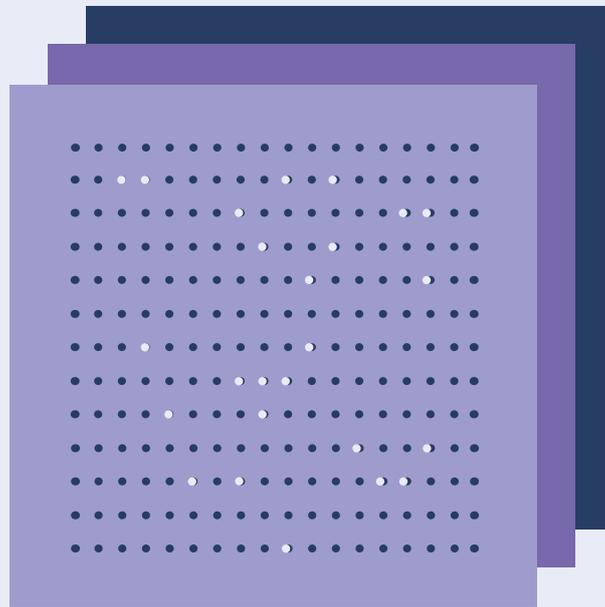
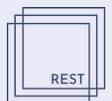


RESIDENCE PERMITS, INTERNATIONAL PROTECTION AND VICTIMS OF HUMAN TRAFFICKING

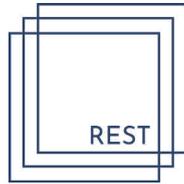
Durable Solutions Grounded in International Law



Johanna Schlintl, Liliana Sorrentino,
with the editorial and substantive contribution of Ryszard Piotrowicz



Residence Permits, International Protection and Victims of Human Trafficking:
Durable Solutions Grounded in International Law



REsidency STratus: Strengthening the protection of trafficked persons

Johanna Schlintl,
Liliana Sorrentino,
with the editorial and substantive contribution of Ryszard Piotrowicz



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The REST Consortium consists of members of the La Strada International – European NGO Platform against Trafficking in Human Beings.



Design: Ivana Lazic

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RECOMMENDATIONS

More targeted and systematic efforts are necessary to secure a durable solution for victims of trafficking in terms of long-term protection and access to socio-economic rights. Based on in-depth analysis of the project REST, its consortium encourages stakeholders to act on the following recommendations:

Identification of victims of trafficking

- Put the best interests of the trafficked person at the centre of all measures, and ensure that he/she is provided with the most appropriate protection to secure their rights as well as access to a durable solution, be it granting international protection or permanent residence in the country of destination or ensuring safe return and reintegration in the country of origin.
- Ensure that the rights of trafficked persons to be identified as such, to access to assistance, support and justice, are fully effective and without prejudice to their right to seek and enjoy asylum.
- Call on States to further reconcile their obligations under refugee and human rights law with those under anti-trafficking law to ensure sufficient and adequate protection of victims of trafficking seeking asylum, and fair decision-making concerning their asylum claims.
- Ensure that the person is informed about all possibilities, including that of having access to a recovery and reflection period, a temporary residence permit to facilitate cooperation with the authorities and/or for reasons related to their personal situation, as well as their prospects of being granted asylum or subsidiary protection, or of safe and dignified return to their home country.

Residence permit

- In compliance with Art. 14 of the CoE Anti-Trafficking Convention, allow victims of trafficking to apply for residence on the basis of their personal situation from the outset, without putting pressure on them to cooperate in the investigation and prosecution of traffickers, and ensure that applications are entirely disconnected from the prospects of success of the investigation and prosecution.
- Define clear criteria for granting residence permits to trafficked persons, both based on their personal situation and in exchange for their cooperation in the investigation and prosecution of traffickers. Ensure that the personal situation criteria allow an assessment of the highly complex and individual personal situations of trafficked persons. Ensure a consistent and comprehensible application of the criteria by providing the competent authorities with clear and viable guidelines, adequate training and sufficient resources.
- Establish an adequate timeframe for the processing of applications for residence permits for victims of trafficking and ensure that the competent authorities comply with it. At the very least, prevent trafficked persons from legal uncertainty concerning their right to residence for the entire duration of legal proceedings against alleged traffickers.
- Remove bureaucratic obstacles to accessing residence permits, inter alia by: a) simplifying procedures for obtaining residence permits for trafficked persons; b) ensuring that the possession of false or no identity documents does not constitute a barrier to access residence permits for trafficked persons; c) not requiring identity documents for the first application

and/or granting trafficked persons easy access to temporary identity documents.

- Prevent the secondary victimisation of trafficked persons, which may result, inter alia, from the repeated questioning of victims about their trafficking experiences.
- Acknowledge the right of victims of trafficking to appeal against the denial/non-renewal decision of their application for a residence permit. Provide for the possibility to have the administrative decision reviewed by a court. Ensure that the appeal has a suspensive effect on a possible decision to expel.
- Strengthen multi-agency involvement in the assessment of the personal situation and the vulnerability of victims of trafficking, and establish good communication between competent authorities and specialised organisations/institutions working with trafficked persons, from a multidisciplinary approach.
- When granting residence in exchange for cooperation:
 - Apply a broad concept of cooperation and require a low cooperation threshold from victims of trafficking – including the provision of information that is only potentially useful for the investigation or prosecution of a crime. A credible report that they have been victims of human trafficking submitted by the person or by a supporting NGO acting on behalf of the person should suffice.
 - Guarantee that trafficked persons receive all the information they need to make informed decisions throughout criminal proceedings.
 - Do not make access of trafficked persons to legal residence dependent on whether proceedings for THB or other related crimes are initiated or not.
 - Increase the involvement of various agencies, including both public institutions and civil society organisations, in the determination process assessing the victim's personal situation.
 - Ensure the safety and well-being of victims of trafficking, and minimise the risks associated with cooperation when they take an informed decision to cooperate in the investigation and prosecution of the alleged perpetrators. Offer them (and their families) comprehensive protective victim-witness measures explicitly tailored to their highly vulnerable situation and special needs, to prevent retaliation and intimidation during criminal proceedings as well as after the trial. Such measures should include the possibility of urgent family reunification.

Compatibility between the residence permit scheme and international protection

- Call on States to further reconcile their obligations under refugee and human rights law with those under anti-trafficking law to ensure sufficient and adequate protection of victims of trafficking seeking asylum, as well as fair decision-making concerning their asylum claims.
- Ensure that both paths can be pursued in parallel.
- Ensure that persons are informed about all possibilities to obtain (temporary) residence and protection available in the country of residence, as well as safe mechanisms to return to their home countries.

International protection

- Call on States to ensure that trafficked persons have fair and effective access to asylum procedures, and that both victim protection standards and asylum procedural guarantees are systematically applied.
- Guarantee the right of trafficked persons to seek and enjoy refugee status where they meet the criteria of the 1951 Convention relating to the Status of Refugees. In doing so, ensure

that due account is taken of how their trafficking experience contributes to informing a valid asylum claim, building on the UNHCR Guidelines no.7 (2006) and GRETA's Guidance Note on international protection (2020).

- Ensure that, in the determination of international protection claims of a trafficked person or a person at risk of being trafficked, no requirement is made of submitting a formal complaint to the authorities about their trafficking or of cooperation with law enforcement. Such criteria are not included in the refugee definition and cannot be prerequisites for enjoying asylum.
- Strengthen efforts to guarantee early identification, the rights to information, assistance and protection of trafficking victims and potential victims amongst asylum seekers and refugees.
- All actors involved in the asylum procedures are encouraged to record data on the persons with indicators of THB, including the recording of information about effective referrals, conducted risk assessments and provided specialised assistance and protection, etc.
- Establish referral mechanisms between the NRM, where one is in use, and the asylum system to grant asylum seekers and refugees who are trafficked access to specialised support and assistance.
- Guarantee the provision of information on access to asylum for those trafficked persons supported and assisted by specialised organisations.
- Develop guidelines or procedures to ensure that the asylum system and the NRM for trafficked persons function in a coordinated and coherent manner to safeguard the rights of trafficked asylum seekers and refugees.
- Support and foster cooperation between NGOs assisting asylum seekers and refugees and anti-trafficking NGOs, to secure protection and support for trafficked persons, as well as to coordinate legal aid and assistance.
- Upon a reasonable suspicion that a person might have been trafficked or be at risk of being trafficked, inform the person about their rights, including the right to specialised support (e.g. health care, psychosocial support, legal aid and counselling), and effectively enable them to access these rights.
- Upon a reasonable suspicion that a person might have been trafficked or be at risk of being trafficked, ensure that procedural guarantees and reception conditions are tailored to their specific needs, regardless of where their trafficking occurred and their ability or willingness to cooperate with the authorities. This includes ensuring reception conditions that are safe and adequate to their needs, both as an asylum applicant and as a victim of trafficking.
- Where a person takes an informed decision to continue with the asylum process without accessing the NRM for trafficked persons, respect their choice.
- Ensure expert legal advice free of charge at the early stages of the identification and asylum procedure to assist trafficked asylum seekers in understanding the procedure, and providing relevant information about their trafficking experience and the risks they may face in case of return or transfer to the first country of entry into the European Union, where appropriate.
- Ensure expert legal advice free of charge at the early stages of the identification process concerning the victim's rights as a victim of trafficking and, more generally, as a victim of crime.
- Treat cases involving vulnerable persons, such as a trafficked person or a person at risk of being trafficked, in the ordinary asylum procedure. Avoid the examination of claims by trafficked persons or persons at risk of being trafficked in border or accelerated procedures, to enable a correct and adequate assessment on the merits of their claims.
- Ensure that trafficked asylum seekers are not held in immigration detention or other forms of custody and ensure compliance with the non-punishment provision in European law.
- Asylum actors should consult specialised anti-trafficking actors during: a) the identification of victims of trafficking; b) the assessment of, and response to, their specific needs (including in terms of reception, protection and procedural guarantees); c) the refugee status determina-

tion procedure, including concerning the situation and risks in the country of origin.

- Ensure systematic training of asylum officers on UNHCR Guidelines no.7 on trafficking in persons (2006) and on the GRETA Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection (2020), as well as on assessing trafficking vulnerabilities, handling applications and interviewing trafficked persons. Such training should also include interviewing techniques to reduce/prevent re-victimisation.
- Monitor the impact of systematic training events, especially their implementation and the outcome of advocacy activities.
- Raise the awareness and appreciation of the asylum-determining authorities and the judiciary competent on international protection matters of the significance of the trafficking experience in asylum determination, as well as about the vulnerability of trafficked persons seeking asylum, and the impact of trauma on their ability to recall situations and events of profound physical and psychological suffering.
- Ensure that a thorough risk assessment is conducted before issuing a return decision, including a decision on a transfer under the Dublin III Regulation, to ensure compliance with non-refoulement obligations. Regardless of whether the person is in the asylum procedure or not, ensure that a risk assessment at least takes into account the following:
 - » dangers to their life and health,
 - » risk of torture, inhuman or degrading treatment,
 - » risk of persecution (e.g. ostracism, social exclusion or discrimination to the extent that it would amount to persecution),
 - » risk of reprisal or serious harm by traffickers and their associates (including issues related to the person's trafficking experience and the presence of a debt),
 - » risk of re-trafficking,
 - » risk of detention and penalisation for status-related offences,
 - » the capacity and willingness of the home country authorities to effectively protect the trafficked person and/or their family from possible intimidation, violence and harm,
 - » the availability of, and effective access to, social assistance programmes, including safe accommodation, medical, legal and psychological aid, and the opportunities for employment and sustainable means of existence.
- Secure the possibility to claim asylum claims for victims of all forms of trafficking. Especially acknowledge trafficking for forced labour, domestic servitude, forced begging and forced criminality, which also jeopardise human dignity and may entail severe violations of human rights amounting to acts of persecution, where the State of origin is unable or unwilling to protect the victim.
- Incorporate/include the contribution and expertise of reputable and experienced NGOs in the asylum-determination process through the submission of evidence on matters such as the psychological and or mental health evaluation of the trafficking victim, the reasonableness of the victim's fear, the severity of past persecution, the impact of trauma and the credibility of the victim, the conditions in the State of origin, including the State's inability or unwillingness to provide effective protection.
- Guarantee the right of trafficked persons, and persons at risk of being trafficked, to seek and enjoy complementary protection where, although they are not entitled to refugee status, there is a risk of being exposed, in violation of the principle of non-refoulement, to torture, inhuman and degrading treatment or punishment or being trafficked.

Application of the Dublin III Regulation to victims of trafficking

- Ensure that trafficked asylum seekers in Dublin procedures are not discriminated against in their access to support, and in the scope of protection of their rights as victims, solely because they fall within the realm of applicability of the Dublin III regulation.
- Call on States to exercise their sovereignty clause, in accordance with Article 17 of the Dublin III Regulation, and examine the asylum application claim lodged by a trafficked person, even if such examination is not its responsibility under the Dublin criteria.
- Carry out a risk and vulnerability assessment during the Dublin procedures.
- Establish communication channels between those engaged in transfer of individuals in accordance with the Dublin III Regulation and specialised NGOs, to ensure clear coordination in cases of removal of a trafficked person and adequate reception in the country of return, as well as monitoring of the assistance provided to the individual.
- Gather the data on victims of trafficking transferred under the Dublin III Regulation to monitor the protection of their rights in accordance with European law on trafficking and asylum, and document violations of their rights. Advocate for the non-application of the Dublin III Regulation to victims of trafficking

Access to socio-economic rights and social inclusion

- Grant victims of trafficking direct access to the labour market, without imposing restrictions regarding occupation, sector of activity and territorial scope, as a measure towards the social inclusion and the full recovery of victims.
- Develop policies on the inclusion of victims of trafficking in the labour market.
- Establish accelerated procedures, and facilitate preferential access to family reunification, for victims of trafficking.
- Where trafficked persons can apply for other residence permits within the framework of the regular law on aliens, exempt them – at least for the initial application – from general conditions, such as minimum income.

INTRODUCTION

This report has been developed in the framework of the Project REST, which aims to strengthen the rights to residence and international protection for third-country nationals trafficked in Europe, by examining promising practices, gaps and challenges in their actual access to these rights.

The objective of this report is to explore avenues and challenges, in order to secure a durable solution for trafficked persons in terms of long-term residence and access to socio-economic rights, including the right to work. Trafficked persons' access to long-term or permanent residence is an integral part of their right to effective remedies. Securing a long-term residence for trafficked persons is one way to guarantee their dignity and foster their access to justice. A durable solution in terms of residence provides trafficked person with a foundation for safety and stability, and hope for a future perspective.

The report puts centre stage the protection of the rights of trafficked persons. It emphasises that they are bearers of rights as women, men, children, victims of crime, victims of gender-based violence, refugees, asylum seekers and migrant workers. It underlines in particular the rights and protection needs of trafficked persons with regard to access to residence and to international protection. It intends to show how integrating and combining protection under the human rights, asylum and anti-trafficking regimes can contribute to strengthening the overall protection of the rights of trafficked persons, and enhance the prospects of long-term residence and the access to durable solutions.

