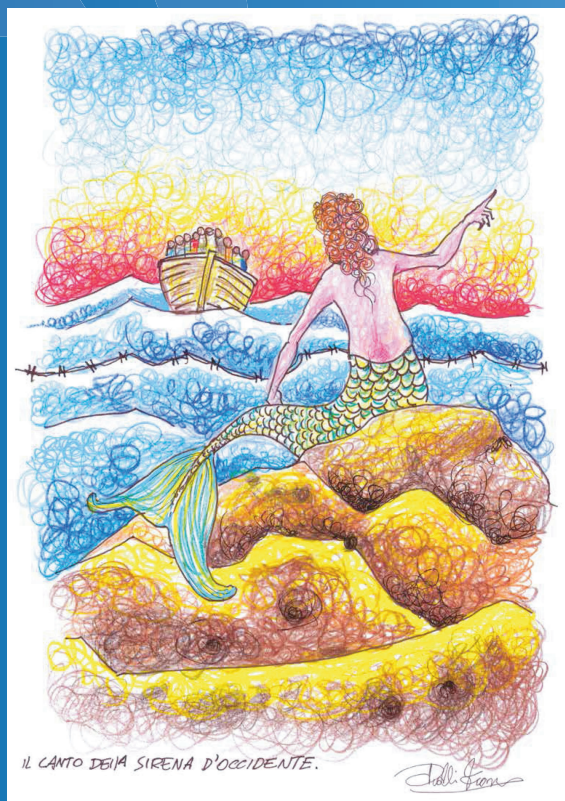


NEWCOMERS AS AGENTS FOR SOCIAL CHANGE: LEARNING FROM THE ITALIAN EXPERIENCE

A Recourse Book for Social Work and Social Work Education
in the Field of Migration



Edited by
Hannah Reich, Roberta T. Di Rosa



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Cover image: *Il canto della sirena d'Occidente*, by Francesco Piobbichi

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Images in the text by Francesco Piobbichi

Welela

Chi salva una vita salva mondo intero

3 ottobre

Noi e loro

È il capitalismo bellezza

Tu!

Ciao mamma, sono vivo

Esodo

Senza nome (onorare la memoria)

A special thanks to Francesco Piobbichi, who has made drawing his weapon against the indifference and violence that permeate the world of migration in the Mediterranean and, unfortunately, sometimes also the reception system. He, a witness to the times in which we live, with a notebook and his pencils, offers us chronicles and memories of stories that the sea has bequeathed to us, so that they are not completely lost in that sea.

Thank you, Francesco, for generously sharing your drawings, and for helping us to honour the lives and memories of so many people we will never know.

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5. Human smuggling and human trafficking. A normative and criminological outline

by Riccardo Ercole Omodei

1. Introduction

Human Smuggling (from now on HS) and Human Trafficking (HT) are both criminal phenomena that characterize our modern and interconnected world. On one hand, the need to address increasing migration flows pushed the States to criminalize and punish HS. On the other, the high demand of illicit markets (such as prostitution, forced labour, human organs, etc.) fosters the repugnant sale of human beings. Against these illicit services stands the multilevel legal order (International, European, and national legislations) which provides several and detailed criminal and procedural provisions. The action of the law makers is so plenty of zeal to show an uncommon level of homogeneity and strength. Nevertheless, the issues related to the matter are manifold and they mainly concern the compatibility with the criminal law principles.

Among the several issues I will focus here on one specific topic related to the controversial role of the migrant in the criminal law system and to the existing and significant gap between the criminological and the normative dimension of the two criminal phenomena. As a matter of fact, by the normative point of view, HS and HT are totally different events, therefore our criminal legal orders treat in two different ways the migrant and the trafficked person. If the latter is considered a victim, the migrant is treated as the object of the crime or even as perpetrator of the offence.

