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## The Mixed Flows Reality among Plural Identities, Legal Constraints and Policy Limits. Issues Related to Human Rights

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### Abstract

The mixed flows today represent a reality for different population movements including refugees, asylum-seekers, economic migrants, victims of trafficking, smuggled migrants, unaccompanied minors and other migrants. Migration has always been a multidimensional phenomenon, involving a variety of different people who are on the move for a diversity of reasons and using different ways and services. Irregular flows nevertheless represent particular challenges. Migrants in mixed flows do not cover often any particular tag or consolidate legal (and sociology) category, such as that of a refugee or trafficked person. Such persons may nevertheless have humanitarian and other needs that should be identified and recognized posing significant problems and challenges. Above all this kind of migration implies more than ad hoc emergency responses to individual events. Attention needs to be paid to the genesis of mixed migration flows in countries of origin, including the connection between internal and external migration, the movement itself, the arrival of irregular migrants in countries of transit or destination, especially during the phase of identification, the post-arrival stage and the longer-term options in terms of assistance and social reintegration available in the different national contexts. The main characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles in terms of identities and personal histories of the persons involved. An individual may, for example, start his or her journey as an asylum seeker, but then become an irregular subject leaving the country of first asylum, sometimes through a smuggling network risking to fall into an exploitative situation. This complexity in the framework of African-Central Mediterranean routes is particularly critical for the intersections between the processes of smuggling of migrants and the situations of trafficking that get dragged into a great number of migrants who arrive in Italy raising important implications in terms of human rights.

**Key-words:** *Public Policy; Human Rights; Mixed Migration Flows; Law on Migration; EU Policy and Law Systems.*

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## **1. On the Governance of Migration: an Introductory Contextualisation**

The paper tries to recognize the different types of migration at different geographical scales in the Mediterranean area meanwhile it offers a possible explanation of the spatial forms and of the features of these flows of human migration in a globalized world with a specific focus on the EU dimension. The definition of migrants is more complicated. According to the United Nations official definition a migrant is 'someone living outside his own country for an year or more' (Koser, 2007). Nevertheless, scholars have progressively formulated further sub-categories in order to capture and explain the complexity of migrant's reality distinguishing among forced and voluntary, low skilled and highly skilled, regular and irregular migrants and others too.

With no doubt we are living a situation characterised by migrations with multiple dimensions that reflect the complexity of the migrant experiences in terms of social, economic, cultural and humanitarian situation. In other words, the stages of the migration processes are interlinked and involve a variety of actors, considerations, duties, interests, as well as numerous others cross-cutting issues including the legislation and the administrative regulations of the destination countries (IOM 2004).

It is evident that migration flows represent also an opportunity at societal level where the obstacles can play a relevant and sometimes dramatic role, and where sex/gender differences cover an important dimension as well as the roles of intermediaries (such as agencies and – criminal - organisations that help migrants to migrate), of the households or of the communities in supporting and facilitating the projects of many people who try to arrive in Europe today crossing the Mediterranean sea (Brettell and Hollifield 2008).

The international migration of these last years has been transforming the spatial movement of people into a system of mobility that brings opportunities and advantages but also risks and disadvantages in the general framework of mixed migration flows today strongly reinforced by the internal and international security and political crisis.

Because of its geographical position, Italy is the main crossroads of migratory flows across the Mediterranean. Every year thousands of migrants arrive on the Italian shores. Among them are international protection applicants, economic migrants and victims of trafficking as well. They constitute very heterogeneous flows in terms of national and ethnic composition, religion, age and social status. Most of them come from Africa and the Middle-East and are directed to all EU countries. These migrants must add up to those who come to Italy through land and air routes, the latter with a potentially

increasing trends in relation to the spread of the flights and the ability to quickly define alternative routes in case of difficulty.

There is no doubt that today the issue of migration is represented in the national scene as an extremely important phenomenon for its inevitable implications at the social, humanitarian and security level, including in relation to international terrorism. It also seems clear that in Italy, as in most EU Member States, sometimes the current policy scenarios oriented toward the integration or the realisation of a 'multicultural citizenship' either are mere rhetoric or lack the impact that today would indeed be desirable, if not necessary, in light of the number of non-EU migrant entering the country and of the variety of identities of these subjects<sup>1</sup>.

On the other hand, the policies for the control of illegal immigration based on border monitoring and the reduction of legal entry opportunities have shown in recent years their structural limits. The most extreme and dramatic representation of these limits are the too many tragedies occurred in the Mediterranean involving persons who have found no other possibility for reaching European shores but to enter into contact with the criminal organisations that manage the industry of illegal entry by sea.

## 2. On Current Policy Scenarios

It is evident, however, that at the political level the governance of migration requires first of all a full recognition of the plurality of actors that today, beyond States, at different levels affect the policy agenda and policy-making processes on the topic, which are characterised so unequivocally by multi-level governance mechanisms. This need is particularly relevant when considering the imbalance in quantitative terms of the afore-mentioned migration flows among the various EU countries, mainly due to geo-political backgrounds of migrants as well as the routes they use to reach Europe.