To this end, the report analyses the international and European legal framework on access to residence permits and to international protection for trafficked persons. Then it examines implementation at national level in six countries (Austria, France, Moldova, The Netherlands, Serbia and Spain) - all parties to the CoE Anti-Trafficking Convention, to the ECHR and the 1951 Refugee Convention. It seeks to identify gaps and barriers in international standards, national laws and their practical implementation that challenge the effective protection of trafficked persons. Promising practices for effective access of trafficked persons to durable solutions in terms of their rights, safety and dignity are highlighted. The report builds on the knowledge, experience and practice of leading anti-trafficking NGOs that support trafficked persons in the process of social inclusion, namely LEFÖ-IBF in Austria, Comité Contre l'Esclavage Moderne (CCEM) in France, Proyecto Esperanza in Spain, CoMensha in the Netherlands, La Strada Moldova in Moldova and Astra in Serbia.

The first thematic part of the report consists of three main chapters. It starts with a discussion of the key provisions on the right to residence of trafficked persons foreseen at the international and European levels. From a holistic human rights-based approach, it gathers arguments for unconditional residence for victims of trafficking who want to remain or cannot return to their countries of origin due to serious risks upon return.¹

A brief summary of the legislation on residence permits for victims of trafficking in the six countries studied, discusses the temporary and permanent residence permits available for victims of trafficking after the recovery and reflection period. The main features of the various national THB-specific residence systems are then summarised in an overview table to allow comparison. The table covers the conditions under which victims of trafficking are granted a temporary residence permit, indicating the initial duration, the reasons for withdrawal and the conditions for renewal. It also shows whether the residence permit for victims of trafficking is linked to access to the labour market and allows family reunification. Finally, it is indicated whether long-term residence permits specifically designed for victims of trafficking exist in the six countries studied.

¹ UNGA (2019), HRC, Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, A/HRC/41/46, para 61, urging better social inclusion of victims and survivors of trafficking.

The most important chapter of this part of the report addresses the impact of the practical implementation of national provisions on the effective access of trafficked persons to residence permits. It considers whether victims of trafficking are thus provided with an accessible durable solution in terms of their rights, safety and dignity. The main purpose of this chapter is to assess and identify in which situations victims of trafficking can obtain a residence permit, i.e. if trafficked persons are granted residence solely in exchange for cooperation or also on account of their personal situation. States' interpretation of the terms "personal situation" and "cooperation", i.e. how and to what extent the personal situation of trafficked persons is taken into account, as well as what is required of victims of trafficking in the investigation and prosecution of traffickers. Of great significance is which actors are involved in the assessment and decision procedures. Throughout this chapter, particular attention is paid to whether the conditions for granting residence permits to victims of trafficking can actually be met by them. In this context, an important question is whether residence is actually granted separately from legal proceedings against perpetrators and detached from them. In view of the fact that residence permits are initially granted for a limited period of time, it is also clarified whether and under which conditions victims of trafficking are offered a long-term perspective – through THB-specific permanent residence permits and/or through the possibility of converting THB-specific temporary residence permits into long-term permits within the framework of the regular aliens law in the six countries studied. With a view to the social inclusion of trafficked persons, the chapter also assesses whether and under what conditions trafficked persons are granted access to the labour market and to family reunification. Lastly, the application procedures for residence permits are examined, and bureaucratic hurdles that challenge the effective access of trafficked persons to temporary and permanent residence permits are identified.

The second part of the report explores the international protection needs of trafficked persons and their access to durable solutions. Refugees and asylum seekers in Europe are increasingly vulnerable to trafficking; some have been trafficked in their home countries, and have managed to escape, others were trafficked during their flight or when they reached a transit country or the country of asylum. While some trafficked persons exiting a situation of trafficking in a foreign country wish to go back home to their families as soon as possible, in other cases, it is just the opposite; they are afraid of being returned to their country of origin because of risks of retaliation by traffickers, rejection by family and/or community, or because they may face the danger of being re-trafficked or subjected to torture or other ill treatment. In such cases, trafficked persons need to be able to access asylum or other forms of complementary protection, which provide opportunities for long-term residence and durable solutions.

This second part of the report is divided into three chapters. It begins with a discussion of the international and European standards to guarantee access to international protection and protection from refoulement for victims of trafficking and persons at risk of being trafficked. It first examines the criteria for the granting of international protection and various possible ways through which victims may fit these criteria and be granted international protection. It then discusses the potential for protection deriving from non-refoulement obligations under Article 3 ECHR. The chapter continues with a concise overview of the main procedural guarantees to safeguard access to asylum for victims of trafficking in Europe.

The second chapter moves on to examining the question of how current provisions on asylum and trafficking are put into practice in the six countries examined to ensure adequate and effective protection of the rights of trafficked persons seeking asylum, and to enable their access to asylum. As recently pointed out by GRETA, "[a]ccess to fair and efficient asylum procedures, early legal counselling and specialised assistance [...] is essential if victims of trafficking are to be enabled to present an asylum claim effectively".² The analysis begins with a discussion of existing mechanisms and current practices for the detection of victims throughout the various stages of the asylum process in the six countries examined. It then considers what procedural guarantees are implemented to take into account the specific protection needs of asylum applicants who are victims of trafficking. The main procedural guarantees for

2 CoE GRETA(2020)0620, Guidance note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection, para.38.

trafficked persons in the various asylum systems are then summarised in an overview table, to facilitate comparison. The table indicates whether trafficking victims are recognised as a vulnerable group, and whether there is a specific mechanism for vulnerability screening. It also shows whether victims have access to special reception facilities and can be exempted from border and accelerated procedures, and whether asylum-seeking victims of trafficking can be detained. Finally, it is indicated whether they may have a support person during the asylum procedure and whether they may express a preference concerning the gender of the interviewer. The two questions – identification and procedural guarantees – are then explored in the context of Dublin procedures because of the particular challenges that emerge for asylum applicants who are victims of trafficking. Throughout this chapter, the relationship between the asylum system and the National Referral Mechanism for trafficked persons is considered, and conflicting priorities, challenges and promising practices are highlighted.

In the third chapter, the report considers whether the implementation of the international protection obligations in the six countries provides victims of trafficking with an accessible durable solution in terms of protection of their rights, safety and dignity. It explores the experiences of trafficked persons and persons at risk of being trafficked, in having their claims to international protection considered. It builds on the knowledge and practice of NGOs supporting trafficked asylum seekers in the process of determination of their international protection needs. Case-studies illustrate the issues and challenges that emerge in the granting of refugee status or complementary forms of protection to trafficked persons.

A table provides an overview of the main content of international protection in terms of refugee status and subsidiary protection in the countries studied. It refers to the duration of the residence permit granted, the right to work and to family reunification, as well as the accessibility to social welfare.

Methodology

The co-authors of the report conducted an in-depth legal analysis of the international and European provisions on the rights to residence and international protection of trafficked persons. They analysed primary sources of human rights, asylum and anti-trafficking law, taking into account recommendations, opinions and reports of relevant institutions, bodies, and mechanisms – such as GRETA, OHCHR, UNHCR – NGOs and scholarly critique. The six partner NGOs carried out studies on the national legislation on residence permits and international protection, using a standardised questionnaire. They gathered more than 150 case-studies and out of these selected 42 exemplary case studies to identify promising practices, gaps and barriers to effective implementation. The research was focussed on adult trafficked persons; hence the report does not consider the specific situation, rights and special needs of children.

The analysis of the results of desk and field research – enriched with information from the national reports of GRETA, the national rapporteurs, scholarly literature and specialised reports from international agencies and NGOs – forms the basis for the research findings and evidence-based recommendations of this report. Furthermore, the research is complemented by selected case law examples concerning asylum claims of trafficked persons, obtained through national research and consultation of the ECRE Asylum Information Database (AIDA).

The main findings and recommendations were discussed, validated and further developed at a multi-day focus group meeting with the participation of national and international experts and stakeholders, held online on 23-24 November 2020. A total of 40 participants joined the discussions: representatives of NGOs, lawyers, asylum experts, immigration and asylum authorities, experts from international organisations, including the Council of Europe GRETA Secretariat and European Asylum Office. A summary of the main outcomes of the focus group meeting is provided in Annex I. Furthermore, the report integrates written comments and feedback by project partners.

With regard to the limitations of the report, it should be noted that due to incomplete data, some important topics are not covered in detail, and merit further research. These include:

- possible links between access to (long-term) residence and the (non-)implementation of the provisions on the recovery and reflection period;
- a closer look at the apparently large gaps in the implementation of the international provisions on safe return and risk assessment; and
- the detailed content of international protection and victims' actual access to the labour market and social welfare.

Although it would have been valuable to include a gender perspective throughout the research, this was not possible due to the disparate data in the six countries studied.

A. ACCESS TO RESIDENCE PERMITS

A.1. International and European Legal Framework

The regularisation of the legal status of victims of trafficking is key for their safety, stability and access to justice. One way of doing so is by providing victims of trafficking with residence permits. This section discusses the key provisions on temporary residence permits for victims of trafficking foreseen in the two relevant EU Directives, namely the 2004 EU Directive on Residence Permits³ and the 2011 Anti-Trafficking Directive,⁴ as well as the CoE Anti-Trafficking Convention.⁵ Going further than the 2004 Directive, the Convention foresees renewable residence permits not only in exchange for cooperation with the criminal justice system, but also on account of the personal situation of victims of trafficking. One of the main concerns is that some States provided for the issue of residence permits only in exchange for the victims' cooperation.

"[This] creates pressure on victims to make a statement against the traffickers at an early stage in the process. Such pressure is undesirable given the needs, problems, and fears of victims immediately after they have left the situation of exploitation."⁶

Furthermore, the mere fact that a trafficked person does not wish to cooperate, cannot provide sufficient information, or that a criminal case will not be initiated, does not necessarily indicate a lack of victimhood.⁷ Thus, making residence permits solely dependent on cooperation would exclude the many trafficked persons from access to assistance and support, who for various reasons cannot, or do not wish to, cooperate with the authorities.

A victim-centred approach puts the needs, problems and fears of victims before the interests of law en-

3 EU Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/19 (hereinafter EU Dir 2004/81/EC).

4 EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1 (hereinafter EU Dir 2011/36/EU).

5 Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, ETS 197 (hereinafter CoE Anti-Trafficking Convention).

6 Rijken, C (2018), Trafficking in Persons: A victim's perspective, in Piotrowicz/Rijken/Uhl (Eds.), Routledge Handbook on Human Trafficking, Routledge, p. 249. Also see for a detailed discussion on the factors and patterns that play a role in the decision by victims of trafficking to leave the situation of exploitation, make use of assistance, report to the police, or testify against, the traffickers.

7 „A distinction should be made between a ‚de facto‘ victim and a ‚de jure‘ victim.“ Rijken, C, 2018, p. 243.

forcement. In this very sense, some EU member States go beyond the current standard of the EU legal framework, in so far as they either do not make residence permits for victims of trafficking conditional upon cooperation, or they allow exceptions to this requirement due to the victim's personal circumstances. In some countries the permit can lead to permanent residence under certain conditions.⁸ This practice is in line with the CoE Anti-Trafficking Convention, and should be replicated elsewhere.

The application of a human rights-based approach demands the de-linking of residence from cooperation, as well as the promotion of trafficked persons' social inclusion. In the following it will be shown, that a human rights-based approach obliges States not only to provide victims of trafficking with a right to remain during legal proceedings against their perpetrators, but also afterwards, if the person's safety requires it. States are in fact required to offer unconditional residence – i.e. without any obligation to cooperate with the relevant authorities. As was recently stated by the UN Special Rapporteur on trafficking in human beings:

"[E]xisting protection measures in most countries are not consistent with the objective of promoting trafficked persons' social inclusion. Most States provide trafficking victims with services that not only are designed for short-term assistance but also are conditional upon victims' cooperation with the criminal justice system. On the contrary, from a human rights standpoint, and with a view to promoting social inclusion, services and residence status should be not only non-conditional, but also should be disconnected from the very existence of criminal proceedings".⁹

In practice, States temporarily regularise the legal status of victims of trafficking through the granting of a reflection and recovery period, under certain conditions followed by a temporary (and, although less frequently, a permanent) residence permit due to cooperation and/or the personal situation of the trafficked person.¹⁰

The legal basis for this practice is contained both in EU law and the CoE Anti-Trafficking Convention. The relevant instruments differ greatly in their basic approaches. The EU Residence Permit Directive "is not a human rights document, or a victim protection scheme, but an instrument designed to combat irregular migration."¹¹ Its purpose is to provide victims of trafficking and migrant smuggling with incentives to cooperate with law enforcement authorities in the investigation and prosecution of the crimes committed against them. However, its express concern is not the protection of either victims or witnesses. Instead, "the overwhelming concern (...) was to ensure that the proposed visa regime was not open to opportunistic abuse or to otherwise aggravating the problem of illegal migration into the EU."¹² With its emphasis on human rights and victim protection, the CoE Anti-Trafficking Convention takes a highly different approach. The explicit recognition of trafficking as a violation of human rights and an offense to the dignity and integrity of the human being in the preamble, establishes the status of the CoE Anti-Trafficking Convention as a human rights instrument.¹³ The same holds true for the EU Anti-Trafficking Directive, with its clear and explicit adoption of an integrated and holistic, human right, victim-centred and gender-sensitive approach. Although limited in particular with regards to the provisions on the legal status of trafficked persons, it marks a shift "from a criminal and migration control approach to one that also includes human rights concerns".¹⁴

8 See EC (2014), Communication from the Commission to the Council and the European Parliament, On the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM(2014) 635 final, p. 8.

9 UNGA, 2019, Report of the Special Rapporteur on trafficking in persons, A/HRC/41/46, para 61.

10 Also possible is the granting of a temporary or permanent residence permit on social or humanitarian grounds, that may be related to, inter alia, respect for the principle of non-refoulement, inability to guarantee a secure return, and risk of re-trafficking.

11 Rubio Grundell, L (2015), EU Anti-Trafficking Policies: from Migration and Crime Control to Prevention and Protection, Migration Policy Center 2015/09, p. 5.

12 Gallagher, A (2010), The International Law of Human Trafficking, New York: Cambridge University Press, p. 102-103.

13 See Gallagher, A, 2010, p. 114-115. The violation of human rights occurs through the failure of the State to prevent trafficking, as well as to support and protect victims of trafficking.

14 See Rubio Grundell, L, 2015, p. 6.

As soon as the competent authorities have become aware of the existence of a trafficked person, they must follow a particular procedure. Once there are reasonable grounds to believe that the person has been trafficked, States must provide the person with a recovery and reflection period.¹⁵ The intention of this is to provide foreign victims of trafficking with time and space to recover and escape the influence of their traffickers, and to decide on their options, including whether they will cooperate with the competent authorities.¹⁶ In other words, the recovery and reflection period serves two purposes which are not always easily reconciled: the protection of victims and the prosecution of traffickers.¹⁷ During that period, victims of trafficking may not be removed from the territory, and unconditional access to services and support is given.¹⁸ The minimum duration of this period is 30 days¹⁹ – even though, especially with a view to the post-traumatic stress many victims of trafficking suffer, a longer period of three months was recommended.²⁰ In any case, what is essential is that the recovery and reflection period in itself is not conditional on present or future cooperation with the investigative or prosecution authorities.²¹

Quite different, and problematic with regard to a victim-centred and human rights-based approach, are the regulations on the granting of temporary residence permits after the expiration of the recovery and reflection period foreseen in the 2004 EU Directive on Residence Permits. Apart from the provision of a recovery period, “there is little in the [2004] Directive [on Residence Permits] that could be said to be motivated by a desire to support and assist trafficked people as victims of THB rather than as components of a prosecution case.”²² Accordingly, only victims of trafficking, who have shown a clear intention to cooperate with the competent authorities and severed all relations with the alleged traffickers, have a right to be considered for a temporary residence permit. Furthermore, the Directive introduces an objective criterion (beyond the victim’s control) in requiring that the person’s stay is deemed

15 Art 6 EU Dir 2004/81/EC, Art 13 CoE Anti-Trafficking Convention. See CoE (2005), Explanatory Report to the Convention on Action against Trafficking in Human Beings, ETS 197, para 172-179. For a comprehensive discussion of various forms of reflection periods and related temporary residence permits see Brunovskis, A/fafo (2012), Balancing protection and prosecution in anti-trafficking policies, A comparative analysis of reflection periods and related temporary residence permits for victims of trafficking in the Nordic countries, Belgium and Italy, Nordic Council of Ministers.

