

**ICMPD Working Paper**  
**Lost in Categorisation:  
Smuggled and Trafficked  
Refugees and Migrants on the  
Balkan Route**

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## About ICMPD

The International Centre for Migration Policy Development (ICMPD) was founded in 1993, upon the initiative of Austria and Switzerland. The purpose of ICMPD is to promote innovative, comprehensive and sustainable migration policies, and, according to the Mission Statement: “Making migration and mobility of people orderly, safe and regular, including through the implementation of planned and well-managed migration policies.”

ICMPD is an international organisation with 17 Member States (Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Hungary, The former Yugoslav Republic of Macedonia, Malta, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Sweden, Switzerland and Turkey), around 300 staff members, a mission in Brussels and regional offices and representatives throughout Europe, Central Asia, West and North Africa, the Middle East and South America.

## The Author

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# 1. Introduction

The approach of states to managing immigration and asylum relies to a significant extent on the **assignment of categories** to people entering from abroad and residing in the country. Among these categories are regular migrant, labour migrant, irregular migrant, asylum seeker, refugee, unaccompanied child, smuggled migrant and trafficked person. Each of these categories has a specific definition in national law, and so every person migrating into a country fits into one of these categories – or at least that is how we understand migration and migration policies.

There are indeed many reasons why this categorisation is necessary – each category has specific rights attached to it, and describes the situation that each person is in. Those of us working on migration policy also apply these categories in order to guide the scope of our work. However, in responding to mixed migration flows to Europe during the past few years, this has been a challenge. Some people are experts on human trafficking, while others are experts on asylum and refugees. Other people are experts on irregular migration or migrant smuggling, while still others are experts on children in a migration context.

Yet to comprehend these migratory movements, it is necessary to understand legislation, policy and practice in all of these areas, because the adults and children who travelled along the Balkan and Mediterranean routes to European Union (EU) countries during the past three years **did not fit neatly into just one of these categories**. In fact most of them fell under a number of categories at once.

What has been referred to as the “**politics of labelling**” in the area of mixed migration – the politically loaded use of certain terms to elicit particular responses to groups of people – is usually discussed in relation to the choice as to whether to use the term “migrant” or “refugee” (Whitham, 2017). This highlights the sometimes artificial distinctions embedded within the language of migration and the use of “language, definitions and categorisations” to determine the rights and treatment afforded to different people (Dolan, 2017).

Acknowledging that **multiple categories can be applied to individual people** in this context is problematic, because states and service providers, as well as researchers and policy advisors, depend on the application of these categories in order to make sense of their work. This paper examines the challenges, and some possible ways forward, in dealing with the nexus between asylum, migration management and combatting human trafficking in mixed migration contexts in general.

The ‘Balkan Route’ to the EU exemplifies this nexus. Of particular relevance are two key features of this particular mixed migration movement, which have implications at a global policy level:

1. First, research and investigations conducted on this route have shown that almost every single person taking it used the **services of migrant smugglers**, at least at some stage.<sup>1</sup> It is simply impossible to make the journey without smuggling services.
2. Second, over half of all those travelling along the route are from refugee-producing countries, due to conflict or individual persecution (such as Syria, Iraq, Afghanistan, Eritrea and Somalia), and therefore they have a high likelihood of being granted refugee status, subsidiary protection or humanitarian protection in EU countries. In addition, almost all of those who arrived along the Balkan Route ultimately **applied for asylum** in an EU country.<sup>2</sup> First they were smuggled across borders, and then their status became that of asylum seekers.

This paper considers migrant smuggling and asylum **as they relate to the phenomenon of human trafficking**, from a legal and theoretical perspective. It looks specifically at how “labelling” and the “language of migration” play out in relation to human trafficking in the context of migrant smuggling and asylum at the international level. The paper concludes by examining the implications of these considerations and suggesting some possible ways forward.

## 2. Smuggling of Migrants and Trafficking in Persons

### Smuggling is not trafficking

Anyone working on migration is well acquainted with the difficulties people have in distinguishing between trafficking in persons (synonymous with “trafficking in human beings” in the EU context) and smuggling of migrants. The significant increase in the numbers of people using the Balkan Route in 2015 led to intensified interest in migration policy among the media, politicians, policy-makers and the general public across the EU and beyond. Unfortunately, this increased attention did not translate into conceptual clarity, often due to general confusion and inaccuracies regarding the related – but distinct – phenomena of migrant smuggling and human trafficking.