Certainly, it is on the inadequacy of European institutions' efforts and solutions with regard to the situations that these migratory movements are

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<sup>1</sup> On the definition of International Migrants see: Department of Economic and Social Affairs, Statistics Division Statistical Papers Series M, No. 58, Rev.1, Recommendations on Statistics of International Migration, ST/ESA/STAT/SER.M/58/Rev.1, United Nations, New York, 1998. The lack of uniformity among countries in respect of determining who is an international migrant has long been recognized as a key source of inconsistency in international migration statistics. The UN Department of Economics and Social Affairs has defined an international migrant as a 'long-term immigrant' as a person who has entered a country with the intention of remaining /or more than one year para. 32, p. 9), "a permanent immigrants" as non-residents (both nationals and aliens) arriving with the intention to remain /or a period exceeding a year. At: [http://unstats.un.org/unsd/publication/SeriesM/SeriesM\\_58rev1e.pdf](http://unstats.un.org/unsd/publication/SeriesM/SeriesM_58rev1e.pdf).

determining that many of the calls based on a 'securitarian' perspective are grounded. These invocations mostly come from right-wing political parties or anti-European organisations that exacerbate both the social fragmentation and the manifestations of rejection against third national citizens characterised by markedly racist undertones. Migrants are often depicted as people involved in illegal activities or otherwise people dependent on welfare regimes of Western countries, often with an irregular status (Dal Lago 1999).

This type of propaganda is part of the Italian geo-political contexts. Indeed, despite obvious efforts to overcome the logic of emergency in hospitality and to take care of these people, since the Arab spring Italy has not to date been able to face numerous problems, be they of cyclical or structural nature.

The reference policy document is the *Piano Nazionale Accoglienza* defined under article 16 of Legislative Decree No. 142/15, which in paragraph 2 states that the National Coordination Committee is mandated to set up on an annual basis (or if needed on a shorter term basis) a national plan for the assistance and reception of migrants on the basis of both the estimated arrivals for the concerned period and the individual requirements of places reserved for the reception of international protection applicants (Ministry of Interior - Statistics Office 2016).

The scale and fluidity of refugee movements in Europe have posed significant challenges for both the asylum systems and reception facilities in many countries. More in general, the exposure of refugees and migrants to smuggling rings remain high. Moreover, despite the increasing number of search and rescue operations, also the exposure of migrants to the harsh and dangerous conditions of the journey by sea remains significant.

For Italy, the yearly number of asylum applicants had remained below 10,000 between 2001 and 2010, with the exception of 2008, when the figure reached 30,000. However, in 2011 the number of asylum applicants increased fourfold compared to 2010 (40,000 from 10,000 in 2010), which then subsequently went down to 17,000 in 2012 and 27,000 in 2013. 2014 again saw a massive increase of applications reaching the threshold of 65,000. The sudden and high influx of arrivals had posed serious strains on both the national reception system and the processing of applications. Reception facilities were overcrowded. In 2011, Italy had around 5,516 places in governmental reception facilities, to which around 4,000 (precisely 3,979) were added from the SPRAR (Protection system for asylum seekers and refugees).

Today, the Italian reception system hosts 175,485 migrants (Ministry of Interior, 30 December 2016), located in different places and accommodations with dis-homogeneous standard of assistance. In other words, establishing

adequate reception conditions, particularly for individuals with specific needs, remains a challenge.

According to UNHCR statistics, the numbers of people risking their lives at sea in search for safety in Europe have increased at an alarming rate. By early November 2015, more than 790,000 people had arrived in Europe by sea. In Greece, the number of arrivals is already 13 times higher than 2014. The majority of people are fleeing war, violence and persecution – one in two new arrivals is Syrian, and more than 80 per cent originate from the world's top 10 refugee-producing countries. European States bordering the Mediterranean Sea, the western Balkans and other European countries have been struggling to deal with this influx (UNHCR 2016/2017). The situation of refugees and migrants in the Mediterranean represents a critical point and advocate for alternative legal channels to allow refugees to reach Europe safely, including: enhanced resettlement opportunities, humanitarian admission programmes, private or community-based sponsorship schemes, increased access to family reunification, humanitarian visas, and student scholarship schemes.

When comparing the number of migrants landed in Italy from 1 January 2016 until 30 December 2016 with those entered in the same period in the years 2014 and 2015, it is possible to observe an increase of 17.84% compared to 2015 and of 7.08% compared to 2014. More precisely, 169,304 third-national citizens had arrived in 2014, 153,842 in 2015, and 181,283 in 2016. Among these people, unaccompanied foreign minors have been 13,026 in 2014, 12,360 in 2015 and 24,929 in 2016, which is a very notable increase (Ministry of Interior - Statistics Office, 2016).

### **3. Profiting Misery: the Importance of the African-Central Mediterranean Route**

The situations that, starting from the crisis of the countries of the Southern shores of the Mediterranean, have developed alongside the arrivals by sea of thousands of migrants are a clear manifestation of the weakness of the model for the management of both borders and conflicts (Campesi 2011).