16 In the spirit of its main aim the 2004 Directive frames it as only a reflection period, so that victims of trafficking can take an informed decision as to whether cooperate with law enforcement.

17 See CoE, 2005, Explanatory Report to the Convention, para 173-174.

18 As per Art 7 EU Dir 2004/81/EC victims of trafficking will be entitled to emergency medical and psychological care and material assistance, free legal aid, translation and interpretation services. During the recovery and reflection period as per Art 13 CoE Anti-Trafficking Convention trafficked persons are entitled to the measures in Art 12.1 and 2 CoE Anti-Trafficking Convention. This includes measures to assist victims in their physical, psychological and social recovery (standards of living capable of ensuring their subsistence, through such measures as appropriate and secure accommodation, psychological and material assistance; access to emergency medical treatment; translation and interpretation services, when appropriate; counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; access to education for children) as well as measures that take victims’ safety fully into account.

19 Art 13 CoE Anti-Trafficking Convention. The 2004 Directive does not foresee a minimum duration, but leaves it to the discretion of Member States. As per Art 6.1 and 4 EU Dir 2004/81/EC, the reflection and recovery period may be terminated for reasons relating to public policy and to the protection of national security as well as if the victim renews contact with the perpetrators. This states an additional requirement, whose purpose is unclear in this context, since it is typically imposed on criminal informants. But the CoE Anti-Trafficking Convention contains some caveats: As per Art 13.3, the reflection and recovery period can be refused or terminated on grounds of public order or if the competent authorities establish that victim status is being claimed improperly. Furthermore, its granting does not provide for the possibility to refuse to give testimony when required by the court. See CoE, 2005, Explanatory Report to the Convention, para 176.

20 See i.a. Brunovskis, A/fafo, 2012, p. 48; Gallagher, A, 2010, p. 119, fn. 439; Planitzer, J (2014), Trafficking in Human Beings and Human Rights: The Role of the Council of Europe Convention on Action against Trafficking in Human Beings, Studienreihe des Ludwig Boltzmann Instituts für Menschenrechte 32, Vienna: n.w.v, p. 124, fn. 718; EC Group of Experts on Trafficking in Human Beings (2009), On a possible revision of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Opinion 4/2009, para 12.

21 See CoE, 2005, Explanatory Report to the Convention, para 175.

22 Piotrowicz, R (2018), The European legal regime on trafficking in human beings, in Piotrowicz/Rijken/Uhl (Eds.), Routledge Handbook on Human Trafficking, Routledge, p. 47.

necessary for the investigation or judicial proceedings. The permit is valid for at least six months, and can be renewed based on the same conditions.²³ Then again, it can be withdrawn at any time if the holder renews contact with the alleged traffickers, if the authorities believe that the trafficked person's cooperation has ceased or become fraudulent, as well as if the authorities decide to discontinue the proceedings.²⁴ And it "arguably demands too much for what it offers".²⁵ As soon as the proceedings have terminated, the permit is not to be renewed. National aliens' law is to be applied and the victim may be required to leave the country.²⁶ To sum up, one can say that within the legal framework of the 2004 Directive, victims of trafficking receive support only in so far and as long as it is required by the needs of criminal prosecution.²⁷ This is problematic not only in terms of a victim-centred and human rights-based approach, but also because it is largely unclear what the condition of cooperation actually requires of victims.

It is precisely in this sense, that the CoE Anti-Trafficking Convention goes one important step further. It provides victims of trafficking with a renewable temporary residence permit not only in exchange for cooperation, but also on account of their own needs, when their stay is deemed necessary owing to their personal situation.²⁸ The Convention does not give any further guidance on how to assess the necessity of issuing a residence permit due to personal circumstances. Instead, the Explanatory Report lists examples such as "the victim's safety, state of health, family situation or some other factor which has to be taken into account".²⁹ The victim's personal situation must be such that it would be unreasonable to compel them to leave the country.³⁰ This uncertainty as to requirements not only has the potential to bring about varying standards in States; it might also serve as another reason for States to opt for only providing residence in exchange for cooperation.³¹ Indeed, the problem remains that State Parties are not obliged to adopt both approaches simultaneously. This has the practical effect that States in fact can (and frequently will) opt for granting residence permits only to those victims who cooperate with the authorities.³² Consequently, some States decline to issue a residence permit solely due to the fact, that the victim is not considered necessary to assist with an investigation or prosecution,³³ although GRETA has repeatedly urged countries to either adopt legislation to enable, or otherwise ensure, that victims of trafficking can fully benefit from their right to obtain a renewable permit on account of their personal situation, including persons who do not co-operate with the authorities.³⁴

It is in the very nature of temporary residence permits that they expire at a certain point. Consequently, the return of a trafficked person to her or his country of origin³⁵ is regulated both on the UN and the CoE level. Return should preferably be voluntary, and the rights, safety and dignity of victims of traf-

23 Art 8, 13, 14 EU Dir 2004/81/EC.

24 Art 14 EU Dir 2004/81/EC.

25 Piotrowicz, R, 2018, p. 47.

26 Art 13 EU Dir 2004/81/EC.

27 For detailed criticism see inter alia, Piotrowicz, R (2002), *European Initiatives in the Protection of Victims of Trafficking Who Give Evidence Against their Traffickers*, *International Journal of Refugee Law* 14(2/3), pp. 263-267;

28 Art 14 CoE Anti-Trafficking Convention.

29 CoE, 2005, Explanatory Report to the Convention, para 184.

30 See CoE, 2005, Explanatory Report to the Convention, para 183.

31 See Planitzer, J, 2014, p. 124.

32 See Gallagher, A, 2010, p. 120.

33 See Piotrowicz, R, 2018, p. 43.

34 See i.a. CoE (2015), GRETA, 4th General Report on GRETA's activities, GRETA(2015)1, p. 48.; CoE (2017), GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Serbia, 2nd evaluation round, GRETA(2017)37, para 152; CoE (2018), GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, 2nd evaluation round, GRETA(2018)19, para 170; CoE (2018), GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, 2nd evaluation round, GRETA(2018)7, para 203; CoE (2019), GRETA, 8th General Report on GRETA's activities, pp. 42-43.

35 This may be the country of her or his nationality or where (s)he has the right of permanent residence.

ficking have to be taken into account.³⁶ In particular, such rights include the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of her or his identity.³⁷ Where repatriation would pose a serious risk for the safety of victims of trafficking or their families, States are required to provide legal alternatives.³⁸ In order to comply with the obligation of non-refoulement,³⁹ GRETA requires from States that “a full and competent risk assessment must be carried out before anyone is returned”.⁴⁰

As already indicated, a holistic approach based on human rights would indeed require that States grant an unconditional right of residence to trafficked persons. Only then would the rights of victims, as set out in the above-mentioned European and international instruments, be fully effective and meet the needs of victims. Specifically, the following human rights of victims of trafficking and corresponding obligations of States must be taken into account when considering whether to grant a victim of trafficking a (temporary or permanent) right of residence.⁴¹

First, victims of trafficking have a right to participate in legal proceedings against their perpetrators – which includes both prosecutions of traffickers and civil actions for recovery of wages. Therefore, States must refrain from removal until the person has been able to participate in the relevant proceedings.⁴² Due to the risks trafficked persons take for themselves and their families when testifying, States are required to ensure witness protection during investigation and proceedings, as well as afterwards, if the safety of the person requires it. This includes the identification of options for continued stay. Furthermore, a trafficked person’s legitimate interest in legal proceedings has to be accommodated, including when (s)he is unwilling or unable to testify.⁴³ That is to say, that the right to participate in legal proceedings includes a right to remain, which does not end automatically at the end of the court proceedings and is not conditional on the victim’s cooperation.

Second, victims of trafficking have a right to protection and support. This includes at least that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care.⁴⁴ States have to ensure that victims of trafficking have such access to protection and support and not make it conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.⁴⁵ Furthermore, protection is not limited to immediate or short-term assistance:

36 Art 16.2 CoE Anti-Trafficking Convention. See also Art 8.2 UN Trafficking Protocol, which states that the safety of the person has to be taken into account

37 See CoE, 2005, Explanatory Report to the CoE Anti-Trafficking Convention, para 202.

38 See OHCHR (2010), Recommended Principles and Guidelines on Human Rights and Human Trafficking, Commentary, HR/PUB/10/2, Principle 11.

39 As per Art 14 UN Trafficking Protocol and Art 40.4 CoE Anti-Trafficking Convention nothing in these instruments „shall affect the rights, obligations and responsibilities of States and individuals under international law“. In the context of return, one of the most important principles of international law is the principle of non-refoulement.

40 Even though Art 16.7 CoE Anti-Trafficking Convention explicitly requires States to conduct a pre-removal risk assessment only prior to the return of trafficked children. See CoE, GRETA (2020), 9th General Report on GRETA’s activities, para 172. See also the discussion on non-refoulement in B.1.2

41 Of high relevance especially with regard to long-term protection also is the obligation of States not to return victims of trafficking when they are at risk of serious harm, including from intimidation, retaliation and re-trafficking. This will be further explored in the next chapters

42 As per Art 6.2 UN Trafficking Protocol as well as Art 25.3 UN Convention against Transnational Organized Crime, 15 Nov 2000, 2225 UNTS 209, States have to provide victims with an opportunity to participate in legal proceedings against their perpetrators. Art 8.2 UN Trafficking Protocol and Art 16.2 CoE Anti-Trafficking Convention obliges States to carry out returns of victims of trafficking “with due regard (...) for the status of any related legal proceedings.” Art 7.1 UN Trafficking Protocol encourages States “to consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.” – without imposing an obligation on States. See Gallagher, A, 2010, pp. 349-351.

43 See OHCHR, 2010, Recommended Principles and Guidelines, Principle 9, p. 153.

44 See OHCHR, 2010, Recommended Principles and Guidelines, Principle 8, p. 141. It furthermore includes their right to effective remedies as well as legal assistance in a language that is understood and more. For a detailed discussion on the State’s obligations to take protective measures for trafficked persons, see Planitzer, J, 2014, pp. 78-83.

45 See OHCHR, 2010, Recommended Principles and Guidelines, Principle 8, p. 141; UNODC (2004), Legislative Guide for the Implementa-

“[i]nstead, it requires States to take robust and effective measures that can allow trafficked persons to rebuild their lives, free from threats of violence and exploitation, beyond the recovery and rehabilitation phase.”⁴⁶

An essential prerequisite to access to such measures is the right to remain in the country legally. More often than not, this will require the regularisation of the trafficked person’s legal status.⁴⁷ To meet the due diligence standard as regards their obligation to protect, States are therefore bound to offer victims of trafficking with a possibility of residence – without imposing any obligation to cooperate. Planitzer puts it very clearly:

“It is not understandable why one has to cooperate with relevant authorities in the first place in order to have access to rights; rights which have to be protected by the State in any case.”⁴⁸

Third, victims of trafficking have a right to effective and appropriate legal remedies. Remedies, or more specifically, reparation, consist of a wide range of measures including restitution, compensation,⁴⁹ rehabilitation, satisfaction and guarantees of non-repetition.⁵⁰ The obligation to provide reparation serves as an argument for unconditional residence in two ways: without a right to remain, victims of trafficking may be in fact denied the exercise of their right to effective remedies. When the presence of the person is required to seek remedial action, repatriation will inevitably hinder the free and effective exercise of the person’s right of access to remedies.⁵¹ Furthermore, residence functions also as a form of restitution in itself. To this effect, trafficked persons should be provided with a temporary or permanent residence permit “where a safe return to the country of origin cannot be guaranteed, may place them at the risk of persecution or further human rights violations, or is otherwise not in their best interest.”⁵² Clearly, this principle would be violated if there was an obligation to cooperate in order for trafficked persons to be eligible for residence.⁵³

Lastly, the state’s ability to fulfil its obligation to effectively investigate, prosecute and adjudicate trafficking depends crucially on the cooperation of victims of trafficking. In most cases, it is the testimonies of victims that ensure convictions. As trafficked persons are in most cases treated as the main source of evidence, ensuring their cooperation plays an important role in successful prosecution. However, concerns are warranted about the extent to which States hold victims responsible for playing their role in the fight against trafficking. And, as Ward/Fouladvand put it:

“For any such ‘responsibilisation of the victim’ to be acceptable, it has to be coupled with a recognition of the victim as a bearer of rights which the state has a responsibility to uphold (whether or not the victim is a citizen of that state).”⁵⁴

tion of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, para 62.

46 UNGA, 2019, Report of the Special Rapporteur on trafficking in persons, A/HRC/41/46, para 4.

47 See UNGA (2012), Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/20/18, para 55.

48 Planitzer, J, 2014, p. 107.

49 Efforts to improve access to remedies for trafficked persons often focus on compensation. As per Art 6.6 UN Trafficking Protocol at the very least, States are required to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered, This is one of the very few mandatory victim protection provisions of the Trafficking Protocol. See also Art 25.2 Organized Crime Convention.

50 See UNGA (2005), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147. For a detailed examination of the right to effective remedies for victims of trafficking in persons under international law, see ICAT (2016), Providing Effective Remedies for Victims of Trafficking in Persons, Issue Paper.

51 See OHCHR, 2010, Recommended Principles and Guidelines, Principle 11, p. 180.

52 UNGA (2011), HRC, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/17/35, Annex 1, Draft basic principles on the right to an effective remedy for trafficked persons, para 7(b).

53 See Planitzer, J, 2014, p. 108.

54 Ward, T/Fouladvand, S (2018), Human Trafficking, Victims’ Rights and Fair Trials, The New Journal of Criminal Law, 82(2), p. 141.

Moreover, it must be borne in mind that “the compelled victim is unlikely to make a strong witness”.⁵⁵ All the more so in the probable case that the person is still suffering from trauma or fears retaliation. It is therefore important to ascertain whether victims of trafficking are discouraged or supported in cooperating. To assess to which extent a State has fulfilled the due diligence standard regarding its obligation to conduct effective prosecution and investigation, Gallagher asks, if victims of trafficking are offered genuine incentives to cooperate (such as short-term residence permits).⁵⁶ Planitzer goes one important step further, when she rightly points out that the question should rather be, whether States step up their efforts in effective investigation and prosecution by offering an unconditional residence permit to raise the prospects of cooperation with the trafficked person.⁵⁷

In summary, a human rights-based approach clearly obliges States to offer unconditional residence. However, the practice of linking residence with cooperation is not only at odds with the human rights-based approach proclaimed both in EU and CoE treaty law. It also contradicts some of the most important provisions for the protection of trafficked persons in these very instruments.

