> The support must be specifically adapted to different types of victims and must include both specialist and general support services.<sup>126</sup> It also provides for a duty of a competent MS authority to give information, services and assistance to any victim of crime from the moment of initial contact and without any delay.<sup>127</sup> Moreover, those recognised as victims of crime can actively participate in the criminal proceedings, be informed and challenge a decision not to prosecute the alleged offender.<sup>128</sup> In the context of being actively involved in these proceedings, victims also have the right to an individual assessment to determine their vulnerabilities and protection needs, thus aiming to avoid further harm inflicted by the criminal justice process or the alleged offender.<sup>129</sup> It makes it mandatory for MS to provide a minimum

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<sup>119</sup> European Parliament Study (n 43) 39.

<sup>120</sup> *Forin and Healy* (n 8) 25.

<sup>121</sup> For five years under Treaty on the Functioning of the European Union Protocol (No 36) on transitional provisions [2012] OJ C326, Art 10. See European Parliament Study (n 43) 24.

<sup>122</sup> EU Victims’ Directive (n 89).

<sup>123</sup> *ibid* Art 10.

<sup>124</sup> *ibid*; EU Commission, ‘The Victims’ Rights Directive What does it bring?’ (2017) <[http://ec.europa.eu/newsroom/document.cfm?doc\\_id=43139](http://ec.europa.eu/newsroom/document.cfm?doc_id=43139)> accessed 1 June 2018, p 2.

<sup>125</sup> EU Commission (n 124) 3; EU Victims’ Directive (n 89) Arts 3-9.

<sup>126</sup> EU Commission (n 124) 3; EU Victims’ Directive (n 89) Arts 8-9.

<sup>127</sup> EU Commission (n 124) 2; EU Victims’ Directive (n 89) Art 6.

<sup>128</sup> EU Commission (n 124) 3; EU Victims’ Directive (n 89) Arts 10-16.

<sup>129</sup> EU Commission (n 124) 4; EU Victims’ Directive (n 89) Arts 18-24.



standard of protection irrespective of immigration status.<sup>130</sup> In theory, the Directive also includes protection for criminal acts which have occurred beyond the Union's territory (i.e. extraterritorially) as MS' domestic laws must allow for this.<sup>131</sup> Hence, if the smuggled person is exploited along the route in the EU, they would receive support, unless the exploitation ended, in Turkey, for instance, as the Directive would not apply to them and their vulnerable position would remain unchanged. While it is a positive development that residence status cannot prejudice victim protection, this Directive, however, only applies to crimes committed within the EU, which in the case of crimes committed in the context of irregular migration often happens *en route*, and hence many occur outside the EU, as is described in further chapters.

Even though the Victims' Directive is a notable milestone for the protection of, among others, those smuggled or trafficked, it still seems to be rooted more in victimisation rather the empowerment of human beings. Nevertheless, the Directive provides that all victims of crime should generally be treated supportively, and respectfully, hence promoting and prioritising human dignity.<sup>132</sup> However, as is discussed in the last chapter, without addressing the root causes and practices amounting to continuous victimisation after reaching the destination country, including the public narrative and social stigma, this author argues that no fully comprehensive and systemic improvements can be achieved unless a HRBA is implemented. Indeed, the HRBA should also incorporate some of the ideas for victim protection within the Directive and, nonetheless, should not be strictly limited to those.

### c) *Policy on Trafficking*

In 2010, the OHCHR called upon States to adopt a human rights-based approach to human trafficking.<sup>133</sup> In addition, the Union has developed the EU Strategy Towards the Eradication of Trafficking in Human Beings 2012-2016 (*EU Anti-Trafficking Strategy*)<sup>134</sup> which expands on Directive 2011/36/EU and focuses on 'prevention, protection, prosecution and partnerships [...] to increase knowledge' on trafficking-related issues.<sup>135</sup> The Strategy's priorities are as follows: '[i]dentifying, protecting and assisting victims of trafficking'; '[s]tepping up the prevention of trafficking in human beings'; '[i]ncreased prosecution of traffickers'; '[e]nhanced coordination and cooperation among key actors and policy coherence'; [i]ncreased knowledge of and effective response to emerging concerns related to all forms of trafficking in human

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<sup>130</sup> European Parliament Study (n 43) 39; EU Victims' Directive (n 89) Art 10.

<sup>131</sup> *ibidem*.

<sup>132</sup> European Parliament Study (n 43) 39; EU Victims' Directive (n 89) Art 1.

<sup>133</sup> UNHRC, 'Situation of Migrants in Transit - Report of the Office of the United Nations High Commissioner for Human Rights' A/HRC/31/35, p 21.

<sup>134</sup> EU Strategy Towards the Eradication of Trafficking in Human Beings 2012-2016

<sup>135</sup> EU Commission, 'Together Against Trafficking in Human Beings: EU Policy' <[https://ec.europa.eu/anti-trafficking/eu-policy\\_en](https://ec.europa.eu/anti-trafficking/eu-policy_en)> accessed 10 June 2018.

beings'.<sup>136</sup> When compared to the priorities in the Action Plan against Migrant Smuggling, it is noticeable their order is different, i.e. the approach towards trafficking does appear to be much more human rights-centred. The 2017 follow-up Communication to the EU Anti-Trafficking Strategy states that 'since [human trafficking] has continued to evolve, EU action to combat [it], both within and beyond the EU', must develop and focus more on: '[d]isrupting the business model and untangling the trafficking chain'; improving the victims' access to rights and their realisation; and [i]ntensif[ing] a coordinated and consolidated response, both within and outside the EU'.<sup>137</sup>

This is reflected in Directive 2011/36/EU (*EU Anti-Trafficking Directive*)<sup>138</sup> on preventing and combating trafficking in human beings and protecting its victims, which substituted the repealed 2002 Framework Decision. This Directive provides for a more extensive victim's protection, makes mandatory the appointment of National Rapporteurs for 'early identification and assistance of victims and supports the principle of non-punishment and unconditional assistance'.<sup>139</sup> Some authors hold that while previously the assistance had been 'conditional on cooperation', the EU had largely neglected the causes and consequences of human trafficking, had mostly relied on the 'prohibition of [trafficking] and the prosecution of traffickers', with victims' protection as a secondary goal.<sup>140</sup> Now, as shown by the EU Anti-Trafficking Strategy and the Anti-Trafficking Directive, the Union's policy is 'human rights based, victims centred, gender specific and child sensitive'.<sup>141</sup> This starkly contrasts the policy on smuggling.

The previous sub-sections have discussed how the two Protocols outline the legal threshold for the status of a smuggled or trafficked person, respectively. Yet, they do not provide guidelines regarding the identification process, which is a prerequisite for any protection.<sup>142</sup> Even though the most recent EU policy changes on irregular travellers, thereby including victimised smuggled persons, no longer appears to be as fragmented and vague, it still does not fully ensure the human rights of those smuggled. Whilst the EU's approach to human trafficking is based on human rights protection and acknowledging the vulnerable situation of women and children, the one towards smuggled individuals remains far from that. This thesis proposes to remedy this through a HRBA in the final chapter because, as is discussed extensively below,

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<sup>136</sup> Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: EU Action Plan against trafficking in human beings (2012 - 2016) COM (2012) 286, p 5.

<sup>137</sup> Communication from The Commission to The European Parliament and The Council COM (2017) 728, p 3; *Forin and Healy* (n 8) 33.

<sup>138</sup> European Parliament and Council Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ L101.

<sup>139</sup> EU Commission (n 135).

<sup>140</sup> *Rijken and De Volder* (n 65) 49, 50.

<sup>141</sup> EU Commission (n 139).

<sup>142</sup> *Gallanger* (n 3) 27.

the circumstances faced by both trafficked and smuggled persons may not be extremely different in practice. The subsequent chapters attempt to bring more clarity on this issue.

## 5. The Role of Human Dignity for the International and European Legal Regimes

The link between irregular migration, smuggling specifically, and human dignity has not been a very common one and yet it is, nevertheless, of great importance. The Preamble of the Universal Declaration of Human Rights (*UDHR*) provides that: '[a]ll men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience and should act towards one another in a spirit of brotherhood'.<sup>143</sup> When one moves past the omission of other genders in this definition and considers its subsequent interpretation, it is clear that everyone's equal rights are inherently intertwined with equal dignity. The latter was also a 'central organizing principle' of the 1993 Vienna World Conference on Human Rights and its Declaration and Programme of Action, adopted by all UN State Parties at the time,<sup>144</sup> recognised dignity as foundational for human rights in general and for: the prohibition of torture; the prohibition of gender-based violence and harassment; the abolition of extreme poverty; and subsequently: the right to be provided minimum conditions of welfare; the right to health; and the right of children to be treated with dignity following abuse.<sup>145</sup>

Similarly, dignity language has also become an integral part of regional human rights texts. It is in the Preambles of the 'Inter-American, Arab, African, and (some) European human rights instruments'.<sup>146</sup> Moreover, the South African Constitutional Court has interpreted the principle of equality in the light of human dignity, and, as one judge has eloquently stated, the equality principle seeks the 'establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership in particular groups'.<sup>147</sup> Although not present in the Council of Europe (CoE)'s European Charter on Human Rights (ECHR), it is mentioned in recent CoE conventions and statements, which hold that human trafficking undermines some of the primary concerns of the organisation, namely human rights and human dignity.<sup>148</sup> Moreover, the Court overseeing ECHR's implementation (*ECtHR*) has based many of its decisions, in particular the prohibition against torture, inhuman and degrading treatment within Art.3 ECHR, on the human dignity concept.<sup>149</sup> It has held that '[t]he very essence of the Convention is respect

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<sup>143</sup> UNGA, Universal Declaration of Human Rights (10 December 1948) 217 A(III), Art 1.

<sup>144</sup> See Vienna Declaration and Programme of Action (n 30) Arts 1, 5.

<sup>145</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 4(19) EJIL 655, 670.

<sup>146</sup> *ibid* 672, 673.

<sup>147</sup> *ibid* 691.

<sup>148</sup> *ibid* 672, 673; Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) <<https://rm.coe.int/16800d3812>> accessed 10 May 2018, p 30.

<sup>149</sup> McCrudden (n 146) 683.

for human dignity and human freedom'.<sup>150</sup> Moreover, regarding adequate sanitation, in the case of *Neshkov and Others vs Bulgaria*, the ECtHR ruled, that '[a]ccess to properly equipped and hygienic sanitary facilities is of paramount importance for preserving the inmates' sense of personal dignity [...] [and] [a] truly humane environment is not possible without ready access to toilet facilities or the possibility of keeping one's body clean'.<sup>151</sup> This is also linked to the situation of M's family, as elaborated further in a subsequent chapter. For now, it is essential to mention that human dignity has also been established by the ECJ as a general principle of law, stemming from the constitutional traditions of the MS.<sup>152</sup> Dignity is further mentioned several times in the Charter of Fundamental Rights of the European Union.<sup>153</sup>

While the EU also seems to recognise the equality of fundamental rights and human dignity, the current application of the EU's anti-smuggling policies appears to diverge. Nonetheless, what would a human dignity approach look like? Some academics have suggested that regarding caselaw, the concept seems to be generally accepted worldwide, while its 'substantive conception' varies.<sup>154</sup> Hence, it appears to be much like the HRBA, with an inherent PANEL principles-based framework and a varying substance depending on the field of application. This is explored further in the last chapters. Prior to that, it is paramount to acquire a deeper understanding of the differences and similarities between the smuggling and trafficking phenomena.

### III. Exploring and Understanding the Core Distinctions and Similarities between Human Smuggling and Human Trafficking

To understand whether human smuggling entails serious human rights concerns, which are currently not addressed sufficiently directly, one must first examine how the legal similarities and distinctions between smuggling and trafficking correspond to the social reality. Many academic works focus on examining the three main differences: *coercion vs consent*; the *cross-border* element; and whether there is the *intention to exploit*.

However, to gain a more contextual understanding of both phenomena, the next section form clusters of issues around these three categories, namely: intention of the parties involved; *coercion vs consent*; cross-border element, destination, means of reaching it; the identities of those involved and the narrative in the

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<sup>150</sup> *ibidem* 683.

<sup>151</sup> Case *Neshkov and Others v Bulgaria* no 36925/10 [2015] ECtHR, para 240.

<sup>152</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR- I-09609; McCrudden (n 146) 684.

<sup>153</sup> Charter of Fundamental Rights of the European Union (2000/C 364/01), OJ (2000) C 364/1, Preamble Arts 1, 25, and 31; McCrudden (n 146) 670.

<sup>154</sup> McCrudden (n 146) 712.

public domain. These categories they are central elements to the legal definitions or in practice are crucial for understanding and comparing these phenomena. Arguably there is a fourth category, stipulating that the generation of profit in smuggling happens through the irregular crossing whereas in trafficking that happens by means of continuous exploitation.<sup>155</sup> However, this author considers this as vague in practice and better explained through the nuances of the other distinctive elements.<sup>156</sup> Moreover, due to the significant degree of vulnerability, the subsequent sub-chapters also examine these phenomena through gendered and socio-economic lenses and, briefly, consider the special case of minors, asylum-seekers and refugees.

#### A. Answering the ‘Why?’ Question: Intention of the Parties Involved

Whilst in trafficking the primary purpose is seen to be exploitation of those trafficked for profit, in smuggling such an intention to exploit after the destination has been reached is not present.<sup>157</sup> However, despite the clear distinction in the legal realm, in practice as the OHCHR notes, the two are ‘often interrelated and almost always involving shifts, flows, overlaps and transitions. An individual can be smuggled one day and trafficked the next.’<sup>158</sup> For instance, if a smuggled person, upon reaching the destination, finds themselves forced to work in poor working conditions (*exploitation*) to pay off a debt which had not been mentioned in the initial negotiation and payment (*deception*), then the smuggled person turns into a trafficked person.<sup>159</sup>

For trafficking, the intention underpinning a trafficker engaging in such behaviour is contained within the definition (to exploit) for a direct or indirect benefit, including trading of children for the purposes of sexual gratification.<sup>160</sup> Nevertheless, the intentions must necessarily involve some benefit. Notably and as shown in a previous chapter, the trafficking definition’s intention element is more elaborate than that for the smuggling. Hence, it may not be surprising that the smuggler’s intentions are the subject of extensive literature discussions.<sup>161</sup> Even though many scholars portray the smugglers as either driven solely by profit or motivated only by altruism, empirical studies show that the reality is a mix of the two, sometimes contradictory, polarities.<sup>162</sup> One approach to analyse them is as the *criminological* vs. the *sociological*

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<sup>155</sup> European Parliament Study (n 43) 22.

<sup>156</sup> *ibidem*.

<sup>157</sup> John Salt, 'Trafficking and Human Smuggling: A European Perspective' (2000) 1 International Migration <<https://pdfs.semanticscholar.org/9155/cdfdde3e19cbe08c98e0acd2e22b3707592d.pdf>> accessed 10 May 2018, p 21, 22.

<sup>158</sup> *Butterfly* (n 66) 47; OHCHR ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary’ HR/PUB/10/2, p 34, 35.

<sup>159</sup> *Salt* (n 157) 21, 22.

<sup>160</sup> UNODC (n 66) 259; *Reichel and Albanese* (n 118) 17.

<sup>161</sup> *Reichel and Albanese* (n 118) 145.

<sup>162</sup> UNODC (n 10) 63.