The crisis of the European 'closed' border regime is today, first of all, a political crisis, which has been triggered by the collapse of the political structures and agreements that had been able to halt or to contain the migration routes from Africa to Europe via the South-central Mediterranean. The collapse of these structures and agreements have brought a series of repercussions on the entire complex institutional structure of the European governance of the Union's borders, which had been further exacerbated by

the numerous humanitarian crises and political emergencies dictated by fundamentalism and Islamic terrorism.

These situations are coupled with the fact that the ongoing transformation processes of developing societies – increase of school rates, access to internet and other communication tools, urban/rural domestic migrations – had caused an increase of the life and good consumption expectancy of populations, which is however often matched with the consciousness that such expectations could not be satisfied locally. In addition, the persistence of complex emergency situations, political crisis and conflicts of different nature had considerably contributed to fuel the desire of many people to leave the country of origin for reasons related not only to the need to flee from persecution or risks connected to crisis, but also to survival and cultural emancipation.

Moreover, to many prospective migrants the presence of large shares of foreign nationals in developed countries represents the concrete existence of the possibility to successfully migrate. Such perspective is also reinforced by the strong support from national or ethnic networks that migrants create in the destination countries so that the opportunity to receive assistance from those who have already finalized their migratory project seems to significantly reduce the uncertainties and risks of who is about to leave (Ambrosini 2006). In these years, transnational networks had confirmed the concrete possibility for migrants to find a job, even if almost inevitably an unskilled job in the sector of small businesses, domestic or personal care work, in the informal economy or in criminal activities. The general perception was that the need for unskilled labour went beyond, or better disregarded, both the legal status of migrants and the national systems of migration control. In Italy this is somehow confirmed by the system of so-called '*sanatorie*' (possibility for employers to acquire a work permit for undocumented immigrant workers) adopted in the past decades.

The cumulative effect on the migration potential of the least developed countries and of those countries affected by humanitarian crisis - dramatic today in some territories - of all these factors is difficult to assess quantitatively.

There is no doubt, however, that one of the most problematic elements both at political and economic level that States are facing in recent decades is the structural imbalance between the supply and the demand of foreign workers' entries. This element was crucial in pushing governments towards the development of migration management policies for a long time marked by a dual exigency. The first one, the need to have a large low-cost labour force to be employed in low-skilled economic sectors; the second one, to develop a legislative framework characterised by strong restrictions on regular stay

and residence. In practice, a set of rules defined by exclusionary logics and strongly limiting the rights of foreigners living in a given territory.

It is exactly within this dynamic that the 'industry of the irregular entry' is developing, with a range of more or less structured criminal activities.

In recent years, people smuggling networks have become better organised and interconnected. In some cases, the dangerous journey from Sub-Saharan Africa to Europe takes months, or even years, with migrants being subjected to robbery, slavery, forced work, rape and torture. Nowadays, the journey through land routes in Africa can take less than a couple of weeks, but the risks to migrants' safety remain extremely high. In 2015, the route from Libya to the European Union was mainly used by migrants from the Horn of Africa and Western African countries. The characteristic of the smuggling networks in Libya is the proliferation of actors, ranging from ordinary Libyan citizens offering their services to migrants, to former militiamen and law enforcement officers. Due to the increasingly profitable business of smuggling migrants by sea, the journey by boat has become even more risky as networks start competing with each other. Migrants have reported cruel and aggressive smugglers who force larger and larger groups of people onto the rubber boats, often at gunpoint, to squeeze more money from each trip.

During the journey across the African continent, there is a dangerous desert to cross and, while it is impossible to calculate the number of people who do not survive this trip, the mortality rate is likely very high. On this particular route, it is usual that different smuggling groups serve specific legs of the journey.

Differently, the route from Eritrea seems to be controlled by one sophisticated network managing the whole journey, starting from Eritrea, going through Sudan, and then into Libya. This means that the payment is made to the same network, usually using the Hawala system - an informal way of transferring funds based on an honour code operating outside traditional financial channels. Hawala is mainly used in the Middle East, North Africa and the Horn of Africa and relies on a network of brokers.

Another group of people that attempt to reach Europe from the Libyan shores is made by migrant workers and contractors who had lived in Libya over the recent years, such as Bangladeshis who used to be employed on oil and gas projects in dramatic conditions, and who now use the existing smuggling networks in Libya to cross the Mediterranean.

The virtual absence of the rule of law in Libya since the fall of Muammar Gaddafi in 2011 appears to have created near-perfect operating conditions for criminal gangs. Frontex identified two main overland routes to Tripoli. The eastern one, leading from Somalia, Ethiopia, Eritrea and Sudan towards Al Kufrah in the eastern Libyan Desert, is the most highly organised. The



western route, from Mali, Nigeria and Niger up to Tripoli via Qatrun and Sabha is more informal, with regular bus lines used by migrants to reach Niger (Agadez). In both cases, however, the Libyan leg of the journey is jealously controlled by local militiamen, whose ranks have been swollen by former soldiers of the Gaddafi regime (Frontex 2016).

