

Migration-Trafficking Nexus and Ideology:
Is Migration Part of the United Nations Trafficking
Protocol's Definition of Trafficking in Human Beings?

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Abstract

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Globalisation has made many issues of international crime more prominent. Trafficking in human beings is one of these issues affected by globalisation. New measures have had to be implemented to fight transnational crime. One such measure has been the UN Trafficking Protocol, which is the basis for the universal definition of trafficking and the fight against trafficking. The Protocol has consequently brought up the relationship between migration and trafficking, the migration-trafficking nexus. Migration control and border measures have been emphasised in the fight against trafficking and trafficking is seen as part of irregular migration. This relationship is confusing, because the most relevant and influential interpretations do not regard migration as part of the definition of trafficking in the Protocol.

The focus of this master's thesis is on examining the migration-trafficking nexus from a critical point of view. It questions and argues against the dominant view of the relationship between trafficking and migration, which de-emphasises the role of migration in the definition of trafficking and connects trafficking consequently to irregular migration. This interpretation is mostly advocated by the United States of America. This thesis argues that migration is part of the UN Trafficking Protocol's definition of trafficking, specifically the action element and its different acts. The thesis also assesses this relationship in the context of the whole UN Transnational Organized Crime Convention, as well as some of the history of trafficking to support this claim.

In particular, this thesis delves into the ideologies and biases hidden in the dominant interpretation of migration-trafficking nexus. What are the possible ideological reasons behind the dominant interpretations that do not acknowledge migration as part of the definition of trafficking, even if it is actually possible to interpret migration as part of it? Furthermore, there is assessment of what are currently the possible effects of the dominant interpretations and what possible effects could there be for anti-trafficking measures, if this dominant interpretation of migration–trafficking nexus was dismissed, and migration was acknowledged as part of the definition of trafficking.

Keywords: International Criminal Law – Human Trafficking – UN Trafficking Protocol - Migration – Migration-Trafficking Nexus – Globalisation – Ideology

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TURUN YLIOPISTO

Oikeustieteellinen tiedekunta

MATILDA HEIKKONEN: Ihmiskauppa, siirtolaisuus ja ideologia: Onko siirtolaisuus osa Yhdistyneiden kansakuntien ihmiskauppalisäpöytäkirjan ihmiskauppamääritelmää? Pro gradu -tutkielma, s. XIV – 63.

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Monet kansainväliset rikokset ja niihin liittyvät ongelmat ovat tulleet merkittävimiksi globalisaation myötä. Ihmiskauppa on yksi näistä rikoksista, johon globalisaatio on vaikuttanut. Kansainvälisten rikosten torjunnassa on täytynyt ottaa käyttöön uusia toimia. Yksi tällainen toimi on ollut YK:n lisäpöytäkirja ihmiskaupan ehkäisemisestä, torjumisesta ja rankaisemisesta, joka on perustana muun muassa ihmiskaupan määritelmälle ja sen torjunnalle kansainvälisellä tasolla. Siirtolaisuuden ja ihmiskaupan suhde on myös selkeämmin noussut esille tämän lisäpöytäkirjan kautta. Maahanmuuton valvonta ja rajavalvonta ovat nousseet korostettuun asemaan ihmiskaupan vastaisessa työssä. Tämä suhde on omiaan aiheuttamaan hämmennystä, sillä merkittävimmät ja vaikutusvaltaisimmat tulkinnat eivät hyväksy siirtolaisuutta osaksi YK:n lisäpöytäkirjan määritelmää ihmiskaupasta.

Tämä pro gradu -tutkielma keskittyy selvittämään kriittisestä näkökulmasta ihmiskaupan ja siirtolaisuuden välistä suhdetta. Tutkielma kyseenalaistaa ja argumentoi siirtolaisuuden ja ihmiskaupan suhteesta olevaa vallitsevaa tulkintaa vastaan. Tämä vallitseva tulkinta minimoi siirtolaisuuden roolin ihmiskaupan määritelmässä ja yhdistää ihmiskaupan laittomaan maahanmuuttoon. Tämä tulkinta on suurimmaksi osaksi Yhdysvaltojen ajama. Tämä tutkielma arvioi ja argumentoi, että siirtolaisuus on osa YK:n ihmiskauppalisäpöytäkirjassa säädettyä ihmiskaupan määritelmää ja erityisesti sen toimintaelementtiä ja siinä eriteltyjä tekoja. Tutkielma myös tukee tätä väitettä tarkastelemalla tätä suhdetta koko YK:n järjestäytyneen rikollisuuden vastaisen sopimuksen kontekstissa sekä ihmiskauppasopimusten historiassa.

Eryteisesti tutkielmassa paneudutaan mahdollisiin ideologioihin ja ennakoasenteisiin, jotka ovat piilossa hallitsevassa tulkinnassa ihmiskaupan ja siirtolaisuuden suhteesta. Mitkä ovat mahdolliset ideologiset syyt hallitseville tulkinnoille, joiden mukaan siirtolaisuus ei ole osa ihmiskaupan määritelmää, vaikka siirtolaisuus olisi mahdollista tulkita sen osaksi? Lisäksi arvioidaan mitä mahdollisia vaikutuksia voi seurata tämänhetkisistä ihmiskaupan torjumiseksi tehdyistä toimista. Vastaavasti arvioidaan mahdollisia vaikutuksia, joita voisi seurata, jos tämä hallitseva tulkinta hylätään ja siirtolaisuus hyväksytään osaksi ihmiskaupan määritelmää.

Avainsanat: Kansainvälinen rikosoikeus – Ihmiskauppa – YK:n ihmiskauppalisäpöytäkirja – Siirtolaisuus – Globalisaatio – Ideologia

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Abbreviations

CoE Council of Europe

EU European Union

ICJ International Commission of Jurists

ILO International Labour Organization

IOM International Organization for Migration

NGO Non-Governmental Organisation

UN United Nations

UNDP United Nations Development Programme

UNGA United Nations General Assembly

UNOCD United Nations Office on Drugs and Crime

TIP Office US Department of State's Office to Monitor and Combat Trafficking in Persons

WHO World Health Organization

1 Introduction

1.1 Background for the Reader

Trafficking in human beings (later human trafficking and trafficking) is widely seen as one of the most serious breaches of human rights.¹ Trafficking is the recruitment, transportation, transfer, harbouring or receipt of persons by coercive means or deception for the purpose of exploitation, including sexual exploitation, forced labour, and slavery or practices similar to slavery.² This definition includes all kinds of situations, which vary from case to case. For example, trafficking includes situations, in which a person is taken from one country to another, but also includes situations, in which a person is trafficked within just one country or even just in their home community.³ Some people may have consented to go to another country for a work opportunity, but they have been deceived about the nature of the job and find it to be something different once they are there.⁴ Some may have even voluntarily migrated to work in domestic work, prostitution and entertainment services, but they are confronted with debt bondage, exploitation of their labour and service, violence and their illegal status is taken advantage of.⁵

While trafficking is not a new phenomenon and has existed in the past, it has grown to be more wide ranging as one of the unwanted consequences of globalisation. Globalisation has many elements that can increase trafficking: supply and demand of transportable commodities, transfer of capital and trade deregulation have all benefitted trafficking. Furthermore, borders have been opened to an extent, and travelling has become easier and more cost-effective.⁶ Globalisation has overall increased inequality among and within nations, market goals rule over social and human goals and human beings can be just another commodity to be traded and moved.⁷ All of this has an effect of trafficking becoming more wide ranging. Furthermore, new technological advances have brought new challenges and affected the volume of trafficking.⁸

¹ Piotrowicz 2007, p. 275.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. UNGA Res. 55/25, Nov. 15, 2000. Art. 3 (a). The definition will be fully explained and stated in chapter 2.1.

³ UNODC 2016, p. 16 – 18.

⁴ Piotrowicz 2007, p. 275.

⁵ IOM 2000, p. 29 – 30. See also TIP Report 2004, p. 9. A woman voluntarily went travelled from Thailand to Australia to work as a prostitute, but her passport was taken away and she was locked in a house.

⁶ Nagle 2008, p. 137 – 138.

⁷ Nagle 2008, p. 152 – 157.

⁸ See for example Barney 2018, p. 756 – 761; UNODC 2020, p. 117 – 128.

Due to the effects of globalisation, trafficking can be seen to concern every country in the world, whether as a country of origin, destination or as a transit country.⁹ It would be difficult for a country or a person to be completely disconnected from the realities or the effects of trafficking. For example, United Nations Office on Drugs and Crime (UNODC) has reported that from 2012 to 2014 victims who were discovered in Europe, there were 137 different citizenships. This seems to be an indication that trafficking involves every country in the world one way or another.¹⁰

It is difficult to reliably estimate how many have been or are currently trafficked, because of the hidden nature of trafficking: not many traffickers are caught or prosecuted, and victims are not necessarily identified as such.¹¹ The number of convictions of trafficking remains low, since the crime has a high burden of proof and it is difficult to establish that a crime has happened - trafficking is considered to be a crime of low risks, but high rewards.¹² But to give an estimate for the reader, in 2008 report by the US government, it was found that annually approximately 800 000 people are trafficked across national borders and million are trafficked within countries.¹³ However, the number of detected victims is much lower compared to these estimates.¹⁴

In 2000, United Nations General Assembly (UNGA) adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) as part of the United Nations Convention against Transnational Organized Crime (Transnational Organized Crime Convention)¹⁵ as an answer to the new globalised environment, with a goal to suppress and criminalise trafficking. While there had been different international instruments, which included rules and measures to combat the exploitation of persons, there had not been one universal instrument, which addressed all

⁹ *Country of destination* is a country where a person or a group of persons are migrating. *Country of origin* is “a country of nationality or of former habitual residence of a person or group of persons who have migrated abroad”. *Country of transit* is a country through which a person or a group of persons pass through in-between the country of destination and origin. In all definitions the migration can be irregular or regular. IOM Key Migration Terms. Country of destination, Country of origin, Country of transit, accessed 1.6.2021.

¹⁰ UNODC 2016, p. 1.

¹¹ Piotrowicz 2007, p. 275.

¹² Ollus 2016, p. 38.

¹³ TIP Office 2008, p. 7.

¹⁴ See for example UNODC 2018, p. 21 – 22.

¹⁵ United Nations Convention against Transnational Organized Crime. 2225 UNTS 209, Nov. 15, 2000.

aspects of trafficking.¹⁶ As a result, the Trafficking Protocol provided the first international definition of human trafficking, which can be seen as one of its biggest accomplishments.¹⁷

While the Trafficking Protocol provided a universal definition of trafficking, there has been constant discussion on the definition and how it should be interpreted.¹⁸ Trafficking is overall a complex legal issue, as it connects so many different areas, such as, criminal law, national security, human rights, violence against women and children, migration issues and refugee protection, business responsibility and supply chain accountability, and economic development.¹⁹ It touches upon both the public and private sectors as well as international and national laws, which furthermore confuses the legal framework around it. Real life complexities are difficult to fit strictly into just one definition. Therefore, it is also important to accept that no legal definition of trafficking can ever be expected to respond fully to the shades and complexities of the real world.²⁰ However, the Trafficking Protocol, and as a consequence much of the anti-trafficking discourse, defines trafficking first and foremost as a question of transnational organised crime and illegal immigration.²¹

There has always been an underlying implication of connection between migration and trafficking. This shows in the way trafficking has been defined and in the policies related to trafficking.²² Overall, the international community has traditionally viewed trafficking as an issue of crime and migration control.²³ Especially the older treaties relating to trafficking have addressed trafficking as girls and women being moved across State borders for sexual exploitation. Gallagher has noted that from around 1997 onward, the links between trafficking and broader migration flows became more acknowledged in literature.²⁴

Migration-trafficking nexus is a term commonly used to describe these linkages between migration and trafficking.²⁵ It has been noted that trafficking and migration (and migrant smuggling) are separate, but inter-related issues: the majority of trafficked people have been stated to be migrant workers, regular migration flows seem to overlap with trafficking flows

¹⁶ Trafficking Protocol, Preamble.

¹⁷ Gallagher 2015, p. 16.

¹⁸ See for example Gallagher 2010, p. 47 – 53.

¹⁹ UNODC 2016, p. 16.

²⁰ Gallagher 2010, p. 52.

²¹ Ollus 2016, p. 27.

²² See for example Gallagher 2010, p. 13 – 25. The chapter gives an overview of different trafficking definitions in the history, most of which include migration.

²³ Fitzpatrick 2003, p. 1145.

²⁴ Gallagher 2010, p. 17.

²⁵ See for example Zalewski 2005, p. 120 – 129; Kaye 2003.

and the concept of push and pull migration seems to also correlate with trafficking.²⁶ However, while there are clear linkages between trafficking and migration, UNODC and the United States of America (the US) have both in their interpretations separated migration (or movement) from the definition of trafficking.²⁷ This matters, as UNODC is behind the Trafficking Protocol and can be seen as having at least some interpretations power on it, and the US is known to have a lot of power in the interpretations of international law and particularly the US has taken a leading role with trafficking regulations in international stage.²⁸

As a result, the connections between migration and trafficking have been left unclear and implicit, but it is still clear that migration affects trafficking policies heavily. Especially anti-migration is widely used for anti-trafficking measures.²⁹ These efforts focus specifically on young women with campaigns that have anti-migration messages, prohibition of migrating and travelling as well as profiling of victims based on sex, economic and marital status.³⁰ These stricter migration policies do not limit trafficking, but rather just change when or where trafficking happens, and even increase the clandestine migration and through that trafficking.³¹ Therefore, I think it is important to research the relationship between migration and trafficking to see if the current dominant views on migration-trafficking nexus are actually beneficial for the people they seek to protect, or do they just serve the dominant States' ideological goals.

1.2 Approach to the Thesis – Research Questions, Method, Aims, Sources and the Structure of the Thesis

In this thesis, I intend to examine this confusing relationship of migration and trafficking by questioning the dominant view of the definition of trafficking, which de-emphasises the role of migration in the definition. This interpretation is most clearly promoted by the US. Furthermore, I will assess, if the Trafficking Protocol could and should be interpreted in a way that includes migration in more explicitly in the definition of trafficking. Moreover, I will examine if the current dominant interpretation of the definition of trafficking is informed by ideological thinking and biases, which have lead to this interpretation.

²⁶ Kaye 2003, p. 3. These connections will be further explored in chapter 2.3

²⁷ UNODC 2016, p. 13; TIP Office 2006, p. 6 and 10.

²⁸ Chuang 2006b; Chuang 2014, p. 610.

²⁹ Edwards 2007, p. 18 – 19.

³⁰ UN Commission on Human Rights. UN Doc. E/CN.4/2000/68 Feb. 29 2000, para 42, 47, 89 – 92. For more problems in the anti-trafficking campaigns, see O'Brien 2016.

³¹ See for example Weatherburn et al 2015, p. 43; Chacon 2006, p. 2977.

My thesis is divided to two parts by the two research questions. First, to look at the possible ideological thinking in trafficking-migration nexus, I will need to look if it possible to interpret and argue that migration is part of the definition of trafficking. This is to show that the most influential interpretation is not necessarily the best one, or what was even originally intended. Based on this, I will then assess the ideological thinking in the way the definition is at the moment interpreted by the dominant voices, who deny that this definition includes migration and movement. Therefore, my research questions are: (1) *Is migration part of United Nations Trafficking Protocol's definition of trafficking* and (2) *what does this reveal about the ideology behind the interpretations of migration's relation to trafficking?*

I will explain my approach to ideology. Ideology can be defined in a lot of ways, and there has been complex discourse and theory on it.³² There is no single definition, which sums up ideology in a complete way.³³ But, for the purpose of this thesis and my research questions, I will apply the definition of ideology, as its most widely accepted.³⁴ This is Thompson's critical conception of ideology: "To study ideology, I propose, is to study the ways in which meaning (or signification) serves to sustain relations of domination."³⁵ This definition is not only a reference to belief systems, but also to questions of power. Of course this definition, as all, has some problems. For example, feminism and socialism can be seen as ideologies, but do not hold dominant power, which is stated in this definition.³⁶ However, as I aim to examine the dominating ideas and biases from the dominant countries behind the migration-trafficking nexus and the interpretations of it, I find this definition most appropriate.

In the tradition of Third World Approaches to International Law (TWAIL), it has been long noted that there is a need to look at the way the dominant voices from Europe and North America affect international law and how international law further emphasises those voices. This produces international law, which provides structures that marginalise and dominate people of the Third World.³⁷ Furthermore, the dominant power can legitimise itself and make their beliefs universal and "self-evident", even if those are not necessarily the best ones and do not hold any more logic than the beliefs that counter the dominant power.³⁸ Because of

³² For a more in-depth analysis of the discourse on ideology, see for example Eagleton 2007.

³³ Eagleton 2007, p. 1.

³⁴ Eagleton 2007, p. 5.

³⁵ Thompson 1985, p. 4.

³⁶ Eagleton 2007, p. 6.

³⁷ Gathii 2011, p. 32.

³⁸ Eagleton 2007, p. 5 – 6.

this, I find it important to examine what power structures are weaved into the migration-trafficking nexus, which affects people all over the world.

Overall, the purpose of my research is to examine critically the complex relationship between migration and trafficking, which I consider to be important, since anti-migration has been emphasised in the anti-trafficking measures. My aim is to question the dominant views and interpretations of the migration-trafficking nexus, and by doing that, possibly opening new and more comprehensive ways to see this relation. By looking at the migration-trafficking nexus, I hope to find if the dominant interpretations are informed by underlying ideological or biased thinking and how it affects the perception of trafficking and the anti-trafficking measures. As a more general goal, I am trying to further the academic discussion on migration-trafficking nexus by examining it from a fresh perspective and also help in clarifying migration's part and position in the definition of trafficking.