First, it contradicts the obligation under both the 2011 Anti-Trafficking Directive and the CoE Anti-Trafficking Convention to ensure access to assistance and support for victims of trafficking with the goal of enabling them to exercise their rights as victims of crime. Such assistance and support are to be provided before, during and for an appropriate period of time after the conclusion of criminal proceedings. It is not to be made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial.⁵⁸ In this context, GRETA has regularly noted, that the exclusive linking of residence permits to cooperation may restrict or even prevent unconditional access to assistance for foreign victims of trafficking, when it is only provided for nationals or foreigners legally residing in the country. Thus, not only the standard of unconditional assistance is eroded, but also the requirement of safety and protection for victims of trafficking, as well as the prevention of further trafficking. Also for this reason, GRETA has urged States to grant victims of trafficking renewable residence permits on account of their personal situation.⁵⁹ However, the 2011 Directive contains substantial limitations to this effect in as much as unconditional access to assistance and support is without prejudice to the 2004 Directive on Residence Permits and in fact may be limited to the reflection period only.⁶⁰

Second, the practice of linking residence with cooperation is at odds with the obligation to respect the rights of victims of crime, including trafficking victims. These include the rights to be acknowledged as victims and to have access to justice pursuant to the 2012 Victims’ Rights Directive⁶¹ – which explicitly applies to all victims of crime, irrespective of their residence status.⁶² Moreover, there are also tensions

55 Gallagher, A, 2010, p. 298.

56 See Gallagher, A, 2010, p. 384; OHCHR, 2010, 2010, Recommended Principles and Guidelines, Principle 13, p. 195.

57 See Planitzer, J, 2014, p. 107.

58 Art 11.3 EU Dir 2011/36/EU, Art 12.6 CoE Anti-Trafficking Convention. As per Art 12.1 CoE Anti-Trafficking Convention, States shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance; access to emergency medical treatment; translation and interpretation services, when appropriate; counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders; access to education for children.

59 See i.a. CoE, GRETA, (2015)1, 4th General Report, pp. 44, 48.

60 This becomes clear, when Art 11.3 last phrase EU Dir 2011/36/EU is read in conjunction with Recital 18. It was reiterated by the EC in its 2014 Communication: After the reflection and recovery period, Member States are not obliged to continue providing assistance and support on the basis of the Anti-Trafficking Directive “if the victim is not considered eligible for a residence permit or does not have lawful residence in that Member State, or has left the territory of the Member State”. EC, COM(2014) 635 final, p. 6.

61 EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57. It includes the right to information, right to access victim support services including shelters, trauma support and counselling, right to participate in criminal proceedings, right to have special protection needs recognised.

62 Recital 10 of Dir 2012/29/EU. See also European Commission DG Justice (2013), DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing

between a system of residence in exchange for cooperation and the Charter of Fundamental Rights.⁶³ Article 47 provides it is laid down that the right of victims of trafficking to be provided with effective access to justice – and, to this end, to be empowered, encouraged and supported according to their needs – cannot be premised on the victim’s cooperation. On the contrary, it constitutes a corresponding unconditional obligation of States.⁶⁴

A system that allows residence in exchange for cooperation considerably interferes with victims’ rights to have access to support services and justice. When access to residence is made conditional on cooperation, so is access to assistance and support for third-country nationals without a legal right to remain.⁶⁵ That said, in reality, the right of irregularly residing victims of trafficking to have access to assistance and support and justice “remains only theoretical as long as they are not offered a safe option of regularising their residence status.”⁶⁶

Against this backdrop it is necessary “to revise the Directive on Residence Permits (...) to ensure access to temporary and long-term protection residence is granted outside and beyond criminal proceedings”.⁶⁷ The European Commission has taken the view that the 2004 Directive insufficiently addresses the legitimate needs and rights of victims of trafficking.⁶⁸ It is hoped that the EC will revise and expand the Directive on Residence Permits for the benefit of victims, and revise it.⁶⁹ As the Commission itself has stated, that there seems to be emerging consensus on the necessity to think beyond the law enforcement objective, and provide long-term residence permits for victims of trafficking “as an incentive to cooperate as well as a way to strengthen legal certainty.”⁷⁰

States are already obliged to make use of the possibility of granting residence permits based on the victims’ personal situation under the CoE Anti-Trafficking Convention. This is not only necessary in view of the needs of victims. The delinking of residence permits from cooperation is indeed a human rights obligation. In doing so, States are merely adopting the human rights-based approach proclaimed both in EU and CoE anti-trafficking law. Only in this way can States ensure that the victims’ rights of access to assistance, support and justice are fully effective. In order to ensure the fullest possible protection for trafficked persons, the refusal of a residence permit should be subject to appeal.

A.2. National Provisions on Residence Permits for Victims of Trafficking

This section provides a brief overview of the national provisions on residence permits for victims of trafficking in the six countries examined. It deals with the availability of temporary and permanent residence permits for trafficking victims after the recovery and reflection period. The impact of the practical

minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, p. 8.

63 Art 47 Charter of Fundamental Rights of the European Union, 26 10 2012, OJ L C 326/391.

64 FRA pointed out, that „because of this conflict, it could be maintained that the entering into force of the Charter invalidated the Residence Permit Directive. In the interest of the rule of law and legal clarity, this issue is waiting to be settled.” FRA, (2015), *Severe labour exploitation: workers moving within or into the European Union, States’ obligations and victims’ rights*, p. 19.

65 See Bosma/Rijken (2016), *Key Challenges in the Combat of Human Trafficking, Evaluating the EU Trafficking Strategy and EU Trafficking Directive*, *New Journal of European Criminal Law*, Vol. 7, Issue 3, p. 325.

66 As was noted by FRA with respect to the access to justice of victims of severe labour exploitation. See FRA, 2015, p. 19.

67 OHCHR/UNHCR/UNICEF/UNODC/UN Women/ILO (2011), *Prevent Combat Protect, Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, p. 24. See also FRA, 2015, p. 20.

68 Because “the requirement to place human rights at the centre of anti-trafficking measures necessitates superior protection measures for victims, irrespective of whether they participate in relevant national proceedings.” EC Group of Experts on Trafficking in Human Beings, 2009, para 3.

69 See EC, COM(2014) 635 final, p. 11; EC Group of Experts on Trafficking in Human Beings, 2009.

70 See the Commission’s report on the December 2016 meeting of the EU network of NREMs, EC (2018), *Commission Staff Working Document, Accompanying COM(2018) 777 final, SWD(2018) 473 final, Annex I*, p. 86.

implementation of the provisions on access of trafficked persons to the residence permits provided for therein is dealt with in the next section.⁷¹

All six countries provide in their legislation for a temporary residence permit specifically designed for victims of trafficking. In principle, we can distinguish between countries that provide for the granting of temporary residence permits solely in exchange for cooperation (Austria, Moldova) or a priori on both (the Netherlands, Serbia, Spain, and France but only in cases of sexual exploitation). In all six countries examined, THB-specific residence permits are initially limited in duration. After their expiry, Spain and the Netherlands also provide for THB-specific long-term residence permits in exchange for cooperation or because of the personal situation of the victims. France provides for a long-term residence permit only in the event of a conviction of traffickers. In Austria, Moldova and Serbia, no THB-specific long-term residence permit exists. Instead, victims of trafficking can apply for other permits under the regular aliens laws - provided that they fulfil the very demanding criteria. However, the special situation and needs of victims of human trafficking are not taken into account.

In countries where there is no explicit provision for a residence permit based on the victim's personal situation, victims may be eligible for other residence permits, for example on humanitarian or social grounds. In the next section, these residence options are mentioned, where appropriate, but are not discussed in detail; first, because their examination would go beyond the scope of this paper, but also because they can hardly be regarded as a substitute for taking into account the personal situation of victims of trafficking in human beings when granting residence, as provided for in the CoE Anti-Trafficking Convention. Their accessibility seems to be poor, as they are usually not offered to trafficked persons when they have to decide whether they can or want to cooperate in the prosecution of traffickers. Instead, they seem to serve only as a last resort for those who are unable or unwilling to cooperate. And since many of these permits are granted on a discretionary basis, they cannot, even in theory, offer the same legal certainty as a residence permit with legally defined conditions for granting it. Finally, numbers of approvals of applications for these permits are low and partly they come with lesser rights.

It would go far beyond the scope of this report to assess the relevant provisions applicable in detail. For a basic understanding, the following Table gives a quick overview of the different THB-specific residence permit systems in place. It does not claim to be complete. Rather, it attempts to summarise and contrast the main features of the different national systems. It covers the conditions under which victims of trafficking are granted temporary residence permits. It specifies the initial duration of permits, the reasons for their withdrawal and the conditions under which they can be renewed. The Table also shows whether residence permits for trafficked persons guarantee access to the labour market and family reunification, and, it is indicated whether the national residence permit systems contain long-term residence permits specifically designed for trafficked persons. Finally, the Table indicates whether there is a right of appeal against refusal of a residence permit. In principle, all six countries allow appeals.

⁷¹ In the interest of readability, the references to the individual national laws and regulations are listed in their detailed discussion in the following section.

Table 1: Overview of THB specific residence permits available to victims of trafficking in the six countries examined

	Austria	France	Moldova	Netherlands	Serbia	Spain
THB specific temporary residence permit	Yes	Yes	Yes	Yes	Yes	Yes
Granting conditions	On-going legal proceedings (criminal or civil)	Cooperation in criminal proceedings against traffickers (or "process of exiting prostitution")	Cooperation in criminal proceedings against traffickers	Cooperation in criminal proceedings against traffickers or exceptional circumstances (safety, health)	Cooperation in criminal proceedings against traffickers or personal situation	Cooperation in criminal proceedings against traffickers and/or personal situation
Initial length	1 year	1 year	6 months	1 year	At least 6 months (cooperation) or up to 1 year (personal situation)	No fixed length.
Reasons for withdrawal	Public interest conflict	Multiple (e.g. renewal of contact with trafficker/s, suspension of criminal proceedings)	Multiple (e.g. renewal of contact, cessation of cooperation)	Discontinuation of investigations/proceedings, dismissal, acquittal	Multiple (e.g. renewal of contact, cessation of cooperation/discontinuation of proceedings)	If conditions of granting are no longer fulfilled
Renewal	As long as legal proceedings are on-going	As long as criminal proceedings are on-going	Semi-annually (up to 5 years)	Twice (on-going legal proceedings)	Under the same conditions	Not required. Only the foreign ID card is renewed annually.
Access to labour market	With additional work permit	Yes	No	Yes	With additional work permit	Yes
Family reunification	In principle	In principle	In principle	In principle	In principle	Only in case of a definitive permit, and after 1 year.

THB specific permanent residence permit	No	Yes (only in the event of a final conviction)	No	Yes	No	Yes
Right to appeal	Yes, to the Administrative Court	Yes, to the Administrative Court	Yes, to the Administrative Court	Yes	Yes, to Ministry of Interior	Yes

A.3. Promising Practices, Gaps and Challenges in the Access of Victims of Trafficking to Residence Permits

This section considers whether the implementation of the provisions on residence permits in the six countries examined provides victims of trafficking with an accessible durable solution in terms of their rights, safety and dignity. Gaps in international standards, national laws and their practical implementation that call into question the effective protection of trafficked persons are identified. Promising practices that should be implemented on a larger scale are highlighted. Key issues are discussed for each of the countries examined. The level of detail of the discussion depends mainly on the results of the national studies and the additional information available, in particular in the GRETA reports.

As explained in in chapter B.1., given the needs and in accordance with the human rights of victims of trafficking, it is of the utmost importance that States make use of the possibility contained in the CoE Anti-Trafficking Convention to grant residence on the basis of the victim’s personal situation. The main question underlying this chapter therefore is in which situations victims of trafficking can obtain a residence permit. Since residence permits are initially granted for a limited period in all the countries studied, the question arises whether and under what conditions trafficked persons are subsequently offered a long-term perspective. There may be either THB-specific permanent residence permits or the possibility of converting THB-specific temporary residence permits into long-term permits within the framework of regular aliens law.

Spain, Serbia and the Netherlands have the explicit option of granting a temporary residence permit on the basis of the personal situation of victims, regardless of whether they cooperate or not. This raises the question of how and to what extent the personal situation is taken into account – in the laws and in the application thereof by the authorities. It is also important to know which actors are involved in the assessment and decision procedures. Of further interest is whether residence is actually granted outside of legal proceedings against perpetrators and detached from them.

Austria and Moldova grant residence permits for trafficked persons solely in exchange for their cooperation. France adopts a similar conditional approach, except for cases of trafficking for sexual exploitation. It is clear that the human rights-based approach proclaimed both in EU and CoE law cannot in principle be fulfilled in this way. The question remains, however, what level of participation in the investigation and prosecution of traffickers is required of trafficked persons. Above all, however, the question is how do the authorities interpret “cooperation”. Of further interest is whether trafficked persons who cooperate are only granted short-term permits or whether they are offered a right to remain in the country after the conclusion of the proceedings against traffickers.

With regard to the social inclusion of trafficked persons, special consideration is given to whether and under what conditions the residence permits for trafficked persons guarantee access to the labour market. Further references are made to access housing, healthcare and social welfare.

It was also intended to look in detail at the access of trafficked persons to family reunification. This is not only important from a long-term social inclusion perspective. It obviously has implications for the

safety of trafficked persons and their families. Thus, it also has an impact on the ability and willingness of trafficked persons to cooperate in legal proceedings against traffickers. In principle, the residence permits for trafficked persons in all the countries examined also provide for the possibility of family reunification. However, trafficked persons must meet general requirements, such as minimum income, accommodation, insurance coverage and waiting periods. In none of the countries examined are there special procedures or facilitated access conditions.⁷² Accordingly, there is little state practice that could be analysed in this report. In the following, reference will only be made to the discriminatory practice in Spain.

Finally, the application for residence is also a bureaucratic task. If victims need help from specialised NGOs and (sometimes perhaps costly) lawyers to navigate the system, that is clearly detrimental to accessibility. Given the great need of victims of trafficking for legal certainty, a key issue is the timeframe for application and decision-making procedures, both in law and in practice. Additionally, in the course of the application procedure, various documents, including identity papers, must be presented. At the same time, it is not uncommon for trafficked persons to have forged passports or no documentation at all – because of their migration route and not least because retention of their identity documents is a means for traffickers to exercise control over them. States must address this issue – so that this typical characteristic of THB does not become a barrier to trafficked persons accessing their rights.

Due to the limited scope of the text and the incomplete data available, some important topics are not dealt with in detail and remain valid for future research. These include possible links between access to long-term residence and the (non-)implementation of the provisions on the recovery and reflection period, an examination of the possibility of appeals against the rejection of applications for residence permits, and a closer look at the apparently large gaps in the implementation of the international provisions on safe return and risk assessment.