According to the multilevel legal system, HS and HT are criminal provisions characterized by different *wrongdoings*¹, because they affect different interests. The smuggling of migrants causes a harm to the right of the State

¹ For the notion of *wrongdoing* see Fletcher (1998), p. 77-ff.

to control the borders whereas trafficking of human beings is a direct threat to the person and his/her dignity. Moreover, usually the HS is conceived by law as an act that requires the consent of the migrant, in opposition to the HT where the person trafficked is the victim and his/her consent is absent or vitiated.

Summarizing, if human smuggling is punished just as a service of transportation from one State to another, trafficking is criminalized to prevent the diffusion of the modern forms of slavery.

This strict separation that informs the normative dimension sometimes is not useful in the counteraction on the phenomena. The criminological dimension suggests that, even if the two conducts are different also at this level, far more frequently than the legal systems can think they overlap in a tangled-up situation in which it is not easy to separate them.

In the following pages, I will try to show the extent of this gap and its consequences. Firstly, I will focus on the normative approach on HS and HT. Secondly, I will give a brief criminal outline of the two phenomena. Finally, I will try to underline the inadequacy of the dominating normative point of view.

2. The normative approach on human smuggling

I get started with the supranational law on HS that shows two different facets. On one side, we have the definition provided by the Additional protocol on human smuggling to the 2000 UN Convention on organized crime (also known as Convention of Palermo). The main purpose of this act is to prosecute and punish the international criminal organizations and their manifold activities, such as also the human smuggling. Thus, the criminal phenomenon is faced to counteract the criminal associations.

Different is the approach of the European Union law. According to the latter, HS is an act that has to be punished because it affects the common market and the common area of free movement of the European citizens, therefore the criminal offence is focused on the wrongness of the irregular migration.

The two different approaches obviously have consequences on the structure of the criminal provisions.

2.1. The point of view of the additional Protocol to the Convention of Palermo

As said, the UN Protocol on smuggling criminalizes the HS for countering the criminal organizations and, in doing so, it takes into account the rights of the migrants, as provided for by the Article 2². The choice to deal with this criminal phenomenon by this point of view has clear consequences on the criminal provision of HS. In fact, this is structured around the idea of the exploitation of the migrant's vulnerability. Thus, the Protocol on smuggling does not punish every kind of HS but only the one realized in order to obtain a *financial or other material benefit*³. It is evident that, according to the UN Protocol, the migrant is not the subject of the criminal offence, but it is a victim of the crime. By making the material benefit a definitional element of the crime, the UN law maker decided to shape the wrongdoing of the offence in terms of exploitation, punishing the commodification of the human beings (Gallagher, David, 2014; Militello, Spina, 2018; Mitsilegas, 2018).

This approach, that pays particular attention to the rights of the migrant, is emphasized by the following provision (Article 5) according to which "migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of the conduct set forth in Article 6".

In conclusion, after this very brief description, we can state that the UN Protocol punishes HS to protect the migrants from the many risks they may face whenever involved in this criminal process.

2.2. The European Union's point of view

Totally different is the European Union's point of view. The EU law on this topic is firmly dominated by the aim of fighting irregular migration (Mitsilegas, 2015), therefore the Directive 2002/90/EC and the Framework Decision 2002/946/JHA tend to protect the common area of free movement instead of the single migrant. This is clearly underlined by the definition

² "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among states Parties to that end, while protecting the rights of smuggled migrants", <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

³ According to the art. 3 (a) of the Protocol, "smuggling of migrants shall mean the procurement, in order to obtain, directly and indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (emphasis added).

provided by the European legislator. In the EU law the phenomenon is not addressed as human smuggling, notion that recall the idea of the migrant as an object or as a victim of the crime, but it is defined as *facilitation of unauthorized entry, transit, and residence*.