I approach these research questions by looking at the subject of migration-trafficking nexus through a critical lens. My approach to examining the migration-trafficking nexus is in line with the tradition of TWAIL, as I examine and offer critique on the dominant narratives of the migration-trafficking nexus.³⁹ As I examine the possible ideologies or biases that can be found in it, I try to examine how the unequal relationship between the Third World and developed countries affect the migration-trafficking nexus. Therefore, the focus is on the power structures between destination countries and origin countries, but consideration is also on how these affect victims' and migrants' rights. Furthermore, this thesis has some connection to political theory through the consideration of States' ideologies, but the focus is on the law.

I will be examining this issue by focusing my research on the Trafficking Protocol and its related material. This is because of the Trafficking Protocol's leading nature in defining and criminalising trafficking, and most UN Member States are Parties to it. Furthermore, the Protocol, and its definition, is the basis for regional and national legislations.⁴⁰ Because of this, the Protocol works as an important basis for investigating the migration-trafficking nexus. The overall basis for this thesis is connected to the international criminal law, with the use of the United Nations Convention against Transnational Organized Crime and its Protocols as well as the related soft law of travaux préparatoires. I will also look into the

³⁹ Gathii 2011, p. 37. "...a central project of TWAIL is to challenge the hegemony of the dominant narratives of international law."

⁴⁰ UNODC 2020, p. 23.

theory of international migration, as it is relevant relating to assessing my thesis question. As I have connected the thesis question into ideology, this ties somewhat into the political theory.

Besides the Convention, its Protocols and the soft law of the travaux, I have used the materials provided by UNODC, especially the Global Reports on Trafficking in Persons. Similarly, to find out the US' approach to trafficking, the Trafficking in Persons Reports (TIP Report) by US Department of State's Office to Monitor and Combat Trafficking in Persons (TIP Office) are frequently used as a source. Moreover, my research also relies on research done by others in the legal field, and especially those who have looked into the connection of trafficking and migration in their research. Most notably, I must mention Professor Janie A. Chuang, whose many publications have been used as a source in my thesis as their subjects are similar to mine. I wish to build upon this basis. Notably, the ideological basis of trafficking has been already examined from the view of abolitionist movement in the past.⁴¹ I wish to build upon this but from a different perspective, by examining the ideology that might be related to the migration-trafficking nexus.

Because of the length limits of this thesis, I will here mention that while I will be examining the issue of migration, it will be limited to the relation it has to trafficking. I am talking more of the general concept of migration, rather than going into detail with all of the national and international laws that in reality govern migration. This might make it seem that I am equating all migration and migration experiences to a lump. I acknowledge that it is a much bigger and complicated subject. People migrate for all kinds of reasons, sometimes as a necessity and sometimes from their own desires. Especially migrant smuggling is interrelated subject, but also refugees and labour laws concerning migrants⁴², but I will not handle them in much detail in this thesis due to space limits. I have also chosen to focus mostly on adults, and have not here made differentiation between trafficking of children and adults. Also, I will not go into the political theory, which is interconnected with ideology and the subject I look into in chapter 4, but I am keeping my thesis' main focus on legal aspects and political theory would distract from that. Lastly, my focus, when talking about the destination countries has been on the US, because the available materials and their dominant place and will to affect trafficking issues on global stage.⁴³

⁴¹ See Chuang 2010; Weitzer 2007.

⁴² For a more specified look into labour rights, migrant exploitation and trafficking, see for example Haynes 2009 and Shamir 2012.

⁴³ For the US' influence regarding trafficking, see Chuang 2006b; Baird 2020, p. 175 – 177.

I should also note that when I am talking about trafficking and the statistics relating to it that trafficking is still considered to have a low conviction rate and also low detection rate. It is easy to for international migrants to be confused as smuggled migrants, when they in actuality could be trafficking victims. For this reason, the data and conclusions presented are based on the detected victims of trafficking, and they might not show the whole truth about the issue. UNOCD has similarly acknowledged in their research, because there is not all that much information, it is difficult to make in-depth analysis in a broad, international scope.⁴⁴ This reflects on how it is difficult to analyse all the aspects of the migration-trafficking nexus.

The structure of this thesis goes as follows. In the second chapter, I will explain out the legal framework of the subject, namely international human trafficking framework as well as some of the migration framework, as it is appropriate to my subject. I will also explain the key concepts of my subject. In 2.3 I will illustrate the migration-trafficking nexus and its contradiction: trafficking-migration nexus is generally accepted, but migration is not accepted to be part of the definition of trafficking in the dominant interpretations. In the third chapter, I will argue that it is appropriate to interpret migration as part of the Trafficking Protocol's definition of trafficking. I will look at the action element in the definition of trafficking, especially the act of harbouring. I will look at the key things relating to the Protocol's definition of trafficking, such as the travaux préparatoires and the drafters' intentions, as well as the trafficking-migration relationship as a whole, based on the Transnational Organized Crime Convention and its Protocols' relationship on migration. Lastly, after I have argued that migration can be interpreted as part of the definition of trafficking, I will be examining what this reveals about the migration-trafficking nexus in the fourth chapter. Specifically, I will examine if it uncovers some ideologies and goals hidden in the way the migration-trafficking nexus has been built in the dominant interpretations. Lastly, I will look at the possible effects regarding migration as part of trafficking more explicitly could have on anti-trafficking measures.

2 Migration-Trafficking Nexus

2.1 The International Legal Framework for Trafficking

⁴⁴ UNODC 2016, p. 57 – 58.

In this chapter, I will build the basis for my thesis by clarifying some key concepts and terms, which are related to this thesis and are specifically needed to understand the complex relationship of migration and trafficking. I will do this by going over the related international legal framework for trafficking, and then the international legal framework for migration, as it is relevant to my thesis. Lastly, in 2.3 I will demonstrate the concept of migration-trafficking nexus. The examination of the migration-trafficking nexus here covers concepts of migration that clearly link to trafficking, such as push and pull migration, migration control, migration smuggling and vulnerability of migrants. I will also explain the dominant interpretations of migration-trafficking nexus, namely, the interpretation that migration is not part of the definition of trafficking while trafficking is interpreted to be part of migration.

Overall, trafficking legislation and policies work in different levels, and the Trafficking Protocol and its definition can be seen as the most universal. There are also multilateral, regional and national policies and laws.⁴⁵ Not only is the Trafficking Protocol a basis for national instruments, but also shortly after the Trafficking Protocol was adopted, several regional treaties and similar instruments on trafficking were developed. Three such conventions are the 2002 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Convention, the 2002 Council of the European Union Framework Decision on Trafficking Human Beings and the 2005 European Convention on Action against Trafficking.⁴⁶ Anti-human trafficking is also included as an agenda in several conventions that aim to eliminate violence against women, for example in the Convention on the Elimination of All Forms of Discrimination against Women.⁴⁷

Until the Trafficking Protocol, there had not existed a clear definition of human trafficking in international conventions or instruments, which would have addressed all aspects of human trafficking.⁴⁸ That is not to say that the Trafficking Protocol has been the first international instrument to address trafficking; there have been international treaties that have concerned human trafficking since the early 1900s.⁴⁹ One example of such a treaty is the Convention

⁴⁵ Muntarbhorn 2003, p. 152.

⁴⁶ Gallagher 2010, p. 43.

⁴⁷ Convention on the Elimination of All Forms of Discrimination against Women. 1249 UNTS 13, Dec. 13 1979, Art. 6.

⁴⁸ Trafficking Protocol, Preamble.

⁴⁹ Gallagher 2010, p. 13.

against White Slavery (1904),⁵⁰ which was amended by a Protocol by the UN in 1948 (the convention's name was changed to Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others), which formed the previous explanation for trafficking in international law before the Trafficking Protocol. In article 1 it obliged States to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.

However, this convention does not offer a definition as such, nor does it specifically mention it as trafficking in human beings. The definition of trafficking started to come into fruition in 1990's in the context debates of international regulations of prostitution and prevention of exploitation of women and solidified into international treaty in the Trafficking Protocol.⁵¹ But, this does suggest that trafficking has in historical context been connected largely to prostitution, movement and racism with the specific term of white slavery.

This lengthy legal and political history behind trafficking, and also the Trafficking Protocol, can be seen as a factor that makes it different from many other contemporary international legal issues.⁵² This history affected the debates over the Protocol and the definitions of trafficking. The negotiations before the formation of the Trafficking Protocol can be described as ideologically charged, especially regarding the issue of prostitution.⁵³ The Trafficking Protocol came to be after a history of differences in opinion on the definition of trafficking, and its relation or differences to related issues, for example irregular migration and migrant smuggling. It has been noted that the previous definitions mirrored largely “the interests, priorities, and perspectives of their promoters”.⁵⁴ I will later argue that this has not changed, even if States came to an agreed-upon definition with the Trafficking Protocol.

The Trafficking Protocol is part of the Transnational Organized Crime Convention. Besides the Trafficking Protocol, there are two other Protocols included in the Convention: Protocol to against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol)⁵⁵ and Protocol

⁵⁰ International Agreement for the Suppression of the White Slave Traffic, 1 LNTS 83, done May 4, 1904, entered into force July 18, 1905 amended by a Protocol approved by the UN General Assembly on General Assembly on Dec. 3, 1948, 30 UNTS 23.

⁵¹ Gallagher 2010, p. 16.

⁵² Gallagher 2010, p. 12 – 13.

⁵³ Kotiswaran 2014, p. 357.

⁵⁴ Gallagher 2010, p. 12 – 13.

⁵⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime. UNGA Res. 55/25, Nov. 15, 2000.

against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearm Trafficking Protocol)⁵⁶. As the name suggests, the Convention is focused on transnational organised crime and its purpose is laid out in Article 1: “The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.”

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, was adopted by the General Assembly in 2000 and entered into force three years later in December 2003. According to the article 5(1), all the States party to the Protocol are required to adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in the definitional article 3. The Trafficking Protocol is widely ratified; as of August 2020 there are 178 parties to it.⁵⁷ It has laid the base for the current recognition and regulation of human trafficking in most parts of the world. All relevant UN organs and agencies, as well as a lot of intergovernmental and nongovernmental organizations working on this issue, have adopted the Trafficking Protocol’s definition of trafficking, or the core elements of its definition.⁵⁸

The purpose of the Trafficking Protocol has been laid out in the article 2:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.

These purposes work as a good frame of reference and as a starting point for interpretation and reading of the Protocol, especially later, when I will be looking at the relationship the Protocol has to migration. As has been noted, especially as a basis for victims’ human rights, this seems to be passively stated and does not form a strong obligation for the States. This seems to indicate that the strongest aim for the States is to prevent and combat trafficking from criminal law perspective.⁵⁹

Trafficking Protocol sets out the definition for trafficking in human beings in article 3 (a):

⁵⁶ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime. UNGA Res. 55/255, May 31, 2001.

⁵⁷ United Nations Treaty Collection. Status of Treaties. Trafficking Protocol, accessed 6.8.2020.

⁵⁸ Gallagher 2010, p. 42.

⁵⁹ Shin 2018, p. 19 – 20.

Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition of human trafficking consists of three elements, which can be separated from it. These elements form the *actus reus* and *mens rea* of trafficking.⁶⁰ All of the three elements have to be present in a situation for it to be recognised as trafficking in persons, and for the Trafficking Protocol and the Organized Crime Convention to become operational.⁶¹ These elements are action, means and purpose.

The first element describes an action or act, which has to take place: recruitment, transportation, transfer, harbouring or receipt of persons. The action element is one part of the *actus reus* of trafficking. The practices mentioned have not been defined in the Trafficking Protocol or in a clear way in the related material by the UNODC. The list is not exhaustive, and this element could also be fulfilled by different acts, which have not been mentioned in the definition. An action could be neutral alone, but it can fulfil the action element if the act is also combined with means and/or intention to exploit.⁶² Overall, trafficking is a process, and all of the acts do not have to be performed by one person for them to be guilty of trafficking. A person could only be part of the trafficking process as a harbourer and they would still be guilty of trafficking. No one has to be involved through the whole process of trafficking from the country of origin to the destination country.⁶³ I will examine this element, definitions these practices might have and their relation to migration more closely in chapter 3.

The second element describes the means used to secure the action in the first element, and it is the second part of the *actus reus* of trafficking. These means are

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 (art. 3 (a)).

The element is only relevant in consideration of adults. The means element shows that there are indirect and direct methods, which can fulfil this element. Indirect methods are deception,

⁶⁰ For a crime to have happened, usually there has to be two components: an act, *actus reus*, and a mind, *mens rea*. *Actus reus* refers to the act and *mens rea* to the criminal intent and mindset. Criminal culpability comes when these two components are together in a situation. Nemeth 2012, p. 83 – 84.

⁶¹ Gallagher 2010, p. 29.

⁶² Gallagher 2010, p. 29 – 30.

⁶³ Piotrowicz – Redpath-Cross 2012, p. 238.

fraud and abuse of power etc., and direct methods are brute force by, for example, abduction. Most of the means included in the element are overlapping with one another in real situations, and their meanings can be seen as self-evident. But some, such as coercion and deception and fraud, have had their meaning assessed. Deception and fraud are examples of less direct means, and this usually means that the victim has been deceived about the work they will be doing and/or the conditions of it.⁶⁴

The third element is related to the purpose of the action for which the means are used:

exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (art. 3 (a)).

This element describes the mens rea of trafficking: the purpose and the intent is to exploit the person or persons being trafficked. UNODC has stated that this element in trafficking is a crime of specific or special intent, *dolus specialis*, which can be defined as “the purpose aimed by the perpetrator when committing the material acts of the offence”.⁶⁵ For this element to be fulfilled, it does not require that the intended exploitation will actually take place or the aim to be achieved, but rather, that the intent to exploit was present. This means that trafficking can occur without any exploitation actually taking place.⁶⁶ Furthermore, the element relates back to the first one in a way that anyone involved in any of the acts in the action element with an intention to exploit can be a trafficker, be they a harbourer, a final exploiter or recruiter.⁶⁷

The acts of exploitation listed are only examples, and the list is not meant to be an exhaustive one. Of all the detected trafficking victims, it has been concluded that sexual exploitation and forced labour are the forms of exploitation that trafficking victims encounter most often. These different forms do not of course rule each other out, and a victim could be, for example, exploited for forced labour as well as sexually. And as the list is not exhaustive, other forms of exploitation can be considered to be under the definition, as long as the other elements of trafficking are present. So action and means as defined have to be also present in a situation with the exploitation.⁶⁸ Trafficking can also include for example forced begging, forced marriage, forcing to produce pornography etc.⁶⁹

⁶⁴ Gallagher 2010, p. 31.

⁶⁵ UNODC 2009, p. 5.

⁶⁶ UNODC 2004, p. 268 – 269, para. 33.

⁶⁷ Gallagher 2010, p. 34.

⁶⁸ Piotrowicz – Redpath-Cross 2012, p. 238.

⁶⁹ UNODC 2016, p. 1.

It is also important to note, that the purpose of the definition in the Trafficking Protocol is “to provide a level of consistency and consensus around the world” on the subject.⁷⁰ The definition is meant to be included in the domestic laws of the States, but they do not have to necessarily follow the precise language of the Protocol. Domestic legislation is meant to be adapted in accordance with domestic legal systems and through that give effect to the meaning and concepts that are laid out in the Trafficking Protocol.⁷¹ I will also note here, that the Trafficking Protocol is meant to be operational in situations in which there is both transnational element and involvement of an organized criminal group involved (Art 4), but I will not be considering these, since I am looking at specifically the definition in Article 3 (a), since it is the definition that States are interpreting and adapting to their own systems.

The Trafficking Protocol has lots of merits, for example, unlike the treaties before, the Trafficking Protocol was written to be genderless, even if women and children are emphasised as the two groups that should be most protected by its efforts. The Protocol was also the first time a generally agreed upon definition of trafficking was provided in international law, despite the inclusion of trafficking in different treaties before that. This definition has been stated to have the merit of forging a common vision of trafficking between different States after a history of differences in opinion on what trafficking consists of. The definition can be considered to be one of the main achievements of the Trafficking Protocol and the Trafficking Protocol itself has formed to be a breakthrough in fighting trafficking on international level.⁷²

However, the Protocol has also been criticised for various reasons, mainly for its focus on criminal investigation and prosecution over protection of victims. It has also been criticised for not taking into account the actual root causes behind trafficking, but only superficially mentioning them.⁷³ The Protocol is an instrument of transnational criminal law, rather than human rights, and the point is for the State Parties to adopt legislation and other measures to establish trafficking as a criminal offence. The Protocol does offer provisions on protection and support of the victims of trafficking in Article 6, 7 and 8, but the language regarding the protection of victims is mostly weak and merely suggestions, such as “in appropriate cases and to the extent possible under domestic law” and “shall consider”. Furthermore, even if it

⁷⁰ UNODC 2009, p. 2.

⁷¹ UNODC 2009, p. 2 – 3.

⁷² Gallagher 2015, p. 14 – 16.

⁷³ See for example Todres 2011.

has been stated “the definition was also critical in forging a common vision between States”⁷⁴, I do think that this has been on a surface level and will argue later in chapter 3 and specifically 4 that the definition leaves a lot to be interpreted, which does not necessarily forge a common vision of the definition of trafficking and leaves it to be influenced by different ideologies and goals.