Overall, the restrictions introduced by States on the possibility to migrate through legal channels have in fact made necessary the recourse to for-profit illegal services. Today, more than ever, the asylum seekers probably represent the category of migrants most affected by this crime. It is estimated that in 2015 people smuggling networks gained more than 4 billion Euro from their criminal activities. Most of the profits from smuggling migrants are used by criminal organisations to fund other illegal activities, such as the sale of illegal drugs and weapons (Frontex 2016).

Therefore, if for years the typology of services provided, the modalities to access them, their cost, the typology of organisations, the journey and the routes, as well as the number of actors involved in these criminal activities have been structured around the economic need and the human desire to migrate of thousands of individuals (UNODC 2011), today the scenario is severely worsened by the plurality of extraordinary complex humanitarian situations.

The number of wars erupted in these last years is obviously creating some distress to the stance and positions adopted by governments which, instead of opting for the reception and integration of thousands of migrants who are striving for better conditions of life, had privileged an exclusionary logic putting in place mechanisms to close their borders and reduce the possibility of regular entries.

In the Italian case, such restrictive mechanisms are practically anticipated through the so-called 'rejection at the frontier or postponed rejection', which physically prevent the entry in the country, and the crime of 'illegal entry and stay in the territory of the State'. The latter sanctions a behaviour (Savio 2011) that, with the adoption of law 67/2014 through which the Parliament had delegated the government the competence to de-criminalise a number of crimes, had recently seemed to be in the process of being abolished<sup>2</sup>. Such

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<sup>2</sup> Law 94/2009, amending the Consolidated text on migration, introduced art. 10-bis. This provision punishes whoever enters or stays in the country in violation of immigration laws with a fine ranging from 5,000 to 10,000 Euro. Being a crime punished by a fine, the Italian criminal system prohibits the application of measures that limit individual liberty such as arrest or custody by the police. The provision, however, providing for the possibility for the judge to issue an expulsion order as an alternative to the fine, was basically introduced for the purpose of circumvent the limits posed by the Directive 2008/115/CE of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

process had however not finalized as, notwithstanding the numerous and eminent calls for the suppression of this crime, the political convergence supporting it had failed due to the re-actualisation by some political forces of those symbolic and anti-systemic arguments that in 2009 had brought to the adoption of the same provision.

A choice, the Italian one, once again distorted not only by the current interdependence and globalization processes, but also by the constant references to the need for security and public order. References that not only have little to do with the roots of migration or the real conditions of millions of individuals, but that leave little room for the building of positive relationships in terms of cohabitation and effective recognition of the numerous foreign communities in the country (Caponio 2011; Caritas/Migrantes 2016).

#### **4. Severe Forms of Exploitation in the Framework of Mixed Migration Flows**

The phenomenon of trafficking and, more in general, that of severe forms of economic exploitation of hundreds of thousands of foreigners have been known and discussed in Europe for years now. Sometimes, however, such discussions had been characterised by sensationalist arguments and expressions, which have not helped in providing a correct and evidence-based representation of such rooted phenomena (UNODC, 2016).

In fact, there is an increasing number of governmental and non-governmental agencies and institutions that at the international, regional and national level in different ways are involved in these issues and that periodically produce reports and documents in order to delineate more precisely the outlines of this phenomenon and its rapid changes.

Human trafficking is at the centre of a series of burning issues from the political and cultural point of view: migration, prostitution, sexual violence, multiple and intersectional discrimination, cultural diversity, security, illegal employment, cross-border crime, wars, poverty, terrorism, religious fundamentalisms, 'globalization'. All these problems can undoubtedly lead to approaches inspired by ideological maximalists or rather to the risk of indulging into unacceptable forms of dramatization or criminalization of vulnerable people. Both approaches are completely unfit to solve the problems of those actually involved in such situations and, above all, prevent the correct definition and identification of cases that can really be considered as falling under those terms.

It is in this sense emblematic to see how difficult is within the public debate, but sometimes among professionals, to distinguish among voluntary

prostitution, sexual exploitation and trafficking for the purpose of sexual exploitation; a distinction that appears to be crucial as it is at the basis of the different systems of intervention and related normative frameworks (Walby et al. 2016). Even more illustrative is the disorientation observed with regards phenomena such as begging, especially when minors are involved, and forced criminal activities, the latter being another significant sector for the exploitation of foreigners in conditions of vulnerability (Temvi 2016).

Today, it can be very difficult also for social workers and the law enforcement agencies to identify in objective terms the characteristics of the relationship that many victims, primarily women in prostitution, develop with those who materially exploit them. These difficulties are overcome only when the conditions of exploitation become unbearable because of the degree of violence exercised or the lack of earnings. In these circumstances, the victims themselves seek help in order to exit the condition of exploitation and almost inevitably end up collaborating with law enforcement authorities and the judiciary, although under Italian law the cooperation with the investigating and prosecuting authorities is not a prerequisite to access protection and social reintegration programmes.

Similarly to what mentioned before, these situations created a perfect breeding ground for alarmist proclamations and for populist or symbolic calls. The consequence of this is that cases of severe forms of exploitation are thrown into the public order and decorum discourses, which are often associated with convincing and emotional arguments concealing and conveying policies of intolerance against foreigners and policies against irregular (but not only) migration. Instead of protecting those in vulnerable situations, as the rich and articulated legal framework with respect to these phenomena provides, these policies penalised the victims.