*perspective* classification.<sup>163</sup> The *criminological perspective*, upon analysis of police reports, criminal court proceedings and on direct observation, tends to portray smugglers as violent criminals, very few would even argue for a terrorism link.<sup>164</sup> The criminological perspective may also be seen as having ‘a natural bias towards [big] cases and those that have come to the attention of the authorities’ and hence narrowly portraying smugglers as vicious and profit-driven criminals.<sup>165</sup> This theory would apply to academic who view smugglers as organised in mafia-like hierarchical structures.<sup>166</sup> Similarly, it may explain some research findings, as for instance from smuggled people’s interviews in FYROM, that while living in refugee camps along the route, they were forced to participate in smuggling activities.<sup>167</sup> Examples of criminological perspective research findings from a UK reception centre show smugglers, sometimes with some degree of alcohol and drug addictions, as functioning in a ‘mafia -like’ organisation based in the UK and with functional structures elsewhere.<sup>168</sup>

Conversely, the *sociological perspective* is more concerned with the mutual interests and complexities of the smuggler-smuggled relationship.<sup>169</sup> Sociologically-driven research in the UK, finds that smugglers are mostly working-class citizens with very diverse occupations, most being locals, with good knowledge of the border areas, the local language and often with previous experience in other forms of smuggling.<sup>170</sup> This is exactly what some research on Turkish smugglers shows. The latter are reported as regarding themselves as smugglers as being similar to any regular profession and smuggling as an ordinary part of the economy.<sup>171</sup> On the contrary, other research into Turkish smugglers, which would support more the criminological perspective, portrays them as more violent criminals whose ‘smuggling networks are semi-legal businesses that thrive on internal corruption and the unwillingness of the state to prosecute [them]’.<sup>172</sup> Sociological research has also claimed that whilst making a short-term profit from the individual journey, in the long-term is also important for smugglers to maintain a good reputation and build a loyal customer base by receiving good reviews from those who have already used their services.<sup>173</sup> Generally, this approach finds more varied intentions which are sometimes even altruistic, such as: supporting mobility through helping others who are in the difficult position that the smuggler once was; as a way of ‘paying the favour forward’ the assistance of smugglers in the past by helping someone else.<sup>174</sup> Beyond general characteristics, there is a lack of data-backed understanding of who the smuggler is which may be due, in part, to low-

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<sup>163</sup> Both are described extensively in UNODC (n 10).

<sup>164</sup> *ibid* 55.

<sup>165</sup> *ibidem*; Ilse van Liempt ‘*Navigating Borders: Inside Perspectives on the Process of Human Smuggling into the Netherlands*’ (Amsterdam University Press 2007) 214, 45.

<sup>166</sup> *Reichel and Albanese* (n 118) 150.

<sup>167</sup> *Forin and Healy* (n 8) 62, 63.

<sup>168</sup> UNODC (n 10) 57.

<sup>169</sup> *ibid* 56.

<sup>170</sup> *ibid* 56, 57.

<sup>171</sup> *ibid* 57.

<sup>172</sup> *ibidem*.

<sup>173</sup> *Sanchez* (n 23) 19.

<sup>174</sup> *ibid* 15.

quality sources of information, including interviews with those smuggled who may not know much about their smugglers, the lack of full identity disclosure to avoid interception by the police and to maintain the reputable name of the smuggler, especially if they are part of the same community as their potential clients.<sup>175</sup> Therefore, determining the frequency of different rationales remains largely unknown.

In addition, it must be borne in mind that intentions may change during the smuggling process, depending on the circumstances. Research has suggested that one may become a smuggler in two main ways: through family members and acquaintances who are smugglers already or when approached as someone who is smuggled, either to receive a discount or to pay off (a part of) the journey.<sup>176</sup> There is also claimed that smuggling is divided into three stages: recruitment of irregular travellers in their home state; transportation of those irregular travellers from origin to destination states; and integration into destination countries.<sup>177</sup> This method has been criticised for paying too much attention to the process at the expense of the individuals involved, simply presenting smuggled travellers as passively following the smugglers and omitting any focus on the complex intentions and, at least partially limited by financial resources, decisions.<sup>178</sup> In light of the HRBA, this author would add that such a portrayal is disempowering and ingrains victimisation into one's identity, as is described more extensively in further chapters.

Comparing the intentions of those who are smuggled or trafficked does not appear to be so evident. Migrating individuals worldwide are generally driven by similar circumstances: inequalities, conflict, poor economic situation, human rights abuses.<sup>179</sup> Those who are smuggled often have no other option than to use facilitators to overcome 'physical and legal borders' due to a lack of the required documents.<sup>180</sup> There are also indications that in some communities, particularly in West Africa, there is overt pressure to migrate as those who do not are stigmatised as too lazy not to be poor, whereas those who do migrate receive the blessings of community leaders.<sup>181</sup>

Intentions of the trafficked, according to UNODC Global Report on Trafficking in Persons 2016, begin with an eagerness 'to migrate but with no other option than to rely on someone who they believe will facilitate their irregular migration into a better life'.<sup>182</sup> It is possible that some go into trafficking, often those trafficked for sex work, with some degree of awareness that one will be exploited because that seems as a

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<sup>175</sup> UNODC (n 10) 56.

<sup>176</sup> Sanchez (n 23) 17.

<sup>177</sup> See, *inter alia*, Theodore Baird, 'Theoretical Approaches to Human Smuggling' (2013)

<[https://www.files.ethz.ch/isn/170120/WP2013-10\\_ted%20baird\\_human%20smuggling\\_web.pdf](https://www.files.ethz.ch/isn/170120/WP2013-10_ted%20baird_human%20smuggling_web.pdf)> accessed 10 June 2018, p 4; UNODC (n 10) 40, 41.

<sup>178</sup> van Liempt (n 165) 168; UNODC (n 10) 41.

<sup>179</sup> UNODC (n 10) 47.

<sup>180</sup> Carling, Gallagher and Horwood (n 24) 1.

<sup>181</sup> UNODC (n 10) 42.

<sup>182</sup> Forin and Healy (n 8) 17.

better alternative to the current situation.<sup>183</sup> However, usually the presumption is that most trafficked persons are not aware of probable exploitation and even with some degree of awareness, any consent would be considered null and void in the presence of coercive circumstances.<sup>184</sup> Nevertheless, determining coercion may be problematic, as is discussed further in the subsequent sub-chapter.

### B. Answering the ‘How?’ Question: *Coercion vs Consent*

Although, coercion is one of the requirements in the Anti-Trafficking Protocol’s definition in order to meet the threshold for the offence and allow for *victim protection*, in practice the notion of coercion may be difficult due to its vagueness: would persecution, extreme poverty or prolonged family separation count?<sup>185</sup> Whilst poverty, hunger, poor health, lack of education and displacement could theoretically amount to coercion which induces a position of vulnerability and hence any ‘abuse of power or of a position of vulnerability’ would fall within the scope of the Anti-Trafficking Protocol, in practice whether state authorities would agree varies greatly.<sup>186</sup> Especially since it would mean that many more smuggling persons could be within the scope of the wider net of trafficking protection. The role which social, economic, cultural and gender factors are acknowledged to have is far from being clearly and uniformly defined, probably as it would involve a range of delicate moral considerations.<sup>187</sup>

Beyond the initiation of the journey, it is also useful to consider the manner in which smuggling occurs. One scholar has identified three main types of migrant smuggling, namely *ad hoc*; by fraudulent documents; or as pre-planned stage-by-stage.<sup>188</sup> The circumstances described above would fit into the first, *ad hoc* type, provided that the person has reached a certain point on the route legally and seeks smuggling services for the remainder.<sup>189</sup> This is not pre-organised and supposedly tends to involve men from Eastern European countries with lower education who migrate due to a lack of prospects.<sup>190</sup> The second identified type is through fraudulent documents such as passports, visas, marriage certificates or ‘adoptions of convenience’ which all require involvement of corrupt government officials.<sup>191</sup> The third type, pre-planned stage-by-stage smuggling, is deemed to be organised through a complex network of facilitators: *stage coordinators*

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<sup>183</sup> *Butterly* (n 66) 47, 51.

<sup>184</sup> *ibid* 53; Anti-Trafficking Protocol (n 42) Art 3(b).

<sup>185</sup> Jacqueline Bhabha and Monette Zard, ‘Smuggled or trafficked?’ 25 FMR

<<http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/peopletrafficking/bhabha-zard.pdf>> accessed 10 May 2018, p 7.

<sup>186</sup> *ibidem*.

<sup>187</sup> *Butterly* (n 66) 47; *Bhabha and Zard* (n 185) 8.

<sup>188</sup> UNODC, ‘A short introduction to migrant smuggling’ (2010) <[https://www.unodc.org/documents/human-trafficking/Issue\\_Paper\\_-\\_A\\_short\\_introduction\\_to\\_migrant\\_smuggling.pdf](https://www.unodc.org/documents/human-trafficking/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf)> accessed 10 June 2018, p 18; UNODC (n 10) 83.

<sup>189</sup> UNODC (n 188) 18.

<sup>190</sup> UNODC (n 10) 83.

<sup>191</sup> *ibid*; UNODC (n 188) 19.



who contact *local coordinators*, who in turn cooperate with local service providers, the latter usually being residents and/or nationals of the transit countries, to whom most of the smuggling is outsourced.<sup>192</sup> Here those smuggled not having to negotiate with local smugglers *en route*, are nonetheless more vulnerable to trafficking and exploitation as the payment has been made in advance.<sup>193</sup> This network is not deemed to have higher leadership as that may in practice functionally disadvantage its large-scale coordination.<sup>194</sup> This type of pre-planned smuggling has been identified as predominant of smuggling cases from South Asia to Western European states, where those smuggled either: have lower income and wish to join diaspora members; or move from crisis regions with their families and substantial financial resources to states with a high probability of being granted asylum.<sup>195</sup>

However, smuggling, trafficking and irregular migration overlap as many irregular travellers' experience 'a degree of deception, coercion, abuse of vulnerability, or exploitation'.<sup>196</sup> Accepting some degree of exploitation or coercion may still be the best available option<sup>197</sup> and may even be better than the initial situation.<sup>198</sup> Deception is not mentioned in the Anti-Smuggling Protocol, perhaps based on the idea that *consent* implies transparency and a lack of deception. Even if initial consent is withdrawn and the smuggled person is forced to carry on, this does not automatically become trafficking because two more types of trafficking elements must be present.<sup>199</sup> If a person has irregular status, seeking protection from the law enforcement authorities is often avoided due to a fear of being detected and it is in this climate of fear that such practices continue.<sup>200</sup> Arguably, there are three main ways for smuggled persons to become exploited and/or trafficked, namely: by having to repay their debts in destination countries; or in transit by smugglers who become traffickers when border-crossing gets more difficult; or when (stranded) migrants *en route*, in order to finance their basic necessities and onward journey, find work and subsequently realise its exploitative nature.<sup>201</sup> Nevertheless, merely a smuggler's offer being exploitative does not necessarily amount to coercion, unless the smuggled person has no other acceptable options, as for instance, if by refusing the offer, one would not be able to find food or vital medicine for an ill family member, that can hardly be deemed as a real choice.<sup>202</sup> Similarly, formal consent in a coercive situation does not alter the coercive nature of the situation.<sup>203</sup>

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<sup>192</sup> UNODC (n 10) 84, 85; UNODC (n 188) 20.

<sup>193</sup> UNODC (n 10) 84, 85.

<sup>194</sup> *ibid* 85.

<sup>195</sup> *ibid* 84, 85; UNODC (n 188) 21.

<sup>196</sup> Heli Askola 'Violence against Women, Trafficking, and Migration in the European Union' (2007) 13(2) ELJ 204, 207.

<sup>197</sup> *ibidem*.

<sup>198</sup> *Butterly* (n 66) 47, 51.

<sup>199</sup> *Salt* (n 157) 21, 22; Anti-Smuggling Protocol (n 41) Art 3.

<sup>200</sup> *Picón* (n 96) 26.

<sup>201</sup> *Forin and Healy* (n 8) 21.

<sup>202</sup> *Bhabha and Zard* (n 185) 8.

<sup>203</sup> *ibidem*.

Specifically, along the Balkan route, tightening border controls and the lack of safe legal pathways for continuing onwards contribute to the opportunity for smugglers to take advantage of vulnerable persons and also exploit or traffic them.<sup>204</sup> The limited research along this route shows a strong correlation between smuggling, exploitation and trafficking, especially due to debt, sexual and psychological harassment, or threats of violence towards one's family members as a method of coercion.<sup>205</sup> Also along the Balkan route, some research shows that a way for smugglers to exercise control in an exploitative situation is to withhold identity documents or to demand more money during the trip, where smuggled persons' ways of earning that money are significantly limited and make them vulnerable to exploitation, by the smugglers or by someone else.<sup>206</sup> In Bulgaria, irregular travellers have told law enforcement officials, upon being detected, that they must reach their destination to pay back the money for the journey and that upon reaching it 'nobody is free [...] [as the] situation of exploitation [lasts] for several years, and the salary they receive is not sufficient to pay for living expenses and repay the debt for the trip'.<sup>207</sup> Generally, despite the distinctions, the two phenomena are often blurred and 'to a large extent, influenced by the same political and socio-economic factors'.<sup>208</sup>

However, presently, the only way one would receive significant protection is to prove a significant degree of exploitation triggered by one of the recognized forms of coercion. In other words, to receive protection, one must meet the threshold for trafficking and anything less than that, no matter how degrading, would warrant no protection. As there cannot be a legally enforceable contract, due to the illegal nature of the activity itself, persons who are smuggled often report being charged additional fees; not receiving some or any of the agreed services because the smuggler has disappeared after having been paid already.<sup>209</sup> Reports indicate that sexual assault, murder, kidnapping and physical violence are also used as coercion in smuggling.<sup>210</sup> However, violence itself seems to have a special role both in the narrative about the smuggling process and in the academic works on the topic. Hence, this is examined separately below.

## 1. The Role of Violence

Trafficking may mostly involve violence as a means of exercising coercion.<sup>211</sup> Human smuggling, in contrast, does not require violence because as long as the smuggler and the smuggled person have fulfilled

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<sup>204</sup> Forin and Healy (n 8) 61, 62.

<sup>205</sup> *ibidem*.

<sup>206</sup> Forin and Healy (n 8) 62.

<sup>207</sup> *ibidem*.

<sup>208</sup> TRACE, 'Trafficking as a Criminal Enterprise' (2015) <[http://trace-project.eu/wp-content/uploads/2015/12/TRACE\\_D5.2\\_FINAL\\_Nov-30-2015.pdf](http://trace-project.eu/wp-content/uploads/2015/12/TRACE_D5.2_FINAL_Nov-30-2015.pdf)> accessed 10 June 2018, p 20.

<sup>209</sup> Sanchez (n 23) 17.

<sup>210</sup> *ibid* 18.

<sup>211</sup> See Ogboru and Kigbu (n 71) 227.

their mutual obligation, a conflict triggering violence may not arise. Nonetheless, violence does not occur in a vacuum and is not exclusively perpetrated by smugglers.<sup>212</sup> Although the scale of violence *en route* is not known as it is significantly underreported, it could be perpetrated through robberies or abuse by state, non-state actors or locals.<sup>213</sup> Scholars who seem to align with the sociological perspective, would suggest that transnational migration facilitation is ‘significantly less violent or dark than what the media and official accounts suggest’ and that ‘Illegality alone is not sufficient to create high levels of violence in criminal markets [...], particularly in smuggling, where the service being sold is protection- even if limited or scant’ and that violence may be counterproductive when it would damage the smuggler’s reputation and place them in a less favourable business position.<sup>214</sup> This stems from the research, which shows that those who would seek the services of smugglers have planned and considered their options carefully, relying on referrals from friends, family and acquaintances but also on face-to-face meetings with smugglers who seems to satisfy certain criteria. The most commonly cited considerations are: ‘reliability, punctuality, risk levels, cost and quality of transportation’, whilst other factors include ‘kinship proximity, levels of respect shown towards women and the elderly, quality of care [...], friendliness, honesty, cleanliness and quality of room and board provided’.<sup>215</sup> Although such considerations may ultimately aim to secure an ‘initial net of protection’, some research suggests that with the increasing distance from the start of the journey, the protection decreases.<sup>216</sup> These authors often acknowledge that *structural violence* does exist and may often occur in the context of negotiations between the smuggler and the smuggled, although not necessarily the case.<sup>217</sup> While negotiations-only approach is favoured by most smugglers, in the prospect of doing future business together again, many use threats to obtain their fees and some also resort to violence such as abuse, kidnapping, torture or inhuman and degrading treatment.<sup>218</sup> The arguments among smugglers and their client over the fees payment, regardless of intensity, do appear to be systematic and may be triggered by many situations: a smuggler trying to charge additional fees after the deal is done and refusing to carry on; holding those smuggled against their will unless such fees are paid; or a smuggled person may not be fulfilling the agreement on the journey.<sup>219</sup> In addition, there are indications that smugglers may often provide at least some guarantees for the paid sum which may range from the money being deposited with a third party, and only paid upon arrival, to offering several crossing attempts included in the price.<sup>220</sup>

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<sup>212</sup> Sanchez (n 23) 19.