2.2 The Relevant International Legal Framework for Migration

Migration, like trafficking, is not a new phenomenon, and similarly to trafficking, globalisation has had an effect on it, and the current wave of migration seems to be, at least partly, driven by the demand for cheap labour.⁷⁵ Overall, migration has increased within and across State borders since the nineteenth century as a result of a trend of urbanisation. This trend seems rather natural, as work opportunities now concentrate to towns and cities, and people follow after them. Furthermore, when there are no local work opportunities, people will start looking for these opportunities from the international markets. This trend has also increased the need for international framework for migration management in different aspects related to migration.⁷⁶

The current legal framework for migration is even more complex and fragmented than the one concerning human trafficking. There are both national and international instruments governing and managing migration, which creates a more fragmented framework. Furthermore, the policy interests vary widely from State to State depending on their current migration needs and history regarding migration and foreigners. Overall, what makes the framework fragmented, is that there is not a one specialised international migration treaty, which would include all the key principles and terms, neither is there a one global migration institution, which would monitor that States comply with and enforce the international migration law. To illustrate further, in a compilation of international migration law instruments, over 120 separate treaties, declarations, principles and guidelines could be identified.⁷⁷ Subsequently, international migration law is “an umbrella term for the complex web of legal relationships among persons, groups and States that together regulate the movement of individuals”.⁷⁸

⁷⁴ Gallagher 2015, p. 16.

⁷⁵ Kapur 2010, p. 27 – 28.

⁷⁶ Bedford 2012, p. 19.

⁷⁷ Opeskin – Perruchoud – Redpath-Cross/Foundations of International Migration Law 2012, p. xi.

⁷⁸ Perruchoud – Tömölová 2007, p. v.

From this, it would seem to be clear that the problems of international migration framework are not, at least, because of a lack of instruments available. But rather, this confusing framework seems to have resulted in confusing legal situations for migration and migrants. For example, Haynes has argued that while migration as an action is very visible, it is still pushed to the private sphere by states. A migrant can view the action as simply migration, but from the perspective of the destination country, migration can be perceived as “legal and permanent (immigration), legal and temporary (visiting or working without hope or opportunity to permanently remain), or illegal (entering or remaining without permission)”.⁷⁹ I will later argue that this diminishing of migrants’ visibility has also affected the destination countries’ will to include migration in interpretations of trafficking in a way that would make migrants’ legal standing stronger, and that this might even be the goal.⁸⁰ Overall, it would seem that the unclear relation these different migration instruments have with other international instruments, such as the Trafficking Protocol and its interpretations cause confusion. These confusing situations and differences of interpretations influence the way migrants and migration are treated by, for example, law enforcement officials, judges and immigration personnel.⁸¹

One of the essential aspects of a sovereign State can be seen to be the State’s control of its national borders. As it is, this is one of the reasons that migration is seen as a complex issue, highly charged and contested, especially in States, which are regarded as destination States. Migration has been lifted in national political debates: migration and migrants are seen and painted as a threat for national security and national identity, or even as causes of economic uncertainty. These types of political debates have developed into legal framework, which does not necessarily consider migrants’ human rights as much as they should.⁸² There is also confusion here: globalisation has opened free movement of capital, but movement of people, specifically flow of labour, has not been opened. Instead, labour migration has met with restraints and restrictions. Not only is there aforementioned concern for erosion of national identity and losing the sovereign state, but also there is a panic of terrorism, which also has lead to anti-migration policies and stricter border controls.⁸³ All of these can also be seen

⁷⁹ Haynes 2009, p. 72.

⁸⁰ See this discussion in chapters 4.1 and 4.2.

⁸¹ Haynes 2009, p. 72. Haynes notes specifically that people may have difficulties with differences of trafficking and smuggling, as well as, how terms such as “consent” and “coercion” may have cultural differences in understanding.

⁸² ICJ 2014, p. 36.

⁸³ Kapur 2010, p. 28.

mirrored with the way trafficking has met with confusion in States' approaches to it, which I will comment on in 2.3.

It must also be said that viewing of migration as a purely international matter is misleading and does not correlate with the way internal migration and migrants can come across the same issues that occur in international migration. For example, Kapur has written and argued that state-centric account of migration is not the reality of migration experience. She has argued that migration is not necessarily just about physical movement or the regulation of the movement, but that the subject of migration is also connected to a person occupying a subaltern position.⁸⁴ She has written specifically how this manifests in India. It is also connected to the perceived national identity, which consist of people following for example sexual, familial and cultural norms. This can differentiate between insiders and outsiders, inclusion and exclusion.⁸⁵ Another example can be taken from China and its internal system of migration, which Haynes compares to the way a lot of Western countries treat the migration of non-citizen. According to this, in China a lot of migrant labourers are moving from rural areas to urban areas. They are registered as residents of their birth community, and the benefit are attach to that place. If they migrate from their birth community elsewhere to work, they will not receive labour protection, because they are basically invisible as they work and exist in the private sphere. This makes the exploitation of internal migrants easy in similar way to exploitation of international migrants.⁸⁶

Furthermore, Haynes has argued that in general certain sectors of most economies are permitted to operate as a grey market economy, as long as not too much attention is called to it, nor too many rights are violated in a too visible way, and if this continues to benefit the economy.⁸⁷ This reflects to the way migrants are treated, but can also explain how trafficking situations grow from allowing economies grow on the back of underpaid or non-paid labourers, who remain invisible and without protection. Overall, I will later argue that this is what is one the bigger reasons why migration is excluded from interpretations of the definition of trafficking, while still keeping them tied in an implicit way that allows States to not make changes to overall migrant labour rights.

⁸⁴ Kapur 2010, p. 3 – 4.

⁸⁵ Kapur 2010, p. 39 – 56.

⁸⁶ Haynes 2009, p. 64.

⁸⁷ Haynes 2009, p. 65.

In this thesis, I am using International Organization for Migration's (IOM) definition of migration when I argue in the next chapter that migration can be interpreted to be part of the definition of trafficking. I am using the IOM's definition since IOM is a UN related organisation (a specialised agency), and UN refers to IOM's definition of migrants on their website page on migration.⁸⁸ Furthermore, IOM's definition, as seen below, seems to offer wide and generally applicable definition, and there is no other universally accepted definition of migrant or migration.⁸⁹ I will also note here that all through this thesis I will be using both migration and movement to mean migration interchangeably.

International Organization for Migration has defined migration as

The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.⁹⁰

The current IOM definition of migration is

The movement of persons away from their place of usual residence, either across an international border or within a State.⁹¹

IOM has made some changes to its definition of migration, but these changes in the definition seem to be with the goal of making the definition of migration internally consistent with the definition of migrant.

IOM defines migrant as

any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.⁹²

All of these definitions seem to be quite wide and vague. There seem to be no requirements for length of time or movement for something to be considered migration. Therefore, it is difficult to assess, which types of movements the definition even excludes from migration. The newer definition might be more limited with a person moving "away from their place of usual residence", but IOM does not have a definition for it, so even this meaning is left for

⁸⁸ UN Global Issues: Migration, accessed 1.5.2020.

⁸⁹ UNODC 2016 p. 16 – 17, note 12; IOM Key Migration Terms. Migrant, accessed 27.6.2020.

⁹⁰ IOM Key Migration Terms. Migration, accessed 4.11.2018. World Health Organization (WHO) still has this definition on their website's list of definitions. WHO Refugee and Migrant health. Definitions, accessed 17.9.2020.

⁹¹ IOM Key Migration Terms. Migration, accessed 27.6.2020.

⁹² IOM Key Migration Terms. Migrant, accessed 27.6.2020.

interpretation. IOM's other definitions, such as migrants, also includes movement for any purpose and for any length of time.

However, it is clear from the definition that, similarly to trafficking, both transnational and internal movement are included in the definition of migration. These terms are quite clear: transnational migration refers to migration that crosses State borders and internal migration is migration that takes place within State borders. These two movements have vast differences in the way they are treated in the legal migration framework. They are very distinct from the perspective of global governance and politics, since the internal migration is under the domestic politics and States have the sovereign power to make the policies concerning it.⁹³

Similarly, it seems that the definition includes all forms of migration, whether it would be categorised irregular, regular, voluntary and/or involuntary. Voluntary and involuntary forms of migration are simply defined migration, which has been undergone voluntarily or involuntarily. While some people choose to migrate for example to study or for job opportunities, there are also migrants who are forced to migrate because of different reasons such as poverty, discrimination, violence, political upheaval or poor governance.⁹⁴ Regular migration is a term used to describe migration, which occurs in compliance with the laws of the country of origin, transit and destination, while irregular migration is movement, which occurs outside these laws.⁹⁵ Regular migration flows include, for example, labour migration, family reunion and humanitarian migration. Irregular flows include, for example, voluntary undocumented movement across international borders and people smuggling.⁹⁶

As has been noted by Piper and Satterthwaite, there is generally a gap between theory and practice, when it comes to human rights and rights of migrants, and States, especially destination States, are hesitant to ratify international conventions made to protect these rights because of a lack of political will.⁹⁷ Existing international treaties that protect migrant work and migrants are poorly ratified, and also unevenly ratified, with only few destination countries having ratified them.⁹⁸ For example, International Convention on the Protection of

⁹³ Betts 2011, p. 9.

⁹⁴ UNGA Human rights of migrants. UN Doc. A/69/302 Aug. 11 2014, p. 5, para 16.

⁹⁵ IOM Key Migration Terms. Irregular migration, Regular migration, accessed 1.6.2021.

⁹⁶ Bedford 2012, p. 20.

⁹⁷ Piper – Satterthwaite 2007, p. 253.

⁹⁸ Ramji-Nogales 2017, p. 627 – 628; Cholewinski 2007, p. 255 – 271.

the Rights of All Migrant Workers and Members of Their Families⁹⁹ seeks to protect all migrants workers' basic human rights, but none of the major receiving countries have adopted it, so it does not do all that much.¹⁰⁰ There is also a difference in how refugees and economic migrants are handled in the international law and how widely conventions considering them are ratified. Economic migrants, who are seeking to improve their lives, are defined as opposite to refugees, and not worthy of lawful entry to country or protection.¹⁰¹ I will later hope to show that this dynamic of destination States lack of political will with migrants protection, can also be a reason for the confusion relationship of de-emphasis of migration in interpretations of the definition, but on the other hand emphasis on the border control and anti-migration in anti-trafficking measures.

While the international migration framework includes a lot of different instruments, its effectiveness has been criticised. Ramji-Nogales has even suggested that international migration law is actually one of the causes for migration problems and the international migration law have outdated solutions for modern problems. In addition, these written instruments are nearly impossible to change.¹⁰² Beyond that, she has criticised the migration framework on its failure to establish mechanism that could help people move across borders in safe and orderly way. She argues that there are instruments that protect migrants, but these instruments do not offer a safe passage or entry for migrants fleeing for violence or poverty, which leads to migration crises. A majority of migrants and migration routes are still barely governed by international law, especially if compared to, for example, migration of goods.¹⁰³

Transnational criminal law has importance to international migration framework by providing a binding legal framework. However, it does have a limited approach: Ramji-Nogales describes the transnational criminal law as “carceral and exclusionary”.¹⁰⁴ From the perspective of migration, Organized Crime Convention, the Smuggling Protocol and the Trafficking Protocol seem to work to prohibit certain behaviour connected to the movement of people. However, the criminal law framework has benefits. It has been widely adopted by different States, and it is somewhat detailed when compared to a lot other international legal

⁹⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. UNGA Res. 45/158, 18 Dec. 1990.

¹⁰⁰ Ramji-Nogales 2017, p. 627 – 628.

¹⁰¹ Ramji-Nogales 2017, p. 633.

¹⁰² Ramji-Nogales 2017, p. 612.

¹⁰³ Ramji-Nogales 2017, p. 626 – 627.

¹⁰⁴ Ramji-Nogales 2017, p. 631

instruments. But on the other hand, it does only address a limited area of issues from the view of migration – the main focus is to criminalise specific forms of movement.¹⁰⁵

As this chapter shows, migration is legally a messy and complex concept. Overall, migration might not necessarily be a clear event, or a single event in lifetime, which can be easily isolated. The different kind of ways movement takes place: irregular, regular, voluntary, involuntary, etc., further complicate things. These might overlap with each other, and not all of them can necessarily be identified cleanly when applied to real life situations. In addition, the given definitions are vague. Therefore, the clearer definitions around the terms such as short-term, long-term, short-distance and long-distance movements will depend on a specific definition given in specific analysis and statistics.¹⁰⁶ In reality, it would not probably be realistic to equate all movement of a person with migration, but this also tells that there is a need for States to have some kind of unified starting point for States to look at, at least international migration and instruments, such as the Trafficking Protocol.

2.3 Migration-Trafficking Nexus and the Conflicting Interpretations

In this chapter I will discuss the links between migration and trafficking, the migration-trafficking nexus, as they are most commonly accepted and understood. Most of it is more specifically in relation to transnational trafficking and migration, as it is generally how migration-trafficking nexus is regarded¹⁰⁷, but a lot of these links could also be extended to situations of domestic movement. This chapter is not an exhaustive look on the migration-trafficking nexus, but rather works to demonstrate the nexus by looking at some prominent examples of these links. First, I will look at the globalisation and push and pull migration, then at migration control and its relation to trafficking, then at connection between migrant smuggling and trafficking, and the special vulnerability migrants have in the context of trafficking. Lastly, I will illustrate the contradictory way migration-trafficking nexus is regarded and interpreted by de-emphasising movement's role in the definition of trafficking.

It must be said that overall trafficking is a complex crime, which is driven by a range of factors and not all of them are related to migration. However, there are prominent connecting

¹⁰⁵ Ramji-Nogales 2017, p. 631.

¹⁰⁶ Bedford 2012, p. 17 – 18.

¹⁰⁷ See for example Zalewski 2005, p. 120 – 129; Kaye 2003; UNODC 2016, p. 57 – 63; Global Alliance Against Traffic in Women 2010.

factors between trafficking and migration.¹⁰⁸ One of the clear factors connecting trafficking into the bigger phenomenon of migration is that there are similar driving forces behind both migration and trafficking. Globalisation has especially had effects on both trafficking and migration by widening the wealth gap within different communities in countries and between different countries. This dynamic affects the concept of push and pull migration: there are push factors, such as, the lack of economic opportunities in migrants' hometowns or home countries, and they are intensified by the pull factors. The most notable pull factor is the increasing demand for cheap goods and services in wealthier countries, which creates work opportunities for migrants who have little to no job opportunities in their place of residence. This does not even necessarily mean wealthier countries, but wealthier areas of a country, where there are jobs. This global supply and demand dynamic fuels a lot of migration, and also trafficking.¹⁰⁹ It has even been argued that trafficking is ultimately driven by consumers' demand for commercial sex and desire for cheap goods and services.¹¹⁰

UNODC has demonstrated this global supply and demand by showing the connection between both regular migration and trafficking flows, especially in its 2016 Global Report on Trafficking in Persons. This research observes that there are similarities between trafficking flows and regular migration flows, as well as vulnerabilities certain migrant flows have to trafficking.¹¹¹ UNODC has found that the citizenships of the detected victims in a country broadly correlate with the regular migrants during the same periods of time. For example, overall in Europe and in the US, the detected trafficking victims reflected the newly arrived migrant groups. Furthermore, trafficking flows generally go from areas of lower economic activity to economically attractive areas.¹¹² However, while the detected trafficking flows tend to mirror the broader migration flows, UNODC has also observed that there are noticeable exceptions to this pattern.¹¹³ From this, UNODC has drawn a conclusion that there are factors other than regular migration that have an impact on trafficking flows.¹¹⁴

In UNODC's 2018 report, the data showed that most trafficking victims are detected in their countries of citizenship, and that detection of domestic trafficking victims has increased over

¹⁰⁸ UNODC 2016, p. 13.

¹⁰⁹ Chuang 2006a, p. 138 – 147.

¹¹⁰ Todres 2011, p. 61.

¹¹¹ UNODC 2016, p. 57 – 63.

¹¹² UNODC 2016, p. 57 – 58.

¹¹³ UNODC notes that for example in Western and Southern European destination countries the regular migration flows do not correlate with the detected victims. Similar situations were found in the United States as well as Argentina. UNODC 2016, p. 59.

¹¹⁴ UNODC 2016, p. 59.

the last 15 years.¹¹⁵ This, as UNODC notes, could be because of there might be increasing in the awareness of domestic victims among the relevant authorities.¹¹⁶ In 2020 report, UNODC focused more on domestic trafficking flows, and reports, in relation to court cases, that a lot of victims are exploited at a close proximity to where they were recruited, for example in nearby motels or bars. But other cases also follow the pattern of general internal migration from poorer to richer areas, and for example to tourist areas and other areas of more economic activity.¹¹⁷ UNODC has also noted that in more affluent countries the share of foreigners among detected victims is much higher compared to the developing countries.¹¹⁸ This might indicate the actual share of foreigners among the victims of trafficking in these countries, but this could also be a result of national authorities being influenced by preconceived notions of what a victim of trafficking looks like, which leads to profiling of non-citizens as victims and perpetrators.

It has been noted that a particular characteristic of globalisation is that international trade has become easier and more unrestricted, but movement of people does not have the same freedom.¹¹⁹ This contradiction is illustrated by restrictive migration control measures and their connection to trafficking, which shows that trafficking is strongly connected to the migration framework. Restrictive migration control refers mostly to the control measures over the transnational migration to and from countries. States have a sovereign right to control and determine who can cross its national border, but of course international instruments, such as the Smuggling Protocol and the Trafficking Protocol, aim to manage migration between destination and origin country, as it relates to smuggling or trafficking.¹²⁰

However, restrictive measures do not actually prevent or limit irregular migration, but migrants, who cannot use regular channels, will turn to irregular migration channels to enter and stay in a country. Consequently, restrictive measures fuel the need for smugglers and give opportunities for traffickers to take advantage of migrants. Furthermore, smuggled migrants, who have not fallen into the hands of traffickers, but reside illegally in a country, are very vulnerable to exploitation and trafficking later.¹²¹ These current immigration and labour policies, driven by destination countries, make migrant workers vulnerable to abuse by their

¹¹⁵ In comparison, in the 2016 report approximately 60 per cent of the detected victims are foreigners in the country of detection. UNODC 2016, p. 57.