A.3.1. Austria

Austrian law provides for the granting of a temporary residence permit to third-country nationals who are victims of THB, the so-called special protection residence permit.⁷³ This does not specifically require trafficked persons to cooperate with the competent law enforcement agencies, nor does it provide for the granting of a permit on account of the victim's personal situation. Instead, it stipulates a pending legal (criminal or civil) procedure as an (objective) condition for obtaining a special protection residence permit.⁷⁴ The express purpose of the provision is "to ensure the prosecution of criminal offences or the assertion and enforcement of civil law claims in connection with such offences".⁷⁵ It is highly commendable that no limitation is made to offences clearly qualified as THB. Instead, the law only mentions victims of trafficking or cross-border prostitution as particularly entitled. This opens up the possibility that victims of trafficking may be granted a residence permit even if the public prosecutor's office does not initiate proceedings for THB but for other related crimes. In practice, however, Austrian authorities only consider victims of trafficking eligible for a residence permit under this provision if offences of THB or cross-border prostitution are prosecuted.⁷⁶ This is a significant restriction, as the qualification of crimes by the public prosecutor's office is subject to criteria that are beyond the control of the victims and disconnected from their cooperation. On a positive note, the law refers not only to criminal proceedings, but also to civil claims against traffickers. However, it should be noted that the civil claims made must be related to criminal proceedings against the offenders.

⁷² National Research, Austria, p. 14; France, p. 25; Moldova, p. 22; Netherlands, p. 22; Serbia, p. 34; Spain, p. 40.

⁷³ As per Art 57.1.2 Asylum Law, Federal Law Gazette I No. 100/2005 last amended by Federal Law Gazette I No. 70/2015, ELI NOR40171184.

⁷⁴ See CoE, GRETA(2015)19 Austria, para 132.

⁷⁵ Translation by the author.

⁷⁶ National Research, Austria, email correspondence, 18 June 2020.

The permit is valid for at least one year, and subject to renewal for as long as legal proceedings are on-going.⁷⁷ The Federal Office for Immigration and Asylum (BFA) is responsible for applications for residence permits from victims of trafficking.⁷⁸ In the course of the application procedure, it requests a reasoned statement from the competent regional state police directorate (LPD) as to whether criminal proceedings have been initiated or civil claims asserted. Theoretically it should be enough for victims of trafficking to be named as witnesses or victims in on-going legal proceedings. National research shows, however, that always a formal complaint is required from them. And even when the supposedly clear criterion of an on-going procedure was fulfilled, victims were not always granted a residence permit – on the grounds that the person’s statement was not considered necessary or sufficient.⁷⁹ What is more, similar arguments have been used in the past to deny trafficked persons access to a special protection residence permit in the event of a mere interruption of proceedings.⁸⁰ This shows that trafficked persons – although not legally obliged to do so – must cooperate effectively in practice to be granted residence. Their contribution to the judicial process against their perpetrators must also be considered necessary. Consequently, even if it may appear so by right alone, in its implementation the Austrian residence scheme for victims of trafficking does not fully respect the right of trafficked persons to participate in legal proceedings against their perpetrators. Instead, a discriminatory distinction is made between deserving and undeserving victims, and the legal nature of their rights as victims of crime is ignored. As a result, not only the many victims of trafficking who for various reasons cannot or do not want to cooperate with the authorities are in practice excluded from access to residence permits; those who do cooperate effectively may also be excluded if their contribution to the prosecution of their traffickers is no longer considered necessary.

The denial of residence permits also effectively excludes many victims of trafficking from access to assistance. On a positive note, it should be stressed that assistance to trafficked persons in Austria is state-funded, provided by a victim-protection organisation, and generally not subject to any conditions. It is available to officially identified as well as to presumed victims of trafficking. It does not depend on the initiation of legal proceedings against traffickers or on the person’s willingness to cooperate with law enforcement authorities. However, since trafficked persons who are not officially identified as such do not have access to residence permits, also their access to assistance is limited in the long-term. And just as access to residence permits depends on cooperation, so does access to assistance. This obviously erodes the standard of unconditional assistance and is contrary to the duty to ensure the safety and protection of trafficked persons, as well as the prevention of further trafficking. And the situation is aggravated by the fact that the police – although legally obliged to do so – do not always immediately turn to recognised victim protection bodies when they come into contact with a person threatened by violence. Instead, this depends in part on whether the police see sufficient evidence to open criminal proceedings against traffickers. Victims of human trafficking in detention centres are particularly affected.⁸¹

As regards the application procedure for the residence permit, Austrian law specifies a time-limit of six weeks for processing the application from the moment that the application is lodged. However, this period does not begin until the BFA receives the above-mentioned reasoned statement from the competent regional state police directorate, for which no time-limit exists. In practice, in many cases this deadline is not met, but extended to several months and even up to one year. Victims of human trafficking are thus kept in an irregular administrative situation for much too long.⁸² National research suggests that this is also due to the fact that the competent authorities in some cases request a statement from the regional state police directorate on the existence of on-going legal proceedings, not once but twice. As a result, even if at the time of application, a legal procedure is underway against their perpetrators and the trafficked per-

77 Art 59 Asylum Law (Austria).

78 It has offices in all Länder and employs around 150 case workers who interview asylum seekers (some 30,000 cases a year). See CoE, GRETA(2015)19 Austria, para 30, 133.

79 See National Research, Austria, p. 21.

80 See National Research, Austria, p. 28.

81 See CoE, GRETA, 2019, 8th General Report, pp. 42-43; National Research, Austria, pp. 14-15.

82 See CoE, GRETA(2015)19 Austria, para 133 ; National Research, Austria, p. 3.

son's contribution is deemed necessary, she or he cannot be sure of obtaining a permit.⁸³ Consequently, trafficked persons are treated as mere components of a criminal prosecution, and not as victims of crimes in need of support, assistance and legal certainty. An illustrative example of this significant shortcoming is the following case study of two Venezuelan women.

Austria: challenges in granting special protection residence permits

After being discovered by the police, they decided to return to their home country. After several months they returned to Austria to take part in the trial of their traffickers. Upon arrival, they applied for a special protection residence permit. At the time of their application, proceedings were underway against their traffickers. Their participation in the trial was of great importance. However, BFA officials requested the date of the trial from the judge. As a result, the women's application for residence was not processed for six months and until a final decision was given. The traffickers were convicted. However, as the proceedings had thus ended, the women no longer fulfilled the requirements for being granted a special protection residence permit. Instead, they had to wait until the conviction of their traffickers was final. With the support of LEFÖ-IBF they could then initiate civil proceedings against their traffickers and apply anew for a special protection residence permit.⁸⁴

The Austrian approach to the issue of identity documents appears particularly problematic. An application must be accompanied by a valid travel document and a birth certificate or equivalent document with German translation. In many cases this will not be possible for trafficked persons. Then, a written "Antrag auf Zulassung der Heilung des Mangels der Nichtvorlage von Urkunden" (request for rectification of deficiency) must be submitted. This must set out and explain the reasons for the lack of documentation. National research has shown that the fact that trafficked persons in most cases do not have sufficient resources to have their documents sent from their country of origin is not considered sufficient reason to grant the exemption. Instead, it is necessary to explain in detail why it is impossible to produce the required documents. In addition, trafficked persons must show that they have tried everything in their power to obtain them, such as accessing consular services or contacting their families. It seems particularly questionable that in most cases the reasons given in writing are further checked at interview. During these interviews the risks of secondary victimisation are high, as officials tend also to ask questions about the trafficking experience.⁸⁵

Should a victim of trafficking be granted a special protection residence permit, their position remains weak. Holders of a special protection residence permit are not granted full access to the labour market. They must apply for a work permit from the Labour Market Service. And this comes with significant restrictions: The permit is valid for one year and only for the specific job for which the application was made. Consequently, a new permit must be applied for if the job is changed or even if the working hours are altered. Furthermore, national research indicates that the process of issuing of a work permit takes around six weeks. This is a further disadvantage in the labour market, where many positions have to be filled immediately, and few employers are willing or able to wait until a new employee can be hired.⁸⁶ Moreover, trafficked persons in principle have no access to state job integration counselling services. However, a promising practice can be seen in the special agreement concluded between LEFÖ-IBF and the Labour Market Service. This enables 20 trafficked persons per year to take advantage of the counselling services of the latter.⁸⁷

83 National Research, Austria, p. 27.

84 National Research, Austria, LEFÖ-IBF, p. 27.

85 National Research, Austria, pp. 25, 27-28.

86 National Research, Austria, p. 23.

87 National Research, Austria, p. 16.

Another issue is that, under Austrian law, victims of trafficking who cooperate in legal proceedings do not have a long-term perspective to stay in the country. Instead, the permit is not to be renewed when the legal proceedings have been terminated, irrespective of the outcome.⁸⁸ Austrian law does not provide for a THB-specific long-term residence permit. Victims of trafficking receive support only as long as the prosecution of traffickers requires. This is contrary to a human rights-based and victim-centred approach. Nor does it provide a strong incentive for cooperation.

The only long-term residence option granted to victims of trafficking is the possibility to submit an application for a “Rot-Weiß-Rot Plus Card” under the regular aliens’ law. For this, however, very demanding criteria must be met, which do not take into account the special situation and needs of trafficked persons – such as a secure livelihood, health insurance cover, proof of accommodation and a certain level of German language skills.⁸⁹ The very few trafficked persons who are able to comply with these requirements are granted a one-year permit. After two years of legal residence, they may apply for a three-year extension. The next application is then for a five-year permit. For the initial application, however, the conditions for an extension of the special protection residence permit must also be fulfilled.⁹⁰ Thus, the right of residence of trafficked persons in Austria only becomes independent of pending court cases against their perpetrators when the second application for a “Rot-Weiß-Rot Plus Card” is filed.⁹¹

In case of rejection of an application for the special protection permit, the competent authority is obliged to consider a humanitarian right to residence for reasons relating to the protection of the right to family and private life within the meaning of Art 8 ECHR.⁹² The number of permits granted is low. This is because the provision is interpreted in such a way that excludes many victims of trafficking. They must either have close relatives in Austria who are entitled to stay, or they must be highly integrated, which presupposes in particular a long period of residence, a good knowledge of German and the realistic possibility of finding work.⁹³ Although this at least seems to respect the right of trafficked persons to family and private life, the provision is no substitute for a complete and competent risk assessment as required by the obligation of non-refoulement.⁹⁴

A.3.2. France

In general, the French system is geared towards the cooperation of victims of trafficking with the criminal investigation and prosecution. Consequently, trafficked persons are eligible for a temporary residence permit after having lodged a complaint accusing an individual of trafficking and/or pimping offences against them, or having testified in criminal proceedings for the trafficking and/or pimping offence.⁹⁵ As the French Criminal Code is highly fragmented with regard to trafficking for various types of exploitation, some offences related to trafficking in human beings, such as forced labour, inhumane working conditions and forced begging are not included in the offences considered for eligibility for the trafficking permit. It is encouraging that some administrative centres apply a broader understanding of THB, contrary to the too-narrow legal definition. However, national research shows that persons who have become victims of these types of exploitation face greater difficulties in accessing residence permits.⁹⁶

88 As per Art 59 Asylum Law (Austria).

89 Translates as „red-white-red plus card“. Art 41a Settlement and Residence Act, Federal Law Gazette I No. 100/2005 last amended by Federal Law Gazette I No. 56/2018, ELI NOR40206175.

90 As per Art 41a.3 Settlement and Residence Act (Austria) in conjunction with Art 59.4 Asylum Law (Austria).

91 National Research, Austria, pp. 25-26.

92 As per Art 11.3 Settlement and Residence Act (Austria).

93 National Research, Austria, p. 26.

94 See the discussion on non-refoulement in the next chapters, particularly under B.1.2.

95 As per Art L316.1 Code Governing the Entry and Stay of Foreigners and Right of Asylum (CESEDA).

96 National Research, France, p. 29. For an overview of the evolution of the French substantive criminal law on trafficking in human beings,

French Law does not refer to the broader notion of cooperation in the CoE Anti-Trafficking Convention, but to that of complaint and testimony. Hence, it gives a “narrower meaning to what is expected of victims in order to benefit from this provision”.⁹⁷ The prefectures are responsible for issuing residence permits. In practice, they interpret the cooperation requirement restrictively. Sometimes permits are only issued if the complaint or testimony of the person may be useful in supporting a prosecution of THB. Instead of relying on the filing of a complaint of THB, as they should, in some cases permits are only granted if a THB offence – and not other related offences – also becomes the object of investigation and prosecution.⁹⁸ As mentioned above, this is a significant limitation, as the qualification of crimes by the prosecution and the actual possibility of initiating criminal proceedings against traffickers is linked to criteria that are beyond the control of victims, and disconnected from their cooperation.

For the sake of completeness, it should be added that French law provides for the option of granting a temporary residence permit to trafficked persons who do not cooperate with the judicial services. But this is available only to victims of trafficking for the purpose of sexual exploitation, who commit to a “process of exiting prostitution”.⁹⁹ Since this establishes a difference based on the type of exploitation, it is not in conformity with the CoE Anti-Trafficking Convention.¹⁰⁰ On the positive side, applications are considered by a multidisciplinary commission. However, national research shows that access to these commissions varies greatly amongst the regions. Even if a trafficked person has obtained a positive assessment, she or he cannot be certain of obtaining a residence permit, since the prefect, the head of the administrative centre, makes the final decision. Overall, numbers are very low, with only three permits issued in 2018. Finally, the obligation to have left sex work before making an application as a matter of course excludes many victims of trafficking, including those trafficked for the purpose of sexual exploitation.¹⁰¹

According to the regulations on the application procedure for residence in exchange for cooperation, as evidence to support the application, it should suffice that victims show the first page of their complaint mentioning THB (or pimping). In the course of the assessment of the application the competent administrative authority should then interview the investigating law enforcement officers about the victim status of the person, and verify that the person has indeed ceased all relations with the alleged exploiter.¹⁰² This not only introduces a further condition, it also raises questions concerning investigation secrecy. In some cases, officials of the administrative centres learn of decisions by police, prosecutors and judges before the victims and their lawyers. It has happened that victims of trafficking have had their permits withdrawn or not granted at all because the administrative centres learned of the judges’ intention to discontinue proceedings against the traffickers - although the discontinuation of proceedings was still open to appeal. And according to the national research, in many cases the competent authorities tend to go even further than the “minimum” required of victims – e.g. they demand a copy of the whole complaint, have investigating agents interview the applicants on their relationship with the alleged trafficker or check whether they really live where they say they do.¹⁰³ It may be expected that this climate of distrust and suspicion towards trafficked persons causes stress and increases the risks of secondary victimisation. Because this practice reinforces victims’ distrust of the authorities and thus undermines their willingness to cooperate, it is also problematic from a law enforcement perspective.

Seemingly positive is that the rules governing the application procedure allow for early regularisation of the stay of victims of trafficking. Upon their first application, they should receive a certificate valid

see CoE, GRETA(2017)17 France, para 19-21, 225-237.

97 See CoE, GRETA(2017)17 France, para 188.

98 See *ibid.*

99 Art L.316.1.1 CESEDA was inserted by Law no. 2016-444 of 13 April 2016 on strengthening action against prostitution and providing assistance to persons engaging in prostitution. See CoE, GRETA(2017)17 France, para 195.

100 See CoE, GRETA(2017)17 France, para 195.

101 National Research, France, p. 15.

102 See Circular of the Minister of the Interior of 19 May 2015, Instruction No. NOR INTV1501995N; National Research, France.