<sup>213</sup> *ibid* 18; UNHCR (n 133) 18.

<sup>214</sup> *ibid* 11, 18; See also UNODC (n 10) 63.

<sup>215</sup> Sanchez (n 23) 15.

<sup>216</sup> See Nassim Majidi, 'Communities of smugglers and the smuggled' (2016)

<<https://www.opendemocracy.net/beyondslavery/hsr/nassim-majidi/communities-of-smugglers-and-smuggled>> accessed 10 June 2018.

<sup>217</sup> Sanchez (n 23) 18.

<sup>218</sup> *ibid* 17, 19.

<sup>219</sup> *ibid* 19.

<sup>220</sup> *ibid* 16. Multiple crossing attempts were also reported as a practice in Northern Greece in the expert interview.

On the contrary, scholars who seem to support the criminological view, would regard human smuggling as an inherently violent crime.<sup>221</sup> The latter view also comprises the predominant narrative in one of the major EU law enforcement agencies' reports, as is shown in a subsequent sub-chapter. However, as this view is often more frequently presented as the way all smuggling occurs, rather than together with its counter-narrative, it created a polarised perception of smuggling which significantly biases the way this phenomenon portrayed.<sup>222</sup> This tendency, generates negative stereotypes about smugglers, formed by, almost exclusively, reporting on 'deadly smuggling failures and abuses'.<sup>223</sup> It would also hold that the information-gathering process prior to the moment smuggling begins, is inherently limited by scarce and sometimes deceptive information, distributed by smugglers, among others, about the destination and/or the journey.<sup>224</sup> This may extend to a belief that some personal contacts are untrustworthy and that irregular travellers are convinced by the perception that the destination country is vaguely regarded as 'good'.<sup>225</sup> While that is certainly possible, the degree to which it would be likely may depend on many other factors, there are indications that the situations where such arguments lead to violence are significantly more likely to be experienced by people who are vulnerable due to their low-income and hence limited opportunities within the smuggling realm.<sup>226</sup> However, these inequalities will be explored further in the 'gendered and socio-economic lenses' sub-chapter. For now, suffice it to conclude that any stark simplifications probably constitute a significantly distorted view of the smuggling reality.

## 2. The Role of Corruption

Despite the Anti-Trafficking Protocol and increasing international cooperation to combat trafficking, the sparse number of trafficking convictions is striking.<sup>227</sup> A potential explanation for this may be corruption, especially among medium and high-level government officials, but also in cases where regular police officers are paid to look away.<sup>228</sup> This can range from passively tolerating or ignoring a behaviour or actively organising the trafficking chain.<sup>229</sup> Even though it is generally known that corruption is a significant challenge in almost all South-eastern European States, there have been reported cases of bribes given to consular staff of both Western European and non-Western European consulates, airline staff,

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<sup>221</sup> *Ogboru and Kigbu* (n 211) 227.

<sup>222</sup> *van Liempt* (n 165) 45.

<sup>223</sup> UNODC (n 10) 63.

<sup>224</sup> *ibid* 41.

<sup>225</sup> *ibidem*.

<sup>226</sup> *Sanchez* (n 23) 19.

<sup>227</sup> Jan Van Dijk and Fanny Klerx-Van Mierlo 'Revisiting the Link between Corruption Prevalence and Implementation Failure in Anti-Trafficking Policies' (2013) 7(2) *The Press* 1, 2.

<sup>228</sup> *ibid* 2, 6; Louise Shelley, 'Human Smuggling and Trafficking into Europe: A Comparative Perspective' (2014)

<<https://www.migrationpolicy.org/sites/default/files/publications/BadActors-ShelleyFINALWEB.pdf>> accessed 10 May 2018, p 10.

<sup>229</sup> *Van Dijk and Klerx-Van Mierlo* (n 227) 2.

immigration and border control officials.<sup>230</sup> However, on the Balkans law enforcement authorities are often underpaid and hence more likely to accept bribes from traffickers whilst those officials may be protected by high-status political figures who have been bribed.<sup>231</sup> Hence cases of trafficking should be taken as an indication of a systemic issue, which also results in a lower quality of government, increased human rights violations and structural inequalities within societies based on administrative status which may contribute to a rising anti-immigrant sentiment.<sup>232</sup> Yet, trafficking is known to frequently use corruption along with money-laundering to conceal profits.<sup>233</sup>

Corruption also appears to be a key element in human smuggling as well, often involving border officials, police, soldiers, consulate and embassy officials who, often for financial benefits, actively or passively assist smugglers.<sup>234</sup> However, corruption in human smuggling disproportionately affects the poor, may increase the risks *en route* and be a barrier for realising smuggled persons' human rights.<sup>235</sup> Although UNODC, amongst others, has highlighted the role of corruption in the smuggling process, more research is needed to address the link between smuggling, trafficking and corruption along the entirety of popular migration routes to better understand these correlations.<sup>236</sup> This is even more necessary on the Balkan route where countries generally have higher rates of corruption and even higher law enforcement officials openly acknowledge that corruption among state officials contributes to the enabling environment for those smugglers and traffickers to profit.<sup>237</sup>

### C. Answering the 'Where' Question: Cross-Border Element, the Destination and Means of Reaching It

Smuggling occurs either by entry into another country in breach of the immigration regime or by enabling a person to stay in the country irregularly, regardless of whether the entry was irregular or not.<sup>238</sup> Trafficking, however, does not require a breach of the immigration regime for residing or even entering another country.<sup>239</sup> In other words, trafficking may happen within only one country and if a transnational

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<sup>230</sup> *ibid* 2, 6; *Shelley* (n 228) 10.

<sup>231</sup> Helga Konrad, 'Trafficking in Human Beings - The Ugly Face of Europe' (2002) 13(3) Helsinki Monitor 260, 266.

<sup>232</sup> *Shelley* (n 228) 14; *Konrad* (n 231) 266.

<sup>233</sup> Council of Europe (n 148) 31.

<sup>234</sup> UNHCR (n 133) 9.

<sup>235</sup> *ibidem*.

<sup>236</sup> See, *inter alia*, UNODC (n 10) 84, 102.

<sup>237</sup> A prominent albeit typical example is case from Bulgaria. Alexander Andreev, 'Border police officials in Bulgaria fired for cooperating with human traffickers' (2016) <<https://www.dw.com/en/border-police-officials-in-bulgaria-fired-for-cooperating-with-human-traffickers/a-19478782>> accessed 10 June 2018.

<sup>238</sup> *Salt* (n 157) 21-22.

<sup>239</sup> *ibidem*.

element exists, that may be either regular or irregular. Smuggling, however, is based on facilitating irregularity, either of entry or of stay.

For those smuggled, by definition across borders, the exact destination is often known from the outset as it plays a significant role in determining the price for the journey.<sup>240</sup> Other factors which play a role in the price are based on the journey: ‘the degree of institutional control of the route and the reception of migrants in transit and destination countries’; distance; means of transport; routes; access to different actors who may expedite transits; documents supplied; or based on the smuggled person’s profile: age, gender, health.<sup>241</sup> Moreover, Europol reports that smugglers often offer discounts for additional people such as family members or provide packages which include various other services such as fraudulent documents.<sup>242</sup> However, it is impossible to make any conclusions about the standard cost of smuggling services due to all above-mentioned factors.<sup>243</sup> The next sub-section examines what influences the destination and how it is reached.

### 1. Diaspora Communities at the Destination

Some scholars argue, and this author would agree, that existing diaspora communities outside the country of origin, and relatives within those communities, would significantly influence the choice for a destination country. Generally, regarding communities, some scholars see smuggling, as a ‘form of human security from below’ which is ‘rooted in generations-long, historical notions of solidarity, tradition, reciprocity, and affect’.<sup>244</sup> This is also described by some as the *network theory* where expanding network connections through kinship, friendship and/or ethnicity reduce the costs and risks associated with migration and hence increase its likelihood.<sup>245</sup> Especially with present-day social media, diasporas probably find it easier to ensure a ‘soft landing’.<sup>246</sup> Regarding the dangers of the journey, diaspora members may, due to their own experience, attempt to reduce the obstacles along the way and thus serving as a part of a safety net.<sup>247</sup> However, in certain cases if a smuggler is aware that the person being smuggled has close family ties with

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<sup>240</sup> Sanchez (n 23) 16.

<sup>241</sup> *ibidem*; UNODC (n 10) 85.

<sup>242</sup> The report also notes that smugglers have become increasingly discreet when advertising and now rely predominantly on instant messaging tools to advertise their services. One cannot help but wonder if this shift, compared to the time when Facebook groups were used without much concealment, is directly influenced by the scholarly and media attention. Europol, ‘Two Years of EMSC’ (2018) <[https://www.europol.europa.eu/sites/default/files/documents/two\\_years\\_of\\_emsc\\_report.pdf](https://www.europol.europa.eu/sites/default/files/documents/two_years_of_emsc_report.pdf)> accessed 17 April 2018, p 17; Also see, for example, Zoe Roberts, ‘Information Exchange between Smugglers and Migrants: An Analysis of Online Interactions in Facebook Groups’ (Criminal Justice, Borders and Citizenship 2017) <<https://ssrn.com/abstract=3051186>> accessed 18 May 2018.

<sup>243</sup> UNODC (n 10) 85.

<sup>244</sup> Sanchez (n 23) 10, 20.

<sup>245</sup> UNODC (n 10) 11.

<sup>246</sup> Carling, Gallagher and Horwood (n 24) 2.

<sup>247</sup> Sanchez (n 23) 15.

a wealthy diaspora member, that may make the situation more unsafe, resulting in the irregular traveller being held against their will, and subjected to many forms of emotional and physical abuse, until a set ransom is paid by their diaspora relative.<sup>248</sup> Although some scholars would argue that when people rely on friends and family to migrate, the social relationships that are maintained and strengthened.<sup>249</sup> Nonetheless, diasporas worldwide may vary greatly and even the diaspora groups of a particular nationality within one state should not be seen as a homogenous group. Despite the above considerations, this link does not appear to be sufficiently explored by academia which could be addressed in future studies.<sup>250</sup>

With regard to exploitation at the destination country, it has also been suggested that a significant part of it may occur within ethnic diaspora communities in Western countries where, mostly men are subjected to forced labour, but often also young women and girls may be confined to the homes where they work long hours.<sup>251</sup> Those who traffic others for labour exploitation may also find it easier to profit from this labour within closed diaspora communities, which would in turn influence and require the end destination to have such an accommodating diaspora community.<sup>252</sup> Nevertheless, most traffickers are found to work from within their own countries, i.e. along migration routes.<sup>253</sup>

## 2. The Role of Communities along the Route

Whilst it would be problematic to make general statements about ethnic groups as a whole, in the context of the Balkan route, certain patterns have emerged which may improve one's general understanding of these two phenomena. Generally for the EU, it has also been suggested that both human smuggling and trafficking are more ethnically diverse in Europe than in North America.<sup>254</sup> Specifically for the Balkan route, research has also pointed out that Balkan traffickers operate within family groups and/or diaspora communities and hire locals to conduct daily activities and 'minimize risks'.<sup>255</sup> For example, there are indications that regarding human trafficking and labour exploitation, the Turkish diaspora plays a central role and collaborates, either through coercion or by choice, with Turkish criminal groups which have strong presence in Western European States.<sup>256</sup> Such a view would be in line with the criminological perspective, mentioned above.

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<sup>248</sup> Or sometimes this may be used to blackmail the diaspora member into paying to avoid such a situation from happening. These practices have been identified especially with regards to Mexican diaspora members in the US as well as Eritrean and Sundanese asylum-seekers whose family lives in the EU. Sanchez (n 23); UNHCR (n 133) 10.

<sup>249</sup> Sanchez (n 23) 11.

<sup>250</sup> See, for example, IOM (n 7) 126.

<sup>251</sup> Shelley (n 228) 11.

<sup>252</sup> *ibid* 7.

<sup>253</sup> *ibid* 8.

<sup>254</sup> Shelley (n 228) 8.

<sup>255</sup> *ibidem*.

<sup>256</sup> *ibid* 9.

Some reports suggest that the human smuggling and trafficking landscape in Europe is diverse and unevenly distributed, with those smuggled and those trafficked coming from around the world.<sup>257</sup> For both phenomena, five states have the highest number of victims and are considered principle destinations: Belgium, Germany, Greece, Italy and The Netherlands, whereas the second most-popular group seem to be: Austria, Denmark, France, Spain and Switzerland.<sup>258</sup> At the same time, according to a 2008 Europol report, source states often have much lower national income, namely: Bulgaria, Romania, Moldova, Nigeria, Russia and Ukraine.<sup>259</sup> However, there are indications that since the EU accession in 2007, smuggling routes have increasingly shifted to Bulgaria and Romania while other smuggling hubs and corridors in the Balkans, especially around Istanbul and on the Greek-Turkish border, remain intact.<sup>260</sup> Whilst the EU accession of Poland and The Czech Republic reduced the use of such routes, with the Bulgarian and Romanian routes it has been the opposite, perhaps due to the prevalent corruption practices described above.<sup>261</sup> For Northern Greece, this thesis' expert interview suggests that those smuggled further along the Balkan route, would be accompanied by Greek smugglers take them to the Albanian border for example, where Albanian smugglers would take over and yet, rarely within a criminal network. A shift from the green border entry to irregular entry at border crossing points could be particularly observed on external land borders between Bulgaria, Greece, FYROM and Turkey.<sup>262</sup> The above-mentioned statistical tendencies are scant and hence should not warrant any conclusion before further and more comprehensive research is conducted.

#### D. Answering the 'Who' Question: Identities of the Parties Involved and the Narrative in the Public Domain

As already indicated, one of the most significant discussions in the academic field appears to be revolving around the structure of the smuggling network: a rather loosely organized and mostly decentralized horizontal web of individuals; or a highly organized criminal organization which is solely profit-oriented and is related to other forms of transnational criminal activity. This sub-chapter further explores the two viewpoints, the issue of identity of the parties involved in human smuggling and trafficking, how Europol's *EMSC* addresses this issue and analyses the impact on human rights of those involved in the smuggling process.

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<sup>257</sup> *ibid* 4.

<sup>258</sup> *ibidem*.

<sup>259</sup> *ibid* 5.

<sup>260</sup> UNODC (n 10) 89.

<sup>261</sup> *Shelley* (n 228) 6.

<sup>262</sup> UNODC (n 10) 89.