¹¹⁶ UNODC 2018, p. 9 and 41.

¹¹⁷ UNODC 2020, p. 56 – 57.

¹¹⁸ UNODC 2018, p. 9; UNODC 2016, p. 57.

¹¹⁹ Dottridge 2004, p. 28.

¹²⁰ Weatherburn et al, 2015, p. 42.

¹²¹ Weatherburn et al, 2015, p. 43.

recruiters, transporters, and employers.¹²² There is tension, as employers want to increase profit by looking for vulnerable employees to keep labour costs and rights low. They create the demand for specifically migrant workers. But contrarily to this, the destination countries implement strict border control and migration laws to protect the local workers' jobs.¹²³ International Labour Organization (ILO) has even stated that human trafficking is nothing but “an opportunistic response” to the tension created from the economic need for some to migrate and politically motivated restrictions on migration denying easy ways to migrate.¹²⁴

Chuang has even gone as far as saying that trafficking is mostly “labor migration gone terrible wrong in our globalized economy”.¹²⁵ This in basics means that a lot of migrants, who end up being trafficked, were trying to migrate for job opportunities. This contextualises trafficking specifically as part of economic and labour migration. She also states that trafficking lies in the emigration continuum where the migration is for survival as opposed to opportunity-seeking migration.¹²⁶ Migrants are moving for their own need for survival, but they are also fulfilling a critical role in the global economy and the demand for labour that domestic workers do not, in the more dangerous and low-wage sectors.¹²⁷ This shows in the way that trafficking victims are often poor and unskilled migrant workers, more specially migrant women.¹²⁸ Because of this, there seems to be no denying that it is easy to correlate migration as an inherent part of trafficking.

Trafficking and migrant smuggling also have a connection, which makes the seeming connection between migration and trafficking even stronger. The crimes are both part of the UN Transnational Organized Crime Convention and share similarities between the concepts. Overall, it can be said that there is an overlap between victims of trafficking and smuggled migrants.¹²⁹ UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime defined smuggling of migrants in Article 3 (a):

“Smuggling of migrants” shall mean procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

¹²² Chacon 2006, p. 3039.

¹²³ Shamir 2012, p. 83.

¹²⁴ ILO 2005, p. 46.

¹²⁵ Chuang 2006a, p. 138.

¹²⁶ Chuang 2006a, p. 141.

¹²⁷ Chuang 2006a, p. 143.

¹²⁸ Gallagher 2010, p. 100.

¹²⁹ UNODC 2016, p. 17.

In theory, it is easy to differentiate trafficking and migrant smuggling. Contrary to trafficking, which can involve movement either within a State or across State borders, and legally or illegally, migrant smuggling always involves crossing of State borders illegally. Furthermore, smuggling does not end in exploitation, at least not in the level meant in the Trafficking Protocol.¹³⁰

However, there is significant overlap between the migrant smuggling and trafficking, especially trafficking and aggravated smuggling. The legal distinction between the two is more of an artificial one, as it does not reflect the reality of these two closely related complex phenomena.¹³¹ Smuggled migrants and trafficking victims share a lot of the same vulnerabilities, for example, both often gather large debts from the migration process, if they have to rely on smugglers, making them vulnerable to exploitation and trafficking.¹³² The crimes have also been tied, at least, in their recent history: when the protocols were created, there were suggestions that the crimes would be combined as an offence of “illegal trafficking and transport of migrants”.¹³³

Lastly, while all of these aforementioned concepts add and connect to vulnerability of migrants, certain factors specifically seem to make an individual or a group more vulnerable to trafficking and overall in the context of trafficking. Especially migrants are vulnerable once they are caught in a trafficking network; their travel documents are often taken away from them, which makes escaping difficult. Migrants are also vulnerable because of language and social barriers. They may also be afraid of seeking help in fear of the police and criminal prosecution.¹³⁴

But even before being trafficked, those, who seek better economic opportunities at home or abroad, are vulnerable to exploitation and trafficking.¹³⁵ Europol has also noted that globalisation has made some people more vulnerable to trafficking: freedom of movement, lowered travel costs and ease of travel, as well as more job opportunities overseas make it easier for traffickers to recruit persons, who might not otherwise be thought of as

¹³⁰ Gallagher 2010, p. 92.

¹³¹ Gallagher 2010, p. 51 – 52.

¹³² Shamir 2012, p. 111.

¹³³ UNODC Travaux Préparatoires GA, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants. U.N. Doc A/AC.254/4/Add.1 Dec 15, 1998.

¹³⁴ UNDP 2009, p. 66.

¹³⁵ Todres 2011, p. 58 – 59.

vulnerable.¹³⁶ A person's socio-economic status and their ability to get work in their country of citizenship are important when considering a person's vulnerability. These are factors that may increase migration, but in particular, it has been noted that poor, "unskilled" or low-skilled women are willing to work in dangerous and difficult jobs, even in informal sectors (or illegal jobs), which are rejected by domestic workers in wealthier countries or areas, and are also more often subjected to exploitation.¹³⁷

Dottridge has in his research come up with common factors, which increase a person's vulnerability to trafficking.¹³⁸ He identifies that the main reason people from particular communities end up being trafficked is because there are no other ways for them or their family to earn a living. Rather than only poverty, the lack of economic stability or a shortage of jobs make people vulnerable. Furthermore, pre-existing inequalities in many countries marginalise certain communities and these communities are more at risk of exploitation, which he ties to discrimination. Although, he notes that it is difficult to assess whether a person has been trafficked because they belong to a particular community or because they are poor, but concludes that the discrimination and marginalisation also keep these communities poor. There are also several other factors, which he states to make a person vulnerable to trafficking, which are tied to wishes to migrate. For example, he identifies lack of education, cultural norms, domestic violence, crises (natural and man-made), ambition and hope.¹³⁹

Now, while this connection is acknowledged and accepted two relevant interpretations have excluded movement from their interpretations of the definition of trafficking. First of all, the US, which has generally influence in policies regarding trafficking, has argued that movement is not part of the definition.¹⁴⁰ It seems also clear that the US wants to be seen as the leading figure in the fight against trafficking, as they have published TIP Reports for twenty years, which look into the world's situation with trafficking and comments on other governments

¹³⁶ Europol 2009, p. 3.

¹³⁷ Chuang 2006a, p. 145.

¹³⁸ His research has been done with children in mind, but he equates these vulnerabilities to concern adults as well. Dottridge 2004, p. 28.

¹³⁹ Dottridge 2004, p. 28 – 31. See also Draft resolution submitted by the President of the General Assembly United Nations Global Plan of Action against Trafficking in Persons 2010, p. 6, point 12. This has identified a lot of the same vulnerabilities: "poverty, unemployment, inequality, humanitarian emergencies including armed conflict and natural disasters, sexual violence, gender discrimination, social exclusion and marginalization as well as culture of tolerance towards violence against women, youth and children".

¹⁴⁰ Baird 2020, p. 175 – 177; Chuang 2006b; Chuang 2014, p. 620.

efforts for fighting trafficking.¹⁴¹ It has written that the TIP Report is “a critical tool in bringing governments to the table and encouraging them to prioritize human trafficking”.¹⁴²

It can be detected from the reports that the US has overall acknowledged the connection migration and trafficking, as well as trafficking as a global problem.¹⁴³ However, TIP Office has de-emphasised the role of movement in the definition of trafficking. TIP Office has used emphasis and interpretation to increase the importance of exploitation at the cost of decreasing the importance of movement in the definition.¹⁴⁴ Furthermore, in the TIP Reports, TIP Office has communicated that the US does not regard movement to be part of the definition of trafficking.¹⁴⁵ The same has been communicated through the US Department of State’s website explaining key principles and concepts of trafficking:

Neither U.S. law nor international law requires that a trafficker or victim move across a border for a human trafficking offense to take place. Trafficking in persons is a crime of exploitation and coercion, and not movement. Traffickers can use schemes that take victims hundreds of miles away from their homes, or exploit them in the same neighborhoods where they were born.¹⁴⁶

Furthermore, in the TIP Reports, the importance of migration to the whole context of trafficking seems to be de-emphasised. For example, in 2016 report, vulnerable people are discussed, but this does not connect to migrants as a whole. Rather fleeing from crisis and statelessness are the only factors mentioned in connection to migration.¹⁴⁷

There are other destination countries, which might include movement explicitly in their definition, such as Australia.¹⁴⁸ But what makes the US different is that it offers authoritatively interpretations of the international law, the Trafficking Protocol. The US seems to act as the authority to interpret the Protocol and uses its economic and political influence to make other countries follow this interpretation.¹⁴⁹ Overall, the US seems to regard itself as the self-declared leader in the fight against trafficking.¹⁵⁰

¹⁴¹ TIP Office 2020, see especially p. 2 – 17. The text describes the history of the TIP Reports. p. 63 – 546 describe different countries situation with trafficking by ranking them by three-tier system.

¹⁴² TIP Office 2020, p. 3.

¹⁴³ See for example TIP Office 2016, p. 16 – 19.

¹⁴⁴ Chuang 2014, p. 619 – 622.

¹⁴⁵ TIP Office 2006, p. 6 and 10.

¹⁴⁶ US Department of State Fact Sheets - Office to Monitor and Combat Trafficking in Persons. Understanding Human Trafficking, accessed 13.5.2021.

¹⁴⁷ TIP Office 2016, p. 8, 20 – 23.

¹⁴⁸ See Division 270 and 271 of the Australia’s Commonwealth Criminal Code Act 1995, in which Australia's slavery, slavery-like and human trafficking offences are set out. Trafficking includes only acts related to movement.

¹⁴⁹ Chuang 2006b, especially p. 452 – 493; TIP Office 2020, p. 12. The US will not give foreign assistance that is non-humanitarian and nontrade-related to any government, which fail to follow its minimum standards.

¹⁵⁰ See TIP Office 2017 and 2018, Secretary of State’s foreword.

Moreover, similarly to the US, UNODC has mentioned in its Trafficking Report, that while there is a clear connection of trafficking and the migration phenomenon, movement is not a requirement in the definition of trafficking.¹⁵¹ However, UNODC seems to make a strong connection to trafficking victims as migrants in its report. The report describes even in the same page that the trafficking victims' stories often "start as brave attempts to improve their life" and directly connects this to other migration experiences.¹⁵² This seems to indicate that UNODC regards trafficking as connected to the migration framework, even if migration is not technically part of the definition. Most of these UNODC's noted links between migration and trafficking also happen in the area of transnational migration.¹⁵³ This does not of course correlate with the fact that according to UNODC's data, over half of trafficking happens within States.¹⁵⁴ There are of course explanations, such UNODC is a global organisation and it has transnational focus, but it does also indicate that UNODC has had an emphasis on transnational aspect of trafficking.¹⁵⁵

In conclusion, there is support for the concept of migration-trafficking nexus. Trafficking's connection to the larger phenomenon of migration is rather well established, but there is not a similar support for movement to be included in the definition of trafficking, at least in the dominant interpretations. Therefore, it seems that trafficking is only connected to the larger framework of migration, without the connection going the other way around, at least, not in a similar sense. This seems not only confusing and unbalanced, but could also lead to States connecting trafficking one-sidedly to irregular migration. For example, Gallagher has stated that the origins of the Protocol are in an attempt by the States to control their own borders from a particularly exploitative form of migration.¹⁵⁶ This seems to have overall set the tone for destination countries to see the definition of trafficking through the lens of migration control, rather than looking at migrants' rights and balance in the measures, and I will argue in chapter 4 that this could be behind the interpretations of the definition of trafficking. But first, I will in the next chapter argue that it is possible to interpret migration to be part of the trafficking definition in a more comprehensive way than the current dominant interpretations claim.

¹⁵¹ UNODC 2016, p. 13.

¹⁵² UNODC 2016, p. 13.

¹⁵³ UNODC 2016, p. 57 – 63.

¹⁵⁴ UNODC 2018, p. 41. In 2016 58 per cent of the detected victims were trafficked in their own countries.

¹⁵⁵ However, in their recent 2020 report UNODC did briefly note on domestic trafficking. See UNODC 2020, p. 56 – 57.

¹⁵⁶ Gallagher 2015, p. 14.

3 Migration as Part of the UN Trafficking Protocol's Definition of Trafficking

3.1 Migration as part of the Action Element and the Travaux Préparatoires

As I illustrated in 2.3, there are clear links between trafficking and migration, especially connecting trafficking to the bigger phenomenon of migration, even if these links are treated quite one-sidedly. In this chapter, I will look into the Trafficking Protocol's definition and argue that it is just as possible to interpret migration as part of the definition of trafficking, and that this might even be more appropriate interpretation of the definition, contrary to what the US and UNODC have stated.¹⁵⁷ First, I will examine the action element and then specifically the act of harbouring. I will also examine the travaux préparatoires of the Trafficking Protocol to determine the drafters' intentions regarding migration's importance in trafficking. Lastly, I will look at how migration fits into the definition, when examined in the context of the Transnational Organized Crime Convention.

The action element is the part of the definition, which is most connected to migration and movement, as I will show here. The action element includes in the Trafficking Protocol's definition recruitment, transportation, transfer, harbouring and receipt of persons. As I stated in the last chapter, the acts mentioned in the action element have not been defined in the Trafficking Protocol or in its travaux préparatoires. The action element is one part of the *actus reus* of trafficking. It is critical in establishing the scope of the definition of trafficking, but it is also important to remember that the acts mentioned are not meant to be exhaustive list.¹⁵⁸ In addition, as the acts are not defined, it is not that clear what these acts actually contain. Most importantly to this thesis, this element is the biggest reason why the US has claimed that movement and migration is not part of the definition of trafficking.¹⁵⁹

However, despite the US' interpretation, it is also quite common for writers to define the action element as migration or movement, as seen in the following examples.¹⁶⁰ To illustrate,

¹⁵⁷ For the US' and UNODC's statements, see the end of 2.3 and footnotes 144 – 145 and 150.

¹⁵⁸ Gallagher 2010, p. 29 – 30.

¹⁵⁹ Chuang 2014, p. 620. The TIP Office has communicated that harbouring specifically rules out movement as a requirement.

¹⁶⁰ See also for example Global Alliance Against Traffic in Women 2010, p. 4; Shin 2018, p. 25; Rijken 2013, p. 10 – 11.

the first example is from a book on global migration governance and the second is from a practical guide for practitioners in the security sector.¹⁶¹

1) Therefore, the defining elements of trafficking are the activity, the means and the purpose, where: (a) the activity refers to some kind of movement either within or across borders, (b) the activity relates to some form of coercion or deception, and (c) the purpose is the ultimate exploitation of a person for profit or benefit of another.¹⁶²

2) One of the best ways to capture the complexity of trafficking is therefore to think of it as a transactional network. The model contains three parts: 1) Required roles: Elements of trafficking that must be present. Specifically, these are a) recruitment, b) movement and c) exploitation of victims.¹⁶³

The second definition does not seem to fit strictly with the one provided by the Trafficking Protocol, as it does not mention coercion or use of force as one of the elements. However, both interpretations are clearly based on the Trafficking Protocol's definition.¹⁶⁴ But this does demonstrate the confusion about the different elements and the role of migration in the definition of trafficking. Furthermore, these examples demonstrate that there seems to be a common understanding of movement being part of the definition and it is possible to interpret it as such.

The acts in the action element are notably vague, and there are no official definitions offered to explain their contents. In the drafting process, it also seems that the discussions around the definition were the most difficult, so it is probable that the definition was left intentionally vague, so that everyone in the drafting process would be satisfied with the end result.¹⁶⁵ However, the vagueness allows for different interpretations of elements of the definition. It is also one of the reasons why the US has been able to state its interpretation in the way that would benefit it the best, and also pressure other countries to follow its lead. But, this vagueness also allows for the inclusion of migration in the definition of trafficking, even if it is not explicitly stated in it.

There is not any official interpretative material by the UNODC, which would provide guidance on how the acts in the element should be interpreted or applied. The Trafficking

¹⁶¹ Costa 2009, p. 5.

¹⁶² Callaway – Martin 2011, p. 255. This was sourced to IOM Trafficking in Persons: An Analysis of Afghanistan, Geneva 2004. However, I could not find the part where IOM would have used movement to explain the action element of trafficking, so I would assume that this is Martin and Callaway's interpretation, not IOM's. If IOM had made this explanation, it would have even more implications, when considering the influence IOM has.

¹⁶³ Picarelli 2009, p. 128 – 129.

¹⁶⁴ See Costa 2009, p. 5 – 6. The foreword talks about the Protocol and that the guide is done in cooperation with UNODC. Moreover, the way Global Migration Governance (ed. Betts 2011) is built shows that the interpretation is from the Trafficking Protocol's definition.

¹⁶⁵ Gallagher 2001, p. 984 – 986.

Protocol does not have a treaty-monitoring body with powers to resolve the interpretative disputes or to assess individual state compliance with the Protocol's obligations. Instead, the UNODC is responsible for providing technical and legislative guidance for the countries.¹⁶⁶ UNODC's anti-human trafficking manual for criminal justice practitioners leaves the definitions of the acts to be determined by the domestic legal systems, which might already had exact definitions for these acts.¹⁶⁷ However, it only talks about individual acts, not the whole intention behind the element. It seems that the intent is to allow the States to use terms that might already have meaning in their domestic legal systems and languages. Therefore, if the intent behind the element was to include movement, this does not affect that original intent. In addition, the UN Vienna Convention on the Law of Treaties (the Vienna Convention) states that treaties "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose" (art 31 (1)).