103 National Research, France, pp. 29-30.

for six months.¹⁰⁴ However, national studies indicate that the fact that many victims of trafficking do not have valid identity documents may make it difficult for them to obtain a residence permit. The otherwise speedy procedures are delayed, and victims remain in legal uncertainty.¹⁰⁵ Additionally, France is the only country studied that also requires a formal administrative or residential address.¹⁰⁶ Although it is possible to provide the address of a specialised NGO, this may pose an obstacle for some victims of trafficking who are not assisted by an NGO.

In principle, victims of trafficking may receive asylum seekers' allowance (ADA).¹⁰⁷ But while holding an applicant's certificate trafficked persons are excluded from access to it. In order to apply for ADA, a person must submit a letter from the administrative centre in addition to her or his residence permit. This letter confirms the legal basis on which the permit was granted and is only issued when the person receives the residence permit, not when she or he receives the six-month certificate. And subsequently, when trafficked persons receive the one-year THB specific permit, not all of them are granted access to the allowance. The practices in granting the allowance differ in reality and usually assume that the trafficked persons themselves know about their entitlement. Because if they do not ask for said letter themselves, it will not automatically be given to them.¹⁰⁸ On another positive note, under the Ac.Sé national secure reception system trafficked persons can be accommodated far away from the place where they have been exploited.¹⁰⁹ Technically, access to it is neither conditional on their willingness to cooperate in the prosecution of traffickers nor on their administrative situation. In practice, however, access appears to depend on cooperation as the majority of those referred to Ac.Sé had previously lodged a complaint. Additionally, the funding of Ac.Sé is insufficient, leading to long waiting periods. Trafficked persons may also be placed in other social accommodation facilities. But in practice access to them is limited due to overloads. And some even refuse to receive trafficked persons if they are in a precarious administrative situation.¹¹⁰

This appears to be a clear case of non-compliance with the provisions on unconditional access to assistance and services in both EU and CoE law, as discussed in detail in chapter B.1. Unlike in most of the countries studied, French law does not make it difficult for trafficked persons to enter the labour market. They are granted full access to the labour market as soon as they receive their initial certificate.¹¹¹ Then again, it must be assumed that it is not easy for victims to find work in the first few months and would actually need material assistance.

In addition, practices for issuing certificates and permits vary widely at the regional level. For example, depending on which prefecture is involved, either no certificate at all is provided, or several are issued consecutively. In some cases, the processing of the first application for residence can take several months. In other cases, the permits issued do not include a work permit or access to material assistance. This naturally leads to unequal treatment of trafficked persons, and creates insecurity. A promising practice can be found in the Parisian prefecture, where all application for residence permits for trafficked persons are centralised in one service, the service of general affairs. According to the national research, this avoids delays and enables direct communication with competent contact persons.¹¹²

104 According to the law the receipt should be valid for 4 months. In practice, however, prefecture services issue receipts for 6 months. See Circular of the Minister of the Interior, 2015, France; CoE, GRETA(2017)17 France, para 187; National Research, France, p. 27.

105 Instead, they may present a consular certificate bearing a photograph. See CoE, GRETA(2017)17 France, para 187; National Research, France, p. 29.

106 See Circular of the Minister of the Interior, 2015, France, p. 27.

107 Allocation pour demandeurs d'asile (ADA) as per Art L744.9 of the CESEDA (France).

108 National Research, France, pp. 11, 29, see also CoE, GRETA(2018)17 France, para 158, 189.

109 This is a network grouping together accommodation and social reintegration centres (CHRSs) and reception facilities, as well as specialised NGOs, run on a voluntary basis and, therefore, without additional funding from the authorities. See CoE, GRETA(2017)17 France, para 148.

110 See CoE, GRETA(2017)17 France, para 150, 153-154.

111 See Circular of the Minister of the Interior, 2015, France.

112 See CoE, GRETA(2018)17 France, para 189, National research, France, pp. 30-31.

In terms of legal certainty and long-term protection, the French residence system does not offer much for trafficked persons. The temporary residence permit is issued for one year and subject to renewal, as long as the investigation is on-going or proceedings against the traffickers have been initiated. However, it is not to be renewed if the investigation is suspended or the proceedings failed to secure a conviction. Additionally, it is not renewed or may be withdrawn if the applicant has, on her or his own initiative, renewed a relationship with the perpetrators or if the complaint or testimony is considered false or untruthful. Especially problematic is that the permit is not to be renewed or may be withdrawn, if the prosecutor decides to prosecute offences other than THB or pimping.¹¹³ As already noted, this is highly problematic because the prosecutor's qualification of the offence is beyond the victim's control and disconnected from the victim's cooperation.

The situation is particularly aggravated because the THB-specific residence permit is explicitly excluded from the multi-annual residence permit system. This in general allows holders of temporary residence permits to access ever-longer permits. After one year of holding such a permit, the beneficiaries automatically have access to a permit valid for two, then four years. National research indicates that, by excluding trafficked persons not only are they kept in a precarious legal situation for years, it also makes it difficult for them to access housing and the labour market.¹¹⁴

Only in the case of a final conviction of the trafficker will the trafficked persons concerned be granted a long-term residence permit of 10 years.¹¹⁵ It should be emphasised that this is the longest envisaged residence permit for victims of trafficking in the six countries examined. However, the condition of its issue is largely beyond the control of its potential beneficiaries. The possibility of a longer stay thus depend not only on the willingness or ability of the trafficked persons to cooperate; it also depends on whether sufficient indications and evidence can be presented to enable successful prosecution of traffickers. But even if trafficked persons have indeed contributed to the prosecution of their traffickers, errors on the part of investigating or prosecuting authorities may make access of trafficked persons to long-term residence permits impossible. Disconnected from legal proceedings against traffickers, French migration law also offers access to a standard ten-year residence permit. However, the stringent conditions, including the requirement to have a minimum means of subsistence at least equal to the French monthly minimum wage, exclude many victims of trafficking.¹¹⁶

For the sake of completeness, it should be noted that trafficked persons who do not cooperate may also be granted a residence permit on other grounds, such as for "family and private life considerations"¹¹⁷ or "humanitarian or exceptional considerations".¹¹⁸ The latter in particular should be used by the administrative centres to regularise the legal status of identified victims who do not cooperate for fear of reprisals against them or members of their family.¹¹⁹ These permits are not specific to victims of trafficking, and are issued for one year only. But, unlike the THB-specific temporary residence permit, they do not exclude holders from the multi-annual residence permit system. However, they allow only limited access to assistance. For example, holders of these permits are excluded from the allowance available to asylum seekers. However, the main problem is that the decision lies at the discretion of the administrative authorities.¹²⁰ The following case study is one of the very few cases in which a victim of trafficking was granted humanitarian residence after an unsuccessful criminal investigation. According to CCEM, it was made possible by the good communication between CCEM and the contact point in

113 As well as "if the presence of its holder constitutes a threat to public order." Art 316.4 CESEDA (France).

114 National Research, France, pp. 16, 29.

115 See CoE, GRETA(2017)17 France, para 187.

116 National Research, France, p. 28.

117 As per Art 313.11.7 CESEDA (France). Trafficked persons may be eligible if they can provide proof of stable, strong and longstanding personal and family ties in France.

118 As per Art 313.14 CESEDA (France).

119 See Circular of the Minister of the Interior, 2015, France.

120 See CoE, GRETA(2017)17 France, para 192-194.

the Paris prefecture, as well as the specific involvement of the Central Office for Combating Illegal Labour (OCLTI).¹²¹

France: Granting residence on humanitarian grounds

Mr N was recruited from his country of origin by a fellow countryman, who offered him a job in the construction industry and promised him administrative regularisation in France. When he arrived in France in 2013, the trafficker met him and took him to a construction site. For almost one year, Mr N worked on several construction sites for about 15 hours per day. He was locked in containers every night, had hardly any access to food and hygiene, and received no wages. After Mr N had managed to escape, he spent several months on the streets of Paris. After being advised in a mosque to go to CCEM, he was identified there in June 2015 as a victim of human trafficking. In October 2015, he filed a complaint of THB with the OCLTI. In December 2015, following an application for residence in exchange for cooperation, he received a 6-month residence permit from the Paris administrative centre, which also allowed him to work. In August 2016, he was granted a one-year residence permit which was renewed until 2018. However, the police investigation was unsuccessful, as the perpetrator could not be identified, despite the information provided by Mr N. As a result, the investigation was terminated, and Mr N was in danger of having his permit withdrawn. Aware of this, CCEM held an informal meeting with the administrative centre so that a residence permit on humanitarian grounds could be considered. As OCLTI was convinced of the credibility of Mr N's complaint and his status as a victim of THB, it contacted the administrative centre and supported his application for a residence permit. In 2018, Mr N was granted residence for one year on humanitarian grounds. In line with the multiannual system, he was granted a two-year residence permit in 2019.¹²²

A.3.3. Moldova

Moldova remains mainly a country of origin of victims of trafficking, with some being exploited within the country. Although there are signs of an increase in trafficked persons in transit in the country, there is no data available to confirm this.¹²³ It is very rare for foreigners to be identified as victims of trafficking. No THB offences against foreign citizens were registered officially between 2016 and 2017. In 2018, five foreign victims of trafficking were identified.¹²⁴

Although Moldova has also become a country of destination for victims of trafficking, with 45 identified foreign victims of trafficking in 2019,¹²⁵ its anti-trafficking policy focuses on the rights of victims of trafficking who are Moldovan nationals. But the Moldovan law on the rights of victims of trafficking also provides for a temporary residence permit for foreign victims of trafficking – if they are placed in centres for protection and assistance, or if they participate in criminal proceedings against traffickers.¹²⁶

¹²¹ It translates Office central de lutte contre le travail illégal.

¹²² National Research, France, CCEM, Case Study No. 2.

¹²³ See CoE, GRETA(2016)9 Moldova, para 13.

¹²⁴ The Moldovan specialised anti-trafficking law enforcement body, the Centre for Combating Trafficking in Persons (CCTP) initiated one prosecution of THB for labour exploitation (with three victims, citizens of Turkey) and two of THB for exploitation in begging (one victim from the Russian Federation and one from Ukraine). Also, one case of THB for labour exploitation in construction (with 10 victims from Turkey) was initiated. Later, however, this case was officially registered by the CCTP as one of organisation of illegal migration. See PA International Centre "La Strada" (Moldova) (2020), Migrants vulnerability to human trafficking and exploitation in the Republic of Moldova, Table 9, p. 70. Available at http://lastrada.md/pic/uploaded/Raport_migratie_en_2020.pdf

¹²⁵ All 45 persons were subjected to labour exploitation in construction. See National Committee for Combating Trafficking in Human Beings, antitrafic Moldova (2019), National report on the implementation of the 2019 policy for preventing and combating trafficking in human beings, p. 11.

¹²⁶ Art 24 Law of the Republic of Moldova on Preventing and Combating Trafficking in Human Beings No. 241-XVI of 20 October 2005 (Official Monitor of the Republic of Moldova, 2005, No. 164 -167, Art 812).

Accordingly, it would appear that trafficked persons may be granted a residence permit not only in exchange for cooperation but also on account of their personal situation. However, there seems to be a contradiction with the later law on foreigners. According to that instrument, victims of trafficking are required to cooperate with the competent authorities in the investigation and criminal prosecution of traffickers in order to obtain a residence permit. This requires a decision by the criminal prosecution authorities recognising the person as a victim of THB.¹²⁷

The Moldovan authorities have not hitherto issued any residence permits to foreign victims of trafficking. According to the authorities, this is mainly due to the fact that there have been very few foreign victims.¹²⁸ But this must also be seen in the context of the absence of rules and procedures for granting temporary residence permits to trafficked persons.¹²⁹ According to the national research, this might also contribute to the fact that no residence permit has been issued so far.¹³⁰

It should be added that Moldovan law explicitly provides for protection and access to services for trafficked persons, irrespective of their willingness to participate in criminal proceedings against traffickers.¹³¹ According to the law, the identification of trafficked persons in order to provide them with the necessary protection and assistance shall be carried out both as part of, and separately from, criminal proceedings against traffickers.¹³² What is missing, however, is a clearly established regulation for the identification of trafficked persons outside criminal proceedings. Furthermore, the existing guidelines on the identification of victims of trafficking only aim at identifying national victims of trafficking. Foreign victims are not included.¹³³ Thus, in practice, also access to services most probably hinges on the cooperation of victims of trafficking in the investigation and prosecution of traffickers. Indeed, national research shows that state-run service providers favour victims of trafficking who cooperate in criminal proceedings against traffickers.¹³⁴ This has the effect of undermining the standard of unconditional assistance, even though it is actually required by law.

In principle, identified victims of trafficking are guaranteed access to specialised shelters. In practice, however, the Centre for Assistance and Protection of Victims and Potential Victims of THB (CAP) often does not grant foreigners access to them.¹³⁵ In general, the services for victims of trafficking available in Moldova are mainly aimed at women and children. Male trafficked persons have no access to specialised shelters. Thus, identified male victims of trafficking are usually referred to the shelter for homeless persons. This is particularly problematic because the realisation of other rights is (in)directly linked to access to shelters. Fortunately, this discriminatory situation should change soon, because the construction of a shelter for trafficked men was underway at the time of writing.¹³⁶

Moldovan law does not offer much in terms of long-term protection and social inclusion of victims of trafficking. The residence permit for trafficked persons is to be issued for periods of up to six months. It is to be extended for new periods of up to six months, but for not more than five years in total.¹³⁷ More-

127 Art 42 Law of the Republic of Moldova on the Regime of Foreigners in the Republic of Moldova No. 200 of 16 July 2010 (Official Monitor of the Republic of Moldova, 2010, No. 179 -181, Art 610).

128 National Research, Moldova, p. 5. See also CoE, GRETA(2016)9 Moldova, para 133.

129 This is due to the fact that provisions of the Law on Preventing and Combating Trafficking in Human Beings and the Law on the Regime of Foreigners have not been harmonised with the Law of the Republic of Moldova on Identity Documents in the National Passport System No. 273-XIII of 09 September 1994 (Official Monitor of the Republic of Moldova, 1995, No. 9, Art 89).

130 National Research, Moldova, p. 6.

131 Art 20 Law on Preventing and Combating Trafficking in Human Beings (Moldova).

132 Art 16 Law on Preventing and Combating Trafficking in Human Beings (Moldova).

133 See Guidelines on Identification of Victims and Potential Victims of THB, Order No. 33 of 20 February 2012 of the Ministry of Labour, Social Protection and Family; National Research, Moldova, p. 15.