If situations of severe economic exploitation are considered, the scenario that in these years has developed shows that the subjects involved are mainly male adults who often had arrived in Italy outside the trafficking networks, with a voluntary migration project. Only in rare cases, the departure is linked to a coercive act (Carchedi 2003 2010).

The cost of the journey may vary depending on the distance to cover to reach Italy and, very often, the vector used. The money is paid after having borrowed it from parents/friends or from other unrelated individuals who commonly later become the intermediaries with those materially managing the exploitation of migrants in Italy. The debt incurred then becomes the strategic driver for the development and legitimation of the subjugation of the individual in situations of both labour and sexual exploitation as well as, although little is known about these cases, in any other field of exploitation.

In reality, labour exploitation in EU Member States, as pointed out in the 2011 Europol Report on Trafficking, while not being a recent phenomenon, has only recently been worth considering. Indeed, situations connected to labour exploitation have never represented an emergency from the internal or social security point of view. As a consequence, in these years entire segments of the migrant population involved in severe forms of exploitation and forced labour have gone unnoticed, including by investigative and judiciary authorities. For these reasons, not only the knowledge and the monitoring of the dynamics of this phenomenon lag behind, but there is a manifest qualitative gap in the expertise of those professionals, and more in general of the social system of intervention, devoted to the assistance of these victims.

Overall, the recruitment methods and the fields of exploitation now seem to be in some ways much more fluid than before, while they continue to vary according to the nationality of migrants and, in the case of minors, depending on age.

What perhaps is emerging in a significant way is a sort of continuum between different policy areas, so that the same person may be simultaneously exploited in more ways, or be periodically moved depending on the needs of the criminal group, from one area to another.

The element to be noted about trafficking today is, however, another. It regards the number of foreigners arrived in Italy with extremely diversified individual projects in a scenario of mixed flows that tends to obfuscate their original features or, at least, to obscure the differences that had once connoted the variety of solutions and services offered by the industry of illegal entry, thus preventing the correct identification of those in potential conditions of severe exploitation.

Victims from Sub-Saharan Africa were mainly detected in Africa, the Middle East and Western and Southern Europe. Over the last 10 years, the profile of identified victims of trafficking has changed. Although most identified victims are still women, children and men now make up larger shares of the total number of victims than a decade ago.

Today, criminal justice practitioners are more aware of the diversity among offenders, victims, forms of exploitation and flows of trafficking in persons, and the statistics may reflect this increased awareness.

While traffickers are overwhelmingly male, women represent a relatively large share of convicted offenders, compared to most other crimes. For instance, this element emerges in connection to cases involving relatives entrusted with the care of a family member who had broken the promise and then profited from the family member's exploitation.

People fleeing war and persecution are particularly vulnerable to trafficking. The urgency of their situation may push them into adopting dangerous migration decisions. Conflicts create favourable conditions for trafficking for several reasons, including but not limited to the fact that they generate masses of vulnerable people.

There is a clear link between the broader migration phenomenon and trafficking in persons. It is true that victims of trafficking are not always migrants and, according to the legal definition, victims do not need to be physically moved to be considered as having been trafficked. The stories of victims of trafficking, however, often start as brave attempts to improve standards of life, as it is also the case for many migration stories. Those who end up in the hands of traffickers had often envisioned a better life in another place.

Traffickers, whether they are trafficking organisations or legally registered companies often take advantage of this aspiration to deceive victims. Trafficking in persons is driven by a range of factors, many of which are not related to migration. At the same time, migrants and refugees fleeing conflict and persecution are particularly vulnerable to trafficking (UNODC 2016).

It is precisely the (at least partial) disappearance of the conventionally defined characteristics used to distinguish the different categories of migrants that is today causing a number of difficulties in attributing to these individuals one of the status commonly known in the literature – economic migrants (today also referred to as international migrants), victims of trafficking, humanitarian migrants – and therefore in activating the appropriate systems of protection from the first assistance phase to the release of a residence permit and, where necessary, the return or expulsion procedure. With respect to the protection of the rights recognised to the different categories of migrants, this situation is problematic not only in terms of application of norms, but also because it highlights the unsuitableness of a regulatory framework shaped around these differentiated identities to deal with the hybrid and intersectional profiles of migrants. Mixed migration flows are such firstly because it is impossible to look at these individuals through the established legal and sociological categories.

If until the beginning of 2000 trafficking in human being has not been properly distinguished from smuggling with the consequence that in national policies it had long represented a mere appendix of the governance of irregular migration, today's difficulty in correctly identifying the real essence of the migration processes of thousands of migrants arriving in Italy in dramatic conditions is linked to the structural developments that in this historical period are affecting the phenomenon of migration in itself, especially in light of the current humanitarian crisis.