The literature on the profile of smugglers is mostly sparse and, if present, heavily influenced by stereotypes.<sup>263</sup> There have been attempts by scholars to outline several typologies of smugglers operating in larger groups, while explicitly discounting the view that a pyramid-like structure is inherent to smuggling and also acknowledging that small-scale smugglers may act completely independently.<sup>264</sup> The classification outlined below sees individuals as having different roles. Firstly, the *coordinator/organiser* as the manager, bearing overall responsibility for the smuggling, conducting oversight, changing any aspects of the smuggling process if necessary and delegating tasks to others.<sup>265</sup> A full smuggling operation might have one or multiple organisers and there is often very little evidence collected against them.<sup>266</sup> Secondly, *recruiters* as the ones who advertise and convey some, at times untrue, information about the journey as well as the final destination.<sup>267</sup> They often have established themselves in the source country or along the route, know the language of the irregular travellers and/or are acquainted with them personally and may collect initial payments.<sup>268</sup> Thirdly, *transporters/guides* as carrying out one or more border crossings, after which they change and if intercepted, may pose as being one of those smuggled to avoid sanctions.<sup>269</sup> They tend to play a key role and nevertheless be easily-recruitable, predominantly men, and from border areas with local knowledge who may essentially be smuggling freelancers looking for work.<sup>270</sup> The fourth category being *spotters/drivers/messengers/enforcers* as having *ad hoc* roles in the smuggling process.<sup>271</sup> *Spotters*, for instance, report information on law enforcement checks, often by moving in front of but still at a distance from the smuggling vehicle.<sup>272</sup> *Enforcers* may be those who try to exert control over those smuggled by using threats of or actual violence to, *inter alia*, collect unpaid fees.<sup>273</sup> A fifth category as the *service providers/suppliers* who often have relations with other types of smugglers and receive a profit share for their role in assisting any smuggling group requiring a particular service, such as using a boat or an apartment.<sup>274</sup> However, this role may be filled by taxi drivers, cashiers, train conductors, document-forgers, law enforcement officials, consular officials and hotel owners for instance, the latter being particularly useful with large groups of smuggled travellers.<sup>275</sup> Nevertheless, it is possible that, a taxi driver for example, participates unknowingly or with a limited degree of awareness of what might be happening.<sup>276</sup>

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<sup>263</sup> *van Liempt* (n 165) 43; UNODC (n 10) 55.

<sup>264</sup> This particular work appears to have influenced both specialised authorities such as UNODC and scholars. UNODC (n 10) 69, 71.

<sup>265</sup> UNODC (n 10) 69; See also *Reichel and Jay Albanese* (n 118) 147.

<sup>266</sup> UNODC (n 10) 69.

<sup>267</sup> *ibidem*; Also see Andreas Schloenhardt, 'Trafficking in Persons in Australia: Myths and Realities' (2008) <[http://www.liu.xplorex.com/sites/liu/files/Events/HTWG\\_Trafficking\\_Myth\\_and\\_Realities\\_sep\\_2008.pdf](http://www.liu.xplorex.com/sites/liu/files/Events/HTWG_Trafficking_Myth_and_Realities_sep_2008.pdf)> accessed 30 June 2018, p 6.

<sup>268</sup> UNODC (n 10) 69.

<sup>269</sup> *ibidem*; *Reichel and Albanese* (n 265) 154.

<sup>270</sup> UNODC (n 10) 71.

<sup>271</sup> *Reichel and Albanese* (n 265) 154.

<sup>272</sup> UNODC (n 10) 69; *Schloenhardt* (n 267) 28.

<sup>273</sup> UNODC (n 10) 70.

<sup>274</sup> *ibidem*; *Reichel and Albanese* (n 265) 154.

<sup>275</sup> UNODC (n 10) 70.

<sup>276</sup> *ibid* 71.

Similarly, to the above-mentioned theory, the general consensus among scholars would be that smugglers work mostly independently, in a flexible manner, relying on personal connections and resources and perform a ‘single, highly specific task only’ but in coordination with other smugglers, who may be entirely unrelated and unfamiliar, with whom they cooperate when necessary.<sup>277</sup> Independent interactions with other facilitators are also made possible through the use of mobile technology.<sup>278</sup> Nevertheless, the argument continues, there are situations where this coordination is led by a specific individual only for the purposes of temporary supervision, usually ending once the destination has been reached.<sup>279</sup> There have been indications of this happening often on the inflatable boats from the Libyan to the Italian coast, where one of those who are smuggled is ‘appointed’ as a leader and instructed how to operate the boat in exchange for a lower fee or by coercion, hence becoming both a smuggler and a smuggled person.<sup>280</sup> The latter is supported, for instance, by this thesis’ expert interview, according to which it is not uncommon for unaccompanied minors who are smuggled into Greece to be recruited as low-level smugglers themselves.<sup>281</sup> Therefore, any views of smugglers solely as profit-seekers, especially if communicated by EU and MS public officials as discussed in the following sub-chapter, would be a dangerous oversimplification. Although there seems to be no agreement regarding the link between smugglers and mafia-types organisations, such links have been identified in areas where anti-smuggling policies may have driven small-scale operations to adapt and become more sophisticated.<sup>282</sup> However, this extremely negative portrayal may be detrimental to their treatment by border control officials and result in more hostility by the host society as the media’s influence on the public perception is crucial.<sup>283</sup> Some would suggest that this criminalization framed as triggering an emergency ‘migration crisis’ which warrants a security response boosts the border security industry further, in turn contributing to the problem rather than to a solution.<sup>284</sup>

Another widely-cited conception is *migration business theory*, which views smuggling as a highly organised crime, smugglers as ‘illegal entrepreneurs’ and those who are smuggled are seen as *customers* who are paying for a service provided, namely reaching their end destination.<sup>285</sup> However, a significant number of smuggling scholars have criticised this oversimplified portrayal of irregular migration as seeking ‘to construct the practice in a manner that exempts the state from its role as generating the conditions that

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<sup>277</sup> Sanchez (n 23) 14; Such a practice to reduce risks in case a smuggler is arrested is also confirmed by the expert interview.

<sup>278</sup> Sanchez (n 23) 14.

<sup>279</sup> *ibidem*.

<sup>280</sup> Sara Bellezza and Tiziana Calandrino (n 5) 171; UNODC (n 10) 94.

<sup>281</sup> Expert interview.

<sup>282</sup> UNODC (n 10) 71, 81.

<sup>283</sup> Didier Bigo, Sergio Carrera and Elspeth Guild, 'The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security' (2009) <<http://aei.pitt.edu/12224/1/1905.pdf>> accessed 30 April 2018, p 10, 11; Sara Bellezza and Tiziana Calandrino (n 5) 138.

<sup>284</sup> Andersson (n 6) 13.

<sup>285</sup> See, *inter alia*, Baird (n 177) 13.

ultimately influence the decision of migrants and asylum-seekers to travel with smugglers'.<sup>286</sup> Some scholars suggest that those smuggled are mostly aware that they are breaking a law but do not consider themselves as criminals as they do so out of necessity.<sup>287</sup> Regarding the smuggled's profile, it appears to have changed over time, acknowledging a greater diversity and moving away from the assumption of being mostly uneducated and unskilled men from rural areas.<sup>288</sup> Nevertheless, much more research is necessary to acquire an understanding of the profile of migrants relative to the organization of the smuggling process and the methods used.<sup>289</sup>

However, stepping back from this whole debate, one could argue that here as well, one must be aware of a certain degree of fluidity and subjectivity. Around the period of the two World Wars, facilitating irregular migration for those who were fleeing grave human rights violations was seen as a heroic act.<sup>290</sup> However, historical and political changes appear to have shifted the narrative towards associating smuggling as participating in an organised criminal activity.<sup>291</sup> Nevertheless, these identities, even if predominantly true nowadays, are still subjected to much more complexity than a polarised view would allow.

As for trafficked persons, a problematic lack of awareness of one's rights may cause a trafficked person not to ask for any protection because they do not identify the behaviour they were subjected to as something they could seek redress.<sup>292</sup> Moreover, those trafficked may often feel ashamed to contact the authorities or have incorporated the *victim of trafficking* status into their identity, which has left them feel powerless, especially if their story has somehow entered the public domain.<sup>293</sup> Since there seems to be a connection between intention and identity, both being subject to a certain degree of fluidity, a HRBA may potentially be able to reverse this disempowerment, as stipulated by the PANEL principles.

## 1. Enforcement-Reinforced Identities: Analysing EMSC's Second Annual Report

The perception that both human smuggling and trafficking are highly organized by a vertical criminal structure is also reinforced by Europol's European Migrant Smuggling Centre. The latest report of the two-

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<sup>286</sup> Sanchez (n 23) 20.

<sup>287</sup> Shelley (n 228) 8, 9.

<sup>288</sup> UNODC (n 10) 45.

<sup>289</sup> *ibid* 40.

<sup>290</sup> And it seems that this term has a completely different image attached to it. See, for instance, Miriam Cosic, 'When people smugglers were seen as heroes, and we welcomed the dispossessed' (2016)

<<https://www.theguardian.com/commentisfree/2016/may/14/when-people-smugglers-were-seen-as-heroes-and-we-welcomed-the-dispossessed>> accessed 30 June 2018.

<sup>291</sup> Sara Bellezza and Tiziana Calandrino (n 5) 51, 96.

<sup>292</sup> As also suggested by the expert by the expert interview.

<sup>293</sup> Konrad (n 231) 262; Michael Papendick and Gerd Bohner 'Passive victim – strong survivor'? Perceived meaning of labels applied to women who were raped' (2017) 12(5) PLoS ONE <<https://doi.org/10.1371/journal.pone.0177550>> accessed 18 June 2018, p 16-19.

year functioning of the EMSC quotes its director stating that '[r]uthless and violent criminals are increasingly providing smuggling services to irregular migrants to evade border controls, migration regulations and visa requirements'.<sup>294</sup> Moreover, the second to the report, that of Rob Wainwright from Europol, has a very similar tone. He states that '[f]ortunately the numbers of irregular migrants arriving in the EU have fallen since 2015, but there are still far too many deaths at sea caused by ruthless and reckless smugglers.'<sup>295</sup> Whilst the EU-Turkey deal is not explicitly mentioned anywhere in the report, this statement undoubtedly refers to its effect which are deemed as fortunate, whilst the EU's role for the demand for smuggling is not acknowledged and casualties are blamed exclusively on the vilified image of the smuggler.

It is important to note that Europol reports that less than half, namely 46%, of those involved in smuggling are 'poly-criminal', stating that one quarter of those 46% are also involved in human trafficking.<sup>296</sup> Nevertheless, EMSC's report suggests that some organised criminal groups (*OCGs*) have 'added migrant smuggling to their criminal portfolio' due to high profits and demand whilst using the routes and infrastructure used for trafficking because smuggling is a 'hugely lucrative criminal business with relatively low levels of risk'.<sup>297</sup> Europol, for instance, has a separate anti-smuggling centre and yet, the latter's report seems to implicitly compare the efforts towards combatting smuggling with those towards trafficking.<sup>298</sup> This appears to demonstrate that smuggling is also a high priority, alongside with addressing human trafficking. Furthermore, it is interesting to note what is not in the EMSC report: no mention of how a smuggling situation can progress into human trafficking, despite this being widely acknowledged by OHCHR and academia, as shown above; no mention of cases of unaccompanied minors being recruited as smugglers, perhaps as that would not fit the image of the 'ruthless and reckless smuggler'.<sup>299</sup> The term *unaccompanied minors* is mentioned only once to acknowledge that they are 'especially vulnerable to all types of exploitation'.<sup>300</sup>

Moreover, according to the EMSC report, smuggling involves '[s]ophisticated and often life-threatening concealment methods [...] [noting that] purpose-built, airtight compartments, and even spaces behind engines in vans, lorries, cars and cargo trains are increasingly reported'.<sup>301</sup> Although the focus on human rights abuses and deaths has traditionally been strongly related to smuggling by sea, Europol acknowledges that it such risks and abuses are involved in other forms of smuggling as well, for instance by land.<sup>302</sup> Despite this acknowledgement, the overall narrative of the report seems to be one which frames the

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<sup>294</sup> See the Head of EMSC, Robert Crepinko's statement. Europol (n 242) 5.

<sup>295</sup> *ibid* 4.

<sup>296</sup> *ibid* 13.

<sup>297</sup> *ibid* 13.

<sup>298</sup> See the infographic in the report describing anti-smuggling actions, the comparison on two parameters: 'SIENA messages' and 'new cases initiated' in anti-trafficking actions. *ibid* 6.

<sup>299</sup> *ibidem*; Sanchez (n 23) 18.

<sup>300</sup> Europol (n 242) 14.

<sup>301</sup> *ibid* 10.

<sup>302</sup> *ibid* 25.

smuggling phenomena as controlled entirely by multi-criminal gangs and hence constituting a security threat for the EU. For instance, the report uses directly the word *threat* 11 times; *crime-related words* (such as *criminal activity*) 63 times and *OCGs, separately*, 22 times. Human trafficking ‘for the purpose of sexual and labour exploitation’ is referred to as ‘key threat in the EU’ whilst migrant smuggling as ‘key criminal threat’ which involves ‘smugglers who put migrants’ lives at serious risk and therefore pose a security challenge to the internal security of the European Union’.<sup>303</sup> Moreover, and perhaps more positively, the EMSC report uses the word *illegal* 15 times while refraining from using the term *illegal migrant*, perhaps as an effort of being mindful of the impact, and instead using the terms *irregular migrant* and *illegal migration*.<sup>304</sup>

The EMSC report seems paint a rather black-and-white picture of the human smuggling phenomenon which undoubtedly is reflected directly in the public opinion. This triggers more support for repressive measures which, in turn, drive any smuggling activities further underground, hence increasing the human rights risks.<sup>305</sup> However, this polarised view of the smuggling process misses some crucial nuances, which influence who is less likely to be subjected to human rights violations and who is less likely to be along the journey to seeking a better life.

## 2. The Public Discourse

Whilst the previous sub-sections have mostly focused on how smugglers are portrayed, it is also important to pay some attention to the way those smuggled are addressed in public discourse within the EU. In this context it is crucial to note that from an ethical and juridical standpoint no human being can be illegal and hence the label of an *illegal immigrant* is unjustifiably used.<sup>306</sup> The migration issue and its policy discourse, most importantly, is used to refer to a specific group of non-nationals rather than all, namely those with low economic means.<sup>307</sup> Nonetheless, within the EU, it still appears to be the rule, rather than the exception, to use the terms *illegal migration* and *illegal immigrant*, thus creating a veil of stigma and placing the safety and human rights of irregular travellers at a higher risk.<sup>308</sup> This types of language projects to the public, including MS public officials, certain images and associations, in the case of an immigrant - someone who

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<sup>303</sup> *ibidem* 5.

<sup>304</sup> See for example Europol (n 242) 15.

<sup>305</sup> *Andersson* (n 6) 12.

<sup>306</sup> *Bigo, Carrera and Guild* (n 283) p 11.

<sup>307</sup> *Picón* (n 96) 12.

<sup>308</sup> Joanna Parkin, 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research' [2013] 61 CEFP

<<https://www.ceps.eu/system/files/Criminalisation%20of%20Migration%20in%20Europe%20J%20Parkin%20FIDUCIA%20final.pdf>> accessed 18 April 2018, p 4; *Picón* (n 96) 13.

violates criminal law with their illegal acts and should be subjected to public suspicion and negates their perceived vulnerability.<sup>309</sup> Other international and regional organisations utilise more neutral terminology to avoid this stigmatising effect and yet most EU institutions and MS used the latter expression.<sup>310</sup> The CoE, for instance, has denounced these terms as contrary to human rights and human dignity.<sup>311</sup> Moreover, illegal immigration may be used to describe several distinct situations, hence lowering the legal certainty within EU discourse.<sup>312</sup>

Another issue, perhaps an extension of some EU agencies' overly polarised narrative, is that the media often mixes up the terms human smuggling and human trafficking.<sup>313</sup> This may indeed be a consequence of the criminalisation of the smuggling phenomena. Some NGOs have suggested that this criminalisation is a way to 'legitimize human rights violations in order to combat and control illegalized migration'.<sup>314</sup> Regardless of the exact causes, the results are highly likely to negatively impact those who are in any way associated with the human smuggling phenomena primarily because thus criminalising narrative portrays irregular border crossing as a matter of criminal law.<sup>315</sup> In fact, criminal law differentiates between two types of crimes depending on the harm inflicted: against an individual, which often attract the most public corner; and crimes against the 'general good' as defined by the state, varies significantly across EU MS and is often contested.<sup>316</sup> Irregular border crossing and stay, without any exploitative elements present, merely infringe upon state immigration and border control legal statutes, not on the rights of any persons.<sup>317</sup> Hence, as no harm is directly inflicted upon an individual, not on any property nor on state security, and hence the use of criminal terminology when referring to human smuggling becomes more challenging to justify.<sup>318</sup> Generally criminalisation happens through the public discourse and not through legal means, as irregular migration usually falls under administrative and not criminal legal provisions.<sup>319</sup> This is among the reasons why for a HRBA on human smuggling, it would be pivotal to address the public discourse.

