
Mixed migration flows into Europe: discharging state anti-trafficking obligations through the proper identification of trafficking victims

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Abstract: The mixed migration flows continuously moving towards Europe test the social stability and sustainability of European states, thus rendering imperative the adoption and implementation of revised measures and action plans to protect effectively the individuals involved and comprehensively address any criminality relating to this movement. Most of these displaced persons are bearers of rights, triggering state obligations, with some belonging to the category of human trafficking victims, and as such entitled to a special protection regime. Part 1 explores the challenges European states face in fulfilling the core anti-trafficking obligations, within the specific context of the current mixed migration flow, arguing that identification is the cornerstone for the successful discharge of all these obligations, as well as the most challenging task in the current ‘migrant crisis’ context. Part 2 then endeavours to establish some clearer parameters for the identification of trafficking victims, who qualify as such at the outset, as well as to delineate some indicators of vulnerable individuals, who can potentially become trafficking victims after arrival.

Keywords: human trafficking; mixed migration; anti-trafficking obligations; Mediterranean routes; migrant crisis; victim identification.

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1 Introduction

Migration flows caused by conflicts may undertake different forms and happen under various circumstances; forced or voluntary, legal or illegal; such as migrant smuggling and human trafficking. They can pose serious threats to the social peace and socio-economic sustainability of both countries of origin and destination. They constitute, or at a minimum involve, human rights violations and they test the criminal justice and social welfare systems of receiving countries. Given their transnational nature and gravity of their impact, migration flows have become the object of a number of international regulatory interventions aiming to prevent the crimes involved, punish perpetrators, protect victims and guarantee the protection of human rights.

In this context, most individuals displaced as a result of conflicts in Syria and Iraq, as well as the wider Middle East region and Africa, are bearers of rights that trigger state obligations of both negative and positive nature. Yet, the type and extent of obligations owed by states to these individuals will vary, depending on the particular circumstances of each individual’s displacement and experiences whilst in transit, as well as after arrival at the receiving state.

The ability of receiving state authorities to identify and place each person under a specific category is challenging, especially at a time when the world is witnessing a flow of ‘mixed migration’, defined by the UN High Commissioner for Refugees as “a movement in which a number of persons are travelling together, generally in an irregular manner, using the same routes and means of transport, but for different reasons” [UNHCR, (2012), p.291]. The International Organisation for Migration (IOM) recorded 186,768 such arrivals in 2017 (IOM, 2017b) and 144,166 in 2018 (IOM, 2019). The latest figures for January and February of 2019 indicate that 9,428 persons arrived into Europe (IOM, 2019).

This ‘confluence of many different streams of migrants into one smuggled and unregulated flow’ [Carling et al., (2015), p.11], obstructs authorities’ ability to neatly place migrants into separate categories and provide them with the respective, if any, protections available. This migration flow comprises varied profiles of individuals, including asylum-seekers, refugees, trafficked persons, unaccompanied/separated children, smuggled persons, and other migrants in an irregular situation (UNHCR, 2015). Acknowledging these separate categories is fundamental, since the rights and protections afforded to each vary, and the ability of state authorities to place them in their respective categories is required for these rights to be protected.

Nevertheless, there is limited effort to actively and accurately distinguish within the group, with reports on the estimates of arrivals and profiles simply grouping them all together as refugees and migrants (UNHCR, 2017a). This is particularly problematic, considering that amongst this group, some persons’ particular circumstances of

displacement and subsequent exploitation, or intended exploitation, would place them under the human trafficking category.

Indeed, tackling the practice of human trafficking within the ‘migrant crisis’ context has been declared a priority in the European Commission’s agenda for migration (European Commission, 2015). Following this, the IOM began conducting surveys on the exposure to trafficking and exploitation along the Central and Eastern Mediterranean routes. The surveys found a growing trend to the prevalence of exploitation and trafficking indicators amongst migrants being transported to Europe, with recent statistics revealing that out of the 2,387 persons interviewed from February to April 2017, 76% answered affirmatively to at least one of the four human trafficking and other exploitative practices indicators (IOM, 2017a).

Yet, whilst such surveys are crucial in raising awareness amongst state officials and the public as to the dangers persons are exposed to on these migration routes, these indicators should not be taken as conclusive evidence of the scope of human trafficking along the central and eastern Mediterranean routes. Indicators utilised, such as force in performing work against the person’s will, performing work without pay and being held against one’s will (IOM, 2017a), can undoubtedly be relied upon when looking at the exploitation element of the international definition of human trafficking [UN Trafficking Protocol, (2000), Art. 3]. Yet, for an individual to be identified as a trafficking victim, all elements of the definition must be present, and crucially, there needs to be a nexus between these, as well as the actors behind these.