## 5. Restrictive Regular Entry Policies and Development of the Smuggling Industry

The pervasively spread of the securitarian logic (Waever 1998), which had developed around the discourse about the closure of EU external border and the related emphasis on the danger that the re-opening of such borders would bring, has undoubtedly impacted on the issue of containment of regular entry flows. Conversely, both the persisting unequal international division of labour between the North and the South of the world and the increase of complex crisis have predominantly characterised this historical period. They have determined an increase of social inequality, paucity, uncertainty, ethnic in-fighting, authoritarian regimes, fundamentalism and the militarisation of territories, which all prevent the 'Fortress Europe' from effectively working.

It is evident that what had begun as an effort to eliminate controls within EU borders has evolved into an impenetrable fortress aimed at keeping undocumented migrants and asylum-seekers out. At the same time, it is clear that the sustainable integration of third country nationals does not mean avoiding real problems related to undocumented labour and exploitation, unregulated informal economies, or human smuggling and trafficking. Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and the improvement of the current legislative framework represents an historic achievement. The CEAS should provide better access to the asylum procedure for those who seek protection; should lead to fairer, quicker and better quality asylum decisions ensuring that people in fear of persecution will not be returned to danger; and finally should provide dignified and decent conditions both for those who apply for asylum and those who are granted international protection within the EU. New EU rules have in recent years been agreed after the conclusion of the first phase, setting out common high standards and stronger cooperation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply. In short, this new updated system is composed by the 'old' Temporary Protection Directive 2001/55/EC, three updated EU Directives respectively on asylum procedures, reception conditions and qualifications<sup>3</sup>,

<sup>3</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (applicable from 21 July 2015); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (applicable from 21 July 2015). Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the of the protection granted (recast) (applicable from 21 December 2013).

integrated by the revised Dublin Regulation and the revised Eurodac Regulation<sup>4</sup>.

As for the EU legal framework on trafficking, the most significant legal act is the Directive adopted in 2011<sup>5</sup> and the Commission's approach to trafficking in human beings begins from a gender and human rights perspective. With its focus on prevention, prosecution of criminals and protection of victims it represents a reality, this framework is integrated by a number of provisions on victims' protection which, among others, include the principle of non-punishment for petty crimes and unconditional assistance.

As numerous researches but also investigating and prosecuting activities have showed in the recent years, it is fundamental to offer a concrete form of help and assistance to all those who, even voluntarily, had agreed to irregularly enter the territory of a third country and had then been involved in exploitative criminal networks. Indeed, this is essential for both the protection of the victims' rights and for adequately responding to a retributive logic.

It is by no way easy to determine where the process of trafficking starts, at which point trafficking clashes with aiding and abetting irregular migration, or when there is an authentic need to seek refuge in another country and in which circumstances the agreement to undertake an irregular migration project becomes violence, abuse of power or abuse of a position of vulnerability, slavery, servitude, forced labour or sexual exploitation. And this is true even if today the legal framework developed at the regional and national level as well as the experience gained by law enforcement agencies, the judiciary and non-governmental organisations working in the identification, assistance and reintegration of victims have transformed into

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<sup>4</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (applicable from 1 January 2014); Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (applicable from 20 July 2015).

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

assets and tools that are essential to tackle, with a greater knowledge and understanding, such complex situations.

As a matter of fact, today Europe is the crossroad of migratory movement. The impoverishment of entire social sectors, at the regional level driven by both the economic deregulation and the fall of social regimes, and at the international level by the recrudescence of political crisis with relevant humanitarian repercussion, has contributed to the dramatic increase of the supply of individuals who, in pursuing a better standard of life or a mere chance to survive, become goods available at an increasingly lower price.

However, in order to correctly understand the dynamics regulating these phenomena, a very important consideration should be made with respect to the migratory project as well as to the composition in terms of identity, origin and characteristics of these individuals. Indeed, today only a small share of migrants are managed by the trafficking networks from the initial phases of the journey towards the country where they will be exploited. This is because, in most cases, the driver of the subjugation is no longer the bondage related to the debt incurred to pay the illegal services necessary to reach the country of destination. Rather, it stems from the severe condition of marginalization and vulnerability that the same migrants experience once arrived there. As a consequence, the phenomenon of exploitation involves individuals with extremely diversified migratory projects, profiles and status. In addition, in most cases, victims of exploitation have in common a previous experience within assistance programmes that had failed to provide them adequate individual security conditions from the risk of being involved in such situations.

So today – at least in Europe – migrants do not necessarily end up being involved in trafficking according to the pattern that the United Nations (Michelin, 2002; Rosi, 2001) had developed when it had proceeded to legally qualify the crime of trafficking in human beings and the crime of smuggling of migrants (aiding and abetting illegal immigration)<sup>6</sup>.

For years, the link between the illegal entry into a country of destination and the condition of exploitation was considered to be mainly dependent from the migrants' need to pay for the costs of the journey. Today, however, this consideration is challenged by the radical restructuring of the public policy approach towards migration. Within this new course, we are assisting to a review of the control systems so that the possibility to enter into a country

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<sup>6</sup> On December 1998, the United Nations General Assembly had established an ad hoc (Res., 53/111 of December 1998) that in October 2000 presented a consolidated version of the International Convention on transnational organised crimes, integrated by three additional protocols (the first one on Trafficking in Persons especially Women and Children and the second one on Smuggling of Migrants) adopted in December 2000.



of destination becomes extremely difficult for practically all segments of international migrations.