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<sup>1</sup> Brunovskis & Surtees, 2017; EMN, 2015; Forin & Healy, 2018. This finding is also substantiated by ongoing research being conducted in Bulgaria, The former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Italy and Serbia under ICMPD’s research project “Study on Trafficking Resilience and Vulnerability *en route* to Europe (STRIVE)” – see: [www.icmpd.org/our-work/capacity-building/thb-and-related-forms-of-exploitation/ongoing-projects](http://www.icmpd.org/our-work/capacity-building/thb-and-related-forms-of-exploitation/ongoing-projects).

<sup>2</sup> See, e.g., Brunovskis & Surtees, 2017; Mircheva & Rajkovchevski, 2017; Eurostat (16 March 2018). “Asylum Statistics”: [http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics); IOM statistics (as of 28 March 2018): <http://migration.iom.int/europe/>.

Although the distinctions are clearly evident in the text of the international legal definitions of the two crimes,<sup>3</sup> the general public, the media, politicians and even those working directly with migrants and refugees often confuse the two. Simply put, when the media or politicians use the term “traffickers”, very often what they actually mean is “migrant smugglers”. For those who are not specialists in this field, it can indeed be **difficult to fully comprehend the legal definitions of these concepts** and the differences between them (Triandafyllidou & Maroukis, 2012; Laczko & McAuliffe, 2016; Mircheva & Rajkovchevski, 2017). This confusion is detrimental to the design and implementation of effective migration management and anti-trafficking policies, and renders migrants and refugees more vulnerable to abuses and less likely to access protection.

Trafficking and smuggling are two crimes of a very different nature. Human traffickers exploit people for profit, and violate their human rights. Migrant smugglers facilitate people’s irregular migratory journey, thereby committing a crime against the state of entry, rather than against a person. While acknowledging that in some cases, migrant smugglers may abuse the situation to gain additional profits for themselves, or violate a migrant’s human rights, the distinction is that in essence **a smuggler is providing a service that is required by a migrant or refugee**, in the absence of alternatives for safe and regular travel.

So yes, smuggling and trafficking should not be confused.

## Smuggling might be trafficking

However, recent research on migration journeys overland and by sea to Europe shows that in some ways, in practice, **the two phenomena are intertwined**. In some cases, the same people are involved - smuggled migrants and trafficked people; smugglers and traffickers - and the crimes are related (Angeli & Triandafyllidou in: Laczko & McAuliffe, 2016; Baird, 2016; Aziz, Monzini & Pastore, 2015). A recent Issue Brief published by the Inter-agency Coordination Group Against Trafficking in Persons (ICAT)<sup>4</sup> set out the differences between Human Trafficking and Migrant Smuggling, but also noted that the crimes can be committed along the same routes and that smuggling can lead to trafficking (ICAT, 2016).

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<sup>3</sup> Smuggling of Migrants is defined in Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 UN Convention against Transnational Organized Crime 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”.*

Trafficking in Persons is defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the same Convention, 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. Exploitation shall include, at a minimum, the 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”.* In a case of child trafficking, the means are not considered relevant.

<sup>4</sup> *“ICAT is a policy forum mandated by the UN General Assembly to improve coordination among UN agencies and other relevant international organizations to facilitate a holistic and comprehensive approach to preventing and combating trafficking in persons, including protection and support for victims of trafficking.”* ICMPD is an ICAT Partner. See: <http://icat.network/>.

As the UN Refugee Agency (UNHCR) noted over a decade ago:

*“Smuggling rings and trafficking rings are [...] often closely related, with both preying on the vulnerabilities of people seeking international protection or access to labour markets abroad”* (UNHCR, 2006).

In addition, people who have been smuggled may share certain characteristics and be in similar situations in some sense to people who have been trafficked – for example, they may lack identification or travel documents, or they may not speak the language of the country they are in. Such situations also make people who are smuggled more vulnerable to trafficking, exploitation and other abuses.