The wide recognition of human trafficking as a severe human rights violation positions its victims within a particularly vulnerable group and as such are to be subject to special protection and assistance measures, stipulated by international, regional, and national law. This is, naturally, without prejudice to the substantial obligations of states to protect vulnerable persons who have been displaced, but do not qualify as trafficking victims.

Accordingly, this article, bearing in mind the threat to social security, sustainability and peace that human trafficking may pose, will consider the challenges that European states face in the implementation of their anti-trafficking obligations within the specific context of the current mixed migration flow. This article will focus on the issue of trafficking victims’ identification within the current ‘migrant crisis’ evaluating it as the cornerstone for the fulfilment of all other anti-trafficking state obligations. It will endeavour to set some clearer parameters as to who can fall under the trafficking victim framework, triggering both protection and prosecution obligations.

2 Part 1: State anti-trafficking obligations – current challenges in the context of the ‘migrant crisis’

To both prevent and combat trafficking in human beings, as well as to protect trafficking victims, a set of state obligations derive from the international and regional (European) anti-trafficking legal frameworks. The content and nature of these obligations have been elaborated and interpreted by international organisations, UN agencies, EU and Council of Europe bodies and experts’ groups in non-binding but highly authoritative documents. Importantly, state obligations have been established by the European Court of Human Rights (ECtHR) in its case law since 2005. Yet, fulfilling these obligations is particularly challenging in the context of the current ‘migrant crisis’.

2.1 *The adoption of an effective legal framework*

The 2016 Global Report on Trafficking in Persons published by the UN Office on Drugs and Crime (UNODC) indicates that the number of countries criminalising human trafficking on the basis of the UN Trafficking Protocol definition has increased fivefold from 33 countries in 2003 to 158 in 2016 (UNODC, 2016). However, the number of trafficking convictions remains disturbingly low. Although this is due to a number of factors, clarity and strength of anti-trafficking criminal provisions are instrumental in addressing this problem.

Criminal law provisions must provide for a link between the three elements of trafficking (act, means, illicit purpose), except in the case of minors, where the element of means is not required. A clear distinction has to be made between trafficking and its predicate crimes, especially migrant smuggling, so that states are able to fulfil their subsequent obligations, namely to appropriately punish offenders and to effectively protect victims. Similarly, it is important that domestic legislation reflects that human trafficking is a concept wider than slavery, in that, although sometimes traffickers exercise full ownership over the victims, trafficking could also be found whereby the victim is under the control or influence of another person, yet not reaching the higher threshold of slavery (UNODC, 2016). Legislators are therefore under the obligation to criminalise trafficking in human beings, without identifying it as one of the various offences which, although contained in its definition, can nevertheless exist individually. For example, abduction should only be penalised as trafficking, if the other two elements (means and purpose) are present and a link between the three can be established. This required nexus is addressed in Part 2.

2.2 *Effective prosecution and punishment*

Although most states have adopted comprehensive anti-trafficking legal frameworks, they face multiple challenges in effectively prosecuting and punishing offenders. According to the UNODC, based on an analysis of 76 countries during the period 2012–2014, there was only one conviction per five trafficking victims on average (UNODC, 2016). Notably, the more recent 2018 Trafficking in Persons Report recorded merely 7,045 convictions out of 17,880 prosecutions and 100,409 victims worldwide. In a report issued in 2016 the Commission of the European Union also voiced its concern for the low number of prosecutions and convictions in EU member states, particularly against the backdrop of the increase in identified trafficking victims (European Commission, 2016).

This can be explained by a number of factors. According to the commission's report, these factors include the lack of effective intelligence-led investigative tools available, the disproportionate burden put on victims and their testimonies in the course of evidence gathering procedures, as well as the challenges faced in the identification process, and the existing gaps in cross-border cooperation in investigations and prosecutions (European Commission, 2016).

The challenges faced in identifying trafficking victims substantially undermine the effective prosecution of traffickers. As victims go unidentified, they are deprived of basic rights, often being detained and/or deported, which in turn increases their reluctance to testify and thus facilitate the prosecution of traffickers. Law enforcement, asylum and other first-contact authorities often lack the necessary understanding of human

trafficking, its typologies and its manifestations. Trafficking overlaps with other crimes, such as smuggling and forced labour, which authorities find easier to identify, investigate and prosecute. As a result, the offence is often misunderstood by law enforcement and prosecution authorities, particularly in the context of the ‘migrant crisis’, where resources are limited and the circumstances present many challenges (Atak and Simenon, 2014).