But to look at one notable interpretation of the acts, Council of Europe (CoE) and UN have defined the acts in the context of a joint study on organ trafficking. These interpretations seem to support that movement is included in the acts of the actions element, and the action element as a whole. They seem to also interpret them close to their "ordinary meaning" as per article 31 (1) of the Vienna Convention. While these definitions are in the context of trafficking for the purpose of organ removal, they seem to be applicable to the action element for any purpose mentioned in the definition. Moreover, these definitions underline the fluidity and potential breadth of these terms.¹⁶⁸ They are interpreted quite widely and as applicable to a variety of situations.

Recruitment is to be understood in a broad sense, meaning any activity leading from the commitment or engagement of another individual to his or her exploitation. It is not confined to the use of certain means and therefore also includes the use of modern information technologies...

Transportation is also a general term and does not define any particular means or kinds of transportation. The act of transporting a person from one place to another constitutes this element; as in the cases of trafficking in human beings for sexual or labour exploitation, it is not necessary for the victim to have crossed any borders, nor is it necessary for the victim to be present illegally in a state's territory. The offence therefore includes transnational and national trafficking.

The *transfer* of a person includes any kind of handing over or transmission of a person to another person. This is particularly important in certain cultural environments where control

¹⁶⁶ Chuang 2014, p. 616.

¹⁶⁷ UNODC 2009, p. 5.

¹⁶⁸ Gallagher 2010, p. 29 – 30.

over individuals (mostly family members) may be handed over to other people. As the term and the scope of the offence are broad, the explicit or implied offering of a person for transfer is sufficient; the offer does not have to be accepted for the offence of trafficking in human beings to be constituted if the other elements are also present.

The *receipt* of persons is not limited to receiving them at the place where the exploitation takes place either, but also means meeting victims at agreed places on their journey to give them further information on where to go or what to do.¹⁶⁹

Generally, these definitions all seem to connect the acts to movement. Transportation has the clearest and the most unarguable connection to migration. The definition quite clearly and obviously falls under migration. Recruitment, receipt and transfer are also connected to movement in a way that suggest that movement has happened or will happen. In the case of transfer, it could be argued, that the transfer refers to the transfer of control of a person, and not necessarily to physical movement. But even that can be in relation to movement of a person. Furthermore, trafficking does not necessarily constitute from just one of these acts, but can include multiple acts. Although, it must be said that even one of the acts can fulfil the definition, if combined with one of the means for one of the purposes.¹⁷⁰

Now, if we look at the reason the US has excluded movement from their interpretation of the definition in their yearly TIP Reports.¹⁷¹ Chuang has also communicated with the TIP Office personnel¹⁷², who have specifically argued that the harbouring being included in the action element is so that, for example forced labour without movement can be within the scope of the definition of trafficking. Therefore, even if the other acts in the first element involve movement, the act of harbouring removes requirement of movement from the definition.¹⁷³ Because of this, it is important to examine the act of harbouring and its role in the action element.

The *harbouring* of persons means accommodating or housing persons in whatever way, whether during their journey to their final destination or at the place of the exploitation. This, of course, also includes the accommodation of persons in a medical clinic or other place where the illegal removal of organs is conducted – the criminal liability of the individuals involved who use one of the means to exploit the victims.¹⁷⁴

By looking at this definition and comparing it to the other acts in the action element, harbouring seems to be the only component of the action element that does not explicitly

¹⁶⁹ CoE – UN 2009, p. 78.

¹⁷⁰ Piotrowicz – Redpath-Cross 2012, p. 238.

¹⁷¹ See for example TIP Office 2014, p. 9. The report states that a trafficking victim need not be physically transported from one location to another.

¹⁷² Chuang 2014, p. 620, footnote 64, reads “This position has been communicated to the author by TIP Office personnel, including Ambassador CdeBaca on multiple occasions, and confirmed by both TIP Office and Department of Labor personnel as the source of much debate within the U.S. government.”

¹⁷³ Chuang 2014, p. 620.

¹⁷⁴ CoE – UN 2009, p. 78.

involve or does not necessarily relate back to movement. However, harbouring can relate back to migration since trafficking could involve harbouring of a person during migration or after migration.

It is also useful to think about the role of the different acts in the action element and the purpose of their inclusion. Besides describing what trafficking is, they also define the reach and the scope of who can be identified as traffickers.¹⁷⁵ Gallagher has described that trafficking is not just about an individual being moved to a situation of exploitation, but it also includes the maintenance of that person.¹⁷⁶ Therefore, the action element's intent is to bring all the people involved in the trafficking, with the intention to exploit, to being part of the crime. Harbouring brings "owners and managers, supervisors, and controllers of any place of exploitation such as a brothel, farm, boat, factory, medical facility or household" into the reach of who can be identified as traffickers, but they are not necessarily the only ones involved in the crime.¹⁷⁷ Even if it was possible to differentiate between bringing someone into the trafficking situation and maintenance, they are both part of the crime. In conclusion, harbouring can be related back to movement, since someone has been usually moved into a situation in which they are harboured.

There could, of course, be situations in which it is necessary to ignore the element of movement. For example, someone being forced to do sex work from her or his own apartment because of debt bondage would still be probably considered to be trafficking. But, while there might be exceptions to requiring movement to be included in every situation, there are also unintended consequences of de-emphasising the role of movement. Chuang has stated that this could result in the concept she calls "exploitation creep", which refers to trafficking being extended to situations of exploitation with no preceding process, no movement before the exploitation.¹⁷⁸ ILO has particularly used migration to differentiate trafficking from the concepts of forced labour as a whole. While forced labour and trafficking share same elements, forced labour is a much further reaching and wider category.¹⁷⁹ The exclusion of movement would basically be a situation of intergenerational bonded labour, or a work that changes from acceptable to coercively exploitative. In these cases the person has not been trafficked *into* the situation, but can be seen as harboured. However, Gallagher has argued that

¹⁷⁵ Gallagher 2010, p. 30.

¹⁷⁶ Gallagher 2010, p. 47.

¹⁷⁷ Gallagher 2010, p. 29 – 30.

¹⁷⁸ Chuang 2014, see especially p. 610 – 611, 619 – 620.

¹⁷⁹ ILO 2005, p. 46 – 62.

based on the travaux and the otherwise limiting three-part test, that this does not seem to correlate with what the drafters had in mind, even if the definition allows this interpretation.¹⁸⁰ Therefore, excluding movement from the Protocol's definition based solely on harbouring being defined as an act not including movement does not seem appropriate for the purpose of the action element.

Overall, the US' exclusion or de-emphasis of movement because of the act of harbouring seems to be an excuse for driving its own preferred interpretation of the definition, which can be seen in the way the US has set the definition of trafficking in its domestic legislation, the Trafficking Victim Protection Act (TVPA).¹⁸¹ As I have referred before¹⁸², the TVPA excludes the movement from a requirement, so this could just be the US interpreting the Trafficking Protocol to fit and impose its own preferred definition to global stage through the Trafficking Protocol.¹⁸³ Moreover, it has been noted that the TVPA is narrow in its approach to trafficking compared to the Trafficking Protocol.¹⁸⁴ Therefore, it makes no sense for the US to interpret them as the same, and ignore restrictive element inclusion of movement has on the Trafficking Protocol.

Furthermore, the travaux préparatoires reveals some of the drafters' intent on how movement is related to the definition. First of all, the question of transnational movement versus national movement was raised during the negotiations. In the draft negotiations, there are notes on discussion about movement, which was in particular about the question if trafficking includes only transnational movement or also movement within just one State.¹⁸⁵ This has ended up in the Protocol as the scope of the Protocol being limited to transnational movement, but not the definition itself, which also includes situations of movement within one State.¹⁸⁶ This conclusion of the definition being applicable to situations within a State, and the lack of discussion of exclusion of movement from the Protocol's definition seems to indicate that it was actually the drafters' intention to include movement to the definition.

¹⁸⁰ Gallagher 2010, p. 30 – 31.

¹⁸¹ Victims of Trafficking and Violence Protection Act of 2000, 22 USC 7101.

¹⁸² See footnote 146.

¹⁸³ See Gallagher 2010, p. 22 – 23. Gallagher notes that during the Protocol negotiations the US had interest minimising differences between an emerging national definition and the one in the Protocol. Furthermore, in the US, trafficking was seen mostly as problem of sexual trafficking.

¹⁸⁴ Baird 2020, p. 178.

¹⁸⁵ UNODC, Travaux Préparatoires. UN Doc. A/AC.254/4/Add.3/Rev.2 Second Session: 8-12 March 1999, p. 352, footnote 3.

¹⁸⁶ See Trafficking Protocol articles 3 (a) and 4.

Moreover, the travaux reveals that there was concern for migration in the context of trafficking. It is mentioned that a lot the delegations were worried about the Trafficking Protocol supporting illicit migration, if it was obligatory for States to adopt legislation, which would permit the trafficking victims to stay in the country they were trafficked in.¹⁸⁷ Therefore, even if migration is not explicitly mentioned as part of the definition, it is quite clearly implied in these worries that migration is strongly connected to trafficking. These worries might have originally been more related to transnational migration, and not too strongly related to the migration within a country's own borders, but these worries have bled to the overall context of the Protocol and the definition, as I will argue in 3.2.

It has also been argued that the travaux includes several indications that delegates assumed that trafficking entails movement.¹⁸⁸ For example,

...In addition, it was highlighted that trafficking should be construed as a crime separate from its component parts and that the trafficking definition should require the movement or transport of a person to a community other than the one in which he (she) lived to ensure that the movement was sufficiently significant to render the person particularly vulnerable to exploitation.¹⁸⁹

This is particularly interesting, as it has the idea of movement making persons particularly vulnerable to exploitation. UN Special Rapporteur on Violence against Women, shortly before the adoption of the Trafficking Protocol, suggested a definition, which identified coercion as a critical element, replacing the distinction between internal and transnational trafficking with a focus on the separation of a person from their community.¹⁹⁰ Based on this, the exclusion of the movement from the definition would serve only so that countries (destination countries in particular) can ignore the vulnerability of migrants.

Chuang has noted that in the negotiations, the acts of action elements were introduced in the first draft of the Protocol, and they and their specific meanings were not discussed after that.¹⁹¹ The drafters have not therefore discussed explicitly if migration is regarded as part of the acts. However, Chuang has interviewed one of the drafters, Gallagher, on the purpose of the individual acts. The intention of the structure of the element "was assumed to reflect the

¹⁸⁷ UNODC, Travaux Préparatoires. UN Doc. A/AC.254/4/Add.3/Rev.7 Ninth session: 5-16 June 2000, p. 380, footnote 13. This is in the context of what protections should be given to the victims of trafficking such as permit to stay in the country they have been trafficked to.

¹⁸⁸ Chuang 2014, p. 630 – 631.

¹⁸⁹ UNODC, Travaux Préparatoires. UN Doc. A/AC.254/4/Add.3/Rev.2, Notes by the Secretariat Second session: 8-12 March 1999, p. 354.

¹⁹⁰ UN Commission on Human Rights. UN Doc. E/CN.4/2000/68 Feb. 29 2000 para 13 – 15; Gallagher 2010, p. 24.

¹⁹¹ Chuang 2014, p. 631.

drafters' vision of trafficking as a process that multiple actors carried out in concert".¹⁹² The acts are separated out to criminalise all the actors involved in the process of the crime of trafficking: the recruiters, transporters, owners and supervisors of any place of exploitation.¹⁹³ This furthers the idea that the purpose of the action element is to bring different actors to the scope of trafficking, rather than to exclude movement from the definition based on interpretations of the different acts.

It is clear from the definition that transnational movement is not required for acts to be counted as trafficking and trafficking could very well involve only movement that happens within one country.¹⁹⁴ But since movement within one country is also migration, it does not really make a difference in the debate of whether migration is part of trafficking or not. It could also be that this exclusion of transnational movement in the definition has led to the possibly unintended effect of de-emphasis of movement. It could be that there is no explicit mention of migration since the purpose of the definition of trafficking was for it to be adaptable as such to national laws and also into situations happening only within one state.¹⁹⁵ In addition, for example Rijken has argued that while transnational movement (and element of organised crime) have not been included in the definition, the overall transnational aspect of the Convention seems to have influenced the acts in the definition in a way that it would seem that an element of movement is included in them.¹⁹⁶ In conclusion, while the act element has been used to exclude the movement from the definition, it still seems fair to summarise the act element as "movement of persons".¹⁹⁷

3.2 Migration as Part of the Definition in the Context of the Convention against Transnational Organized Crime

Rather than just looking at the action element, I will consider the wider perspective of the definition by arguing that the historical context of migration-trafficking nexus, as well as the Transnational Organized Crime Convention and its other Protocols give strong indications that it is appropriate to interpret migration as part of definition of trafficking. As stated before, the Vienna Convention states that treaties should be interpreted in their context and according

¹⁹² Chuang 2014, p. 631, footnote 126.

¹⁹³ Chuang 2014, p. 631, footnote 127.

¹⁹⁴ Article 3 (a) does not have a mention of transnational movement, while it is in the article 4, defining the scope of the Protocol.

¹⁹⁵ Gallagher 2001, p. 983 – 984.

¹⁹⁶ Rijken 2014, p. 11.

¹⁹⁷ Shin 2018, p. 25.

to their object and purpose in article 31 (1), since there are no official guidelines on how the definition should be interpreted. Hence, while they might not give definite answers, this will demonstrate that the historical context and the Transnational Organized Crime Convention both indicate that migration is in close relation to trafficking in both of these contexts, which have affected the construction of the Trafficking Protocol and the definition of trafficking.

Overall, movement has been part of trafficking in the conventions concerning trafficking and most of the early treaties specifically concern transnational trafficking.¹⁹⁸ The definitions of trafficking in the history of UN have been vague, but they seem to have included movement. For example, in the first UN treaty concerning trafficking, article 1 describes “procuring of women or girls for immoral purposes abroad” and the treaty’s amended Protocol’s article 1 states “procures, entices or leads away”.¹⁹⁹ The focus of the earlier conventions was heavily on the transnational movement, with a specific concern of moving women and girls abroad, as shown in the first conventions wording. Moreover, the earlier conventions on trafficking also had an emphasis on emigration and immigration controls.²⁰⁰ All of this tells that there was a connection on migration in the earlier conventions, which has influenced the overall perception of trafficking as a concern of women and girls, migration and migration control.

More recently, the UNGA has described trafficking to be “the illicit and clandestine movement of persons across national and international borders”.²⁰¹ Here, UNGA has broadened the concept of trafficking from transnational to also concern the movement within national borders. But even in the early drafting processes in 2000 of the Trafficking Protocol, the attention was solely on the ‘movement’ aspects of the very narrow issue of cross-border sexual exploitation of women and girls.²⁰² It has been argued that the new negotiations on trafficking and the need for new legal framework were connected to the end of the Cold War. There was fear that migration would increase as borders opened. As a result, the development of the current global anti-trafficking framework is connected to that, and as a consequence, the current trafficking framework is connected to irregular migratory process in a way that it is impossible to separate from it.²⁰³

¹⁹⁸ Edwards 2007, p. 15.

¹⁹⁹ International Agreement for the Suppression of the White Slave Traffic. 1 LNTS 83, May 4, 1904, amended by a Protocol approved by the UN General Assembly on General Assembly on Dec. 3, 1948, 30 UNTS 23.

²⁰⁰ Chuang 2006a, p. 139 – 140.

²⁰¹ UNGA, Traffic in Women and Girls. UN Doc. A/RES/49/166 Dec. 23, 1994, p. 2.

²⁰² Gallagher 2010, p. 4.

²⁰³ Milivojevic – Pickering 2013, p. 587 – 588.

As can be seen, the Trafficking Protocol is a result of its complicated history and different forces behind it.²⁰⁴ By making it part of the criminal regulation, it has been made more digestible and probably also more effective for the international community. It has been acknowledged that if the Protocol was more connected to human rights, it would not have had the same effect in terms of its reach and effect.²⁰⁵ There is a clear influence of trying to regulate prostitution and migration, and specifically those two together.²⁰⁶ In conclusion, the history of trafficking suggests that migration has been quite heavily ingrained in the concept. In addition, if the intent was to change this connection of migration and trafficking, which has been established in instruments over the years, it would have been clearer to include a conversation on it in the travaux and explicitly state that intent.

Besides these obvious connections migration and trafficking have had in the history of trafficking's definition, the overall context of the Transnational Organized Crime Convention is also strong in its connection to migration. This furthers the connection the Trafficking Protocol, and as a consequence the definition of trafficking, has to migration. It has even been argued that the contemporary global anti-trafficking policies consist of three key pillars: sex, migration, and crime. These pillars, individually and together, would have been instrumental in the process of the development, application, validation and evaluation of current global anti-trafficking strategies.²⁰⁷ While it is possible to dissect the definition from the context of the Protocol and the Convention to national laws, I argue that the overall context of the Convention and its Protocols affects in the background and reveals the intent to connect migration to the definition of trafficking.

First, the statement of purpose of and scope of application of Transnational Organized Crime Convention give an overview of the whole Convention's and its Protocols context in their relation to migration:

Article 1: Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

Article 3: Scope of application

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

- a) It is committed in more than one State;
- b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

²⁰⁴ Gallagher 2010, 12 – 13.

²⁰⁵ Gallagher 2010, p. 3 – 4.

²⁰⁶ See for example Doezema 2005; Kotiswaran 2014, p. 357 – 358; Milivojevic – Pickering 2013.

²⁰⁷ Milivojevic – Pickering 2013, p. 586.

- c) It is committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another State.

Since the Trafficking Protocol is also part of the Transnational Organized Crime Convention, these also apply to the Trafficking Protocol. Article 37 (4) of the Convention even states that the Protocols should be interpreted together with the Convention. These articles of the Convention suggest that migration is overall connected to the whole Convention, and by default also to the definition of trafficking. Of course, these articles are based on the fact that this Convention is applied to transnational organised crime, and the definition of trafficking can be taken from this original context when adapted to national laws, but they suggest that there is an underlying implication of migration as part of the Trafficking Protocol and its definition.