It is therefore not difficult to understand how in the first half of the 1990s an authentic 'smuggling industry' had developed. In a restricted period of time, it has undergone a process of diversification and specialisation both in relation to trafficking and smuggling. However, if at the end of the 1990s the choice made by the international community to distinguish the phenomena of smuggling and trafficking appeared fundamental first of all for emphasizing the different nature of these offenses<sup>7</sup>, today the mingling and the proximity between these two phenomena appear increasingly stringent. This fact is confirmed both by investigative and judicial efforts. In these recent years, in fact, the recourse to offenses related the phenomenon of aiding and abetting illegal immigration with the aggravating circumstance of exploitation are increasingly frequent and systematic, even though the public prosecutor's office of the cities more exposed to these crimes have tried in the last three years to systematically formulate indictments for trafficking in human beings and slavery (UNODC 2016)<sup>8</sup>. As now widely recognized in the literature, the idea of a clear line of demarcation, if not opposition, between the category of voluntary and consensual migration and that of involuntary and non-consensual migration appears to be inadequate to grasp the real dynamics of today migratory movements. Moreover, it seems to be over-simplifying, especially with regard to the need, also at scientific level, to provide a correct representation of the systems and processes that fuel irregular migration in a practical way. The distance between trafficking and smuggling crystallized by the existence of specific and distinct offenses prevents from grasping the complexity and variety of social relationships existing between irregular migrants and their exploiters during the different phases of the migration process.

In other words, if at the end of the 1990s, the distinction between trafficking and smuggling addressed the need to distinguish two criminal conducts which had been developed by criminal organisations with different

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<sup>7</sup> The Trafficking in Persons Protocol is one of the most successful treaties in modern international law, enjoying one of the speediest ratification trajectories ever, and soon approaching universality. As of today, there are 170 ratifications, or nearly 90 per cent of all Member States, including most recently, the Republic of Korea, Singapore and the Maldives. At least 85 per cent of States Parties have criminalized trafficking in persons in their national legislation, which is a truly remarkable feat since its adoption in 2000. This success reflects both a level of consensus on the gravity of this crime and a demonstration of the political commitment to address it.

<sup>8</sup> The conduct of trafficking in persons in Italy may be prosecuted under the following articles of the criminal code: trafficking in persons (art. 601), slavery (art. 600), sale and trade of slaves (art. 602) and illegal intermediation in labour exploitation (art. 603 bis).

criminal expertise, today the reference to international and EU law may seem counterproductive when confronted with the need to critically deconstruct the dominant discourse about human trafficking. In practical terms, it is now increasingly difficult to contextualize the individual experiences of migrants using the definitions provided for by legislation at different levels. The risk is to remain statically entangled in a number of legal representations of a phenomenon whose key characteristics have during these recent years progressively faded away (UNHCR 2016).

In the specific legal definition of smuggling, the criminal subject providing those who request it with the illegal entry in a given country, performs a function similar to a good travel agency. The smuggler guarantees the arrival in the place of destination and is then completely uninterested about the future of the traveller. It is essentially a commercial relationship between the migrant who asks and buys an illegal service and the criminal that offers and sells it upon the payment of a considerable fee.

What today has significantly changed is represented by the very important presence of humanitarian migrants, whose status may also be officially recognised by the different administrative and judicial agencies devoted to the qualification of migrants. Such presence makes the repressive regulatory framework developed at the national level (but not only) incompatible with the provisions of international law and raises significant critical profiles in connection to both the process of identification and the capacity to detect situations of severe forms of exploitation. The capacity to adequately address these latter profiles is, with respect to the human rights paradigm, at the basis of any other subsequent consideration. According to UNHCR (2003), intercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for the illegal entry or presence in a State in cases where the terms of article 31 of the 1951 Convention are met.

In is thus evident that the mechanisms used to detect and identify victims in the context of the procedure for international protection are fundamental in order to identify victims or potential victims of severe forms of exploitation, but also other vulnerable individuals, and give them access to appropriate assistance and support. Such mechanisms should also specifically look at methods for the coordination and referral among the different procedures for the recognition of different status.

This operative condition, whose implementation cannot but depend from political directives which clearly cannot have the containment of migrants at every cost as their primary concerns, is well codified in a number of

declaratory documents of the UNHCR. More specifically, with the adoption of the 10-Point Plan of Action in 2006 (UNCHR 2007 and 2017) tried to help States addressing mixed migration movements in a protection-sensitive way.

The Document recognises that steps must be taken to establish entry systems that are able to identify and refer correctly migrants with international protection needs and to provide appropriate and differentiated solutions for them and for the other groups of migrants involved in mixed movements. The establishment of a functioning entry system is an important element in any strategy relating to mixed movements. Once new arrivals, but not only, have been registered and provided with temporary documentation, an initial determination in terms of first-identification will have to be made with regard to who they are, why they have left their own country and where their intended destination is. Counselling provides an opportunity to establish if and whether they wish to seek asylum and to identify other options available to them in the context of Dublin III mechanism, including return, regularisation or regular onward migration. This arrangement would provide a good indication of a person's reasons for departure and ensure that the person's needs are met.