Even before the significant increase in the numbers of people arriving along the Balkan Route to the EU, a European Migration Network (EMN) study also found there was sometimes an overlap between trafficking and smuggling. The study identified **the moment when migrants run out of money** as a moment of heightened vulnerability to exploitation and other human rights violations (EMN, 2015).

Smuggling is particularly risky if migrants do not pay in advance but rather go into **debt**, planning to pay off the debt to the smuggler after reaching the destination (ICAT, 2016; Triandafyllidou & Maroukis, 2012; Ventrella, 2017; Aziz, Monzini & Pastore, 2015). Indeed, the connection between smuggling and trafficking rests to a large extent on the role that debts play in migrant smuggling situations. Debts to smugglers may lead to people being exploited, either directly by the smuggler, or by someone else, because they are desperate to earn money to pay back the smuggler (Forin & Healy, 2018).

The migrant smuggling sector is a sophisticated market, responding to different customer needs and the different ‘services’ that customers can afford. Generally, more affluent customers can afford a less risky journey. On the other hand, if:

*“migrants are especially poor and/or vulnerable they can move from being a client for a smuggling service to being vulnerable to human trafficking. [...] Those that try to earn money for their journey in a transit country are often exploited by their “employers”* (EMN, 2015).

The availability of **information** also plays a key role. If migrant smugglers know more than migrants about the journey, crossing borders and obtaining a regular status, then they can use this “asymmetry of information” to exploit migrants and asylum seekers (EMN, 2015).

**Kidnapping for extortion** is a particularly prominent form of exploitation in this context. The EMN study identified migrants who were being smuggled through the Sinai desert and Libyan desert by Sudanese, Egyptian and Libyan smugglers. These people described how their smuggling journey turned into a trafficking experience. Sometimes when the journey took them through an isolated part of either of the deserts, the smugglers kept them there and subjected them to abuse until their relatives sent additional money, at which point they were allowed to continue the journey (EMN, 2015).

## Smuggling, trafficking and conflict

Research on human trafficking in Syria and its neighbouring countries showed that conflict and displacement increase people's vulnerability to trafficking because of a lack of access to basic needs and opportunities for income generation, and due to a lack of regular status. However, these are not the only drivers of vulnerability. The **need to use the services of migrant smugglers** is also a risk in terms of trafficking and other abuses. This is because the high cost of these services may lead to exploitation and debt bondage, and also because smugglers may themselves abuse and exploit migrants in a vulnerable situation, or illegally detain them and extort money from them or their relatives (ICMPD, 2015; Aziz, Monzini & Pastore, 2015).

Trafficking affects various groups in the context of a conflict:

- people in conflict zones;
- people who are internally displaced;
- people who flee conflict, particularly if they use smugglers; and
- people who have sought international protection abroad.

As a report on smuggling and trafficking in the Mediterranean, published in late 2015, put it: *"The impact of political instability and conflict is devastating: in the case of Syrians, for example, the growing obstacles to escape conflict zones and the harshening of residency and entry restrictions in neighbouring countries have represented an enormous boost to smuggling practices throughout the region"* (Aziz, Monzini & Pastore, 2015).

People smuggled from Syria to Europe and people smuggled from Eritrea or Somalia through Libya are to a large extent fleeing due to conflict or individual persecution. The issue of **human trafficking in conflict situations** has recently received increased attention from the international community, researchers and policy-makers.<sup>5</sup> UNHCR's 2016 *Guidelines on International Protection* focused on refugee status related to armed conflict and violence, specifically highlighting *"sexual and gender-based violence, including rape, human trafficking, sexual slavery and conjugal slavery/forced marriage, [as] common forms of persecution in many situations of armed conflict and violence"* (p.6).

So the effects of conflict on human trafficking and vulnerability to trafficking are not limited to the fighting itself. Research has indeed found cases of human trafficking, including for exploitation in armed conflict and forced marriage, as well as sexual and labour exploitation, in contexts of armed conflict and violence.<sup>6</sup> But because of their need to use smugglers, people who flee conflict in order to seek international protection abroad are also particularly vulnerable to exploitation and trafficking. This is the second topic that will be addressed in this paper.