Furthermore, some articles in the Trafficking Protocol emphasise the connection of migration and trafficking:

Article 4 Scope of application

This Protocol shall apply, except as otherwise states herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, when those offences are transnational in nature and involve an organized criminal group, as well as the protection of victims of such offence

Article 11 Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

For example, these articles connect migration directly to trafficking in the Protocol. Similarly to the whole convention, the Trafficking Protocol only applies to cases that are transnational and involve an organised criminal group (art 4). Furthermore, one of the main purposes is to promote cooperation among States Parties in the cases of trafficking (art 2). Trafficking's identity is so connected to migration and transnational crime that it has to be addressed through international means and cooperation between different States.

Specifically, the scope of application, anti-trafficking measures and protection of victims reflect the thought of the victims being transnational migrants/non-citizens in the country they are trafficked to. Measures that are directly connected to migration are, for example, the article 11 border measures. Edwards has argued that the second prevention strategy²⁰⁸ in the Trafficking Protocol is border and migration control. Therefore, this indicates that States see

²⁰⁸ Article 11 provides for example that States shall strengthen, to the extent possible, such border control as may be necessary to prevent and detect trafficking in persons.

trafficking as a form of migration and as part of the migration framework.²⁰⁹ This ties migration even more closely to trafficking, and its definition. In addition, Gallagher has stated that a treaty concerning only human rights would not have probably been enough to have such an interest and agreement among so many states, so the collaboration and emphasis on criminal enforcement, border integrity and security threats was needed for successful negotiations for the Trafficking Protocol.²¹⁰ This suggests outright that border integrity was very important in the drafting of the Protocol, therefore migration, especially transnational migration, was an important aspect in the drafting of the Protocol.

Hathaway has even argued that migration control was one of the main reasons that the Trafficking Protocol was even made in the first place, and that the primary purpose of the Protocols in the Transnational Organized Crime Convention was to make “less developed countries to join the developed world’s migration control project”.²¹¹ This control of organised crime gave powerful and more influential States a place in which they could push migration control through both the Trafficking Protocol and the Smuggling Protocol, which both require the intensification of border control as well as other migration control measures.²¹² If the Convention and its Protocols were created for the purpose of migration control, this would place migration to the front and centre of trafficking. Furthermore, the strongest obligatory language in the Trafficking Protocol is about criminalisation of trafficking, protection of borders and the collaboration of States on victim repatriation. This kind of emphasis on transnational crime framework has been stated to influence the behaviour of States and shows that the States were more concerned with transnational crime and irregular migration than anything else.²¹³

Moreover, the definition of migrant smuggling and the trafficking of firearms, which are defined in the sister protocols to the Trafficking Protocol, also connect the definitions to migration:

Article 3 Use of terms (Smuggling Protocol)

- a) Smuggling of Migrants “shall mean the procurement, in order to obtain directly or indirectly, a financial or other material benefit of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

²⁰⁹ Edwards 2007, p. 18. Although, Edwards has noted that this seems to also indicate that States’ understanding of trafficking-migration nexus is limited and ties trafficking to irregular migration.

²¹⁰ Gallagher 2010, p. 4 – 5, footnote 6.

²¹¹ Hathaway 2008, p. 56.

²¹² Hathaway 2008, p. 56.

²¹³ Shamir 2012, p. 89 – 90.

Article 3 Use of terms (Firearm Trafficking Protocol)

e) “Illicit trafficking” shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol

Both of these Protocols have their scope of application narrowed down to transnational crimes (article 4 of both Protocols) similarly to the overall application of the Convention. Furthermore, movement is part of both of these definitions explicitly. One could also assess that because the definition of trafficking does not explicitly mention movement or migration, contrarily to these Protocols, this further confirms that migration is not part of the definition of trafficking. But I would argue that this does not mean movement is not part of trafficking, but rather this is a result of transnational migration as a requirement being excluded from the definition.

The Smuggling Protocol in particular ties to the Trafficking Protocol, and ties it also that way to migration. It was even suggested that the two crimes would be formed into a one crime.²¹⁴ While smuggling and trafficking were dealt in separate protocols, for example, Hathaway has commented “agreement was achieved to establish a transnational duty to criminalise any compensated effort to move unauthorised persons across a border.”²¹⁵ He argues that the focus is on criminalisation and prevention of unauthorised cross-border movement, and that border control emphasis in both Protocols has given destination states a reason or rationalisation for tightening their border control.²¹⁶ He has not been the only to note that the wordings of the articles relating to border measures and security and control of documents is almost identical between the protocols.²¹⁷ Moreover, traffickers and migrant smugglers impose security issues on nations, especially wealthy nations, which seem to be driving forces behind the both Trafficking Protocol and Smuggling Protocol.²¹⁸

While the overall connection of migrant smuggling and trafficking is probably accepted, I would argue that it also shows that the definitions also connect on a deeper level because these initial connections. I would argue that their differences are that, first, trafficking leads to

²¹⁴ UNODC Travaux Préparatoires GA, Ad Hoc Comm. on the Elaboration of a Convention against Transnational Organized Crime, Draft Elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants. U.N. Doc A/AC.254/4/Add.1 Dec 15, 1998.

²¹⁵ Hathaway 2008, p. 26.

²¹⁶ Hathaway 2008, p. 5 – 6.

²¹⁷ Edwards 2007, p. 19.

²¹⁸ Gallagher 2001, p. 976.

exploitation or it was the intent. Second, trafficking does not necessarily have transnational element, not that there is no movement required. Smuggling is more directly tied to only transnational migration. For example, United Nations Economic and Social Council has stated that the crime of trafficking “means much more than the organized movement of persons for profit”.²¹⁹ The Council describes the important element that separates migrant smuggling and trafficking to be the means element in the definition of trafficking.²²⁰ All of this seems to suggest that the Council have included migration also in their interpretation of the definition of trafficking

In conclusion, the wordings of Transnational Organized Crime Convention, the Smuggling Protocol and Firearm Trafficking Protocol suggest that the definitions and migration are to be regarded in relation to each other. When the Convention and the Protocols wordings are compared to the wordings in the Trafficking Protocol, they seem to be unified in their connection to migration. It can be seen from this that migration is imbedded in the foundations of trafficking even if it is not mentioned explicitly in the definition. Overall, I would argue that it is not possible to take just one aspect, such as the definition of trafficking, without also taking the history behind trafficking as well as the general context in which it exists in international law.

On the whole, it is easy to see trafficking in the larger context of migration - it seems easy to categorise trafficking as part of migration, as trafficking is certainly involved with migration. Aradau has noted many seem to regard trafficking as a subcategory of migration, illegal migration and that almost all definitions of trafficking include “movement across borders”.²²¹ States still seem to have a limited view of trafficking-migration nexus and thinking that it is only connected to irregular migration and that it can be countered through border controls and immigration control. This does not regard any other causes of migration.²²² While these interpretations of excluding migration from the definition trafficking and interpreting trafficking one-sidedly as part of the migration framework, there does not seem to be anything that actually suggests that it was meant to or that it should be interpreted that way. It actually seems that it was intended to be part of the trafficking’s definition. Chuang has also come to the same conclusions in her assessments, stating that nothing in the Protocol’s structure, the

²¹⁹ UN Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking. UN Doc. E/2002/68/Add.1, p. 6.

²²⁰ UN Economic and Social Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking. UN Doc. E/2002/68/Add.1, p. 6.

²²¹ Aradau 2008, p. 21 – 22.

²²² Edwards 2007, p. 18.

context in which it was developed, or its travaux supports that movement is not part of the definition.²²³ In the next chapter I will look at the possible ideologies behind the interpretation that de-emphasises migration's role in the definition of trafficking, how this can be justified and the possible effects of interpreting migration to be explicitly part of the definition.

4 Ideology of Migration-Trafficking Nexus

4.1 Ideological Thinking in the Interpretations of Migration-Trafficking Nexus

Everything from the travaux to the overall context of the Organized Crime Convention makes it appropriate to interpret migration as part of the definition of trafficking. Migration and movement could very well be regarded as part of the definition of trafficking based on the text of the Trafficking Protocol. However, this seems to have been removed in the interpretations, at least in the most relevant and influential interpretations. The dominant arguments, which claim that movement is not part of trafficking, seem to be based solely on perception that harbouring does not include movement.²²⁴ However, these arguments seem to arbitrarily take harbouring out of its context in the definition and the Trafficking Protocol. If anything, excluding movement from the definition seems to bloat trafficking into situations that it was not intended to cover.²²⁵

In this chapter, I will assess if the fact that migration is de-emphasised in the definition of trafficking reveals any disguised ideological thinking and if the dominant interpretations could be informed by ideological thinking and how they might affect the trafficking measures. First, in chapter 4.1 I attempt to assess if some ideologies can be separated from the way migration-trafficking nexus has been formed in the current legal framework, and especially how the role of migration has been interpreted from the definition of trafficking. Then, in chapter 4.2, I will look at the effects they have on the anti-trafficking measures and the possible effects that explicit inclusion of migration in the interpretations of the definition of trafficking could have. To clarify my use of concepts, when I am talking in this chapter trafficking as part of migration, I am referring to the interpretation of de-emphasis of migration from the definition of trafficking, which leads to the migration-trafficking nexus

²²³ Chuang 2014, p. 630.

²²⁴ Chuang 2014, p. 620, footnote 64.

²²⁵ Chuang 2014, p. 628 – 632.

being seen as trafficking as part of migration. On the other hand, migration as part of trafficking refers to migration and movement being included in the definition of trafficking.

It is clear that the biases lawmakers have influence the way laws and interpretations of laws are made, whether it is intentional or not. Overall, no law can be hundred per cent removed from ideologies, biases or politics.²²⁶ It has been even suggested that international law in itself could be identified as an ideology.²²⁷ An example of obvious ideological thinking is the emphasis of protection of women and children in the Trafficking Protocol. Women and children are seen in need of emphasised protection. In comparison, there is no similar mention in the Smuggling Protocol, which seems to be an indication of thinking that women and children are primary subjects of trafficking, and men are the willing participants to smuggling.²²⁸

Prostitution is also a clear example of how the Trafficking Protocol has been used to drive ideological policies.²²⁹ It has also a connection to how migration-trafficking nexus has been formed. There has been a strong abolitionist influence in the Trafficking Protocol, which has emphasised sex trafficking and its connection to sex work. The abolitionist organisations have argued that prostitution is somehow inherently connected to trafficking and that women cannot voluntarily migrate for sex work.²³⁰ Kotiswaran has argued that this framing of trafficking has particularly drawn the attention away from the migration flows of the low-income women and men, whose migration is more risky and who migrate to work in informal sector, and has framed the problem to be about individual “social deviants”.²³¹

Since trafficking and migration are both politically contested subjects, the Trafficking Protocol and the interpretations of the definition of trafficking will be affected from different ideologies and goals related to them. Just by looking at the travaux of the Protocol, it is possible to tell that different States had agendas regarding migration, as I already mentioned in the chapter three.²³² Also, the development of the Trafficking Protocol happened at the

²²⁶ See for example Koskeniemi 2007, p. 17 – 18, 513 – 115, 601. Koskeniemi argues that it is not possible to have laws that are not connected to ideology, religion, politics, etc.

²²⁷ See Scott 1994.

²²⁸ Balgamwalla 2016, p. 8.

²²⁹ See for example Simm 2004, which discusses lobbying from different NGOs regarding prostitution in the Trafficking Protocol; Chuang 2010.

²³⁰ Huckerby 2017, p. 630.

²³¹ Kotiswaran 2014, p. 358.

²³² A lot of delegations were stated to be concerned that the Trafficking Protocol would help illicit migration if States Parties had to make it possible for the victims of trafficking to stay in the destination country. UNODC Travaux Préparatoires. UN Doc. A/AC.254/4/Add.3/Rev.7 Ninth session: 5-16 June 2000, p. 380, footnote 13.

moment of concern over border security and transnational organised crimes' role in irregular migration.²³³ This tells a larger tale of the Trafficking Protocol having been developed, at least in some ways, as a measure to control unwanted migration, which has formed the idea of trafficking as part of migration framework, especially migration control and irregular migration. It seems clear that there is an anti-migration ideology behind the perception of trafficking being one-sidedly part of migration, particularly irregular and transnational migration.

It seems that the concept of trafficking as part of migration being the preferred interpretation compared to migration as part of trafficking also implies that illegal things can be seen as part of migration, and it is very natural for the dominant states to categorise crime in connection to migration. They are seen as connected together. However, the other way around, if migration was seen as part of trafficking, it would mean that the legal concept of migration would be perceived as part of trafficking, which does not seem as accepted. Not only has trafficking been constructed to be part of migration, but it seems to be constructed to be a subcategory of irregular migration. This ties into the concept of ideal victim, which has been affected by this framing of migration-trafficking nexus. This frames victims to be people who have been forcefully and illegally taken into another country for prostitution. These people do not have any agency in this scenario.²³⁴ This leaves out a lot of victims, who have migrated legally, and results in victims of trafficking being regarded as passive parts of a crime, victim-objects, and not complex people with their own agendas.

As I said before, the Trafficking Protocol and its definition are both quite vague, which is supposedly to give States a wide scope to make their own decisions, and at the same time this protects the States' national sovereignty.²³⁵ However, as the Trafficking Protocol itself includes provisions on migration, even if the definition does not have explicit mention of trafficking, this means that trafficking has become part of the migration framework. Trafficking's identity is intertwined with transnational crime and international law, and that way trafficking has been established as part of international migration and the international migration framework. This also drives the perception of trafficking as a problem of irregular

²³³ Chuang 2014, p. 613.

²³⁴ See Wilson – O'Brien 2016. The article talks about the framing of ideal victim (accordingly to the Christie, N. (1986). *The ideal victim*. In E. Fattah (Ed.), *From crime policy to victim policy: Reorienting the justice system*. Basingstoke: Palgrave Macmillan.) in the TIP Reports. These frame the ideal victim to be a young woman, who is weak and naïve and has migrated from the global South for an unrelated reason and ends up being forced to sexual exploitation.

²³⁵ See UNODC 2009, p. 5.

migration, which should be handled with border control and anti-migration sentiments.²³⁶ Overall, trafficking is framed as a situation in which the sovereignty of State and border security are the most important issues to consider.

Moreover, the vagueness of the acts in the action element generates confusion about its meaning, and it also creates confusion to the definitions adopted to national laws. Because of the vagueness, it is easy for States, and for example organisations, to interpret the definition how they want, and re-imagine the definition according to their own preference, which has resulted in differences in the way the definition has been interpreted. For example, like I mentioned in 3.1, ILO has perceived migration as part of trafficking as a way to distinguish it from the larger category of forced labour.²³⁷ Furthermore, the countries with more power, such as the US, are able to influence the scope and contents of trafficking. The US has the power to use economic sanctions on those who do not meet their minimum standards with trafficking policies.²³⁸

The US's TIP Office has de-emphasised the role of migration in the definition of trafficking as a way of bringing more emphasis on exploitation in the definition.²³⁹ Therefore, while it might not even be the US's goal to drive the idea of trafficking as part of irregular migration, it happens as a by-product, as they deny that migration is part of trafficking, and regard migration-trafficking nexus one-sidedly. Overall, by expanding trafficking's definition to include all forced labour, which the TIP Office has labelled as trafficking, seems to be for the US to expand its power to police others globally.²⁴⁰ This, and the US using its economic power to make sure that other countries use its standards in trafficking's definition and anti-trafficking policies seem imperialistic.²⁴¹

Imperialism in international law is nothing new, and the imperialistic nature of international law has of course been acknowledged already in the tradition of TWAIL.²⁴² Especially the US has been seen as the perpetrator after its emergence as the single global superpower after the

²³⁶ Edwards 2007, p. 18.

²³⁷ ILO 2005, p 46 – 62. The whole chapter describes links between trafficking and migration, distinguishing trafficking by movement from the larger concept of forced labour.

²³⁸ Chuang 2014, p. 613.

²³⁹ Chuang 2014, p. 619 – 621.

²⁴⁰ TIP Office 2006, p. 6 and 10; TIP Office 2010, p. 7.

²⁴¹ I use the following definition for imperialism: "In broad terms, classical 'colonialism' denotes the actual conquest, occupation and settlement of a country, whereas 'imperialism' suggests a broader set of practices, including those by which a great power in essence governs the world according to its own vision, using a variety of means that may or may not include actual conquest or settlement." Anghie 2005, p. 273.

²⁴² See for example Anghie 2005; Chimni 2012.

Cold War. This has further sharpened following 9/11 and the war against terrorism, which has allowed the US to arguably reproduce imperialism, or at least something closely resembling it. While this might now have become more pronounced, it can also be said that “for many people in the third world imperialism has never ceased to be a major governing principle of the international system”.²⁴³ Capitalism, imperialism and international law can be seen to have a relationship that oppresses people of Third World, especially the subaltern groups.²⁴⁴

The same type of imperialistic ideology can also be said to be in the whole Trafficking Protocol, if we were to believe Hathaway’s argument that the Protocols in the Transnational Organized Crime Convention were used as a way to get less developed countries to join the global migration control efforts.²⁴⁵ This has the same sentiment of imperialism, especially as these interpretations of trafficking as part of migration makes trafficking seem only a one-sided issue of the origin countries. This can also be compared to way the US has used imperialism as self-defence with war against terrorism.²⁴⁶ The anti-migration sentiments are driven by justifications and narrative of protection of people. This mirrors the way human rights have been used as a justification for military interventions, and this “responsibility” and leading role the US has taken upon itself seems to be designed to keep the political status quo.²⁴⁷ Furthermore, it has been argued that even international institutions have a role in sustaining a particular power dynamic in international law, which aligns with the interests of dominant States and their ideological goals.²⁴⁸

To conclude, these can be seen as some of the driving forces behind the interpretation of the Trafficking Protocol’s definition of trafficking, and how the migration-trafficking nexus has been formed in a way that emphasises transnational migration, while also disregarding movement. In addition, this seems to have a strong sense of nationalism.²⁴⁹ Nationalism works in tandem with anti-migration sentiments as migrants can be seen as disturbing the thought of common culture in a nation.²⁵⁰ Hence, it is clear that some States, the destination

²⁴³ Anghie 2005, p. 273.