The criminalisation trends supported by EU agencies like Europol's EMSC are highly problematic. Even the Office of the Council of Europe Commissioner for Human Rights (*CoE Human Rights Commissioner*), among others, has held that that CoE MS, as all EU MS also are, should reverse the criminalisation trends

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<sup>309</sup> Council of Europe Commissioner for Human Rights, 'Criminalisation of Migration in Europe: Human Rights Implications' (2010) <<http://www.refworld.org/docid/4b6a9fef2.html>> (accessed 10 April 2018) p 10; *Picón* (n 96) 18, 19.

<sup>310</sup> Not all of them anymore, as after 2003 it was used in all EU institutions and MS, now still prevalent although the EU Parliament, for example, prefers 'irregular'. J 8,9, 38. *Picón* (n 96) 33.

<sup>311</sup> To that effect, see Council of Europe (n 233) 30.

<sup>312</sup> *Picón* (n 96) 33.

<sup>313</sup> A clear example is this: <https://www.dw.com/en/border-police-officials-in-bulgaria-fired-for-cooperating-with-human-traffickers/a-19478782> (not in sources list yet). This is not only confined to the Bulgarian case but happens in general; *Forin and Healy* (n 8) 20.

<sup>314</sup> *Sara Bellezza and Tiziana Calandrino* (n 5) 17.

<sup>315</sup> *Andersson* (n 6) 12; IOM (n 7) 127.

<sup>316</sup> Council of Europe (n 309) 8.

<sup>317</sup> *ibidem*.

<sup>318</sup> Crepeau (n 1) 120.

<sup>319</sup> *ibid*.

and ‘establish a human rights compliant approach to irregular migration’.<sup>320</sup> This thesis, due to the length constraints, focuses solely on one aspect of this, namely on the human smuggling and those disproportionately disadvantaged within this phenomenon.

## E. Answering the ‘Who is Disproportionately Disadvantaged?’ Question: The Importance of Looking Through Gendered and Socio-economic Lenses

This question can be viewed from two main angles. Firstly, it could compare the safety of regular travellers versus those migrating irregularly. Regarding sea and air travel, recent legal and safety management research has compared the fundamental right to life safeguards for both categories of migrants. It found that, internationally, the safety, and hence protection of the right to life, is a primarily safeguarded for regular travellers and only with secondary importance when it regards irregular migrants.<sup>321</sup> It also found that ‘[e]nforcing the prohibition of cross-border movement of irregularised travellers is the main preventive measure, and search and rescue is only reparatory’.<sup>322</sup> Moreover, while deaths of regular travellers are reported and investigated, hence also subjected to data collection, neither the UN organisations nor any other organisations have collected any comprehensive statistics at all on the deaths of irregular travellers, resulting in an inability to precisely monitor the effects of the current preventative cross-border regulations.<sup>323</sup> Hence, the research concluded that in practice, the right to life is differentiated for regular and irregular travellers.<sup>324</sup> In this author’s view, such research demonstrates inter-group disparities. The following sub-section focuses on intra-group disadvantages by examining the situation of: women and those most economically disadvantaged; minors; and asylum-seekers and refugees.

### 1. Women and the Most Economically Disadvantaged

This oversimplified distinction between coercion and consent does not do justice to the complex nuances of coercion and also builds upon the implicit belief that *victims of trafficking* are often *female*, whilst *smuggling service users* are predominantly *male*.<sup>325</sup> This is problematic as it reinforces gender stereotype-based stigma. Perhaps as a result, researchers and policy makers have been focusing on sexual violence

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<sup>320</sup> Council of Europe (n 309) 39.

<sup>321</sup> Thomas Spijkerboer ‘Wasted Lives. Borders and the Right to Life of People Crossing Them’ (2017) 86 NJIL 1, 5.

<sup>322</sup> *ibid* 14.

<sup>323</sup> *ibid* 13, 14.

<sup>324</sup> *ibid* 17.

<sup>325</sup> *Askola* (n 196) 206.

against women, instead of giving equal attention to the reports of ‘sexual intimidation, humiliation and violence’ against men.<sup>326</sup> However, a UN study on sex trafficking indicates that those trafficked are mostly adult women and yet, within certain ethnicities the proportion of male trafficked persons is much higher than average.<sup>327</sup> However, it is important to acknowledge that the global irregular migration happens in a continuum of ‘economic, social and legal inequalities’ which are gendered and more often disadvantage women and low-income individuals.<sup>328</sup>

Moreover, such stereotypes also affect the perception of smugglers and traffickers. In trafficking, women seem to constitute the highest proportion of perpetrators than any other transnational criminal activity and despite this, according to UN statistics of identified offenders, they rarely compose 1/3 of identified suspects.<sup>329</sup> In smuggling, both genders participate as key figures in facilitation, although most of those arrested are male.<sup>330</sup> This could be due to gender stereotypes as well as the nature of the work division: whilst men more often carry out driving, lookout and recruitment activities, as well as group guiding, women are mostly involved in stereotypically *feminised tasks*, such as cleaning, cooking and taking care of children, and in financial operations, such as ensuring that a payment has been received.<sup>331</sup> However, as a result the smuggling income varies considerably across genders, with women being less likely to acquire additional income.<sup>332</sup> Another gendered similarity between smuggling and trafficking is the tendency for women from third countries who are engaging in prostitution to be apprehended or deported for their irregular status.<sup>333</sup> Having a gender perspective is also important, and hence the calls for more research focus on this, due to the global trends of the feminisation of poverty which adds an additional layer of vulnerability.<sup>334</sup> It is widely accepted that women worldwide are trafficked for the same reasons: mostly for poverty; the patriarchal power structures; inequalities in rights and regular labour market access; but also specifically: gender-based violence, sex tourism demand, and globally unequal wealth distribution and economic development.<sup>335</sup> For smuggling, despite currently fragmented research, findings on human smuggling by land indicate that women are indeed exceptionally vulnerable to suffer from different forms of what is, ultimately, inhumane and degrading treatment, namely: physical harassment, rape and sexual exploitation.<sup>336</sup>

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<sup>326</sup> Sanchez (n 23) 19.

<sup>327</sup> See Forin and Healy (n 8) 65.

<sup>328</sup> Askola (n 196) 207.

<sup>329</sup> Shelley (n 228) 8.

<sup>330</sup> Sanchez (n 23) 13.

<sup>331</sup> *ibidem*.

<sup>332</sup> *ibid* 17.

<sup>333</sup> Askola (n 196) 207, 208.

<sup>334</sup> UNODC (n 10) 105.

<sup>335</sup> Corene Rathgeber ‘The Victimization of Women through Human Trafficking- An Aftermath of War?’ (2002) 10(2-3) EJCLCJ 152, 157; Konrad (n 231) 263.

<sup>336</sup> Perhaps not surprisingly, in North and West Africa women reported being offered to leave their children for illegal adoption in return for the smuggling fee. UNODC (n 10) 105.



There are indications of a correlation between the levels of risk and the price, resulting in lower-income smuggled persons being exposed to higher levels of risk and vice versa, hence perpetuating pre-existent socio-economic inequalities in the smuggling process.<sup>337</sup> The theories explored above seem to suggest that many of smuggling facilitators earn an additional income by performing smuggling tasks and hence may also be of lower socio-economic status, at least initially.<sup>338</sup> Regarding smuggled persons, it has been suggested that the degree of necessity may partially be measured by the means of transport used during the journey.<sup>339</sup> In addition, there are also indications that migrating individuals with lower income and are migrating, mostly women and children travelling alone, are generally less informed about the whole process and hence more likely to be subjected to ‘violence, detention, extreme levels of environmental exposure, exploitation, longer travel times and less safe routes.’<sup>340</sup> In addition, the prices of smuggling services tend to be influenced by factors such as ‘age, gender, health’.<sup>341</sup> Perhaps most importantly, in addition to violence, smuggling-related deaths often result from environmental exposure on isolated and remote routes, taken to minimise police interception risks.<sup>342</sup> Some authors suggest that violence is indeed not random in nature; that some smuggled people do not experience it *en route*, while others, often with the lowest income and most vulnerable are systematically targeted.<sup>343</sup> Hence, this author stipulates that, albeit overtly, a lesser degree of realisation of economic and social rights may lead to more frequent violations of civil and political rights on the smuggled’s migratory journey.

Moreover, it is generally accepted that the more financial means one has, the higher the degree of control they have over their own migration journey.<sup>344</sup> These influence not only the length, possession of travel documents, lower risk of interception and overall security and protection service paid for but also the destination.<sup>345</sup> Hence, generally but not always, those who are economically privileged are more likely to be smuggled rather than trafficked, the latter being of the ‘weakest social and economic groups in their countries of origin’.<sup>346</sup> Due to grave inequalities and lack of human security, it is also important to elaborate on the terms *survival sex* and *survival migrants*.<sup>347</sup> The latter are irregular travellers who have been forced to provide sexual services as a means of transaction for survival, e.g. by paying for food and accommodation, for instance.<sup>348</sup> Yet, depending on the degree of consent, some cases may be later regarded

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<sup>337</sup> Sanchez (n 23) 16, 17.

<sup>338</sup> *ibid* 13; UNODC (n 10) 57.

<sup>339</sup> UNODC (n 10) 40.

<sup>340</sup> Sanchez (n 23) 16,17.

<sup>341</sup> *ibid* 16, 18.

<sup>342</sup> *ibid* 18.

<sup>343</sup> *ibid* 19.

<sup>344</sup> UNODC (n 10) 41.

<sup>345</sup> *ibid* 40, 41.

<sup>346</sup> Shelley (n 228) 11.

<sup>347</sup> Gallagher (n 44) 28; Crepeau (n 1) 119.

<sup>348</sup> Forin and Healy (n 8) 16.

as sex work while others - as sexual exploitation.<sup>349</sup> Although there may be several reasons for this, some studies conducted within the EU suggest that, specifically adult women, both migrating and seeking asylum, are the most frequently officially identified as having been sexually exploited.<sup>350</sup> Such cases have been reported in different countries along the Balkan route and as occurring even in refugee camps.<sup>351</sup> *Survival migrants* are the ones most likely to be trafficked in response to the demand for cheap labour and sexual services in EU destination countries, which according to some authors, has been overlooked in the pursuit of combatting irregular migration.<sup>352</sup> Particularly, along the Balkan route, women specifically are frequently offered smuggling services in exchange for sex and there have been many cases of, specifically women and unaccompanied or separated children being sexually and psychologically harassed.<sup>353</sup> Moreover, research shows that along the Balkans and in Central Europe, the violence against women and children has substantially increased.<sup>354</sup> Although violence often causes physical and psychological harm, irregular travellers rarely seek medical assistance as they are afraid that the authorities will detect their status, which creates a climate of impunity for violent smugglers and a gap in the realisation of the right to health.<sup>355</sup> However, smuggled persons may also be unwilling or unable to seek medical assistance due to pressure to continue along the journey or to the lack of access to professionals and the necessary equipment, specifically persons trained to assist victims of sexual violence and gynaecologists.<sup>356</sup> Overall, it seems that those who need medical assistance most may not receive it, while those more likely to be able to pay for receiving it privately, are less likely to need it.

Overall, it appears that socio-economic class differences are generally shaping the different experiences people have of smuggling, depending on how much they are able to pay. For this author, this resembles a downgrading spiral where those on the top have the most economic means and have the most comfortable and safe journeys; those in the middle have relatively safe experiences; those at the bottom and at the poverty line, being most likely to face exploitation and abuses in the smuggling process; and those below the poverty line not being able to pay a smugglers' fee at all and being more susceptible to be trafficked. Although, these are general statements to which there would be many exception, the literature reviews conducted for this thesis do seem to point to such an overall correlation. Moreover, internationally and within the EU, those who have been exploited and/or abused during smuggling may still receive little to no protection while those trafficked receive substantially more. An analogy can be made to the social benefits injustice effect of those (slightly) below the poverty line may receive welfare benefits, hence raising their

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<sup>349</sup> *ibid* 65.

<sup>350</sup> Often women from Eastern Europe, the Balkans and Sub-Saharan Africa. *ibid* 64.

<sup>351</sup> *ibid* 65.

<sup>352</sup> *Gallagher* (n 44) 28.

<sup>353</sup> *Forin and Healy* (n 8) 61, 62.

<sup>354</sup> UNHCR (n 133) 19.

<sup>355</sup> *ibid* 18.

<sup>356</sup> *ibid* 13-15.

income above that, whereas those slightly above the poverty line cannot, thus *post facto* being more economically disadvantaged. This is not to suggest that one is better off being trafficked rather than exploited while being smuggled due to the possibility of subsequent protection. Nevertheless, it does seem that those who are exploited and smuggled receive too little guidance while having to navigate the difficulties of irregularity in a host country and hence may be re-traumatised and continuously harmed, even after they reach the destination.

In summary, perhaps the most strikingly worrisome trend which seems to appear from human smuggling academia is that persons who are subjected to in a socially disadvantaged position in other situations and are also the most vulnerable, would be most likely to need to flee and, simultaneously, be at a much greater risk of severe human rights violations along the journey because they cannot afford a higher degree of safety. The necessity to have money to trade for human rights protection is exactly the opposite of what the international and the EU's human rights regimes are founded upon. On the contrary, they are founded on, *inter alia*, principles of equality, justice, solidarity, human dignity and human rights.<sup>357</sup> Hence, in view of the presence of such gaps, the EU should consider taking mitigating actionable steps, especially as the underlying reason for smuggling facilitation are the increasingly rigorous security regime controls.<sup>358</sup> In this author's view, currently the best way to do so would be through implementing a HRBA to human smuggling.

## 2. Unaccompanied, Separated and Accompanied Minors

It is increasingly being recognised that 'the cross-over between smuggling and trafficking represents a huge risk for all children'.<sup>359</sup> Migrating children, particularly UASC, generally encounter risks for exploitation and trafficking that adults do but to a higher degree or in a more specific-to-them manner.<sup>360</sup> Sexual exploitation also impacts UASC, particularly underage boys from Afghanistan who are sometimes exploited as *bacha bazi* (*dancing boys*) in their home country, along the route and even in the country of destination.<sup>361</sup> Within the EU, some UASC may be forced to commit a range of criminal acts.<sup>362</sup> Along the Balkan route, and specifically in Greece, there are indications that minors forcibly become smugglers to repay their accumulated fees.<sup>363</sup> This thesis' expert interview suggests that UASC are specifically vulnerable to debt bondage and are recruited because they are seen as more 'dispensable' as, if caught, face

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<sup>357</sup> Art 2 TEU.

<sup>358</sup> *Sanchez* (n 23) 20.

<sup>359</sup> *Forin and Healy* (n 8) 15.

<sup>360</sup> *ibid* (n 8) 69.

<sup>361</sup> *ibid* 66.

<sup>362</sup> *ibid* 68, 69. Also mentioned in the expert interview.