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<sup>5</sup> See: ICAT, 2017a; UNHCR, 2016; United Nations General Assembly Human Rights Council, 3 May 2016; IOM, 2016; ICMPD, 2015; Aziz, Monzini & Pastore, 2015.

<sup>6</sup> *Ibid.*

### 3. Human Trafficking and Asylum

What will be discussed here, although this concept has not yet entered common parlance, is the **trafficking of refugees and asylum seekers**. While the vulnerabilities of refugees to trafficking have begun to attract some attention at policy level, there is still a tendency to think in silos. This means that at international, regional, national and even local level, agencies, institutions and organisations strictly define their mandate as related to refugees and asylum seekers *or* as related to combating human trafficking, but not both at the same time.

The nexus between asylum and trafficking takes two different forms:

1. The possible application of the refugee definition (or subsidiary/humanitarian protection) to a victim of trafficking; and
2. The risk that refugees, asylum applicants or stateless people might get trafficked, because of a lack of alternatives to dangerous journeys or a lack of essential services at destination.

#### Trafficking as grounds for international protection

Sixteen years ago, the UNHCR issued guidelines on gender-related persecution in the context of the 1951 Refugee Convention and its 1967 Protocol. These guidelines include human trafficking as one of the forms of gender-related violence that may constitute persecution perpetrated by a state or private actors. The guidelines call the “*forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation*” a form of gender-related violence or abuse that may lead to a valid claim to refugee status, particularly for women, girls and boys. This is not limited to sexual exploitation, as the Guidelines also acknowledge that other forms of trafficking could also constitute persecution (UNHCR, 2002).

Four years later, in 2006, the UNHCR issued another set of guidelines, this time specifically on the **application of the refugee definition to victims of trafficking** and to people at risk of being trafficked. The Agency referred to their dual responsibility:

- a. to ensure that trafficked people whose situation falls within the refugee definition are granted refugee status; and
- b. to ensure that persons of concern to UNHCR (refugees, returnees, stateless people, internally displaced people and asylum applicants) are not trafficked (UNHCR, 2006).

In relation to the former group - people who have been trafficked and may qualify for refugee status on that basis, there are three possible scenarios:

- Someone is trafficked abroad and seeks the protection of the state that she or he has been trafficked to;
- Someone is trafficked internally within one country, and then flees abroad to seek asylum, in order to get away from the traffickers;
- Someone has not been trafficked but fears becoming a victim of trafficking and therefore flees abroad to seek asylum, to get away from potential traffickers (UNHCR, 2006: paragraph 13).

A trafficking experience can be grounds for: (a) international protection, usually if the trafficked person is considered a member of a “particular social group” that is persecuted and cannot be protected in their country of origin according to the UN Refugee Convention and Protocol; or (b) protection under Article 3, on non-*refoulement*, of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>7</sup> Specifically, if someone is returned to their country of origin or former residence where they are at **risk of re-trafficking or of reprisals** from the traffickers, this could constitute *refoulement*. UNHCR notes that trafficked women and children may face “*serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination*” (UNHCR, 2002).

The **risks of return for trafficked people** are covered in Article 8.2 of the UN Trafficking Protocol, which sets out that a trafficked person should only be returned with due regard for their safety and preferably on a voluntary basis, and Article 33 of the Refugee Convention contains provisions on non-*refoulement*. The Council of Europe Convention on Action Against Trafficking in Human Beings goes further, in Article 16, stating that: “*When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person*” and calls for repatriation programmes that aim to avoid re-victimisation. Trafficked children in particular “*shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.*” To avoid this potential *refoulement*, a state should grant some form of protection to a foreign victim of trafficking.

In the EU context, according to a 2014 study by the EMN, some EU countries explicitly provide for the possibility of granting refugee status to someone on the grounds of them being trafficked, usually “*due to being a member of a particular social group and [provided that] there is a recognised risk of future persecution from the traffickers upon return in the form of e.g. re-trafficking and/or assaults from exploiters against which state protection or internal relocation do not provide a remedy*” (EMN, 2014: 13).