Victims’ participation in the criminal proceedings is extremely valuable as it facilitates the investigation, prosecution and conviction of offenders. States must therefore strive to adopt measures to encourage such participation, while ensuring that all guarantees for their physical safety and psychological well-being are provided. For example, the establishment of strong and effective witness protection mechanisms is vital in that respect, as trafficking victims are often under the overpowering influence of their traffickers and therefore reluctant to testify against them due to fear and trauma (GRETA, 2015).

At the same time, it is imperative to put significant emphasis on the training of all competent authorities’ staff, from immigration officers to judges, involved in all aspects and stages of combating human trafficking, from the identification of victims to the conviction of offenders. Identification of victims constitutes the cornerstone of anti-trafficking strategies, integral to both combating and preventing human trafficking, as well as protecting the victims. In relation to the prosecution and punishment of traffickers, identification of victims is key to its success, as it is what triggers the criminal justice process (OHCHR, 2010). The onus of identification lies with the authorities, thus making it imperative for those, constituting the first point of contact with victims (border control officers, police, immigration authorities, coastal authorities), to receive appropriate staffing, training and operate in cooperation with support organisations (GRETA, 2016).

GRETA, the monitoring body of the Council of Europe Anti-Trafficking Convention, notes that identification undertaken solely by law-enforcement authorities presents challenges and urges states to assign victim identification to multi-disciplinary structures, comprising of agents with different expertise and backgrounds, such as social workers, labour inspectors and NGOs offering support to victims (GRETA, 2015). This is particularly crucial in the context of the current ‘migrant crisis’ where authorities have to deal with a vast number of persons, many of whom may belong to extremely vulnerable groups. The fact that representatives and experts of international organisations and large NGOs with extensive relevant experience are currently in the field, due to the increased migration flows towards Europe, may present an opportunity for the implementation of GRETA’s suggestion. Such an initiative would facilitate the identification procedure and thus support the subsequent criminal proceedings.

At the criminal proceedings stage, the need to distinguish between human trafficking and other related offences that may also constitute elements of it is key, and this has been stressed by the ECtHR. In *CN v The United Kingdom (2012) ECtHR, App No. 4239/08* the court held that domestic servitude is a “specific offence, distinct from trafficking and exploitation, which involves a complex set of dynamics, involving both overt and more subtle forms of coercion to force compliance” [*CN v The United Kingdom (2012) ECtHR, App No. 4239/08, para. 80*]. Conversely, in its 2017 judgement of *Chowdury and Others v Greece (2017)*, a case of trafficking of migrant workers for forced labour, the court noted that Greek judicial authorities seemed to be confused in relation to the scope of servitude and human trafficking and thus rejected the claim of the latter on the basis

that the elements of the former had not been established, leaving in turn the applicants unprotected.

A number of training programs for law enforcement, prosecution and judicial authorities have been implemented in the past decade to address this need of distinguishing between overlapping offences. Given the particularities of the current situation, however, it is imperative that further trainings are developed and delivered with a specific focus on the current crisis, the different crimes that may be committed in its context, and the different protection systems in place, such as asylum, voluntary repatriations and protection of trafficking victims.

2.3 The prevention of human trafficking

European states have significant labour needs that could be covered by migrants in order to be able to address their demographic challenges, enhance their economic competitiveness and sustain growth rates. However, migration policies currently in place are fragmented, lacking long-term strategic vision, coherence and integration. The development of a comprehensive EU labour migration policy would be instrumental in preventing irregular migration and trafficking in human beings. Such a policy would aim to improve ‘labour matching’ using forecasting systems within and outside the EU and would regulate and enhance the role of private placement agencies (European Parliament DG for Internal Policies, 2015).

Despite its contribution in limiting the migration flows into Europe, the EU-Turkey Agreement (European Council, 2015), has been criticised not only for its overall legality but also for hindering the effective prevention of trafficking, by leaving too few alternatives to migrants and refugees (Collett, 2016; Strik, 2016). In its recent report on Greece, GRETA observed that in the context of the implementation of the Agreement, a large number of asylum seekers are trapped in Greece, ‘exposed to exploitation and trafficking when they seek the help of smugglers and try to raise money for their journey’ [GRETA, (2017), p.11].