It is evident the change of focus. The wrongdoing of the EU criminal offence is not linked to the exploitation of the migrant, but it is connected to the help given to migrants who aspire to enter to Europe. What is punished in Europe is, therefore, every conduct that “assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry of transit of aliens”⁴, without the need of a financial gain or a material benefit. The main purpose of the European legal system is to protect the right of the State to control the borders, and in doing so it indirectly criminalizes irregular migration by means of a wide criminalization of the facilitation of irregular migration⁵. The will is to punish every kind of assistance or facilitation given to the irregular migrant.

The strict approach of the European Union is widespread among the western countries, especially in the European region (Militello *et al.*, 2018), therefore it is possible to state that HS is usually perceived as *facilitation to irregular migration* and, as a consequence, it tends to protect the borders of the State instead of the migrants’ rights.

3. The normative approach on human trafficking

Conversely to what realized for the HS, the multilevel legal system about the HT is coherent in all its degrees of legislation with each other (international, European and national one). The different law makers get along about this criminal phenomenon and they decided to fight it in order to enhance the struggle against the modern forms of slavery. Thus, the slavery it is opposed not only with a counteraction on the different exploitation’s area but also by the opposition to the preparatory conducts that can lead to the privation of liberty for the victim. This preparatory conduct is mainly represented by the trafficking of human beings.

⁴ Article 1 (a) Directive 2002/90/EC, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN>.

⁵ The EU law does not completely disregard the rights of the migrants. They are taken into account in two different provisions: The Art. 1 sec. 2 Dir. 2002/90/EC, that allow the State to introduce the humanitarian assistance provision; and the Art. 3 of the Fr. Dec. 2002/946/JHA, that provides an aggravating factor when the conduct is realized with the purpose of the financial gain.

Therefore, this criminal offence is only devoted to the protection of human dignity, and it tends to prevent the illicit activities aimed at exploiting human beings for criminal purposes.

This is evident if we analyse the structure of the criminal offence, given by a very broad definition based on three “pillars”: The acts, the means and the purposes. In order to punish all the manifold actions of the trafficking process, the law makers consider as HT different kind of actions (such as the recruitment, the transportation, the transfer, the harbouring, etc.) realized with different means (coercion, abduction, fraud, etc.) when they are aimed at the exploitation of the victim⁶. What put all the elements together is clearly the final purpose of exploitation that become the core of the criminal offence (Gallagher, 2010).

4. A criminological outline

The criminological perspective is characterized by a sharp distinction between the two phenomena as well. From the HS point of view, conversely to the narrative of the mass media, the literature usually concludes for the absence of a strong and hierarchical criminal organization able to manage all the different phases of HS. Human smuggling is usually addressed as a process managed by horizontal criminal networks composed by largely independent agents and structured by way of loose links (Campana, 2018, p. 481; Triandafyllidou, 2018, p. 676; Militello *et al.*, 2019). Thus, there is no single organization that can control the entire criminal activity but a network of different criminal groups, which cooperate based on a partition of competences and/or geographic areas.

This flexible nature of the network is the strong point of this criminal activity. Thanks to this kind of structure, they are totally able to adapt to the changes (the normative or the sociological ones) of the criminal scenario and so they can change routes, means of transport, etc. without relevant costs in order to optimize the activity.

Different is the scenario of the HT. According to the majority of the literature, trafficking of human beings is characterized by the presence of strong ethnical organizations able to control all the phases of the trafficking: from the recruitment to the final exploitation (Campana, 2015, p. 68; Aronowitz, Theuermann, Tyuryanova, 2010). Dissimilar is also the *modus operandi* that

⁶ This structure is followed by all the supranational text about HT: the additional protocol on human trafficking to the Palermo Convention, the Directive 2011/36/UE and the Convention of Warsaw of the Council of Europe.

has to be adapted to the nature of the criminal activity. If in HS smugglers are selling a transportation service and the profit is mainly realized during the journey, in HT the transportation phase is just preparatory to the final utilization of the victims, without it the criminal organizations gain nothing. Therefore, usually in HT the criminal actors transport the victims little by little, with few people per journey, in order to assure that the victim will reach the destination. On the contrary, broadly speaking, in HS the numbers are totally different given that the profit is linked to the quantity of smuggled people.