One recent case identified in research conducted in Serbia is slightly more complex, as it involves a person who was trafficked abroad, and then fled to a third country. The case concerned a woman from an African country who had moved to a Gulf State in order to engage in domestic work and:

“*was exploited for three years, forced to work, unable to leave the house and repeatedly raped by male members of the household. When she finally escaped, she encountered fleeing refugees on their way to Europe and joined this group, traveling with them to Serbia where she stayed briefly at an asylum centre before attempting to travel onward to the EU*” (Brunovskis & Surtees, 2017: 15).

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<sup>7</sup> The 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states in Article 3 that “*No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*”

At national level, one problem that has been identified is that for legislative or policy reasons, immigration authorities or even NGOs may consider trafficked people as **entitled only to protection schemes and measures that are specific to victims of trafficking**, and may not consider them as potentially eligible for protection as refugees, or for subsidiary or humanitarian protection (ICAT, 2017; EMN, 2014). According to recent research, even with reduced numbers of people travelling along the Balkan Route in 2017, anti-trafficking practitioners and others were struggling to respond and to adequately protect people. Many asylum and migration practitioners are still unfamiliar with trafficking, and, conversely, many anti-trafficking practitioners are still unfamiliar with asylum and migration (OSCE, 2017; Forin & Healy, 2018). Although legislation and policy generally allows for concurrent procedures in European countries, in the actual implementation these two areas tend to be kept separate.

In addition, asylum authorities are often not equipped to identify victims of trafficking among asylum applicants and may lack the capacity to assess actual or feared trafficking experiences (OSCE, 2017; ICAT, 2017; Cancedda *et al*, 2015). This may mean that they **fail to recognise trafficking as a possible ground for asylum and, in the absence of other grounds, they simply consider the asylum application unfounded**.

As of 2014, around half of the EU countries had data on victims of trafficking identified in the context of international protection procedures, but many of these people do not benefit from the protection they are entitled to, both as trafficked people and as refugees, where both categories apply (EMN, 2018). If a trafficked person gives witness statements against their traffickers in the context of a prosecution, this also has implications for their international protection application.<sup>8</sup> The EMN study therefore calls for “*holistic protection possibilities*” (EMN, 2014: 5).

Similarly, while half of the EU Member States provide for the possibility for people to simultaneously apply for international protection and a residence permit as a victim of trafficking (under Directive 2004/81/EC on residence permits for victims of trafficking), most people opt for the asylum procedure only. In eight EU countries, people cannot access rights and services as a victim of trafficking while they are in the asylum procedure and in a further two countries, an application for a residence permit as a victim of trafficking is temporarily suspended until a decision on international protection is issued (EMN, 2014).

## **Refugees as vulnerable to trafficking**

The trafficking-asylum nexus, however, can take another form: people who are refugees on grounds other than having been trafficked, and therefore intend to seek asylum, such as people travelling from Syria, Iraq or Eritrea to an EU country. They may be **at risk of trafficking, or fall victim to trafficking during that journey**. There are risks of trafficking and exploitation for refugees at various stages of the journey. In advance of the journey, particularly, people may go into debt in order to pay smugglers (ICMPD, 2015; IOM, 2016;

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<sup>8</sup> See: Möller, Marie-Luise (2017). Recognizing victims of trafficking in human beings as refugees according to the 1951 UN Geneva Refugee Convention. Impact of a witness statement of a victim of trafficking in human beings on Refugee Status Determination Procedures. Available at: <http://un-act.org/wp-content/uploads/2017/07/Recognizing-Victims-of-Trafficking-in-Human-Beings-as-Refugees-According-to-the-1951-UN-Geneva-Refugee-Convention.pdf>.

ICAT, 2017; Forin & Healy, 2018). As set out above, smugglers are sometimes the only way for people fleeing persecution, conflict and violence to travel, exposing them to risks of trafficking, exploitation and other abuses both before and during the journey.

This is a paradox within international refugee law. Every person has a right to seek asylum, but they do not necessarily have the possibility of travelling regularly and safely in order to reach the intended country of asylum. This is the **tension inherent in the principle of territorial asylum**: “a refugee must reach the territory of a host country in order to lodge a protection claim, [...which] creates powerful incentives for asylum seekers to undertake dangerous, illegal journeys, often at the hands of smugglers and traffickers, which come at high human and financial costs” (Hansen, 2017: 12). According to international law and practice, this was intended to be counteracted to a certain extent by the principle of international solidarity and “burden-sharing” with “overburdened” countries of destination, as well as refugee resettlement programmes. However, in many cases the necessary levels of solidarity and refugee resettlement did not materialise (Wagner & Kraler, 2016).