At the same time, states are required to ensure that vulnerable persons do not fall prey to trafficking networks. This is particularly significant in the context of the current crisis, as most persons do not qualify as trafficking victims from the outset, but, due to specific vulnerabilities, become susceptible to traffickers after their arrival in a country of destination or transit. For example, the US Department of State in its country report on Greece has reported that refugees and migrants mainly from Pakistan, Bangladesh and Afghanistan are particularly vulnerable to debt bondage and labour exploitation in the agricultural sector. Similarly in Italy, most migrants and asylum seekers, who use the services of smugglers to arrive by boats from Sub-Saharan Africa, are extremely vulnerable to traffickers (US Department of State, 2016).

Special attention must be paid to unaccompanied minors and separated children, which form a substantial part of the population arriving in Europe (UNHCR, UNICEF and IOM, 2017). Some of these children have already been trafficked; their transportation has been organised and undertaken by traffickers with the purpose of exploitation in the country of destination. Others, however, have been displaced using the services of smugglers, whose control over them ceases upon arrival in the country of destination. Although these children are not victims of trafficking at the outset, they run the severe risk of falling prey to trafficking networks and are extremely vulnerable to sexual

violence, exploitation and abuse, child labour and detention (UN Committee on the Rights of the Child, 2015). As such, they require particular attention and it is imperative that special protective measures are taken by individual governments, especially by transit and destination states, as well as in the context of regional cooperation, for their protection. This heightened risk of exploitation is confirmed by reports of such minors disappearing soon after they arrive in destination countries' reception centres. Europol's Chief of Staff estimated in January 2016 that more than 10,000 children had gone missing from reception centres since 2014 (Townsend, 2016). This phenomenon suggests that a significant number of unaccompanied children often become victims of exploitation (GRETA, 2016b).

Single women in reception centres also constitute a vulnerable group running a high risk of being trafficked. Women represent a large proportion of migrants arriving into Europe and are exposed to a wide range of trafficking purposes, including sexual exploitation and domestic servitude (European Commission, 2016). According to the European Commission, over three quarters (76%) of the 15,846 victims in Europe for the period of 2013–2014 were women. Indeed, women have been identified as the most frequently detected victim profile in Europe (UNODC, 2016). The substandard conditions at reception and registration centres, including violence and sexual abuse, enhance women's vulnerability to trafficking (European Parliament, 2016). Pregnant women are a distinct risk group which authorities should be alert to, since they can be trafficked for the purpose of sale and illegal adoption of the child (Government of the Republic of Macedonia National Commission for Combating Human Trafficking and Illegal Migration, 2016).

2.4 The protection of victims

In the context of the current 'migrant crisis', the biggest challenges in respect of the provision of protection, lie in three key areas: the identification of beneficiaries, the coordination among different authorities within and across national borders, and the provision of support which is age, gender and profile-specific (European Commission, 2016).

According to a recent report of the European Commission, early identification is key for the provision of effective protection, and accordingly urges member states to further their efforts, formalise and/or enhance the operation of National Referral Mechanisms, which will start the identification process, as soon as there are reasonable grounds to believe that a person is a victim of trafficking (European Commission, 2016). Yet, in this mass migration setting, with highly mobile people who are determined to reach their final destination, there is very limited time, as well as resources, to fully investigate and understand the real situation of each person coming through the borders and the reasons behind their movement (Brunovskis and Surtees, 2017). Indeed, this reality plays to the traffickers' advantage, since the large influx of migrants in reception centres, makes it easier for them to move their victims through Europe and to their final locations for the purpose of exploitation.

Reports have revealed a sharp increase in Nigerian women and girls leaving Libya, of which the IOM estimated 80% of those to be victims of trafficking (European Commission, 2016). A further indicator of such women having been moved for the purpose of exploitation is the fact that many of them, initially placed in reception centres in Europe along thousands of other migrants, have later gone missing (Kelly and Tondo,

2016). Due to the high threshold of the trafficking definition, it is unlikely that most of these individuals would qualify for the anti-trafficking protections at the time of arrival, potentially only becoming trafficked once at the reception centres. Yet, this setting is ideal and no doubt utilised by traffickers who have moved some of these individuals from their countries of origin for the purpose of exploiting them. Therefore authorities, in line with their stipulated obligations, need to act quickly in both identifying those who have been brought in for the purpose of exploitation, as well as take measures in protecting those at risk of being trafficked after arrival.