As by definition irregular migrants strive to remain invisible for the fear to be returned to their country of origin, today the procedure for the recognition of international protection represents the most important channel through which migrants are detected and later regularised. The need for international protection and humanitarian assistance, which are evident among these migratory flows, should be at the core of any political consideration.

The condition of invisibility makes, on the one hand, the monitoring of criminal organisations devoted to smuggling more difficult; on the other hand, it fosters the plurality and multiplicity of exploitation mentioned above. As confirmed by all professionals at the national and international level, one of the main problems of the fight against the criminal organisations that make huge profits from trafficking and smuggling is the detection and identification of victims (Degani and Della Rocca 2008). Today, on the basis of the experience gained, it is indeed possible to maintain that where the victims remain invisible the related criminal phenomena will remain invisible as well. This is especially true in those contexts where the irregular entry and stay in a given country is considered a crime.

## **6. To Conclude**

Today in Italy the situation is particularly awkward with respect to both the application of protection measures and the process of identification of the victims of trafficking and other forms of severe exploitation. This is mainly

due to the fact that the potential victims, beyond the feelings of anguish and the fear of intimidation, have also to face the risk of criminalisation. In this connection, due consideration should also be given to the fact that aiding and abetting irregular migration, beyond being considered a serious crime in itself, could be also considered a conduct whose manifestation is indicative of the occurrence of much more serious crimes such as enslavement and trafficking or, more in general, of criminal behaviours involving the exploitation of human beings and irregular migrants. The critical profile mentioned above does not necessarily mean that the victims of exploitation never find protection under the different humanitarian provisions and mechanisms set up domestically in accordance with the obligations stemming from international law. Rather, it means that, in consideration of the fact that these criminal phenomena are by definition invisible, the criminalisation of irregular migrants, prostitutes or migrants whose application for international protection had been rejected and their subsequent deportation represent an obstacle and jeopardize the activation of the correct procedures for the detection and identification of victims.

The issue of the identification is directly linked with the always increasing number of persons who, at the initial phase of their migration project, do not emerge as victims of trafficking in that it is only at a later stage that they become involved in situations of exploitation. This is particularly true, today, for migrants seeking international protection, as well as for those who, while being granted a resident permit for humanitarian reasons, do not fully take part in any assistance or integration programmes.

In light of the above, it is possible to develop a consideration concerning the systems of protection for those individuals who, because of their specificity, since today have been placed in reception systems regulated by norms inspired by differentiated criteria and needs. However, because of their personal characteristics and experiences, these individuals would need to be assisted and to participate in programmes that are more flexible than those currently set up in accordance with the legal framework.

In other words, it is possible to maintain that in Italy a number of elements concerning the emergence of severe forms of exploitation (both labour and sexual exploitation) as well as the significant incidence of women with regards to some national groups in the most recent migration flows, have raised two fundamental questions in relation to the protection of victims of trafficking in the framework of refugee law. The first one concerns the examination of the circumstances on the basis of which the right for these individuals to lodge an international protection application may be inferred. The second one, more complex than the previous one, is to determine whether the condition of victim or potential victims of trafficking represents, on its

own, a sufficient ground for the formulation of an asylum application and, therefore, for the subsequent release of a residence permit for international protection.

In recent years, in Italy, this situation has nurtured a debate among professionals involved in the protection of the victims of trafficking and asylum-seekers about the need to better understand not only the circumstances that lead a victim of trafficking or severe exploitation to apply for international protection, but also the modalities of intervention to be adopted with those who, having been granted such an application, could be more adequately protected in the framework of the specific mechanisms of protection for victims of trafficking and severe exploitation.

This is a set of problems that for certain aspects goes beyond the legal domain as it once again directly involves the issue of the correct identification of migrants since the moment of their entry in the country under a twofold point of view. The first one is related to the protection of human rights of these migrants. The second one concerns the functioning, respectively, of the trafficking and asylum-seekers referral mechanisms and, more specifically, their structure and performance in light of the increasingly evident overlapping between humanitarian-driven migratory movements and activities devoted to the aiding and abetting of irregular migration aimed at trafficking human beings, as well as in consideration of situations of severe forms of exploitation involving international protection seekers or beneficiaries.

That said, today Italy has addressed this issue from the operational point of view with the adoption of The Guidelines for the identification of victims of trafficking among international protection seekers, drafted in accordance with and for the implementation of art. 10 of legislative decree 24/2014. The Guidelines aim at fostering the identification of victims of trafficking and at implementing a referral system with the institutions specialized in the protection of these category of victims. This is done through the application by the Territorial Commissions of specific standard operative procedures during the procedure for the recognition of international protection. Over again in Italy the engagement on these issues seems, while some relevant concerns persist, to be worthwhile in terms of efforts made to the benefit of the many individuals involved in the situations referred above<sup>9</sup>.

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<sup>9</sup> The documents were drafted in the framework of an Agreement between the National Commission for the Right to Asylum and the UNHCR aimed at the development of projects for the 'monitoring of the quality' and of 'mechanisms of coordination of victims of trafficking'.

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