<sup>363</sup> *ibidem*.

a much lower penalty. Hence, NGOs try to inform them about the consequences of receiving a prison sentence after turning 18 years of age. These interviews also indicate that UASC, mostly boys and especially those who are homeless, are more likely to develop addictions and to deal drugs. Moreover, during the smuggling process, UASC are often kept in warehouses for a certain period of time, where they are vulnerable to being abused or subjected to labour exploitation.<sup>364</sup> This is even more dangerous considering the often-multiple unsuccessful border crossings, with some UASC reporting that they have tried to cross more than ten times.<sup>365</sup>

Generally, research has indicated that some specific factors have been found to increase vulnerability among minors for exploitation and trafficking, namely: lower levels of education; prolonged travelling; traveling alone; and being associated with a particular country or region which may trigger racist or xenophobia-driven abuse.<sup>366</sup> Additionally, a European Commission study has acknowledged that lack of financial resources and supportive mechanisms for unaccompanied children migrating into the EU, make them more easily targetable traffickers.<sup>367</sup> While unaccompanied minors are supposed to have a legal guardian assigned to represent them and look after their needs, in Greece this mechanism does not work well, partly as too many unaccompanied minors are assigned per guardian and may never meet her or him in reality.<sup>368</sup>

In addition, the circumstances which UASC face also largely depend on the facility where they are housed. In some EU MS, the most suitable facilities have severely limited capacity, resulting in many migrating children being held in prolonged detention or among larger adult migrant populations, which aggravates their exposure to poor conditions and violence.<sup>369</sup> Notably, in the ECtHR case of *S.F. and Others vs Bulgaria*, the Court held that while S.F.'s children were housed at a border police detention facility for a relatively short time (32-41 hours), regardless of whether separated or accompanied, minors are extremely vulnerable and have specific needs, which are problematic to meet in situations of immigration-related detention.<sup>370</sup> Moreover, the conditions in the cell were so unacceptable, that the Court considered that they may have caused significant anxiety and stress to the children, even for a short time period.<sup>371</sup> Most notably, ECtHR found that the limited access to sanitary facilities, which forced the family to urinate where in the confines of the small space where they were detained, to be unacceptable, unless hypothetically posing a

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<sup>364</sup> Expert interview.

<sup>365</sup> *ibidem*.

<sup>366</sup> *Forin and Healy* (n 8) 18.

<sup>367</sup> *ibid* 15.

<sup>368</sup> Expert interview.

<sup>369</sup> Vasileia Digidiki and Jacqueline Bhabha, 'Emergency within an Emergency: The Growing Epidemic of Sexual Exploitation and Abuse of Migrant Children in Greece' (Harvard FXB Report 2017) <<https://cdn2.sph.harvard.edu/wp-content/uploads/sites/114/2017/12/Emergency-Within-an-Emergency-FXB.pdf>> accessed 17 April 2018, p 12.

<sup>370</sup> *SF and Others v Bulgaria* no 8138/16 [2017] ECtHR para 79. European Database of Asylum Law, 'ECtHR - S.F. and Others v. Bulgaria, Application No. 8138/16, 7 December 2017' <<http://www.asylumlawdatabase.eu/en/content/ecthr-sf-and-others-v-bulgaria-application-no-813816-7-december-2017>> accessed 30 June 2018.

<sup>371</sup> *ibidem*.

justifiably ‘concrete and serious safety risk’.<sup>372</sup> Immigration detention is currently used to fulfil border enforcement aims and as a deterrent despite evidence that it causes mental and physical harm for those, sometimes unlawfully or arbitrarily, detained, whilst strengthening the negative public opinion about migrants.<sup>373</sup> Although detention must always be a last resort and research shows that it is less effective than other alternative measures, MS continue to use it beyond situations where it would be strictly necessary.<sup>374</sup> In all MS, it is sometimes used for minors, who are in an especially vulnerable situation.<sup>375</sup> This thesis’ expert interviews also suggest an even deeper problem if UASC are homeless. Then they are much more likely to be targets of assault or violence, in addition to other forms of crime. These risks can be aggravated if those UASC are on the way to seek asylum.

### 3. Asylum-seekers and Refugees

Current statistics indicate that 51% of all recognised refugees are 18 years of age or younger, meaning that, presently, millions of minors worldwide are growing up in refugee camps or other forms of temporary housing.<sup>376</sup> Particularly for unaccompanied adolescents of 16 and 17 years of age, some research findings within the EU suggest that, within the camps, for them it is ‘survival of the fittest’.<sup>377</sup> Simultaneously, violence among children is considered to commonly follow the patterns of ethnic and social division visible in adult populations.<sup>378</sup> Moreover, much of the sexual violence in refugee camps is deemed to be unreported due to fear of further harm and retaliation.<sup>379</sup> These are some of the overlapping vulnerabilities for UASC asylum-seekers.

Beyond the special case of minors, generally all asylum-seekers face many challenges within the smuggling process. Whilst all human beings fall within the scope of the core international human rights regime, irrespective of migratory status, recognised refugees under the Refugee Convention have an additional legal status because they also face additional challenges.<sup>380</sup> It is estimated that 90% of irregular migrants in

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<sup>372</sup> *SF and Others v Bulgaria* (n 370) para 86.

<sup>373</sup> OHCHR (n 8) 2.

<sup>374</sup> *ibidem*.

<sup>375</sup> *Crepeau* (n 1) 117.

<sup>376</sup> Independent Commission on Multilateralism, 'Forced Displacement, Refugees, and Migration' (2015) <[https://www.icm2016.org/IMG/pdf/forced\\_displacement\\_refugees\\_and\\_migration\\_final-3.pdf](https://www.icm2016.org/IMG/pdf/forced_displacement_refugees_and_migration_final-3.pdf)> accessed 30 June 2018, p 2, 5.

<sup>377</sup> *Digidiki and Bhabha* (n 369) 20.

<sup>378</sup> *ibid* (n 369) 19.

<sup>379</sup> *ibid* 20.

<sup>380</sup> See, for instance, Mediterranean Affairs, 'Human Smuggling: the EU efforts to undermine organized crime in the Mediterranean' (2016) <<http://mediterraneanaffairs.com/2834-2/>> accessed 18 April 2018.

Europe rely on the service of smugglers.<sup>381</sup> Studies show that smuggling, trafficking and asylum within the EU overlap sometimes, especially in the context of refugee camps where traffickers and smugglers are trying to recruit.<sup>382</sup> Firstly, asylum-seekers and refugees may be most likely to pack and leave promptly, hence giving them less time to plan and choose the most suitable smuggler.<sup>383</sup> Secondly, although being smuggled should not be punished, especially considering the lack of alternatives, the United Nations High Commissioner for Refugees (*UNHCR*), expresses concern that being smuggled may compromise one's asylum application, resulting in a state of 'double criminality': being regarded by the authorities as using the service of criminals to facilitate breaking immigration laws.<sup>384</sup> Hence, there is an inherent dilemma where the only way for most to reach the asylum country is by using smugglers, which may indeed compromise their asylum claim and thereby the very reason they initially used smugglers.<sup>385</sup> In this light, academics are increasingly calling for EU MS to reconsider erecting border control structures, such as walls, which do not stop the flow but merely relocate it and increase the smuggling fees whilst potentially constituting a systematic breach of the *non-refoulement* principle.<sup>386</sup>

Much of the world has changed since the deliberation of the legal instruments on human smuggling were negotiated. The digital era and the current migration flows provide for completely different circumstances. Legal norms do not always fully capture the complex reality for migrants in search for a better reality, such as 'increased risks in terms of greater vulnerability and less protection, not least through a shrinking of the asylum space'.<sup>387</sup> But how can our tools possibly capture the complexities of the smuggling process if we do not even understand it? Some aspects of our collective reality are changing and, consecutively, so must the approach. Despite the small-scale success of the EU Emergency Relocation mechanism in avoiding tens of thousands smuggling instances, the Union is currently on the way to make the reality for those smuggled even more grim. The Commission has recently proposed to nearly triple the funding for 'stronger borders and migration' which includes, *inter alia*,: an even more securitised approach towards smuggling and trafficking; and MS border enforcement equipment and training; support for MS 'under pressure'.<sup>388</sup> Whilst the UNHCR encourages EU MS to continue the relocation scheme temporarily and on a voluntary basis until the Dublin reform of the longer-term EU's asylum policy is finished,<sup>389</sup> there are very few indications that this will happen.

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<sup>381</sup> *ibidem*; Also similar findings in UNODC (n 10) 44.

<sup>382</sup> UNODC (n 10) 44.

<sup>383</sup> *ibid* 41.

<sup>384</sup> *Gallanger* (n 3) 27.

<sup>385</sup> UNODC (n 10) 44.

<sup>386</sup> *ibidem*; Art 33 Refugee Convention; *Reichel and Albanese* (n 265) 5.

<sup>387</sup> *Carling, Gallagher and Horwood* (n 24) 2.

<sup>388</sup> EU Commission, 'EU budget: Commission proposes major funding increase for stronger borders and migration' (2018) <[http://europa.eu/rapid/press-release\\_IP-18-4106\\_en.htm](http://europa.eu/rapid/press-release_IP-18-4106_en.htm)> accessed 1 June 2018.

<sup>389</sup> UNHCR (n 109).

## IV. Introducing a HRBA to Human Smuggling in the EU

### A. Is It Desirable?

After having considered the most notable similarities between human trafficking and smuggling, it may be quite natural for one to ask oneself whether we have oversimplified the distinction between the two for the sake of clarity and ease of comprehension, whilst in the process, depriving many of higher legal protection despite their vulnerability.<sup>390</sup> As mentioned in previous chapters, at the EU level, human trafficking is prohibited by the Charter of Fundamental Rights.<sup>391</sup> Moreover, it should be recalled that the UN's Human Rights watchdog has stated that it is indeed human rights which should be central to anti-trafficking and victim protection measures.<sup>392</sup> It is generally said that trafficking is 'both a cause and a consequence of the violation of human rights and that [human trafficking] must be addressed through a comprehensive approach that involves measures to protect victims of trafficking, including protecting their internationally recognized human rights'.<sup>393</sup> This thesis has thus far shown that there is considerable overlap between the motivations of those trafficked and those smuggled. Moreover, especially in the context of the economically disadvantaged or otherwise most vulnerable, the smuggling journey is likely to be characterised by some coercion, violence, exploitation and/or abuse, and result in human rights violations, similarly to trafficking. Hence, it is safe to say that human smuggling too is 'both a cause and a consequence' of human rights infringements. Hence it should also be met with a comprehensive approach based in human rights. This would remedy the current injustice that those subjected to human trafficking can subsequently receive protection, whereas smuggled persons who have been subjected to human rights violations along the route, most often do not.

The current policies towards human smuggling, which facilitates irregular migration, criminalise the only viable way for non-financially well-off persons to migrate, especially from the conflict situations and humanitarian crises humanity is currently witnessing. This has a terrible cost in terms of human lives and human suffering.<sup>394</sup> The EU an organisation is guided by a set of, agreed upon, fundamental values, among which are respect for human rights and human dignity.<sup>395</sup> Yet, the current criminalisation trends, done in part by the EU, has severe implications on the human rights and on the human dignity of those who migrate

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<sup>390</sup> Inspired by Global Alliance Against Traffic in Women (n 46).

<sup>391</sup> Art 5(3) EU Charter; *Rijken and De Volder* (n 65) 52.

<sup>392</sup> Council of Europe (n 309) 10.

<sup>393</sup> *Rijken and De Volder* (n 65) 52.

<sup>394</sup> *Crepeau* (n 1) 116.

<sup>395</sup> Art 2 TEU.

irregularly in search for a better life and those who assist that migration.<sup>396</sup> Despite efforts to control this migration through securitisation and increasing support for the defence industry and that has exposed migrating persons to even more abuse, exploitation and violence.<sup>397</sup> The EU MS continue to spend money on ineffective immigration measures, which could be repurposed in a beneficial way.

Even though the Union has not been able to stop the flow, it has, in fact, decreased it and yet at huge costs, both externally and internally.<sup>398</sup> Not only do fences and walls along the borders not seem to benefit those inside the state, they present yet another obstacle for those outside the state, who become even more economically disadvantaged and vulnerable after having to pay more money to the smugglers to get around them, thus having serious human rights implications.<sup>399</sup> Internally, irregular travellers may only feel welcomed in ethnic diaspora communities they can create spaces of excluded and deeply marginalised populations, which ultimately are against the idea of a democratic society.<sup>400</sup> Externally, the Union is projecting an example of an incoherent embodiment of its values, which it aims to export to the rest of the world. Nonetheless, the EU's internal values are applicable to the external realm and as an international actor the Union should follow its founding principles.<sup>401</sup> This would be difficult if the EU's values conflict with its *fundamental interests*, which should also be upheld.<sup>402</sup> The current public narrative EU citizens are exposed to, makes it seem that if the EU fully upholds the human rights of irregular migrants, that would be against the fundamental interests of the MS, especially in light of national sovereignty.<sup>403</sup> Some would argue that the control of national borders, and who passes through them, cannot be done collectively in full cooperation with other states because that would diminish state sovereignty.<sup>404</sup> At the same time, borders are nothing more than a social and political construct, migration has existed long before state borders existed and the idea that states can fully control the flow of persons though 'democratic borders [ which] are porous by nature', especially in the context of globalisation, is unachievable.<sup>405</sup> In fact, it has been identified that '[c]ontrolling migration has become a priority on the public discourses concerning security when politicians were confronted with economic difficulties and urban crisis in the mid seventies, early eighties' and this tendency continues today.<sup>406</sup> Nevertheless, there might be a possibility for this to change.

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<sup>396</sup> *Picón* (n 96) 16.

<sup>397</sup> OHCHR, 'Crepeau OHCHR's key messages for the Global Compact for safe, orderly and regular migration' <<https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/OHCHRKeyMessagesGlobalCompactMigration.pdf>> accessed 10 May 2018, p 2.

<sup>398</sup> See Child Protection Hub for South East Europe (n 113) 1.

<sup>399</sup> UNHCR (n 133) 12; (n 1) 117.

<sup>400</sup> *Picón* (n 96) 19.

<sup>401</sup> Art 3(5) TFEU in conjunction with Art 21 TEU.

<sup>402</sup> Art.21(2)(a) TEU; Dimitry Kochenov and Fabian Amtenbrink, 'Conclusion: messianism, mission, or *Realpolitik*? Some concluding observations on the EU's role in shaping the international legal order' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 349, 356.

<sup>403</sup> To that effect, see *Spijkerboer* (n 321) 18.

<sup>404</sup> OHCHR (n 31) 22.

<sup>405</sup> *Bigo* (n 5) 64; *Crepeau* (n 1) 115.

<sup>406</sup> *Bigo* (n 5) 62, 63.



In addition to the reiteration that all irregular migrants have human rights, the New York Declaration provides for a Global compact for Safe, Orderly and Regular Migration which is currently being negotiated and is to be adopted before the end of 2018.<sup>407</sup> It establishes, what could be interpreted as, four essential pillars: solidarity, shared responsibility, multilateralism and engagement.<sup>408</sup> According to OHCHR, *safety* should be the top priority; extending beyond physical security into the broad sense of respect, protection and fulfilment of human dignity and human rights for those either at the country of origin, *en route* or at the destination.<sup>409</sup> Furthermore, *orderly* should mean non-discriminatory and foreseeable cooperative migratory governance for people to migrate *regularly* in compliance with the rule of law and human rights, rather than the current control and prevention strategies.<sup>410</sup> In order to ensure that, especially for those not covered by the Refugee Convention, OHCHR sees the need for a *firewall* division between, on the one hand, immigration enforcement and, on the other hand, public services provision such as: access to justice, police protection, health care, etc.<sup>411</sup> At its minimum, the Global Compact should establish a space for implementation, monitoring and accountability, based on the meaningful and informed participation of migrating persons themselves.<sup>412</sup> To that end, the establishment of an independent body with an explicit human rights mandate, capable of conducting a periodic review and hearing individual complaints, is recommended.<sup>413</sup> Above all, OHCHR states that a ‘migrant-centred, human rights-based and gender-responsive would ensure social inclusion and guarantee alignment with the overarching aim of the 2030 Agenda for Sustainable Development’.<sup>414</sup>

Hence the EU have momentum to adopt a HRBA as the UN Global Compact on Migration is being negotiated, at the time of writing of this thesis. What is more, the EU is also currently negotiating the new Dublin IV Regulation, the outcome of which would probably come after the negotiations at the UN level.<sup>415</sup> Among other critical voices, the EU CHALLENGE project, OHCHR and the CoE Human Rights Commissioner have already stated that the way forward is to adopt an adaptable human rights-based approach to (im)migration.<sup>416</sup> The EU’s High Representative for Foreign Affairs and Security Policy recognises that the Global Compact is an opportunity for the Union to bring to the global level the EU’s

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<sup>407</sup> UNHCR, 'New York Declaration for Refugees and Migrants' <<http://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html>> accessed 18 April 2018.