The work of various competent authorities involved in the identification and assistance of trafficking victims, such as police, immigration officers, social workers, asylum officers and healthcare providers should be fully coordinated, to avoid duplication of efforts, prevent mistakes, address challenges and ultimately provide effective and efficient identification and assistance. Finally, although the overwhelming amount of migrants arriving in Europe renders this task exceptionally challenging, it is important that identification, as well as further assistance services, are provided in an individualised manner, based on a specific needs assessment for each particular case, rather than collectively handling groups of people.

Considering the integral role identification plays in the execution of all aforementioned state obligations, it is pivotal to adopt and apply a clear interpretation of the definition of trafficking in human beings, in order to ensure that the protection of such individuals is not undermined or overlooked in the complex migratory flow witnessed today. This is, accordingly, the focus of Part 2.

3 Part 2: Identifying human trafficking victims amongst mixed migration flows – the cornerstone of state obligations

For an individual to be identified as a trafficking victim, all elements of the international trafficking definition must be present, and crucially, there needs to be a nexus between these, as well as the actors behind these. Accordingly, to clarify this complex nexus, the next two sections will explore the theoretical framework and practical applications of identification, on the basis of the universally accepted definition provided in Article 3 of the UN Trafficking Protocol.

3.1 Identification: theoretical framework – elements of the international human trafficking definition

According to Article 3 of the UN Trafficking Protocol, trafficking in human beings comprises three elements, namely: an action, including ‘the recruitment, transportation, transfer, harbouring or receipt of persons’; through particular means, namely ‘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’ [UN Trafficking Protocol, (2000), Art. 3].

The first element under the protocol is the ‘action element’ of human trafficking (UNODC, 2009a). This can be met by a number of activities, including the recruitment,

transportation, transfer, harbouring or receipt of persons. One can witness such movement in the context of the ‘migrant crisis’ today.

In the last few years, political instability, particularly across the Middle East and East Africa, has led to increased flows of fleeing populations, often through irregular means, towards Europe. A rising migration stream from Nigeria and other West African countries due to violence and insecurity can also be witnessed. The most widely used transportation routes are the central and eastern Mediterranean routes. Migrants often gather in Libya before crossing the sea and are then put aboard overcrowded old fishing boats or even rubber dinghies. They are then transported to Italy or Malta, which are the main destinations on the central route. In a similar manner, the Eastern Mediterranean route is utilised, with migrants predominantly originating from Syria, Afghanistan and Somalia, as well as sub-Saharan Africa transported to Greece, prior to continuing north into Europe. The sea transportation into Europe is often preceded by land transportation, with the use of pick up trucks and cattle trucks into port locations (UNHCR, 2013).

Despite reports which point to an increase in potential human trafficking occurring along these mixed migration routes into Europe (IOM, 2017a), conclusive data is not available as to the presence and extent of trafficking. Nevertheless, it is safe to assume that these routes are exploited by traffickers, both due to the presence of commonly identified root causes in the relevant countries of origin, as well as the infrastructure already available to traffickers through these set migration routes. Internal armed conflicts, civil unrest, political instability, environmental disasters, and corruption are some of the many root causes pushing people to seek the services of traffickers, or the latter to seek them (UN ECOSOC, 2000; Siddharth, 2011). As the IOM found, these are the same elements pushing all persons in the current migratory flow towards Europe (IOM, 2017a).

At the same time, the illegality of the traffickers’ activities requires them to seek the most risk-free ways to undertake these. And this is where the current influx in migratory flow with the established migratory routes comes into play. Whilst the trafficking dynamics are the same as prior to the ‘migrant crisis’, with the same facilitators and vulnerable victims involved, the current reality allows traffickers to better conceal the purpose of transportation, namely exploitation, due to the thousands of other migrants moving along the same routes. Accordingly, the action element of the human trafficking definition, on its own, and in the particular context of the current ‘migrant crisis’, if anything, exacerbates the confusion and conflation occurring amongst the different persons moving along these migration routes, since the illegal movement, as well as the methods of transportation, are often the same as those for smuggled persons and refugees.

Under the UN Trafficking Protocol, the action element must be performed “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” [Palermo Protocol, (2000), Art. 3a]. It must be highlighted that this element need not be present in the trafficking of children.