Also **at the destination**, some of the factors that may make asylum applicants and refugees more vulnerable include discrimination, restrictions on freedom of movement, lack of or inadequate income generation or educational opportunities, or limited access to humanitarian assistance, particularly for unaccompanied children seeking asylum (Cancedda *et al*, 2015; Joannon, 2017; ICMPD, 2015). Recent ICMPD research identified receiving a negative decision on an asylum application as a situation of particularly vulnerability (Forin & Healy, 2018). In the country of refuge, trafficking may take place in the context of negative coping mechanisms (e.g., forced marriage, worst forms of child labour) because of “*lack of security, livelihoods, and national protection mechanisms*” (ICAT, 2017a; ICMPD, 2015).

This, in turn, may mean that asylum applicants again contact smugglers in order to move on to another country, and **in some cases these smugglers may be traffickers** who specifically recruit asylum applicants and refugees in camps, reception centres or other settlements (ICAT, 2017; Brunovskis & Surtees, 2017; Perumadan & Bachinger, 2017; OSCE, 2017; ICMPD, 2015). In certain cases identified in the EU, migrants were specifically instructed by traffickers to apply for asylum in order to stay in the country, thus facilitating their exploitation (Cancedda *et al*, 2015; Perumadan & Bachinger, 2017).

## **Either/Or?**

To date, it is really only trafficking as grounds for asylum that has received attention from researchers and policy-makers. The issue of **refugees’ and asylum seekers’ vulnerability to trafficking**, very specifically in the context of an irregular migration journey to the country of asylum, has regrettably only just started to be addressed. This means that an effective response to prevent the trafficking of asylum seekers and refugees, and to identify and protect those who have been trafficked, is not always in place.

In many countries, refugee status determination, and identification and referral as a victim of trafficking, are considered two separate “tracks”, as set out above, with people being faced with a **choice as to which track to follow**, based on the likelihood of a positive decision

and the rights attached to each status. Yet this is not the situation foreseen by international law. The “saving clause” of the UN Trafficking Protocol explicitly requires that trafficking procedures should not affect refugee status:

*“Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein” (Art.14.1).*

Nevertheless, research has shown that people applying for asylum tend to **fear that it is an either/or situation**, and therefore they do not report that they have been trafficked or seek assistance (OSCE, 2017; EMN, 2014). This may also be because they committed an administrative or criminal offence as a consequence of being trafficked, and fear that they will be held responsible for the offence, despite non-punishment provisions for this scenario in trafficking laws.<sup>9</sup>

People are particularly unlikely to report trafficking while **in transit countries**, as most people’s priority is simply to move on from that country as soon as possible (Forin & Healy, 2018). This means that trafficked refugees may *“not want to be identified as trafficking victims because formal identification as a trafficking victim in a transit country like Serbia is not in their long-term interests and trafficking-specific assistance is not what they want or need in their life at that moment in time”* (Brunovskis & Surtees, 2017: 28).

The difference between being legally recognised as a refugee and as a victim of trafficking is that refugee status gives somebody a **residence authorisation** in the host country and by definition only applies to foreign nationals, while being recognised as a victim of trafficking involves **rights as a victim of a crime**, and may include the issuing of a temporary residence status in the case of a foreign national. So even if someone is recognised as a refugee on the basis of trafficking or other grounds and therefore has a residence authorisation, they still have additional rights as a victim of crime, including protection, rehabilitation, compensation and access to justice (prosecution of the traffickers). This means that the situation is not resolved with the granting of refugee status.

Asylum is primarily a protection issue, while trafficking cases involve both a law enforcement and criminal justice response for perpetrators and victims, and, outside of the criminal justice context, a protection response for victims.

Another scenario that has received little attention so far, and for which the lack of a concurrent “two-track” system is also relevant, is the situation of a person who makes an asylum application and receives a final **negative decision**, taking all possible grounds into account, but may nevertheless be entitled to protection – and a temporary residence status - as a victim of trafficking. However, because that person has “chosen” the asylum track and been refused, in practice they may not be able to access their legal rights as a trafficked person.