²⁴⁴ Chimni 2012, p. 17.

²⁴⁵ Hathaway 2008, p. 56.

²⁴⁶ See Anghie 2005, p 273- 309. Anghie has written on how imperialism is connected to the defense of countries, in particular to the war against terrorism.

²⁴⁷ Frankenberg 2014, p. 40 – 45. The article talks about human rights used to legitimise particularly interventions, but it fits also to this context.

²⁴⁸ Chimni 2006, p. 15 – 16.

²⁴⁹ There are several different ways of defining nationalism, but I define it here to mean the expression of an objective sociocultural identity, which includes that many people feel ” belonging to a specific group identifies by a collective name, shared history, common culture and often language and religion.” Lawrence 2016, p. 6. See also in general Lawrence 2016 for an overview of the definitions and theories of nationalism.

²⁵⁰ See for example Swain 2019; Fielder 2018.

States, want trafficking to be regarded as part of transnational migration and that it is to be regarded as a national security threat. If trafficking is regarded exclusively as part of migration, it can be used as a way to control and strengthen national borders, as well as to control migration flows. Illegal migrants can be seen as threats to national security and potential victims for trafficking. This type of focus on transnational migration with trafficking of course disregards the fact that over half of all trafficking cases happen within countries' own borders without the transnational movement.²⁵¹

On the other hand, the de-emphasis of movement in the trafficking definition allows the same countries to claim that they do not need to make changes overall to migrant or labour rights, and the larger economic framework can continue as it is.²⁵² While there exists conventions that aim to protect migrant labour, countries, especially destination countries, are hesitant to ratify international conventions made to protect these rights because of lack of political will.²⁵³ This can be also said about how issues regarding migrant rights are handled in the context of trafficking. While trafficking has been connected to irregular migration, at the same time, it has been disconnected from the issues of migrant rights and migration within borders. Since movement can be clearly regarded as part of trafficking, there is no reason why anti-trafficking policies are done largely with the thought that trafficking is solely part of transnational migration. Why does migration seem to be separated from the definition of trafficking, if nothing actually seems to point to the direction of that was the purpose of the drafters? Is the purpose of this interpretation not to explicitly connect trafficking and migration, but keep trafficking just as a subcategory of irregular migration?

Chapkis has noted that trafficking policies have been anti-immigration, anti-poor and anti-prostitution. She has argued that for example, the USA's TVPA, while not outright, still carries these sentiments and ideologies. Its language divides "violated innocents" from "illegal immigrants" based on, for example, sex and gender. Women and children are seen as vulnerable and deserving of protection as opposite to economic migrants, who are seen as men, who have wilfully entered into a different country illegally.²⁵⁴ By putting emphasis on trafficking as part of migration, it is easy to pick and choose which migrants are seen as worthy of protection and which migrants are excluded from the protections. I would argue

²⁵¹ UNODC 2018, p. 41. The report found that 58% of the detected victims were within their own borders.

²⁵² See for example Haynes 2009, p. 65. Haynes has argued that States allow grey market economy and exploitation, as long as it is not too visible and overall keeps economy thriving.

²⁵³ Piper – Satterthwaite 2007, p. 253; Ramji-Nogales 2017, p. 627 – 628.

²⁵⁴ Chapkis 2003, p. 924.

that this also reflects the way the Trafficking Protocol has been built.

The interpretation, which does not regard migration as part of the definition, helps countries deny a lot of people the protection measures they deserve. Anti-migration seems to be the ideology behind all of this, and migrants are not seen as people who deserve protection. The Trafficking Protocol is more of a measure, which protects the destination countries from “illegal migrants”. This anti-migration ideology has also marginalised economic migrants, who are not seen as deserving of protections.²⁵⁵ Like Chuang has noted, the existing labour and migration frameworks have proven inadequate to the task of protecting those at the bottom of the global labour hierarchy.²⁵⁶ The exclusion of migration from the definition seems to be one thing that has been used for not focusing on providing better labour and migration rights. By emphasising trafficking as part of migration, trafficking stays merely as an unfortunate subcategory of migration, which does not need different approach from international community.

Moreover, it seems that it is easier to perceive trafficking as part of the transnational migration framework, than address the issues of trafficking through, for example, changes to migrant rights. It is hard to interpret whether this is actually intended to be the result or not. Besides, this shows how easy it is for countries to interpret international regulations according to their own ideologies. It takes blame away from the structural problems within the international migration framework and international community for not ensuring enough right for migrant workers. Even if it was not intended that trafficking was put into the category of illegal and irregular migration, it has happened. The drafters may not have written migration explicitly into the definition, so that the definition could be used in national cases, but the unintended result was movement being taken out of the requirements and the mudding of water between different concepts such as forced labour and trafficking.

All of these anti-migration sentiments can also be seen as strongly connected to racism, which could be the primary ideology behind this interpretation of trafficking as part of migration. The whole history of trafficking is quite explicitly connected to racism, which can already be concluded from the names of the first international treaties – White Slavery Convention, with the focus on white slave traffic – protection of white women and girls. There has been made corrections, at least on paper, but this type of racism, while not as overt, can still be seen in

²⁵⁵ Chuang 2017 – 2018, p. 151.

²⁵⁶ Chuang 2014, p. 612.

the anti-trafficking measures and efforts.²⁵⁷ The legacy of racism is still there. I would argue that the emphasis on trafficking as part of migration, and through that the policies that support that concept, while the definition does not necessarily involve migration, are strongly connected to anti-migration as well as racism.

My arguments can be seen as cynical, but I am not stating that this is the outright intention of the way the definition has been formed by the ones drafting the Trafficking Protocol. Rather, I am suggesting that it does allow it as an end result. Even if the point was to include all kinds of situations into the definition of trafficking, the interpretation of de-emphasis of migration allows States to consider the migration-trafficking nexus from a one-sided viewpoint.²⁵⁸ This allows the anti-migration sentiments to be used as anti-trafficking measures, which do not actually diminish trafficking, but rather have an effect of increasing it.²⁵⁹ Furthermore, it allows countries to shift the responsibility to other countries and away from itself. In addition, this applies to the whole international community and the drive to address the root causes that drive trafficking, as well the overall exploitation of migrants and deregulation of labour rights.

In conclusion, the Trafficking Protocol seems to have a thin neutrality in regard to migration and movement, which cannot necessarily be said of the countries interpreting the definition and the Trafficking Protocol. What is the driving force behind not mentioning movement as a requirement? There can be many reasons and ideologies, ranging from the USA's need to have power on the international stage by seeming like the leader in anti-trafficking efforts all the way to ideologies of anti-migration, nationalism and racism. It may be to undermine the need for actual structural changes both on international and state levels, and specifically to undermine the need for better protection measures for migrant workers. This has most importantly revealed that trafficking has incorrectly been structured to be a subset of migration, especially irregular migration, without regarding trafficking as a multifaceted problem. Irregular migration is seen as the big problem, and trafficking as just one part of it.

4.2 The Effects on Anti-Trafficking Measures and Trafficking Policies

As my arguments show in chapter three, migration could very well be seen and interpreted as part of trafficking, based on the definition in the Trafficking Protocol. It also demonstrates

²⁵⁷ Bruch 2004, p. 39 – 40.

²⁵⁸ See also Koskenniemi 2011, p. 271 – 294. Koskenniemi discusses cynicism versus commitment in arguments of international law.

²⁵⁹ See for example Weatherburn et al 2015, p. 43; Chacon 2006, p. 2977.

that there are ideologies in relation to migration, which have affected the interpretations of the definition and the policies regarding trafficking. Koskenniemi has argued that without political choices, there are also no substantive decisions within the law and that “...in the end, legitimising or criticising state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just”.²⁶⁰ Therefore, I will examine if there are some possible changes to approaches to anti-trafficking measures from bringing migration and trafficking closer together, or is the way the dominant interpretation of keeping migration separated from the definition of trafficking truly the best solution. Of course, it could be that the most influential way is the best to tackle the issue of trafficking, which would render my criticism a bit irrelevant, but to counter this, in this subchapter I will look at the potential effects that interpreting migration explicitly as part of trafficking could have on anti-trafficking measures and trafficking policies. By doing this, I will show that my criticism of the de-emphasis of migration is justified.

The concept of bringing migration framework more closely together with trafficking framework to fight trafficking is not a new thought, and various writers have thought that global migration framework could work to reduce trafficking.²⁶¹ Of course, it is notable that migration framework is currently used mostly in the context of anti-trafficking to strengthen borders and to restrict migration.²⁶² Restrictions on migration do not have the desired effect of decreasing migration, but rather it increases trafficking.²⁶³ However, if migration was acknowledged as part of the definition of trafficking, it could also have “positive” effects to the anti-trafficking measures by bringing them closer together as more comprehensive concepts, which both affect one another.

First of all, seeing migration as part of trafficking could improve the recognition of victims of trafficking and give trafficking victims and migrants more agency. By one-sidedly regarding trafficking as part of international migration, it victimises some migrants from the start. De-emphasis of movement in the definition of trafficking puts emphasis on some migrants, who fit the idea of ideal victim, and reduces them into being nothing but victims, who have no

²⁶⁰ Koskenniemi 2011, p. 61.

²⁶¹ See for example Chuang 2017 – 2018; Zalewski 2005; Ramji-Nogales 2017, the article seeks to eliminate all kinds of migration crises by suggesting that developing a global migration law, which would also have an effect to trafficking; O’Connell Davidson 2013, the article talks about debt-financed migration. Other changes have also been suggested, for example, see Shamir 2012, which argues that labour approach - tackling conditions that create workers’ vulnerability to exploitation and change in the structure of labour markets could help in prevention of trafficking.

²⁶² See for example Edwards 2007, p. 11, 18 – 19; Milivojevic – Pickering 2013, p. 587 – 588.

²⁶³ Bruch 2004, p. 21 – 22.

agency or will of their own, and further disregards their experience as migrants. Furthermore, it unnecessarily causes profiling of particular people, the people who fit the ideal victim profile.²⁶⁴ It has been even found that migrants, who have been trafficked, do not necessarily want to identify as victims of trafficking.²⁶⁵ The ideal victim profile does not fit with the reality of trafficking, since a lot of victims of trafficking are economic migrants, who have migrated for work opportunities of their own will.²⁶⁶

In addition, it has been noted that national immigration laws often do not have good, or even adequate, provision to exempt the victims of trafficking and smuggling from, for example, the irregular migration. Victims are often seen as illegal migrants and may be fined or subject to imprisonment. The justice system can punish and fail them as victims of trafficking, smuggling and illegal immigrating.²⁶⁷ It has been noted that there is still confusion with law enforcement officials regard migration and trafficking: if a person has shown will and motivation to migrate, if they have agency, they cannot be victims.²⁶⁸ By disregarding the reality of migrants and trafficking, it makes the recognition of victims more difficult, since these migrants with agency do not fit clearly to the picture of the ideal victim.

As I mentioned, a lot of anti-trafficking efforts seem to be currently focused on anti-migration sentiment, immigration policies and migration management. Articles 9 – 13 of the Trafficking Protocol are on prevention, cooperation and other measures, which focus seems to be on border measures, security and control of documents. This goal to decrease transnational migration in order to stop trafficking can be found in other measures too: it has been noted, that softer measures, such as campaigns, which aim to reduce trafficking, are often aimed at younger migrant women. The campaigns have a seeming goal to convince young women that sexual exploitation and abuse wait for migrants.²⁶⁹ With these types of measures it is difficult to establish if these measures are the result of the emphasis put on transnational migration, and trafficking as part of migration, or if they are the causes for it. The perception of trafficking as part of irregular migration might have been established through the interpretations of the definition, but it might also be that the different policies affect the way trafficking is regarded as part of irregular migration.

²⁶⁴ See for example Wilson – O'Brien 2016; Doezema 2005, p. 67; Todres 2009, p. 634 – 635. The ideal victim in the context of trafficking is a young woman, who is seen as weak and naïve. She is from the global South, but because of migration ends up being forced to sexual exploitation.

²⁶⁵ See for example van Meeteren – Hiah 2019, p. 1605 – 1618.

²⁶⁶ Gallagher 2010, p. 100.

²⁶⁷ Muntarbhorn 2003, p. 163.

²⁶⁸ Haynes 2009, p. 72

²⁶⁹ Danziger – Guajardo – Martens 2009, p. 271.

Not only are the anti-trafficking efforts lacking, but the protections put in place for victims of trafficking are also quite weak. While it could be said that the protections for trafficking victims seem to be a small exception to the otherwise bad protection for abuse of migrants in general, the protections in the Trafficking Protocol are mere suggestions.²⁷⁰ Most migrants exist in the private sphere, where they get little to no protection from enforceable laws to govern the exploitation. This has been argued to be the result of global economy, which encourages the poor to seek work from the rich and the rich to seek the labour from the poor. This results in poor nations becoming poorer and wealthier getting richer.²⁷¹ I would argue that this reluctance to protect migrants reflects in the way the interpretations of trafficking-migration nexus are handled by the wealthier nations.

This leaves, for example, economic migrants in danger: the current international migration law does not offer good protection, and they are not easily recognised as victims of trafficking, because they do not fit the ideal victim profile.²⁷² Migrant workers encounter a lot of exploitation. The concept of continuum of exploitation has been used to demonstrate how the exploitation migrants experience can differ from no exploitation to less serious forms of exploitation, such as extortionate work discrimination, all the way to more serious forms of exploitation, such as trafficking for forced labour. These forms of exploitation can change in time and are not necessarily linear, but it demonstrates that even the less serious forms of migrant exploitation are connected to trafficking.²⁷³

One-sidedly regarding trafficking as part of migration leaves obvious holes to the international migration framework, the anti-trafficking measures and takes blame away from the international community for the economic disparities between rich and poor nations, not ensuring enough rights for migrant workers and not ensuring that there are ways to immigrate safely. This way the abuse of migrants is reduced to be exclusively the fault of traffickers, and no blame is on the factors and root causes, which make people vulnerable to trafficking.²⁷⁴ There comes issues from the way trafficking has been linked one-sidedly into the framework of migration, all the while de-emphasising the importance of migration in the definition. It means that States can frame the trafficking experience within an immigration control model.

²⁷⁰ Chapkis 2003, p. 924.

²⁷¹ Haynes 2009, p. 73.

²⁷² Haynes 2009, p. 72

²⁷³ See for example Ollus 2016, p. 21 – 23.

²⁷⁴ Chapkis 2003, p. 926 – 927.

This also makes it possible to apply and justify restrictive border controls, as well as penalties for illegal entry or stay.²⁷⁵

It has been argued, for example by Ross, that the US wants to create a strong transnational responsibility for tackling trafficking, which includes sharing responsibility and externalising prevention. She argues that this has especially been directed at destination countries to take responsibility. Furthermore, the US funds transnational prevention programs²⁷⁶, and has encouraged others to do the same.²⁷⁷ However, I would argue that this does not particularly do anything but ensure the US's influence and dominant position in the global discussions on trafficking. Similarly, it has been argued in regard to anti-trafficking campaigns, that they do not actually target structural problems, such as the migration framework, but emphasise inequalities in origin countries and individuals as the problem in origin countries. This absolves the destination countries from responsibility. The funding of prevention programs does acknowledge on some level that destination countries have a role in preventing trafficking, but this puts them to the role of a power saviour all the while they do not have to recognise that the developed economies may have a role in causing and upholding the global inequality.²⁷⁸ Meanwhile governments can ignore exploitation, if it benefits the economy.²⁷⁹

In contrast, if there was a more comprehensive view on trafficking by putting emphasis on migration as part of trafficking, it could be possible to find solutions for these problems. It could help to bring trafficking-migration nexus to a more helpful concept, if it is accepted that migration is an inherent part of trafficking. It could help to recognise that there is a need for better protection of migrants as a whole, if migration was actually acknowledged as an important part of the definition of trafficking, and trafficking and the victims of trafficking were not just a sub-category of migration and migrants. This could help in fixing some of the misconception of the ideal victim of trafficking and help in recognition of victims by bringing all kinds of migration into consideration. This might also give agency to the victims of trafficking. They are not “only” victims but they are complex people with their own agency. They are not just passive elements in a crime.

To add more, this emphasis would have an effect that the definition does not become too

²⁷⁵ Edwards 2007, p. 48.

²⁷⁶ US Department of State Office to Monitor and Combat Trafficking in Persons. Remarks & Releases. International Programs, accessed 20.5.2021.

²⁷⁷ Ross 2014, p. 349 – 354.

²⁷⁸ O'Brien 2016, p. 216.

²⁷⁹ Haynes 2009, p. 64.

wide. It would make easier to distinguish between concepts such as trafficking and forced labour. As I have mentioned earlier, ILO has used movement to distinguish between trafficking and other work related abuses such as forced labour by defining trafficking through movement.²⁸⁰ Chuang has argued that de-emphasis of movement in the definition of trafficking is leading to “exploitation creep”, and different forms of forced labour could be equated with trafficking, and the definition of trafficking loses its meaning.²⁸¹ Also on a similar note, emphasising migration in trafficking could help with understanding the relation of trafficking and migrant smuggling. They have similar root-causes and should probably be addressed in similar ways.²⁸²

Refusal to include migration as part of trafficking keeps trafficking as special sub-category of abused migrants, while still refusing to acknowledge it in relation to other contexts of migration, especially legal migration, such as migration for work. The larger problems that need to be addressed stay in the background. Therefore, the categorisation of trafficking as part of migration without the acknowledgement of the reversal does not work for the benefit of the rights of the victims, but merely gives the States a chance to use it vaguely as a cover to establish anti-migration policies. States can satisfy their guilt by giving protections in special cases of severe abuse and not take part in larger sense. All of this seems to imply that there is a need for larger structural change in migration policies, and especially protection of economic migrants.