Coercion can be both physical and psychological, widening the ambit of potential persons meeting the means element (UNODC, 2009b). As for deception, this can include deceit as to the type of activities the person is moved to perform, but also partial deceit, where, whilst the activities to be performed are known to the person, the conditions under which these will be performed, clearly of a poorer and more exploitative standard than initially communicated, are not (UNODC, 2009b). In the ‘migrant crisis’ context,

evidence pointing towards the utilisation of these more direct means could point towards a trafficking victim and more easily separate such persons from the rest of the migrants. Smuggled persons, for example, are not, at least in theory, coerced or deceived, but choose to utilise the services of smugglers. Yet, as examined below, drawing this distinction in reality becomes problematic.

It must be emphasised that, despite arguments to the opposite (Chuang, 1998), the means element of the trafficking definition is linked to the action element of the definition, relating to the recruitment and movement of a person, and not to the exploitation (UNODC, 2013). For example, a woman transported for sex trafficking, who has been deceived, at the time of her recruitment, as to the nature of the work she was to perform, or whilst knowing she would work as a prostitute, was deceived as to the conditions under which she would be working, would meet the means element of deception. Whilst acknowledging that focusing merely on the initial means used runs the risk of leaving unprotected individuals who, whilst moved for the purpose of exploitation, are unable to provide evidence that such means at the time of recruitment rendered their consent irrelevant, it is pivotal for the means element to be connected to the action element, and not that of exploitation. This is because, coercion and deception are common occurrences amongst all migrants moving towards Europe and form integral parts of other related, yet distinct to trafficking, practices.

The aforementioned IOM flow monitoring survey fails to maintain this nexus, utilising evidence such as physical and psychological coercion into working during transit, as well as threats, as indicators of human trafficking. Whilst such elements are integral parts of practices such as forced labour, servitude and slavery, they are not conclusive as to the existence of human trafficking. Additional evidence pointing to one or more of the stipulated means utilised at the time of recruitment and transportation will also need to be present.

One of the most problematic elements of the trafficking definition, especially in the ‘migrant crisis’ context, is ‘abuse of a position of vulnerability’. The lack of a clear definition brings to the surface issues of consent and questions of whether such individuals are economic migrants, smuggled individuals, or trafficking victims. The CoE Explanatory Report interprets this element as referring to ‘no real and acceptable alternative to submitting to the abuse’ (CoE Convention Explanatory Report, 2005). Nonetheless, the question arising is whether the focus in determining this element should be on the victim’s vulnerabilities or on the actions of the perpetrator in abusing these vulnerabilities.

The UN Model Law advises states to adopt a definition focusing on the latter, namely that ‘the offender was aware of the vulnerability of the victim and had the intention to take advantage of it’ (UNODC, 2009b). Yet, this element’s interpretative note, by referring to a situation where the victim has no real and acceptable alternative but to submit to the abuse, appears to focus on the actual position of vulnerability and not explicitly requiring a further examination into the whether the alleged perpetrator has abused or intended to abuse this position. Considering this, one cannot but question what then distinguishes such vulnerabilities from the vulnerabilities identified as constituting the root causes of human trafficking, as well as the push and pull factors behind the movement of refugees, asylum seekers and smuggled individuals also moving towards Europe. Financial hardship, gender discrimination, and precariousness from the standpoint of social survival and civil unrest, are experienced by the majority of persons

travelling along the Central and Eastern Mediterranean routes. Accordingly, not looking further into the state of mind of the trafficker in establishing this means element could lead to most persons within the ‘migrant crisis’ meeting this element.

The main distinction therefore will come through the third and final element of the trafficking definition, namely the purpose element of exploitation. Article 3(a) of the Protocol notes that the aforementioned action element, conducted through the stipulated means, must be performed for the purpose of exploiting that individual.

A purposive mental state needs to be established not only for prosecution purposes but also for identification purposes, specifically in the current ‘migrant crisis’ context. This is vital in distinguishing trafficking from other forms of migration. As noted, the actions of recruitment, transportation, transfer, harbouring and receipt, taken alone, are an integral part of all persons travelling to Europe as part of the current ‘migrant crisis’. In addition, where evidence of direct means, such as coercion or force, is hard to establish, the means element may not be adequate in making this distinction. Furthermore, the actual occurrence of exploitation, often reaching the threshold of slavery, servitude, or forced labour, all of which are stipulated as forms of exploitation under the Trafficking Protocol, fails to distinguish trafficking victims from other individuals. Exploitation is a common occurrence along these migration routes, therefore the defining aspect of this final element of human trafficking is the initial intention to exploit when recruiting, transporting or moving a person, and not simply evidence of exploitation during transit.