5. The Central Mediterranean route and the need to fill the gap

Until now, HS and HT seem to be different phenomena both from a criminological and a normative point of view. This is true in most cases. But in some scenario, not irrelevant if we take into account the number of people involved, HS and HT are connected and it's difficult for the law enforcement agents to understand what kind of criminal activity they are facing until the end of it.

This is the case, among others, of the Central Mediterranean route. This route is the one that links Libya (as country of last departure) to the south part of Italy, and usually it collects the migration flows from a big part of Africa. Nevertheless, in the last years the numbers of this route constantly decreased, passing from the almost 200.000 arrivals of 2016 to the 14,000 of 2019 (*Frontex Annual Risk Analysis*, 2020). This was due also to the more than controversial role of the Libyan coast guard. Beyond the problematic role played by the Libyan authorities, I want to underline how in this route the borders between the two criminal phenomena are very evanescent, as it is testified by the reports of several international authorities, such as Europol and IOM.

As a matter of fact, in this route, the criminal organizations act as a service platform able to manage different kind of traffics (human smuggling and trafficking, drug trafficking, cigarette smuggling, trafficking of cultural heritage, etc.), that, as a result, are often connected and overlapped. In the context of huge migration flows, the trafficking of human beings is often a direct consequence of the HS or a part of it. It is possible that the person smuggled is exploited throughout the journey, but it is free to go at the end of it, or also it could happen that the migrant particularly vulnerable, for instance minors or women, can be distracted by the final destination and attracted by force or violence to forms of exploitation and slavery.

This strong connection has been underlined also by the NESMeS international project (*the New Era of Smuggling in the Mediterranean Sea*) conducted by a research team of the Department of Law of the University of Palermo (2017-2019). One of the goals of the project was to enlighten the connections between different traffics in the Mediterranean Area, and in doing so, the team realized interviews to law enforcement agents in different European countries (Germany, Italy, Spain, and Portugal).

As it was underlined by several interviewees, the connections are various. According to a Frontex employee “we have no statistically significant evidence that in the same boat there are drugs and migrants, but we have evidence of connections between trafficking and smuggling of migrants”. Furthermore, a representant of the IOM tell us that this connection concerns especially, but not only, women and minors, and he declared that “we believe that almost all the migrants who reach Italy has been victim of exploitation during the journey, also in Libya for a very long period of time”. Again, a prosecutor of the Criminal Court of Palermo told us about this connection. He said “during the smuggling there is the rape, the murder, the sexual violence. Broadly speaking it gets start always as smuggling, rarely we found a victim trafficked by force from the beginning. Instead, the trafficking is realized at the beginning mainly with the deceit”.

To conclude, the “routine” of some kind of HS is characterized by a strong interconnection with the HT, therefore, more often that we can think, the two criminal phenomena overlapped. This should bring to a reconsideration of the entire normative system. The dualistic system that firmly separates HS, that affects the State’s right to control the borders, and HT, punished in order to prevent the new forms of slavery, proved to be unsatisfactory because it postpones the migrants’ rights.

To fill the gap, it could be useful to introduce a criminal offence, in the middle between the HS and HT, conceived as the HS of the UN Additional Protocol, and so a provision that can punish in a harsher way the smuggling realized with the exploitation of the migrant. Truthfully, a similar regulation already exists in most of the Member States, but it is structured as an aggravating factor and not as an autonomous criminal offence. In order to avoid the problems related to the nature of the circumstances of the crime (such as the balancing between aggravating and mitigating factors), the insertion of an autonomous offence is an indispensable step to ensure the coherence of our criminal policy with the current aspect of the criminal phenomena and to better protect the vulnerability of the migrants.

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