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<sup>9</sup> See: OSCE/Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2013). *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*. Vienna: OSCE: [www.osce.org/secretariat/101002?download=true](http://www.osce.org/secretariat/101002?download=true).

## 4. Policy Implications – Migratory Journeys, Refugees and Trafficking

Migrants and refugees are specifically vulnerable to human trafficking if they are not able to travel regularly, and not able to live and work regularly in the country they are in.<sup>10</sup> This means that the key to preventing trafficking among these groups lies in facilitating safe and regular migratory journeys, regular residence status and access to the labour market (thereby reducing reliance on smugglers), and working to prevent and resolve conflicts, and invest in communities of origin for those who do not wish to migrate.

### Trafficking and Smuggling

Some progress has been made at the global policy level in terms of responding to the interlinkages between migrant smuggling – and indeed irregular migration in general, whether or not it is facilitated - and human trafficking. The “Draft Rev 2” of the proposed Global Compact for Migration (28 May 2018) contains an objective on addressing and reducing vulnerabilities in migration by providing specialised protection and assistance. This includes, importantly: “*Review[ing] relevant policies and practices to ensure they do not create, exacerbate or unintentionally increase vulnerabilities of migrants*” (Objective 7). This is very welcome.

In addition, Objective 9 of the proposed Global Compact commits to protecting and assisting smuggled migrants, particularly “*migrants subject to smuggling under aggravated circumstances*” and Objective 10 to: “*Prevent[ing] and combat[ing] trafficking in persons in the context of international migration*”, including by monitoring “*irregular migration routes which may be exploited by human trafficking networks to recruit and victimize smuggled or irregular migrants*”.

At a conceptual level, we also need to move away from the idea of a smuggled migrant always being an irregular migrant, and wrap our heads around the concept of a “**smuggled asylum seeker**” or a “**smuggled refugee**.”<sup>11</sup> And then we need to look very carefully at the situations when a migrant smuggler becomes a human trafficker, and a smuggled person becomes a trafficked person – and why this happens. It is clear that using the services of a migrant smuggler is a key risk for trafficking, exploitation and other abuses, so reducing reliance on smugglers will reduce trafficking and related abuses. This is relevant to policies on irregular migration and to the need for regular, safe migration channels for both migrants and refugees.

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<sup>10</sup> On working opportunities for refugees and asylum seekers in the EU, see: Eurofound, 2016.

<sup>11</sup> Indeed, this idea is not new. The German language term “*Fluchthelfer*” (“escape helper”) was in common usage in the context of the Second World War, to describe those who helped Jewish people and other persecuted groups to escape Nazi-occupied territories, and during the period up to 1989, to describe people who assisted those fleeing the German Democratic Republic.

## Trafficking and Asylum

On the issue of trafficking and asylum, and particularly on the too-often overlooked scenario of people who are **simultaneously refugees and victims of trafficking**, the European Asylum Support Office (EASO), introducing its 2017 Annual Conference on Trafficking in Human Beings and International Protection, noted that:

*“the vulnerability of asylum seekers puts them in a significant risk of being trafficked. It is likely that a number of persons currently applying for asylum were already victims of trafficking”*.<sup>12</sup>

In the Draft 2 of the Global Compact on Refugees (30 April 2018), the actions foreseen to support the application of the Comprehensive Refugee Response Framework cover addressing specific needs in managing large movements as *“a particular challenge, requiring additional resources and targeted assistance”* and the Compact highlights the need for: *“Identification and referral of victims of trafficking and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs”*(1.5).

The European Agency for Fundamental Rights (FRA) recently acknowledged that Greece had finalised Standard Operating Procedures (SOPs) for preventing and responding to sexual and gender-based violence, including trafficking, in June 2017, and that anti-trafficking training had been carried out at the hotspots by Frontex. Nevertheless, FRA highlighted **human trafficking as a specific risk at migration hotspots** in Greece and Italy, and called for an increased focus on trafficking (FRA, 17 October 2017).