<sup>408</sup> European External Action Service, 'UN Global compacts on safe, orderly and regular migration & on refugees at European Parliament 13/03' (2018) <<https://www.youtube.com/watch?v=AWQHscz3ZRg>> accessed 1 June 2018.

<sup>409</sup> UNHRC 'Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General' UN Doc A/HRC/36/42, p 16.

<sup>410</sup> *ibidem*.

<sup>411</sup> OHCHR, 'A Human Rights Based Global Compact for Safe, Orderly and Regular Migration' <<https://refugeesmigrants.un.org/sites/default/files/stocktakingohchr.pdf>> accessed 10 May 2018, p 1; OHCHR (n 397) 1.

<sup>412</sup> OHCHR (n 411) 1, 5.

<sup>413</sup> *ibid* 5.

<sup>414</sup> UNHRC (n 409) 16.

<sup>415</sup> See, for example, European Parliament, 'EP ready to start talks with EU governments on overhaul of Dublin system' (2017) <<http://www.europarl.europa.eu/news/en/press-room/20171115IPR88120/ep-ready-to-start-talks-with-eu-governments-on-overhaul-of-dublin-system>> accessed 1 June 2018.

<sup>416</sup> *Crepeau* (n 1) 123; Council of Europe (n 309) 39. Bigo, Carrera and Guild (n 283) 9, 11.

lessons learned and vision on migration, especially after the USA has withdrawn from the Global Compact in December 2017.<sup>417</sup>

As described extensively above, the EU has incorporated such an approach for human trafficking, which shares many similarities in the way it impacts the most vulnerable. Extending a HRBA to human smuggling would mean that, intrinsically, the Union is acknowledging the, legally and morally, right things to do, whilst opting for a strategy with potentially sustainable positive impact.<sup>418</sup> Furthermore, the EU is also an actor with ‘normative powers’ because it is well-placed to promote certain ideas at the international level, especially related to its core values of human dignity and human rights.<sup>419</sup> The ongoing Global Compact talks would be the best time for the Union to set an example worldwide. For these reasons and all the considerations in the previous chapters, it is clear to this author that a HRBA to human smuggling within the EU is not only desirable but necessary. While the main goal of this thesis is to prove that a HRBA to human smuggling within the EU is necessary, it is not its main aim to suggest how. Nevertheless, based on the many reports, literature and case reviews, this author makes some suggestions as to how, which are described below. The next section provides an example of how a HRBA could change the story of M and her family.

## B. What would it involve?

A human rights-based approach has at its core five ground principles, which, as mentioned above, can be abbreviated as the PANEL principles, and stand for: participation; accountability; non-discrimination and equality; and legality.<sup>420</sup> As mentioned above, a HRBA appears to resemble the human dignity notion which is a concept with a rather fixed meaning and flexible substance.<sup>421</sup> Similarly, the HRBA is a fixed concept, as contained within the collective of its core principles, and yet the substance within that structure varies depending on the field of application.<sup>422</sup> Hence, the following sub-chapters aim to bring more clarity to the possible application of a HRBA, firstly, to M’s case and then, more generally, in the form of proposals and suggested actions towards different stakeholders involved. This is necessary as, once developed for a particular field, the HRBA aims to provide clarity, guidance and concrete strategies.<sup>423</sup> Nonetheless, this thesis does not claim to constitute a comprehensive analysis on the substance of a HRBA to human smuggling.

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<sup>417</sup> European External Action Service (n 408).

<sup>418</sup> OHCHR (n 31) 32.

<sup>419</sup> Ian Bache et al, *Politics in the European Union* (4th edn, OUP 2015) 229, 510.

<sup>420</sup> See, *inter alia*, Scottish Human Rights Commission (n 11).

<sup>421</sup> *McCrudden* (n 146) 712.

<sup>422</sup> *ibidem*.

<sup>423</sup> OHCHR (n 31) 19.

## 1. General Considerations regarding the PANEL Principles

There are many possible ways to achieve this transformation within the HRBA and before considering concrete examples related to a HRBA to human smuggling, it would be useful to make some general clarifications about the PANEL principles. Some would say that out of the five principles, non-discrimination is the most straightforward and directly contributing to the greatest change whilst not adding any confusion.<sup>424</sup> A HRBA could help address the underlying causes of discrimination.<sup>425</sup> It should prioritise those suffering direct discrimination in one or multiple ways; ensure data is collected to identify structural inequalities which could subsequently be addressed; advocate for measures to counter those inequalities; make information available and accessible to all persons in all relevant languages; and support non-discriminatory action campaign and those for changes in attitude.<sup>426</sup> Efforts should also be made regarding gender-mainstreaming to become more than a concept associated with bureaucratic or technical complexities.<sup>427</sup>

The subsequent barriers to claiming rights could be addressed through accountability and participation which are inherently more complex to realise.<sup>428</sup> Accountability is closely-related to the right-duties relationship and it is important to recognise that, generally, everyone has both duties and rights, with the exception of very young minors who have only rights.<sup>429</sup> Yet, In the context of a HRBA to human smuggling, since the state has the obligation to respect, protect and fulfil individuals' human rights, those acting in state capacity or carrying out delegated state-related functions would be deemed to be duty-bearers (although they also have rights) in relation to smuggled persons, the latter being predominantly right-holders (although they also have duties).<sup>430</sup> For individuals to fulfil those duties and claim those rights, they need to have the three types of resources in at their disposal: human; economic; and operational resources.<sup>431</sup> The principle of accountability helps determine 'how well rights are claimed and duties are fulfilled' and involves ensuring that three main things are met: firstly, that duty-bearers accepted responsibility, implicitly or explicitly, for carrying out the duty; secondly, that duty-bearers have the authority to realise

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<sup>424</sup> André Frankovits, 'The Human Rights based approach and the United Nations system' (2006) <<http://unesdoc.unesco.org/images/0014/001469/146999e.pdf>> accessed 10 May 2018, p 54.

<sup>425</sup> HRBA Portal, 'What does the principle of equality and non-discrimination mean for programming?' <<https://hrbaportal.org/faq/what-does-the-principle-of-equality-and-non-discrimination-mean-for-programming>> accessed 10 May 2018.

<sup>426</sup> *ibidem*.

<sup>427</sup> HRBA Portal, 'What is the relationship between a human rights-based approach and gender mainstreaming?' <<https://hrbaportal.org/faq/what-is-the-relationship-between-a-human-rights-based-approach-and-gender-mainstreaming>> accessed 10 May 2018.

<sup>428</sup> Frankovits (n 424) 54.

<sup>429</sup> Jonsson (n 30) 31.

<sup>430</sup> See 'How do human rights guide programme formulation?' at HRBA Portal, 'FAQ on HRBA' <<https://hrbaportal.org/faq>> accessed 10 May 2018.

<sup>431</sup> Jonsson (n 30) 31.

the duty; and thirdly, that duty-bearers can access and control the resources necessary to fulfil the obligation.<sup>432</sup> In other words, accountability of a particular duty-bearer requires that the ‘person feels that he/she should act; that he/she may act; and that he/she can act’.<sup>433</sup> If this is not done, it can be especially challenging when duty-bearers are unwilling to act or national capacities are insufficient.<sup>434</sup> Other strategies to remedy that could include: encouraging cooperation between rights-holders and duty-bearers; advocating for the collection of the necessary data (qualitative and quantitative) which would enable accountability to be more accurate; ensuring that policy analysis and social impact analysis (including vulnerability analysis) are conducted; strengthening the capacities of national human rights institutions; when duty-bearers are non-state actors, advocating adherence to human rights standards while continuously monitoring and publicising the performance results.<sup>435</sup>

The principle of participation would mean ensuring the effective participation of those involved and impacted, which would require better communication and more transparency.<sup>436</sup> Communication is essential for realising human rights and reflects a community or a situation’s power dynamics.<sup>437</sup> Some groups in a disadvantaged position, such as minors, may not be able to communicate effectively and equally, especially in a formal setting, or do not have access to necessary knowledge or communication channels, and hence, cannot effectively participate in any decision-making.<sup>438</sup> Moreover, even when the message content is communicated, that does not automatically empower individuals without them being heard by the duty-bearers and allowed into the decision-making process.<sup>439</sup> Hence, at minimum, information should be equally accessible for everyone, whilst recognising and aiming to overcome existing marginalisation of certain persons and groups, also being conscious of how language reflects ingrained perceptions, concepts, attitudes, and decision-making patterns.<sup>440</sup> This would also require more inclusive participation of civil society organisations so they can contribute with their observations and part-take in the process.<sup>441</sup>

Participation and communication are also linked to the principle of empowerment. For the latter, it is pivotal to shift the perception that irregular migrants are not passively vulnerable and non-independent agents; rather they should be seen as adaptable and resilient actors with much potential to be key actors in their own development, if in the right circumstances.<sup>442</sup> However, if persons are marginalised, they have to

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<sup>432</sup> *ibid* 16.

<sup>433</sup> *ibidem*.

<sup>434</sup> HRBA Portal, 'What does the principle of accountability mean for programming?' <<https://hrbaportal.org/faq/what-does-the-principle-of-accountability-mean-for-programming> > accessed 10 May 2018.

<sup>435</sup> *ibidem*.

<sup>436</sup> HRBA Portal, 'What does the principle of participation mean for programming?' <<https://hrbaportal.org/faq/what-does-the-principle-of-participation-mean-for-programming> > accessed 10 May 2018.

<sup>437</sup> *Jonsson* (n 30) 18.

<sup>438</sup> *ibidem*.

<sup>439</sup> *ibidem*.

<sup>440</sup> *ibid* 20, 21.

<sup>441</sup> HRBA Portal (n 436).

<sup>442</sup> OHCHR (n 411) 3; *Jonsson* (n 30) 28.

develop coping strategies which allow them to survive without fully realising their capabilities.<sup>443</sup> Essentially, A HRBA aims to deepen the understanding of the relations between duty-bearers and rights-holders in order to bridge the existing gaps between the two, requires that both efforts and results of duty-bearers are monitored, and the lessons learned are utilised to improve upon the existing approach to realise everyone's human rights.<sup>444</sup> This can be used to empower smuggled persons who have endured human rights violations, similarly to M's family.

## 2. Possible Implementation in the Present Case

### a) *Unpacking the PANEL Principles: Participation*

In the human smuggling context, ensuring some degree of *participation* of all individuals involved is crucial for understanding each individual's situation and taking it into account when decisions which affect one's rights are made.<sup>445</sup> For instance, in M and her daughters' tremendously challenging journey of seeking a better life through smuggling, participation would entail that their situation is assessed through screening upon the first contact with a front-line responder. It is crucial in that process what the screening is not merely limited to an interview where M is subjected to questioning; rather that she has the chance to participate and disclose certain details she sees relevant for identifying her family's degree of vulnerability. If done in an appropriate manner, this would give M the chance to influence the decisions taken which may make them even more vulnerable. If that would happen, M's family will probably not have been placed in detention. Even if then, the family is still placed in detention as an exceptional case and only with a court order, the interview file should be transferred to the detention facility along with her, where it should be examined along with an opportunity to add any additional information. At this point M could have the chance to share some of the indignities her family went through on the journey, indicate her eldest daughter's fear of men in uniforms, recurring nightmares and bedwetting. Accommodating the family in relation to the information provided could prevent re-traumatisation of M and her children. This does not have to be associated with significant costs and would entail ensuring that the family is in a more dignifying situation, for example by: being placed under the supervision of staff who are not wearing uniforms; having constant access to a bathroom; and is provided a spare set of bedsheets. These otherwise minor changes would have a significant impact on the family's degree of psychological hardships. In other words, even though a substantial amount of trauma had already been inflicted prior to the screening, allowing for some

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<sup>443</sup> *Jonsson* (n 30) 43.

<sup>444</sup> *ibid* 24.

<sup>445</sup> Scottish Human Rights Commission, 'A human rights based approach: PANEL principles'

<[http://www.scottishhumanrights.com/media/1409/shrc\\_hrba\\_leaflet.pdf](http://www.scottishhumanrights.com/media/1409/shrc_hrba_leaflet.pdf) - the Panel principles page> accessed 10 May 2018.

degree of participation in the subsequent process could prevent deepening of that trauma and provide more safeguards for human dignity and hence the human rights of M's family.

b) *Unpacking the PANEL Principles: Accountability*

As mentioned above, the *principle of accountability* closely-linked to that of participation, would ensure some degree of monitoring the way human rights are affected, as described above, and would also provide for possible remedies. This is especially relevant in the context of administrative detention where one is subjected to the full and direct control of the state and nevertheless is not covered by the procedural safeguards which have been developed to ensure a minimum human rights standard in criminal law.<sup>446</sup> Hence, the need for alternative remedies and safeguards is even greater. This could be achieved through ensuring some degree of oversight of unilateral decisions made by a few individuals. For example, in M's case, if she has communicated about her eldest daughter's trauma and this is still not considered, M should have the possibility to approach another state official with the capacity to review that. One way to provide such access would be through the establishment of a specialised hotline, with translators available. There could be many alternative ways for accountability to be achieved and yet it is important to ensure that no civil servant holds too much power over another person without oversight. This is particularly important in situations of extreme vulnerability and especially in detention. Thus, it should be guaranteed that the *principle of accountability* indeed combines, on the one hand, monitoring how human rights are affected and, on the other hand, viable and effective remedies.

c) *Unpacking the PANEL Principles: Non-discrimination and Equality*

This principle can be universally found in nearly all human rights-related national and international texts. Nonetheless, in practice, the enforcement of these texts may not have due regard for this important aspect. The way human smuggling is handled in the Balkan context, it must be noted that there is a considerable number of reports of violent push-backs by border officials and non-state actors, often exclusively based on one's perceived country or region of origin.<sup>447</sup> This thesis' expert interview from Northern Greece

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<sup>446</sup> Even though EU MS acknowledge that children should never be placed in detention, in reality this is a widespread practice throughout the EU despite the fact that the UN Committee on the Rights of the Child has held that a minor's detention due to the migratory status of the parent is always against the *best interest of the child* principle. UNHCR (n 133) 16, 17.

<sup>447</sup> For examples of police brutality along the Balkan route, see MSF, 'Games of Violence: Unaccompanied Children and Young People Repeatedly Abused by EU Member State Border Authorities' (2017) <<https://www.aerzte-ohne-grenzen.de/sites/germany/files/2017-serbien-mental-health-report-aerzte-ohne-grenzen.pdf>> accessed 10 April 2018 p 7-9.

suggest that push backs also happen along the Greek-Turkish border where UASC are identified by law enforcement and nonetheless returned beyond the Turkish border by trucks to a point from which they have to continue on foot. Hence, the lack of equality directly affects one's right to have access to basic human rights, among which, to have one's asylum claim examined.