134 National Research, Moldova, p. 15.

135 National Research, Moldova, p. 11.

136 National Research, Moldova, p. 11.

137 Art 32 Law on the Regime of Foreigners (Moldova).

over, the permit does not allow trafficked persons to work.¹³⁸ Furthermore, Moldovan law does not provide for a THB-specific long-term permit. Instead, trafficked persons may apply for other permits under the regular aliens law. However, these do not take into account their special situation and needs. For the sake of completeness, it should be added that trafficked persons who, for objective reasons, cannot be required to leave the country, may be granted a discretionary residence permit. This does not give the holder a long-term perspective either, as it is only granted for consecutive periods of six months, and is withdrawn as soon as it is established that the circumstances justifying its issue no longer exist.¹³⁹

It is particularly positive to note that the Moldovan Law on the rights of trafficked persons explicitly provides for a risk assessment prior to the return of a trafficked person. Victims of trafficking are not to be repatriated or expelled to her or his country of origin or to a third state if there is a real chance that this would endanger her or his personal safety or the safety of her or his family.¹⁴⁰ However, there are no clearly defined procedures for carrying out such a risk assessment or for issuing a residence permit where such a risk exists.¹⁴¹

A.3.4. The Netherlands

In the Netherlands, the Residence Regulation for Trafficking in Human Beings¹⁴² follows the logic of residence in exchange for cooperation. Consequently, it provides for a “temporary humanitarian residence permit” for trafficked persons who have filed a complaint of human trafficking to the police, the Royal Netherlands Marechaussee (KMar),¹⁴³ or the Labour Inspectorate (SZW)¹⁴⁴ and/or have stated that they are willing to cooperate with the police in tracking down and prosecuting their traffickers.¹⁴⁵ According to the Regulation, the notion of cooperation is broad in the sense that it does not require victims always to lodge a formal complaint, but allows other forms of cooperation to be sufficient. National research shows, however, that the interpretation of the cooperation requirement varies between different police units. Victims of human trafficking are also reported to be treated differently according to their origin. Some are treated with increased suspicion of being unreliable, and more is demanded of them than of others. It is thus more difficult for them to convince the police that they are indeed victims of human trafficking.¹⁴⁶ As shown above for the situation in France, such a climate of distrust and suspicion is likely to be distressing for trafficked persons, and creates risks of secondary victimisation. It is also problematic from a law enforcement perspective because it increases victims’ distrust of the authorities and thus undermines their willingness to cooperate.

Trafficked persons who for various reasons do not wish to cooperate with law enforcement authorities cannot receive a temporary humanitarian permit. This does not apply to persons in respect of whom the

138 National Research, Moldova, p. 22.

139 Art 68-69 Law on the Regime of Foreigners (Moldova); National Research, Moldova, p. 24.

140 Art 24 Law on Preventing and Combating Trafficking in Human Beings (Moldova).

141 National Research, Moldova, p. 6.

142 The Residence Regulation for Trafficking in Human Beings governs the reflection period, residence permit and access to assistance for foreign victims of trafficking without legal residence in the Netherlands. It is part of the Aliens Law of 2000 (Vreemdelingenwet 2000), in force from 1 Jan 2020 until 13 May 2020. The rules governing its practical application can be found in the Aliens Circular of 2000 (Vreemdelingen circulaire 2000 (B), in force from 1 April 2020.

143 KMar is one of the four branches of the Netherlands Armed Forces. It is a gendarmerie force performing military and civilian police duties.

144 See Inspectorate SZW, Ministry of Social Affairs and Employment, What Does the Inspectorate SZW do?, Publication No. 100E, July 2019, p. 3.

145 Chapter B-8 Sec 3-2 Aliens Circular 2000 (B) (The Netherlands). See also Immigration and Naturalisation Service (2020), Domestic violence, honour-related violence, human trafficking, abandonment and your residence permit, Publication No. 3092, p. 4.

146 According to national research, this concerns above all persons from Nigeria and Uganda because there has been an increase in the number of homosexual persons from these countries who report that they have been trafficked for the purpose of sexual exploitation. National research, Netherlands, p. 27.

authorities consider that they cannot be expected to cooperate due to exceptional circumstances. They may be granted a temporary residence permit within the so-called “Schrijvend Pad”.¹⁴⁷ The personal situation of trafficking victims is therefore not taken into account from the outset. Rather, the primary concern is to ensure that victims cooperate in the prosecution of traffickers. Nevertheless, two important aspects of the personal situation of trafficked persons are taken into consideration: their safety and their state of health. To be eligible, victims of trafficking must prove that they cannot be expected to cooperate due to serious threats against them and/or due to medical or psychological constraints or due to being a minor. This has to be substantiated by declarations from the police and/or a medical practitioner.¹⁴⁸

In practice, however, only a very limited number of victims apply for a permit without being able or willing to comply with the cooperation requirement. Between 2013 and 2017 a total number of 1046 victims of trafficking applied for temporary residence permits. Of these, only 35 applications were processed via the Schrijvend Pad.¹⁴⁹ Considering what is known about the extent to which trafficked persons face threats from their traffickers and suffer trauma and psychological problems as a result of trafficking, not only the number of applications submitted but also the percentage of residence permits issued is remarkably low. Between 2013 and 2017 only eight permits via the Schrijvend Pad were granted, 16 were rejected and 11 were discharged, mostly due to withdrawals by applicants.¹⁵⁰

This is most likely due to the personnel involved in the assessment and decision-making processes. The Dutch Immigration and Naturalisation Service (IND) is the body responsible for issuing residence permits. But police and KMar are the sole bodies responsible for determining whether a person is a possible victim of trafficking deserving protection within the framework of the Dutch Residence Regulation regarding Trafficking in Human Beings. This is particularly problematic because the likelihood of success of the investigation and prosecution are reportedly an important factor in the identification process – and thus most probably also in the assessment of exceptional circumstances. Because of the very low figures, it remains unclear in practice how the police interpret the criteria. National research also shows that there is no standard form in use. Consequently – as holds true for the cooperation requirement – different police units do not are not consistent in taking into account the personal situation of trafficked persons. What is missing is a consistent application of criteria.¹⁵¹ Moreover, the assessment by victim protection agencies that victims are too traumatised to participate in legal proceedings against traffickers is not always accepted.¹⁵² It is in this context that the Dutch National Rapporteur on Trafficking in Human Beings has suggested implementing a multi-disciplinary screening during the reflection periods to determine whether there are legitimate reasons not to cooperate.¹⁵³

Against this background, it is highly commendable that the Dutch Ministry of Justice in 2018 launched a pilot project to develop a model of multidisciplinary identification of victims of THB. Its key body, the Victim Identification Board,¹⁵⁴ was tasked with examining cases of possible victims of THB, thus making the assessment of victimhood independent of the criminal law and the investigation of irregular migra-

147 Translates as “harrowing path”.

148 The medical information must come from a practitioner who is listed in the *Register of Professionals in Individual Healthcare* or the *Dutch Institute of Psychologists’ Register*. See IND, 2020, p. 5; CoE, GRETA(2018)19 Netherlands, Government’s comments, para 121.

149 See Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2018), *Slachtoffermonitor mensenhandel 2013-2017*, pp. 104, 111.

150 See *ibid*, pp. 111; National Research, Netherlands, p. 23.

151 This coincides with an observation of the Dutch National Rapporteur on THB as regards big differences in reporting between the different police regions, which cannot be explained by variations in the number of inhabitants. See Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2018), *Victims of human trafficking still underreported*, News item, 18 Oct 2018. See also CoE, GRETA(2018)19 Netherlands, para 108-109, 118; National Research, Netherlands, pp. 25-26.

152 See CoE, GRETA(2018)19 Netherlands, para 121.

153 See Dutch National Rapporteur on THB (2015), *Verblijfsregeling voor kwetsbaarste slachtoffers mensenhandel slechts weinig gebruikt* (Residence Scheme for Most Vulnerable Victims of Trafficking in Human Beings Little Used), News Item, 15 Oct 2015.

154 It was composed of seven members, including a lawyer, a professor of THB and Globalisation, an anthropologist and the former Dutch National Rapporteur on THB.

tion. On request, it could issue an expert report on the plausibility of victimhood, and thereby assist in the consideration of an application for a residence permit on humanitarian grounds. However, although the pilot project was evaluated positively and GRETA expressly welcomed it, it was not continued after its expiry at the end of 2018.¹⁵⁵

The permit in exchange for cooperation is valid for one year. Applications for renewal are dependent on the initiation of investigations or proceedings against traffickers. The permit's validity period will not be extended, or else it will be withdrawn, when the criminal investigation or proceedings are discontinued (either by definitive ruling by a judge or dismissal by the public prosecutor).¹⁵⁶ As stated above, possibilities for continued residence thus depend not only on the willingness or ability of trafficked persons to cooperate, but also on whether sufficient indications and evidence can be provided to enable the prosecution to initiate proceedings against traffickers. The permit due to exceptional circumstances lasts for one year and cannot be.¹⁵⁷

With regard to the social inclusion of trafficked persons, some positive practices can be highlighted. The residence permits on both grounds give trafficked persons full access to the labour market without the need for an additional work permit. Holders are entitled to accommodation in a shelter. They have access to health insurance, social welfare, legal, medical and psychological assistance on the same footing as Dutch nationals.¹⁵⁸ And also with regard to the application procedure, the Dutch system contains some notable examples of good practice. Above all, efforts can be identified to keep bureaucratic hurdles at a low level. The statement of the victim to the police is automatically considered to be an application for a temporary residence permit. The IND must take a decision on the application within 24 hours.¹⁵⁹ In addition, victims of trafficking are not required to provide identity documents for the first application. When the permit is renewed, a passport must be presented. But indications that the victim has taken steps to obtain one also suffice.¹⁶⁰ In terms of long-term protection prospects, the Dutch residence system offers more than most of the countries studied, as it provides for THB-specific permanent residence permits. After the expiry of the temporary humanitarian residence permit and during its period of validity, trafficked persons may apply for a permanent humanitarian residence permit.¹⁶¹ This will be granted if the perpetrator is prosecuted for THB and convicted. This is despite the fact that – as already mentioned several times – the outcome of criminal proceedings depends on far more factors than the ability and willingness of victims to cooperate. It is therefore welcome that trafficked persons who have cooperated are not held in legal uncertainty for the entire duration of prosecutions. A permanent permit will also be granted when the person has held a temporary permit for three consecutive years or more, irrespective of the result of the investigations or proceedings.¹⁶² However, it must be noted that many investigations do not last that long.¹⁶³

If traffickers are not convicted or proceedings are terminated before three years have elapsed, victims of trafficking may have their residence permit withdrawn. As in other countries examined, trafficked persons then may also lose access to assistance and support. As noted several times, this is contrary to the standard of unconditional assistance and the requirement of safety and protection for trafficked persons, as well as the prevention of further trafficking.¹⁶⁴ But, unlike in other countries, support is not immediately

¹⁵⁵ See CoE, GRETA(2018)19 Netherlands, para 108-109. For information (in Dutch) on the pilot and the lobbying for its continuation see <https://www.comensha.nl/actualiteiten/item/evaluatie-pilot-multidisciplinaire-advisering-slachtofferschap-mensenhandel/>.

¹⁵⁶ Chapter B-8 Sec 3.2 Aliens Circular 2000 (B).

¹⁵⁷ See IND, 2020, p. 5; CoE, GRETA(2018)19 Netherlands, Government's comments, para 121.

¹⁵⁸ See OHCHR et al, 2011, p. 43; National Research, Netherlands, p. 24.

¹⁵⁹ See OHCHR et al, 2011, p. 43.

¹⁶⁰ National Research, Netherlands, p. 24.

¹⁶¹ Chapter B-9 Sec 10 and 12 Aliens Circular 2000 (B).

¹⁶² They may be still on-going or may have resulted in an acquittal.

¹⁶³ See GRETA(2018)19 Netherlands, para 166.

¹⁶⁴ See CoE, GRETA(2018)19 Netherlands, para 121; CoE, GRETA, 2019, 8th General Report, para 106.

withdrawn. Trafficked persons may apply for permanent residence, and shall not be deported if convincing reasons of a humanitarian nature can be established. The same holds true for trafficked persons whose permit pursuant to the Schrijnend Pad has expired after one year. They may also be eligible, if it is demonstrated that they still cannot be expected to cooperate because the threat from the traffickers remains, they still have a physical or psychological disorder, or the person is a child.¹⁶⁵ Otherwise, it must be established that the persons concerned cannot be required to leave the country due to exceptional individual reasons directly related to THB. The circumstances to be taken into account include risks upon return (such as reprisal by traffickers or prosecution for past prostitution) as well as the prospects of social reintegration.¹⁶⁶ Here, the Dutch residence scheme for trafficked persons seems to have established – though only on application – a form of risk assessment in line with the CoE Anti-Trafficking Convention.

However, in practice not many trafficked persons apply for permanent residence. Between 2014 and 2018, only 34 per cent (185) of all trafficked persons who were granted a temporary residence permit after the reflection period (in total 548 persons) applied for a permanent permit.¹⁶⁷ This might be because trafficked persons often opt for the asylum track, rather than identifying as victims of trafficking, as the chances of being granted asylum are considered higher than the chances of obtaining a permanent residence permit.¹⁶⁸ At least as far as the chances of continued residence under the residence permit system are concerned, the figures seem to bear this out. Of the 185 applicants, only 74 (or 40 per cent) were granted a permanent residence permit.¹⁶⁹ Also, because conditions for obtaining a permanent humanitarian residence permit are generally considered to be strict, trafficked persons will frequently opt for the asylum procedure. In addition, the choice of the asylum track is not always a conscious one. In some cases, the police send trafficked persons to Ter Apel, the central agency for the reception of asylum seekers, because not being able to return to the country of origin is regarded as a request for asylum.¹⁷⁰

A.3.5. Serbia

Serbia remains primarily a country of origin of victims of trafficking, and there is significant internal trafficking. Between 2013 and 2016 only 13 foreign victims of trafficking were identified. However, there is concern that, as a result of the increase in the number of migrants and refugees crossing Serbia in 2015, efforts to identify victims were reduced due to overburdening of the authorities, particularly the border police. Hence, the real scope of THB in Serbia is probably much higher than these figures suggest.¹⁷¹ But, no victim of trafficking has yet applied for a THB-specific residence permit in Serbia since the entry into force of the current provisions in 2018. Accordingly, none has yet been granted.¹⁷² One probable reason for this is that the majority of (possible) victims of trafficking do not reveal their experience of human trafficking to Serbian officials, because this would mean delaying or reversing their journey

¹⁶⁵ Chapter B-9 Sec 12 Aliens Circular 2000 (B).

¹⁶⁶ See IND, 2020, pp. 4-5; CoE, GRETA(2018)19 Netherlands, para 164-166, CoE, GRETA(2014)10 Netherlands, para 190.

¹⁶⁷ See Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2019), *Slachtoffermonitor mensenhandel 2014-2018*, p. 126.

¹⁶⁸ See CoE, GRETA(2018)19 Netherlands, para 167; National Research, Netherlands, p. 23.

¹⁶⁹ In total, it was 1,648 victims who made use of the residence scheme in the period 2014-2018. See Dutch National Rapporteur on THB, 2019, p. 126.

¹⁷⁰ For a comprehensive analysis of why victims of human trafficking are making use of the asylum procedure in spite of a dedicated regulation being available to them, see Dutch Research and Documentation Centre (2020), *The road(s) to legal residence in the Netherlands for victims of human trafficking*.

¹⁷¹ See CoE, GRETA(2017)37 Serbia, para 12-14.

¹⁷² National Research, Serbia, p. 35, referring to the Migration Profile of the Republic of Serbia, which is adopted annually by the Government of the Republic of Serbia. In its latest report, GRETA points out that, according to the Serbian authorities, under the former Law on Foreigners, eight foreign victims of trafficking were granted residence between 2013 and 2016. See CoE, GRETA(2017)37 Serbia, para 145.

towards the EU and beyond.¹⁷³ Especially in the case of regional trafficking within the Balkans, another reason may be that the victims themselves return to their countries of origin.