The aforementioned theoretical ambiguities surrounding the elements of the international human trafficking definition, in particular the means and purpose element, blur the lines between persons who have been trafficked and others moving along these routes. Accordingly, it is pivotal for authorities, when applying the definition in the execution of their anti-trafficking obligations, to consider not only the presence of the three elements examined above, but importantly the presence of a nexus between these.

3.2 Identification: practical application and implications of the international human trafficking definition in the ‘migrant crisis’ context

One of the main overlaps identified amongst individuals caught up in this migration flow is between those who fall under the trafficking definition and those who are smuggled. Whilst an examination of the trafficking and smuggling definitions seemingly point to a clear distinction between the two practices, these are often interchanged, especially in relation to the current migratory flow into Europe.

Failure to distinguish between the two categories could lead to two opposite, yet equally dangerous outcomes. On the one hand, it can result in individuals, who are transported for exploitation and who are abused along the way, falling through the cracks and not viewed as victims in need of protection and redress, but as undocumented migrants in breach of immigration rules. On the other hand, lack of clarity between the two concepts risks widening the trafficking ambit to an unprecedented extent, with states falling short in providing adequate protection to those who have been moved, through coercive means, for the purpose of exploitation. Whilst the UN Trafficking Protocol makes the protection of individuals one of its principal objectives and, despite the discretionary language adopted, sets out a wide range of protective measures, the UN Smuggling Protocol (2000) affords minimal protections to individuals.

The two practices are inevitably intertwined, making victim identification challenging. Undoubtedly, smuggled persons are particularly vulnerable to being trafficked, since traffickers are profiting from the work of smugglers, and the two may work together with persons presenting themselves as smugglers being indeed traffickers. However, the number of people who can be identified as victims of trafficking is significantly lower than what appear in misleading media coverage and NGO reports that, lacking in-depth understanding of the relevant legal provisions, are keen to identify most refugees and asylum seekers as trafficking victims.

For the distinction between the two practices to be maintained, authorities must look for the presence of an initial and continuing purpose to exploit the respective individuals, which could be followed, but not necessarily, by actual exploitation. As addressed, the definition of human trafficking affords significant weight to the element of exploitation which has to be clearly linked with the crossing of a border, or internal displacement. In its clearest form therefore, while the purpose of smuggling is the illegal crossing of borders, making it, *prima facie*, a crime against the state, the purpose of trafficking is the exploitation of the individuals concerned, and thus a crime against the person.

Yet, this well-defined distinction between the two practices is blurred in the current mixed migration reality. This is due to both the increasing instances of abuse and exploitation reported amongst the people being transported, as well as the opportunistic role-changing amongst the different facilitators of this movement. Persons who have been smuggled experience significant harm during their journey. The clandestine nature of their journey, as well as the often restrictive immigration regimes they are facing at the countries of destination, expose them to serious risks of harm (Carling et al., 2015). Along the route, people are faced with harsh living conditions, commonly provided with minimal or no food and water. Also, many fall victims to extortion and ill-treatment, including being robbed, beaten, with some being subject to sexual violence and forced labour (OHCHR, 2016; UNHCR, 2017b).

When smugglers turn to such exploitative practices to maintain their profit margins and avoid detection, the distinction between trafficking and smuggling is blurred even further (Mixed Migration Platform, 2017). The situation becomes even more complicated since migrants often interact with multiple actors during their journey, many of whom take advantage of their vulnerable situation and exploit them (Carling et al., 2015). Still, despite the common element of exploitation, there is a clear distinction between the two. Whilst in the case of smuggling any reported exploitation can be described as 'incidental', in the case of trafficking this is 'inherent exploitation' [Gallagher, (2010), p.52]. Authorities will therefore need to consider the specific circumstances of the person's recruitment and transportation, in deciding whether this was facilitated for the purpose of his or her exploitation.

It is crucial for authorities to bear in mind, throughout the identification process, that for a person to come under the trafficking definition at the time of arrival, all three elements of the definition as set out in the UN Trafficking Protocol must be present. Crucially, there has to be a link between the three elements; s/he must have been moved through the means outlined above for the purpose of exploitation. Any incidental exploitation along the way will not suffice for the trafficking threshold to be met, unless other evidence can support that the chain of events and actors has been maintained throughout the journey, with the ultimate purpose of exploiting that person at the country

of destination staying intact. As the Special Rapporteur on Violence against Women noted:

Without this linkage, trafficking would be legally indistinguishable from the individual activities of smuggling and forced labour or slavery-like practices...The transport of trafficked persons is inextricably linked to the end purpose of trafficking. Recruitment and transport in the trafficking context is undertaken with the intent to subject the victim of the coerced transport to additional violations in the form of forced labour or slavery-like practices. [UN ECOSOC, (2000), para. 14]