Within the context of a HRBA to human smuggling, non-discrimination could be addressed in several ways. Although states often have little or no control over non-state actors such as self-organised armed groups of civilians, the state nevertheless has substantial influence over such behaviour. As discussed above, the public narrative about irregular migration, and human smuggling in particular, is extremely important in shaping how those who partake in the process are perceived and also treated by the public. Hence, if the narrative provides for a more balanced account of the human smuggling reality, this would be likely to trigger fewer instances of hostility from the local population. A prominent example is the Bulgarian case of the creation of Mr. Dinko Valev's self-appointed and armed volunteer migrant policing unit, patrolling the Turkish border to 'defend [the] homeland'.<sup>448</sup> In such instances it is especially important for the public authorities to have an appropriate reaction. A non-discrimination and equality approach can also be applied *post facto* by high-level governmental officials speedily and firmly denouncing such conduct as being discriminatory, inhumane, unnecessary and unacceptable in a democratic society and hence, in part, counteracting the increasing intolerance of any irregular migratory activity.<sup>449</sup> Nevertheless, in Mr. Valev's case the border police spokesperson commented that 'the authorities welcome information from citizens about criminal activity - including illegal border crossings - but that only the police have the authority to detain and arrest people', thereby not condemning these acts and reinforcing the criminalisation discourse which could trigger more such instances of hostility.<sup>450</sup>

Fully applying the non-discrimination and equality in the daily actions of border officials is an additional challenge. Addressing it would require more extensive training in the universality of human rights, the dire circumstances people often flee from, avoiding the usage of, as mentioned above, inaccurate and indignifying terms such as *illegal migrant* in official and unofficial communications and having a zero-tolerance policy for any form of discrimination. Here non-discrimination and equality, in this author's view, necessarily entail an inherent fairness, in the sense that not only should one not be discriminated on the basis of nationality, gender, skin colour, etc. but also implies 'treating like cases alike and different cases differently'.<sup>451</sup> Therefore, treating M's family in the same way adult individuals who do not show indications of having such a trauma<sup>452</sup> with an explanation that 'everyone gets the same amount of bed

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<sup>448</sup> Matthew Brunwasser, 'Bulgaria's vigilante migrant "hunter"' (2016) <<https://www.bbc.com/news/magazine-35919068>> accessed 10 June 2018.

<sup>449</sup> Gallagher (n 44) 26.

<sup>450</sup> Brunwasser (n 448).

<sup>451</sup> Christopher McCrudden and Sacha Prechal, 'The Concepts of Equality and Non-Discrimination in Europe: A practical approach' (2009) <[www.ec.europa.eu/social/BlobServlet?docId=4553](http://www.ec.europa.eu/social/BlobServlet?docId=4553)> accessed 10 June 2018.

<sup>452</sup> This aspect of the HRBA would have to be expanded with the help of psychologists.

sheets’ or ‘the toilet rule applies to all equally’ would, *de facto*, be to treat unlike cases alike, and hence discriminatory as a result of not accounting for vulnerability. As mentioned above, in the recent case of *S.F. and Others vs Bulgaria*, the ECtHR held that children, regardless of whether separated or accompanied, are extremely vulnerable and have specific needs, which are difficult to ensure in detention and, especially in conditions with limited access to sanitary facilities even for a brief time, can cause the children stress and anxiety.<sup>453</sup> Moreover, the Court recalled findings in previous caselaw regarding prison inmates that ‘subjecting a detainee to the humiliation of having to relieve himself or herself in a bucket in the presence of other inmates can have no justification, except in specific situations where [that] would pose a concrete and serious safety risk [...] That must be seen as equally, if not more, applicable to detained minor migrants.’<sup>454</sup> Hence, assessing the specific vulnerabilities of persons in detention is imperative, especially if those persons have been subjected to the dangers of the smuggling process outlined in the previous chapter. Moreover, in the case of *Neshkov and Others vs Bulgaria*, the ECtHR ruled, that such indignifying conditions are a systemic issue in Bulgarian detention facilities and cited twenty-five previous judgments with the same conclusion.<sup>455</sup> However, these issues are by no means unique to Bulgaria only. Similarly, in the case of *MS.S. vs Greece*, the ECtHR temporarily discontinued returns of asylum-seekers who has initially launched their application in Greece due to the unacceptable living conditions there, contrary to what was previously required under the Dublin III Regulation.<sup>456</sup> In such circumstances where EU MS are facing similar systemic issues, systemically applying a HRBA to people entering EU territories via smuggling routes could be a way to practically improve the situation.

d) *Unpacking the PANEL Principles: Empowerment*

The *empowerment principle* is inextricably connected to the previous three. Empowerment, as opposed to disempowerment, would mean that an individual retains some degree of autonomous decision-making and ability to influence their own circumstances. This would be the case when an individual is allowed to actively participate in the initial screening process and hence adjust, to a certain degree, their treatment. Empowerment would also happen when, through the accountability principle, one has the capacity to challenge a disadvantageous unilateral decision by seeking a remedy. If non-discrimination and equality are realised, empowerment would, to some degree, be as well. Especially in the context of administrative

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<sup>453</sup> *SF and Others v Bulgaria* (n 370) para 82. European Database of Asylum Law (n 370).

<sup>454</sup> *SF and Others v Bulgaria* (n 370) para 86.

<sup>455</sup> *Neshkov and Others v Bulgaria* (n 151) Appendix 2.

<sup>456</sup> *Crepeau* (n 1) 119.



detention, empowerment could make their one's experience more bearable and to some degree, more dignifying.

Empowerment through enabling individuals to retain some degree of decision-making could be realised in a variety of different ways. For instance, if a smuggled asylum-seeker is residing at a MS refugee camp where basic services are provided, instead of financial support, individuals could benefit greatly from retaining some degree of autonomy during the waiting period for the asylum application. For example, being able to choose between two options at least in some of their daily meals would not necessarily increase service costs and, nevertheless, would enable individuals to choose whether to have fruit or a pastry for breakfast, for instance. This is important as it would introduce more variety into one's diet and avoid nutrient deficiencies. Additionally, individuals should be able to communicate any allergies and food intolerances they have to ensure that the means received can indeed be consumed by them. These relatively small considerations would have a considerable impact on, among others, realising the right to health and safeguarding some degree of human dignity.

e) *Unpacking the PANEL Principles: Legality*

The last HRBA principle is *prima facie* the most clear-cut. It implies that all actions taken in the context of a HRBA are rooted in human rights law.<sup>457</sup> For a HRBA to human smuggling in the EU context, especially important legal provisions would be those which comprise the international and EU's human rights regime. This would include, *inter alia*, the: *UN core human rights treaties*, UDHR, The Refugee Convention, the EU's Charter on Fundamental Rights, ECHR, amongst others. However, this would also include non-human rights legal instruments which also have some human rights elements such as: The Anti-Smuggling Protocol and the Victims' Directive, for instance.

Now that the PANEL principles have been applied to M's specific case, the next sections outline general strategies for applying a HRBA to human smuggling. Some of these strategies have been mentioned in literature mostly with regard to children and/or victims of trafficking, and nonetheless could be adapted to constitute a part of the HRBA to smuggling.

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<sup>457</sup> See, *inter alia*, OHCHR (n 12) 8.

### 3. General Structure

#### a) *For the Smuggled*

Firstly, as has been suggested for trafficking, that ‘a person shall be treated as a victim as soon as the competent authorities have an indication that she/he might have been subjected [human trafficking]’.<sup>458</sup> However, this author believes that in light of human dignity, it would be to move away from the disempowering idea of a *victim* who is passively subjected to injustices, and instead, use the term *survivor* or something similar.<sup>459</sup> Secondly, protection for those smuggled to report human rights abuses should be available, when they are ready and comfortable to do so, which would address the lack of access to justice for the exploitation and/or abuse.<sup>460</sup> Thirdly, smuggled persons should have some form of protection from *de facto* not being also to claim their human rights due to fear of detection or deportation.<sup>461</sup> To that end, the suggested *firewall* division ‘between public service provision on the one hand and justice and immigration on the other’ would be very useful, if effectively ensured by MS.<sup>462</sup>

#### b) *For the Suspected Smugglers*

Firstly, the EU should guarantee, in practice, also the fundamental rights of the suspected smuggler, in light of the internationally recognised inherent nature and indivisibility of human rights. Secondly, the EU should explicitly acknowledge that the smugglers’ intentions are more complex and that becoming a smuggler by coercion is a reality in some situations of heightened vulnerability, particularly for minors. Thirdly, as an extension of such an acknowledgement, the Union should proactively seek to change the vilified image of the smuggler in the public discourse. This should be done through all means possible, for instance through: legislation; policies; public statements; and reports. This should also be included in relevant bilateral and multilateral agreements with third countries, if the Union is to maintain an internal and external policy coherence. Similar steps should be taken at individual MS’ level if these efforts are to be effective. Finally, and perhaps most importantly, those who are being smuggled and not smugglers themselves also deserve to be treated according to the PANEL principles as smugglers are primarily human beings.

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<sup>458</sup> Council Framework Decision Proposal on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA COM (2009) 0136, Art 10(2); *Rijken and De Volder* (n 65) 58.

<sup>459</sup> Also see *Papendick and Bohner* (n 293) 16-19.

<sup>460</sup> IOM (n 7) 66.

<sup>461</sup> OHCHR (n 8) 2.

<sup>462</sup> This has also been included in the Global Compact proposal. *ibidem*; IOM (n 7).

c) *For the Public Discourse*

Firstly, as especially as media attention on irregular migration is at its peak,<sup>463</sup> the EU and MS should ensure that they do not portray smuggling in polarised terms, to the detriment of those involved, and provide the public with more knowledge about the complexities and causes of this phenomenon. Hence, smugglers should not be vilified and those smuggled should not be victimised. Furthermore, MS and EU officials should not use the term *illegal immigrant* or *illegal immigration* and such use should be discouraged in the media, when reporting on irregular migration-related events.<sup>464</sup> This should be done, to the extent possible, without interfering with media freedom. Lastly, it is crucial for the public narrative surrounding human smuggling within the EU must evolve first, before any substantial and long-term legislative changes can be made. The CoE similarly noted for trafficking, and this author agrees, that efforts for legislative change must be preceded by a reframing of the public narrative reframing should be complementary.<sup>465</sup>

d) *For EU and MS Reforms*

Firstly, the EU should consider a shift in its criminalisation approach with the goal of ‘prevention of harm to those assisted, and not general deterrence’.<sup>466</sup> EU agencies such as Europol should act in accordance with the do-no-harm principle and the HRBA.<sup>467</sup> Secondly, the EU should introduce the financial gain threshold in its facilitation definition and incorporate the aggravating circumstances provided for in the Anti-Smuggling Protocol.<sup>468</sup> Thirdly, the Union should ensure, as provided for by the Global Compact, that *firewalls* are in place to ensure that for those involved in the smuggling phenomenon, claiming fundamental human rights, such as access to justice, healthcare, education, etc. from public or private bodies, are not prejudiced by fear of detection and deportation.<sup>469</sup> Fourth, the EU and MS should consider providing for a (national) referral mechanism to identify needs for assistance and protection through screenings at every location where smuggled individuals are present, from detention centres to informal settlements.<sup>470</sup> This would also improve the detection of trafficking cases.

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<sup>463</sup> Carling, Gallagher and Horwood (n 24) 2.

<sup>464</sup> Council of Europe (n 309) 40.

<sup>465</sup> Council of Europe (n 233) 31.

<sup>466</sup> IOM (n 7) 64.

<sup>467</sup> Andersson (n 6) 27.

<sup>468</sup> IOM (n 7) 64.

<sup>469</sup> OHCHR (n 8) 2.

<sup>470</sup> UNHRC (n 409) 13.

The role of frontline responders is crucial as they are often the first to come into contact with smuggled persons. The former should, firstly, carry out an established screening procedure to detect signs of exploitation and abuse, based on minimum considerations of the PANEL principles.<sup>471</sup> This screening should be carried out by different respondents at different stages, i.e. once per frontline responder per case but a total of at least twice per every potentially smuggled person. If this burden is exclusively placed upon law-enforcement officials, it is not realistic that any exploited or abused persons can be identified.<sup>472</sup> Human smuggling phenomena is very complex phenomena and *prima facie* assumptions about serious human rights violations would be compromised without any screening. Secondly, frontline responders, who by definition may come into contact with potentially smuggled persons, should be trained to conduct their duties sensitively, with care and in the spirit of human empathy, in order to avoid potentially causing further harm and a re-traumatising effect.<sup>473</sup> On the contrary, this author believes that, if conducted correctly, such an interactional approach may trigger some feeling of safety for those who have experienced exploitation and abuse. This should be done in a special manner and particularly for minors, whose *best interests* should be assessed before making any decision which would significantly impact the child's life.<sup>474</sup>

Thirdly, frontline responders, and especially the law enforcement officials among them, due to their inherent position of more administrative power, should treat potential smuggled persons with dignity, respect and without discrimination.<sup>475</sup> Fourth, frontline responders should refrain from using the term *illegal migrant*, opting for more accurate and dignifying terms instead.<sup>476</sup> Fifth, frontline responders, especially those working in detention centres should proactively take all possible measures within their respective mandate, to ensure that no child is placed in detention. They should also, to the extent possible within their competences, decrease the use of detention as a 'migration management tool', especially with regard to smuggled persons, in favour of more dignifying and effective non-custodial measures.<sup>477</sup> Sixth, frontline responders, especially those working in detention centres or refugee camps, should proactively take all possible measures within their mandate, to ensure that the place of temporary accommodation or detention is as close to providing for basic needs of those housed there as possible.<sup>478</sup>

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<sup>471</sup> In the spirit of *Digidiki and Bhabha* (n 369) 41.

<sup>472</sup> *Forin and Healy* (n 8) 17.

<sup>473</sup> In the spirit of *Digidiki and Bhabha* (n 369) 41.

<sup>474</sup> *ibidem*; UNHCR (n 133) 11.

<sup>475</sup> Inspired by Council of Europe (n 309) 40.

<sup>476</sup> *ibidem*.

<sup>477</sup> As OHCHR also advocates for migration in general. OHCHR (n 8) 2.

<sup>478</sup> More details and inspiration can be found in the ECtHR judgements as well as the basic standards outlined by the CoE. Council of Europe (n 309) 43.

## V. Conclusion

### A. Concluding Remarks

Human beings, along with other species have always migrated. Presently, for people, however, the ability to migrate is increasingly complicated. Especially if the person does not meet the administrative requirements, reaching the EU is hindered by complex procedures, militarised and, nonetheless, permeable borders with an increasing number of fences along them, and a criminalising public narrative. In this context, people who can navigate these obstacles safely, generally have a higher socio-economic status. In contrast, those whose unfortunate circumstances have made migration necessary, often do not have a strong safety net around them. In fact, it seems that on the dangerous and unpredictable smuggling journey, the more a person's vulnerable situation requires a safety net, the less that person can afford it. Perhaps a realisation of this injustice is also behind the motivation of some altruistic smugglers. Nonetheless, research shows that alongside them, there is a significant proportion of profit-driven facilitators who would capitalise on individuals' vulnerable situation and even exploit it various ways. Although the smuggling reality is nuanced and complex, the public narrative within the EU does not reflect this. Within the context of current EU and MS policies, the harm sustained after the journey is over, may continue to worsen.

Ideally, it is important to focus both on the causes and the consequences of irregular migration within an analysis the human smuggling phenomenon. Nonetheless, at present, this author sees a comprehensive approach for addressing the root causes of human smuggling as too distant in the future. While long-term solution efforts should be sustained, it is also important to acknowledge the promising value and necessity of a short-term mitigating approach based on human dignity and human rights. The increasing indications of the similarities between human smuggling and human trafficking, the EU's existing HRBA towards human trafficking, and the ongoing Global Compact for Migration negotiations may create a suitable momentum for the EU to introduce a much-needed HRBA to human smuggling. As described above, this approach would be fully consistent with the EU's intrinsic values, its international obligations and the progressive recommendations from human rights watchdogs. Hence, it seems harder to argue that it is not in line with its long-term interests. The Union may in fact be best placed to initiate such an approach regionally and subsequently advocate for a spill-over effect worldwide. In that spirit, EU MS would do better to focus their efforts on *firewalls* of protection instead of *fences* of restriction, as the latter only increase the cost of human safety. Moreover, EU and MS officials should refrain from using dehumanising rhetoric and strive to portray a more balanced view, as reality seems to reflect. Moreover, the Union should support MS and especially their frontline responders by providing comprehensive screening guidelines which consider them a tool for identifying people who have faced human rights infringements in vulnerable circumstances, rather than considering them victims by identity. As the smuggling process is systematically

indignifying for the most vulnerable, the HRBA should ensure that people are treated with respect and understanding. Although this approach cannot prevent all indignities, it can ensure that they are not deepened by addressing the root causes of ongoing victimisation in EU destination countries. At least until a more long-term solution is agreed upon.

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