Finally, ICAT set out concrete recommendations for states to better protect refugees and asylum-seekers from trafficking:

- *“ensure access to their territory to refugees fleeing persecution, conflict and violence to avoid them resorting to smugglers/traffickers;*
- *provide effective protection and assistance in countries of asylum so that refugees are not motivated to move onward, potentially by resorting to smugglers/traffickers;*
- *and*
- *provide more targeted and safe legal migration and admission pathways to reduce the need for dangerous and irregular movement in the first place”* (ICAT, 2017).

According to international human rights law, being identified as a victim of trafficking and accessing the ensuing rights should never prevent someone from applying for and being granted asylum, and *vice versa*. The current *de facto* situation is that many **trafficked refugees** have to choose between applying for asylum or being identified as a victim of trafficking. Most people will opt for asylum as it is a much more secure residence status, compared to the possibility of obtaining temporary residence status as a victim of trafficking. Yet the *de jure* situation is that these two legal procedures are not options but complementary rights. Any person has the right to be granted refugee status if they are in a refugee situation and to be identified as a victim of trafficking if they have been trafficked. It is not one or the other.

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<sup>12</sup> See: [www.easo.europa.eu/4-annual-conference-thb](http://www.easo.europa.eu/4-annual-conference-thb).

## 5. Suggested Ways Forward

What may at first glance seem like a purely academic debate about terminology has a **serious impact on people's lives**. This reflects, to a certain extent, the fact that the applicable legal and policy frameworks are in some cases unsuited to the realities of mixed migration contexts. Various factors influence an individual person's vulnerability, and they may be subject to multiple violations, meaning that for many people, assigning them to one single category will not adequately reflect their situation. In order to better understand the intersection of categories and improve access to rights for people affected, the following are some suggestions.

- One of the main reasons for assigning categories is migration management, which is generally approached from the perspective of states implementing border control, migration policy or criminal justice responses. However, as these measures affect individual human beings, it is more appropriate to design and implement protection responses **from the perspective of the adult or child concerned**. The first question that should be asked is: what is this person's situation and what are their needs? Then the responses can be tailored to each case, rather than to a rigid set of categories. For this to work, public authorities responsible for migration management, international protection and anti-trafficking need to be properly trained and have structures in place in order to work together.
- As a corollary to this protection and rights-based approach, on a practical level, any **protection needs that a person has should be addressed first**, before resolving issues of immigration status, or conducting criminal investigations and prosecutions. The current systems in place for trafficking cases tend to prioritise migration management and criminal justice responses over protection and access to rights.
- Granting people access to the human rights that they are legally entitled to is not an option for states, it is an international obligation. This means that, where a person is potentially entitled to a number of different statuses, falling under various categories at once, then the principle of granting the **most protective status** should apply. This is not being generous, but rather applying the letter of the law.
- If someone is both a refugee and a victim of trafficking, they must be effectively granted **both sets of rights**: refugee status, access to justice, protection and compensation. If someone qualifies for refugee status because they are a victim of trafficking or have a well-founded fear of trafficking, this status should be granted to them. If victims of trafficking apply for asylum but do not qualify for international protection, they should nevertheless have access to protection as a victim of trafficking. And if people have been subject to other abuses in the context of migrant smuggling, they should also have access to protection.
- The suggestions above are all responses to violations that have already taken place. But it goes without saying that prevention should be the overarching priority. The single most effective measure to prevent trafficking and smuggling-related violations

in this context is to **substantially expand legal migration channels**<sup>13</sup> for migrants and refugees, thereby reducing reliance on smugglers, and ensuring access to swift and fair asylum procedures. Efforts to increase access to legal migration pathways to EU countries have been intensified in recent months, including both refugee resettlement and legal migration,<sup>14</sup> and should be dramatically expanded.

Designing and implementing migration policy in a mixed migration context is not a theoretical exercise. It must be based on the **real, lived experiences** of the individual people who are migrating or seeking international protection, so that girls, boys, women and men do not end up 'lost in categorisation'.

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<sup>13</sup> On legal migration pathways, see: Carrera, Geddes, Guild & Stefan, 2017.

<sup>14</sup> See: European Commission (14 March 2018). *Progress report on the Implementation of the European Agenda on Migration*. COM(2018) 250 final, pp.19-21: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314\\_progress-report-progress-report-european-agenda-migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_progress-report-progress-report-european-agenda-migration_en.pdf).

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