Having said this, it is important to note that this does not exclude the possibility of persons, initially starting their journey as persons utilising the services of smugglers, becoming trafficking victims on their way to Europe. Migrants often become the target of a wide range of potential abusers and exploiters during transit, who take advantage of their precarious circumstances for trafficking purposes. In particular, reports reveal that migrants transiting through Libya are exposed to horrific conditions, including detention, torture, abduction, and exploitation during their stay there (UNHCR, 2017b). Whilst this, in itself, does not constitute trafficking in persons, such abuse is often accompanied by criminal groups taking over the movement of such individuals from Libya to Europe with the purpose of exploiting them further (UNHCR, 2017b). Accordingly, it is fundamental for authorities, when gathering information from arriving migrants, to check not only the reasons and means by which they left their country of origin, but to pinpoint any other locations migrants may have passed through or were held at, before travelling to Europe, and the circumstances of that movement and treatment.

Crucially, in order to effectively discharge their anti-trafficking obligations, in particular their obligation to prevent human trafficking as analysed in Part 1, authorities need to stay alert to the high probability of individuals, not meeting the trafficking definition at the point of arrival, subsequently becoming trafficking victims. Under the 'hotspot approach', EU agencies were mandated to work on the ground with frontline member states to swiftly identify, register, and fingerprint incoming migrants (European Commission, 2015). Whilst in theory this could ensure that the mixed migration arriving into Europe is divided according to each person's status and needs, not enough steps have been taken in ensuring that potential trafficking victims are identified and protected. The European Commission merely notes that the 'hotspot approach' will assist in the dismantling of smuggling and trafficking networks (European Commission, 2015). This has had a negative effect on people at risk of being trafficked, since the lack of a specific strategy in tackling potential trafficking victims, and the waiting around period in such hotspots, has left specific groups at the mercy of organised groups who relish this opportunity to move such persons into different European countries for the purpose of exploitation, with a new trafficking cycle beginning post-arrival.

4 Conclusions

Trafficking in human beings poses a serious threat to social and economic peace, development and sustainability for both countries of origin and destination. It is, therefore, imperative to address its criminal elements and provide appropriate protection to victims. This is particularly challenging in the context of the current migration crisis.

States' obligations under the international and European anti-trafficking legal frameworks cover a wide range of areas from prosecution to victim protection and have been defined in detail by international and European instruments and organisations. The urgency for states to execute these is especially pivotal at a time when the world is witnessing a mass movement of people through precarious routes and illegal means; a number of whom are victims of human trafficking and, as such, bearers of special rights and entitled to a distinct protection regime.

Key to the execution of these obligations is the training of all competent authorities' staff involved in the different stages of combating human trafficking, from the identification of victims to the conviction of offenders. Since, as established, identification is the cornerstone of all the aforementioned state obligations, emphasis needs to be placed on this. As noted by GRETA (2015), multiple stakeholders should partake in the identification of victims, such as social workers, labour inspectors and NGOs. This is plausible in the current 'migrant crisis' context, since international organisations and large NGOs with extensive relevant experience are already in the field, due to the increased migration flows towards Europe.

In particular, training in identification needs to emphasise and break down for stakeholders the constituent elements making up a trafficking victim. This is crucial in the specific context of the migration crisis, due to the conflation witnessed between the different categories of people arriving into Europe. Emphasis needs to be placed on the fact that all three elements of the definition, as set out in the UN Trafficking Protocol, must be present for one to be identified as a trafficking victim. Crucially, the relevant authorities need to be looking for the link between the three elements; namely that a person must have been moved through the means outlined above for the purpose of exploitation. At the same time, however, stakeholders need to be made aware of the importance of pinpointing any other locations migrants may have passed through or were held at, before travelling to Europe, and the circumstances of that movement and treatment. This is because some, who may not have begun their journey as trafficking victims, could have been moved through a transit country later on and brought to Europe for the purposes of exploitation.

Notably, states are also obligated to adopt measures for those who are at a particular risk of being trafficked post-arrival. For such persons, proper identification is also crucial. Whilst, the 'hotspot approach' adopted by EU agencies of identifying and registering migrants upon arrival is in theory key to preventing trafficking post-arrival, more caseworkers need to be on the ground to execute this swiftly, before trafficking rings have the opportunity to move such persons through Europe for the purposes of exploitation.

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