If migration was more acknowledged in the definition of trafficking and also within the context of trafficking, it could improve these current faults in the trafficking framework. Furthermore, migration management processes could also take trafficking better into account and not just focus on anti-migration measures. It could help to understand that migration should not be isolated from it, but contextualise the different elements related to trafficking and anti-trafficking measures. The de-emphasis and exclusion of migration leads to simplification of migration-trafficking nexus and the connection of trafficking and irregular migration. Furthermore, regarding migration as part of trafficking would make it easier to see what needs to be changed, and really tackle the root causes of trafficking and the aspects that make people vulnerable in migration situations. It could help comprehend trafficking as

²⁸⁰ ILO 2008, p. 2.

²⁸¹ Chuang 2014, p. 619 – 623.

²⁸² For example sociologist Julia O’Connell Davidson has written about how there can be cases in which there are “voluntary slaves”, when smuggled migrants are tied by the smuggling fees, but they have had prior knowledge of these fees and agreed to them for a chance to migrate. Read more O’Connell Davidson 2013, p. 176 – 195.

multidimensional problem, which is deeply intertwined with the same problems that migrants everywhere encounter – trafficking is just the deep end of migrant exploitation. This could also help to demonstrate that the current socioeconomic structures benefit and reward the wealthy by exploiting the poor.²⁸³

As I stated previously, it has been suggested that a change in migration policies and overall migration management could have a positive effect on reducing trafficking.²⁸⁴ This, however, would require bigger structural changes, which is hard to imagine that a lot of States, especially the destination States, would have the political will to do. As I suggested in the last chapter, this might be the reason why migration is not explicitly or clearly interpreted as a requirement in the definition of trafficking.²⁸⁵ While the current definition of trafficking can be used as a justification for immigration control, if migration was explicitly stated to be part of the definition, it would more effectively drive the need for actual structural changes. For large effects to happen to trafficking, the root causes and the problems, which make a person more vulnerable to trafficking, would need to be addressed. Such problems are, for example large wage gaps between persons within a country and other countries, and the demand for cheap labour and cheap products.²⁸⁶

I will look at Chuang's arguments for using global migration law to prevent human trafficking to further illustrate and support the idea. First of all, she argues that reducing the abuses of migrant workers would consequently reduce trafficking. She argues that failing to address the cases of exploitation, which are not so severe, creates and sustains vulnerability to trafficking. Global migration law could help to prevent and reduce trafficking in three ways: First, she notes that a change in the way current foreign labour recruitment industry works, and that it should prioritise migrants over private profit interests. This could help with trafficking and its related problems, especially vulnerability of migrants. Second, it could help in getting non-state actors, who have a big role in managing the global labour migration, have more and better accountability, as well as coordination. Lastly, it could help in finding a perspective to labour migration regulation that is more migrant-centred, and it could also change the view that trafficking and its related problems are best managed through aggressive criminal

²⁸³ Chuang 2017 – 2018, p. 147.

²⁸⁴ See footnote 261.

²⁸⁵ See pages 48 – 49.

²⁸⁶ For the root causes, see UN Commission on Human Rights UN Doc. E/CN.4/2000/68 Feb. 29 2000, para 54 – 60. The report is specifically about women and their specific vulnerabilities, but most of the root causes also apply to men.

justice.²⁸⁷

Of course, regarding migration as part of trafficking could also cause some hardships and downsides to the anti-trafficking measures. This could result in even more difficulties in establishing cases of trafficking. It might make it more difficult to recognise the cases happening within one country, even if interpreting migration as part of trafficking does not mean that those cases would not fall within the scope of the definition of trafficking. Moreover, bringing migration and trafficking closer together could also lead to more anti-migration sentiments when fighting against trafficking, and using trafficking as a justification for more anti-migration policies. However, this means that the interpretation of migration as part of trafficking just needs to be pushed simultaneously with better migration framework to counter this.

Similarly, one of the most notable possible downsides is the possible stigmatisation of migration and migrants, if trafficking and migration are brought more closely together. Nevertheless, I would argue that dismissing the connection, while still having them vaguely connected, does not help the case of stigmatisation either. The current interpretations already suggest that trafficking is connected to irregular migration, which stigmatises migration and migrants, without the explicit tie of migration as part of trafficking. Stigmatisation of migrants is in itself a problem that cannot be helped by avoiding these issues, or disconnecting migration and trafficking, while the idea is still under the surface. The Trafficking Protocol and current trafficking policies do not protect the victims' rights as much as it reduces them to migrants who have been victimised.²⁸⁸ However, it might even help, if trafficking was more talked about in relation to migrant rights. By keeping them disconnected, it just helps the destination countries to avoid adopting treaties and instruments relating to migrant rights, especially workers' rights.

However, it has to be acknowledged that international conventions are hard to make and change.²⁸⁹ Accordingly, it is easy to say that there is a need for structural change, while it would be difficult to actually manage. Especially since it would need to be largely ratified for it to actually have much effect.²⁹⁰ Consequently, it would be easier to actually "just"

²⁸⁷ Chuang 2017 – 2018, p. 147.

²⁸⁸ Chuang 2017 – 2018, p. 148.

²⁸⁹ Crawford 2012, p. 20 – 21, 30 – 32, 377, 386.

²⁹⁰ See for example Piper – Satterthwaite 2007, p. 253; Ramji-Nogales 2017, p. 627 – 628. These parts discuss the lack of political will to ratify conventions that relate to migrants' labour rights.

acknowledge and interpret migration to be part of the definition of the Trafficking Protocol, since the definition does not actually dispute it, and actually supports it. However, this would then require other changes for it to result in anything but the possible downsides I laid out.

To conclude, it is easy to find ideologies, which have affected the most influential interpretations of the definition of trafficking and the way we regard the migration-trafficking nexus and the fight against trafficking. Anti-migration sentiments seem to be strong and they reduce trafficking to a single issue of irregular migration and border control. By acknowledging and emphasising migration as part of trafficking, it is possible to take a wider and more comprehensive look at the relationship between trafficking and migration, and how they affect each other. It could benefit the agency of migrants, recognition of victims as well as help as a starting point for wider structural change that is needed to combat trafficking in a more effective way. Keeping migration separated from trafficking creates a weird situation where migration is half acknowledged and half not in the different efforts against trafficking and it also creates a weird vagueness and confusion around the definition.

5 Conclusions

In this thesis, I have looked critically at the migration-trafficking nexus, the interpretations made of it and the policies and measures deriving from it. There seems to be a contradiction in the interpretations made of the Trafficking Protocol's definition of trafficking: trafficking has been connected to the framework of migration and the anti-trafficking measures seem to be specifically aimed at migration, but the dominant interpretations of the definition do not actually acknowledge movement as part of the definition. This raised questions: why is the migration-trafficking nexus regarded as it is, does it reveal some hidden ideologies or goals that have affected the perception of this relationship and how does this affect the anti-trafficking measures?

In order to assess these questions, and to show that the dominant interpretations are not the only possible or appropriate ones, I first argued that it is possible to interpret that migration is part of the definition of trafficking in chapter 3. I did this by focusing on the action element of the definition, which can be seen as a starting place for the analysis of whether migration is part of the definition or not. I examined the act of harbouring more closely, since it has been singled out as the reason migration is part of the definition. Furthermore, I examined if the

travaux préparatoires of the Protocol revealed any intent from the drafters to include migration in the definition. While the travaux does not reveal anything explicit about how the action element is meant to be interpreted, it seems that the inclusion of harbouring was not meant to exclude migration from the definition of trafficking. The acts in the action element are meant to reflect the whole process of trafficking and to ensure that all the actors involved in the trafficking process are in the scope of the crime of trafficking, and can be prosecuted.²⁹¹

Additionally, I assessed the relationship between migration and the definition of trafficking in the context of the whole Convention against Transnational Organized Crime and its Protocols. This analysis also supports the claim that migration is actually meant to be part of the definition of trafficking, as migration is quite imbedded in the whole Convention, even if it is not explicitly mentioned as a requirement in the definition of trafficking. The overall structure and the placement of Trafficking Protocol to the Transnational Organized Crime Convention suggest strongly that migration is connected to trafficking, and that it should be included in the interpretations of the definition. In the light of the context of the Convention, it would actually go against its purpose, if migration was excluded from the definition.

Overall, chapter 3 demonstrates that it is possible to argue and interpret that migration is part of the definition of trafficking. Its inclusion in the definition is appropriate, when it is accepted that migration also means movement within a country and that the elements' purpose in the definition is to show the process of trafficking, and the acts should not be scrutinised as individuals. It actually seems that it was intended to be part of the trafficking's definition. But since it is not part of the most important interpretations, this then leads to the conclusion that there are some ideologies and biases behind the interpretations that de-emphasise movement in the definition.

In chapter four, I looked into this question through assessing what ideological thinking and hidden purposes this reveals, and what changes could the acknowledgement of migration bring to anti-trafficking measures. Anti-migration sentiment seems to be the clearest ideology behind the interpretation that trafficking is part of migration, but migration is not part of trafficking. It is easy to see that the conception of the Trafficking Protocol is connected to the thoughts about global migration and migrants' labour rights. Anti-migration sentiments of course seem to be connected to racism and nationalism. It also shows the bias of the idea of ideal victim.

²⁹¹ Chuang 2014, p. 631, footnote 127.

International law is biased about those who benefit from international law and those who do not, even if different states are formally equal under international law. They are supposedly anti-imperialistic and drive genuine egalitarianism.²⁹² Legal systems have always on one hand promoted equality, but on the other permitted and even promoted exploitation of others.²⁹³ I think that the interpretation of trafficking as part of migration also shows failings in international law and falls to imperialistic ideology, if we believe that the Trafficking Protocol is used as a way to get the origin countries to be part of migration control that the destination countries want to impose.²⁹⁴ This also helps countries, such as the United States to have control over other countries and expand their global power by acting as a leader of anti-trafficking and imposing their standards to other countries.

Furthermore, the focus of trafficking as part of migration helps the destination countries to regard trafficking as something that happens elsewhere, or that it is brought into their countries by individual bad actors. This type of thinking has been illustrated, for example, by Todres, who has quite similarly used the dichotomy of Self and Other to explain this. The Self is virtuous while the Other, and otherness, is uncivilised. The Other is responsible to human rights violations, such as trafficking. This can lead to the global North, the destination countries, to blame trafficking to “others” who are “over there”, as they are not seen to appreciate human rights the way the global North sees itself doing.²⁹⁵ This results in the destination countries overlooking trafficking that takes place in their own countries and by their own citizens.²⁹⁶ This seems to work similarly with the de-emphasis of migration in the definition of trafficking. This interpretation keeps trafficking from being the governments’ fault and as part of the irregular migration.²⁹⁷ This way the origin countries can be brought to the global migration control without the destination countries having to take actual responsibility. Acknowledging that migration is part of trafficking would also mean acknowledging that it also happens within countries’ own borders and not just by, and to, distanced individuals somewhere else.

This also connects to the racism in the concept of trafficking as part of migration (specifically irregular migration) and regarding trafficking as something that happens somewhere else or

²⁹² Schwöbel-Patel 2018, p.711.

²⁹³ Todres 2009, p. 637.

²⁹⁴ Hathaway 2008, p. 56.

²⁹⁵ Todres 2009, p. 622 – 623.

²⁹⁶ Todres 2009, p. 608.

²⁹⁷ See also O’Brien 2016, p. 216 for a discussion of this in the context of anti-trafficking campaigns.

by individual actors who impose a threat to “civilised” societies by bringing trafficking to these civilised societies as a migrant from somewhere else. This drives the perception that traffickers are noncitizens, irregular migrants and that noncitizens are threatening criminals.²⁹⁸ Specifically this drives the perception of traffickers as non-white men, which then affects the anti-trafficking measures and results in profiling of people of colour.²⁹⁹ This also turns traffickers and trafficking into problem of individuals, and takes the blame away from those who profit from trafficked labour and the demand for trafficked persons’ labour.³⁰⁰ A lot of ordinary companies and people get the benefits of trafficked persons’ labour, whether it is directly or indirectly.³⁰¹

These anti-migration sentiments and racist undertones have effects to the anti-trafficking measures and trafficking policies. For example, the focus on migration control seems to be the result of this. Trafficking is equated to be a problem of insufficient border control. Therefore, the goal of reducing trafficking is seen to be achieved by increased law enforcement presence at State borders.³⁰² Hence, a more comprehensive view on migration-trafficking nexus could come from acknowledging that the relationship between migration and trafficking is complex. Treating human trafficking as a subcategory of migration turns it into a matter, which only concerns the control of migration. These measures ignore even the trafficking within States, which is not much affected from migration control. For this reason, there is a need for real changes with the global migration framework, especially to rights of migrant workers.

Moreover, a more comprehensive perception of migration-trafficking nexus could also have an effect on victim recognition, which is currently also connected to anti-migration and racism. The stereotype of a trafficking victim is still strongly connected to the historical concept of trafficking, but also to the concept of trafficking as part of irregular migration. There is a stereotypical concept of the innocent young woman who is lured or deceived into horrifying sex work, which she cannot escape.³⁰³ She is to be rescued, not escape herself. This profile disregards a lot of people: men and boys, economic migrants and overall the complex situations in which victims of trafficking have been and have come from.³⁰⁴ Hence, it would help to reduce these types of stereotypes about migrants to change the emphasis of trafficking

²⁹⁸ Chacon 2010, p. 1630 – 1631.

²⁹⁹ Balgamwalla 2016, p. 30.

³⁰⁰ Chacon 2010, p. 1633.

³⁰¹ Chacon 2010, p. 1635.

³⁰² Chacon 2010, p. 1637.

³⁰³ Doezema 2005, p. 67.

³⁰⁴ Todres 2009, p. 634 – 635.

being a subcategory of irregular migration to migration as part of trafficking. This could help in fixing some of the misconception about the ideal victim, and help in recognition of victims by bringing all kinds of migration into consideration. This might also give agency to the victims of trafficking, by the perception of them being “just victims” changing to regard them as complex people with their own agency.

Of course, this has the possible problem of victimisation and stigmatisation of all migrants: categorising migration as part of trafficking could further victimise migrants. Therefore, there is some delicate balancing to be done. It should also be remembered that migration as part of trafficking contains migration within State borders as well. The point is not to identify migrants as special subjects, but to bring the migration framework to fight trafficking and other abuses of migrants in a more appropriate way. Furthermore, while I have argued that the de-emphasis of movement can help the destination countries to ignore the root causes etc., but on the other hand, if migration was explicitly stated in the interpretations, one could accuse the countries of doing this to focus only on anti-migration measures. However, I would argue that this would bring migration issues to the forefront of trafficking, so States would have to actually focus on migrant rights, and not just keep them as a side-note of trafficking and keep trafficking as one part of irregular migration.

In other words, if migration was regarded as part of trafficking, it could also bring into the forefront that issues of trafficking intersect with issues of labour migration, and migration overall. If the prevention of trafficking is actually wanted, and not just prosecution of traffickers, the solution is to tackle the root-causes. The current global migration framework and trafficking framework fail to address the root causes for the things that make people vulnerable to trafficking and exploitation as migrants. This is easier said than done, but I would argue that regarding migration as part of trafficking is the first step in really connecting migration and trafficking in a meaningful way, and not just as an excuse to use anti-trafficking policies to promote migration control. The focus should be on addressing the problems, such as inequality, large wage gaps within a country and other countries, the demand for cheap labour and cheap products, all of which drive trafficking and have an effect of making some people vulnerable to trafficking.

While my findings do not necessarily offer something different from the solutions that many have already suggested, my thesis further solidifies the conclusion that there is need for change. Overall, this thesis shows that there seems to be confusion about the trafficking-

migration nexus and the role of migration in the definition of trafficking. This does not arguably make it easier to coordinate efforts against trafficking, especially its prevention. Different governments cannot work well in coordination with each other or with different organisations, which work in areas overlapping with trafficking, if the understanding of trafficking and its causes differ a lot. The confusion about relationship between migration and trafficking does disservice to everyone.

It is difficult to deny the strong connection migration has to trafficking and the possible benefits of regarding migration as part of trafficking. Moreover, if trafficking is continued to be regarded as part of migration, the way this relation is seen should also go the other way around. It would be harmful to simply disregard the important connection trafficking shares with migration. It would be even more harmful to reduce trafficking to a subset of irregular migration. This only serves to simplify trafficking and leads to harmful assumptions about trafficking victims and migrants.

This is not to say that there are no good things about the Trafficking Protocol and its measures. As Gallagher has explained, the Protocol has brought the discussions and the global responses to trafficking to a new level.³⁰⁵ At the moment, 90 per cent of UN Member States have criminalised trafficking based on the Trafficking Protocol's definition.³⁰⁶ And as Koskenniemi has argued, despite the flexibility of the international law, the international law and its principles cannot be simply reduced to apologies for class interests and ideologies.³⁰⁷ However, that does not mean it is not important to examine it critically and that there are no ideologies in them. My thesis shows why the relationship between migration and trafficking is so confusing: it has been built and regarded one-sidedly to serve a limited purpose, which does not truthfully reflect its origin, the definition of trafficking.

³⁰⁵ Gallagher 2015.

³⁰⁶ UNODC 2020, p. 23.

³⁰⁷ Koskenniemi 2007, p. 67.