In principle though, Serbian law is in accordance with the CoE Anti-Trafficking Convention, and foresees the granting of temporary residence permits to foreign victims of trafficking, both in exchange for cooperation and on account of the victim's personal situation. Trafficked persons are to be granted a temporary residence permit because either the Centre for the Protection of Victims of Trafficking (CPTV)¹⁷⁴ deems the stay necessary for their protection, recovery and safety, or because the court, prosecutor's office or police deem the stay necessary for the victim's co-operation in the criminal proceedings. In either case, CPTV issues an expert assessment of the victimhood of the person and initiates the application procedure to the Ministry of the Interior (Mol).¹⁷⁵

However, since no applicable regulations exist, it is not clear how, and on the basis of which criteria, CPTV makes such an assessment. Research indicates that Serbia has not issued a residence permit to any foreign victim of trafficking. It thus remains to be seen which criteria are applied in practice. In any event, the decision as to whether the criteria are met is left to CPTV.¹⁷⁶ Since its establishment in 2012, this body has been responsible for the formal identification of victims, as well as the organisation and coordination of victim protection and assistance. Other actors who come into contact with a possible victim of trafficking, are supposed to notify CPTV. Thus, the evaluation of the individual's personal situation may be disconnected from law enforcement's interest in the prosecution of traffickers.¹⁷⁷

However, CPTV struggles with a considerable volume of referrals and cases, with limited staff and financial resources.¹⁷⁸ This insufficient capacity may hinder trafficked persons' access to residence permits.¹⁷⁹ Other factors limiting access may include difficulties in identification due to the short stay of the migrant and refugee population,¹⁸⁰ as well as cultural and linguistic barriers. Moreover, professionals providing free legal aid to foreigners in Serbia are reportedly more oriented towards the asylum procedure.¹⁸¹

As no residence permit seems to have been issued to trafficked persons since the entry into force of the current provisions in Serbia, there is no practical experience with the application process. In principle, police administrations are responsible for issuing residence permits to victims of trafficking. It seems problematic that the conditions for applying for and granting a residence permit on account of the victim's personal situation are not legally defined (unlike for other reasons).¹⁸² Also, CPTV – by its own account – still does not use a publicly accessible and transparent standardised set of indicators for the identification of victims. Thus, both the criteria for identifying victims and the burden of proof regime applied remain unclear.¹⁸³ In the absence of other indications, this raises the concern that the same holds true for the assessment of the personal situation of victims of trafficking applying for residence. On the positive side, there are legally established timeframes for the identification of victims by the CPTV. The identification procedure must be initiated no later than 24 hours after a report has been made to the

173 National Research, Serbia, p. 36.

174 CPTV is a central government body established within the Ministry of Labour, Social and Veterans Affairs. It is responsible for the identification of victims of trafficking and ensuring their referral to assistance and protection. See CoE, GRETA(2013)19 Serbia, para 29-31.

175 Art 62 Law on Foreigners, Official Gazette of the Republic of Serbia, No. 24/18, March 2018 last amended by Law on Amendments to the Law on Foreigners, Official Gazette of the Republic of Serbia, No. 31/2019.

176 See CoE(2017)37 Serbia, para 150.

177 See CoE, GRETA(2017)37 Serbia, para 104-105.

178 In 2018 the CPTV employed four persons with an extremely heavy workload. According to the Centre, the number of reports per staff member was 47.5 and the number of cases handled 83. National Research Serbia, p. 8, fn. 20. See also CoE, GRETA(2017)37 Serbia, para 109.

179 National Research, Serbia, p. 24.

180 See CoE, GRETA(2017)37 Serbia, para 14.

181 National Research, Serbia, p. 37.

182 See Rulebook on the Conditions for Granting Temporary Residence, the Application for Granting Temporary Residence, the Appearance and Manner of Entering the Temporary Residence Sticker in a Foreign Travel Document, Official Gazette of the Republic of Serbia, No. 72/2018.

183 According to an independent evaluation of the NRM in Serbia. National Research Serbia, p. 8.

CPTV. The decision on whether a person is a victim of trafficking must be taken within three months or, in complex cases, within a maximum of nine months.¹⁸⁴ No timeframes are set for the assessment of the personal situation of victims of trafficking. Moreover, the deadlines in the identification process are not always respected in practice due to the limited resources available to the CPTV.¹⁸⁵

The residence permit for victims of trafficking is valid for up to six months in exchange for cooperation, and one year due to the personal situation of the trafficked person. It may be renewed under the same conditions and without time limit.¹⁸⁶ It gives no direct access to the labour market, but entitles trafficked persons to be granted a work permit for the duration of the residence permit.¹⁸⁷ As a recognised special category of foreigners, trafficked persons can apply for a personal work permit with the National Employment Service. This not only allows them to work, but also to access unemployment benefits.¹⁸⁸ Particularly noteworthy is a cooperation agreement between CPTV and the National Employment Agency, which gives trafficked persons priority access to employment programmes. However, the challenge remains that there are few such programmes, and they do not necessarily lead to employment.¹⁸⁹ On a positive note, it should be added that victims of trafficking are entitled to accommodation for the duration of their temporary residence permit.¹⁹⁰ What is missing, however, is a state-funded specialised shelter for male victims of trafficking. CPTV usually refers them to a state institution for elderly persons.¹⁹¹

In principle, (presumed) victims of trafficking in Serbia have access to services as soon as the CPTV receives indications that they have been trafficked. Access to services does not depend on the person being formally identified, nor does it depend on their cooperation.¹⁹² According to the law, once identified by CPTV, victims of trafficking are considered persons in social need, and are entitled to social security, including material assistance and housing.¹⁹³ However, according to the national research, access to services is in practice limited due to the general lack of resources and the significant understaffing not only of CPTV, but of the social welfare system in general. In addition, in many cases victims of trafficking are reportedly not adequately informed about their rights and the services available.¹⁹⁴ Access to health care for foreign victims of human trafficking appears to be particularly problematic. Unlike Serbian nationals, they must first pay for services themselves before they can obtain a refund.¹⁹⁵

Serbian law does not provide for a THB-specific permanent residence permit. Instead, trafficked persons – like all holders of (any kind of) temporary residence permit – will be granted access to general permanent residence after five years' continued legal residence, if they meet the general criteria (such as accommodation and secure livelihood).¹⁹⁶ In addition, one of the reasons for the withdrawal of temporary residence permits for trafficked persons in Serbia is that the proceedings against the traffickers have been discontinued. Thus, the prospects of a long-term stay seem to be rather low and – again – beyond

184 Office for Coordination of Activities in Combating Trafficking in Human Beings, Ministry of Interior of the Republic of Serbia, Standard Operating Procedures for the Treatment of Victims of Trafficking, 2018

185 National Research, Serbia, p. 8.

186 Art 62 Law on Foreigners (Serbia).

187 As per Art 63.5 Law on Foreigners (Serbia).

188 Law on Employment of Foreigners, Official Gazette of the Republic of Serbia, Nos. 128/14 of 26 November 2014, 113/17 of 17 December 2017, 50/18 of 29 June 2018 and 31/19 of 29 April 2019. See also Rulebook on Work Permits, Official Gazette of the Republic of Serbia, Nos. 94/2015 and 9/2018.

189 But only if they are available and financed. National Research, Serbia, p. 19-20.

190 Art 63 Law on Foreigners (Serbia).

191 National Research, Serbia, p. 18.

192 National Research, Serbia, p. 24.

193 Law on Social Welfare, Official Gazette of the Republic of Serbia, No 24/11.

194 National Research, Serbia, p. 24.

195 National Research, Serbia, p. 15.

196 As per Art 68, 70 Law on Foreigners (Serbia).

the victim's control.¹⁹⁷ In principle, victims of trafficking can apply for residence permits on any of the grounds provided for in the Serbian law on aliens. In most cases, however, it will not be possible for trafficked persons to meet the general requirements. According to the national research, a humanitarian permit is the most likely option for victims of trafficking, as it does not require them to meet all of the general conditions. The permit is issued for six months up to one year and is renewable without time limit.¹⁹⁸

A.3.6. Spain

In accordance with the CoE Anti-Trafficking Convention, victims of trafficking in Spain may be granted a residence permit; they may further be granted a work permit in exceptional circumstances if it is deemed necessary for their cooperation in investigations or criminal proceedings against traffickers. They may also be granted such permits in response to their personal situation.¹⁹⁹ With these permits, victims of trafficking are exempted from any administrative liability arising from their illegal stay in Spain. Even if this has no other consequences, it makes the application procedure somewhat more complicated in as much as it foresees an additional step and adds another actor to the decision-making process.²⁰⁰

Only upon the exemption being declared can trafficked persons apply for a residence and work authorisation. According to the law, it shall be declared by a Government Delegate on the basis of a proposal of the authority in contact with the person in the context of criminal investigations or proceedings. If the personal circumstances of the victim are to be taken into account, it shall be declared *ex officio*.²⁰¹ However, in practice a detailed report by a specialised NGO is required. This intervention plan must demonstrate the causal link between the person's vulnerability and their experience of trafficking, as well as the impact of the crime on the victim, by providing information about their safety and protection, family situation and integration process (or at least the willingness to start one).²⁰² In principle, it is highly commendable that the information of specialised victim protection organisations is taken into account. However, care should be taken to ensure that this does not become an obstacle for those victims who do not wish to be cared for by a specialised institution.

Spanish law first provides that trafficked persons be granted a provisional permit (either on the basis of collaboration or on the basis of the personal situation of the victim), which is not time-limited. Once this is granted, the person applies for a foreigner identification card, which is valid for one year and is renewed annually until a decision is made on the granting of the permanent residence and work permit.²⁰³ The provisional permit allows the holder to take employment or be self-employed in any occupation, sector of activity and without territorial limitations.²⁰⁴ Victims of trafficking also have access to government-funded labour market integration measures. These programmes are not generally aimed

197 In addition, as per Art 64 of the Serbian Law on Foreigners, permits under Art 62 are to be withdrawn at any given moment if the trafficked person no longer fulfils the conditions and in particular has renewed contact to the traffickers, has ceased to cooperate or has been deceitful in cooperation.

198 As per Art 61 of the Law on Foreigners (Serbia). National Research, Serbia, pp. 35, 37.

199 According to Art 59.4 Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, reformed through the Aliens Act. 2/2009, BOE-A-2000-544; implemented by regulation through Art 141-144 Royal Decree 557/2011, approving the regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, BOE-A-2011-7703.

200 See CoE, GRETA(2018)7 Spain, para 197. Already in 2013, GRETA was concerned that this poses an additional condition for the access to residence for trafficked persons and adds another layer of decision-making by a separate authority. See CoE, GRETA(2013)16 Spain, para 207.

201 Art 143.1 Royal Decree (Spain). Interestingly, there is only brief mention of the possibility that the exemption can be granted based on the victim's personal circumstances, and it provides for this being done *ex officio*... National research, Spain, p. 44.

202 It should include relevant documents, such as academic and medical certificates or reports, reports from other organisations, a social and proposed work plan, as well as information regarding the schooling of dependent children. National Research, Spain, pp. 44-45.

203 Art 144 Royal Decree 557/2011 (Spain). National Research, Spain.

204 As per Art 59 bis Organic Law 4/2000 (Spain).

specifically at the needs of trafficked persons. However, to facilitate their access, agreements between specialised organisations and employment agencies are in place. Particularly positive is one national programme that foresees bonus payments for businesses that employ victims of gender-based violence, including victims of trafficking.²⁰⁵

Moreover, assistance measures, including the right to suitable and safe accommodation, material assistance, psychological assistance, medical assistance, interpretation services and legal counsel are not subject to pre-conditions. State-funded specialised organisations can provide assistance to victims of THB outside the formal identification procedure, and regardless of whether the victim wishes to co-operate with the authorities.²⁰⁶ National research shows, however, that access to the full range of services, such as public housing or material assistance, in many cases depends on having a regular administrative status, and thus on the formal identification of the victim.²⁰⁷ It should be added that funds for assistance and support to victims of trafficking in Spain have been allocated almost exclusively to women and girls, especially those trafficked for sexual exploitation. Other types of exploitation to which women are particularly vulnerable, such as domestic service or labour exploitation in the field of cosmetics, are not addressed adequately. Moreover, there is still a great shortage of assistance projects for male victims. In the whole of Spain, there is only one shelter for male victims of trafficking, with four places. National research considers this to be clear discrimination on grounds of gender.²⁰⁸ Moreover, Spanish law is discriminatory as regards access of trafficked persons to family reunification. Holders of other residence permits may, if they fulfil the general conditions, submit an application for family reunification after one year. This does not apply to victims of human trafficking. They must wait until they receive a permanent permit. Only then can they apply for family reunification after one year.²⁰⁹

Particularly noteworthy is that Spanish law has established a catalogue of rights for crime victims²¹⁰ beyond those recognised in the criminal sphere, so that victims and their families can receive not only a legal but also a social response. Victims of trafficking are explicitly included as a vulnerable group. These rights focus mainly on access to justice in court. The protection needs of THB victims are assessed individually so that their special protection needs can be adequately identified, correct measures taken and secondary victimisation during the pre-negotiation and judicial phase avoided. Most importantly, there are the so-called offices for the benefit of victims of crime. There, social workers and psychologists work in constant coordination with the police to protect the physical safety of the victims (e.g. being escorted by the police during court hearings). In cooperation with specialised organisations working at regional level, victims are informed about their rights, and are given access to assistance regardless of their origin, administrative situation or other circumstances.²¹¹ However, lack of adequate budgetary resources in many of the Autonomous Regions (Comunidades Autónomas) may pose challenges to the proper functioning of these offices.

A highly promising practice is that the permanent permit gives victims a real long-term perspective of staying in Spain. It is valid for five years, and is automatically renewed upon request. It is no longer THB-specific and can only be withdrawn for specified reasons.²¹² A fundamental defect however, is , is the lack of a legally binding timeframe for the processing of applications. Consequently, national research shows that provisional permits are often renewed for several years without clarifying the criteria for when and how they can become permanent permits. Indeed, one of the strongest criticisms of the otherwise more victim-centred system in Spain is the lack of legally defined criteria for the granting of

205 National Research, Spain, p. 22.

206 See CoE, GRETA(2018)7 Spain, para 153; National Research, Spain, p. 24.

207 National Research, Spain, p. 24.

208 National Research, Spain, pp. 25-26. See also CoE, GRETA(2018)7 Spain, para 114, 137.

209 The same applies to applications for citizenship. National Research, Spain, pp. 42-43, 46.

210 Through Act 4/2015 of 27 April 2015 on the Statute of Crime Victims..

211 See CoE, GRETA(2018)7 Spain, para 154; National Research, Spain, p. 10.

212 E.g. in case of the commission of serious offences. National Research, Spain, p. 45.

permits – both in exchange for cooperation and on account of the victim’s personal situation.²¹³ Under the coordination of the Spanish National Rapporteur, a working group involving the police, prosecutors and judges was set up in 2015 to develop a joint regulation on the granting of residence permits to victims of trafficking. To date, however, no such regulation has been published, and the working group is no longer active.²¹⁴

When a residence permit is based on personal reasons, the competent decision-making authority is the Ministry of Labour and Social Security (State Secretariat for Immigration and Emigration).²¹⁵ From practical experience, it can be assumed that the competent officials understand the concept of ‘personal situation’ as consisting of three core elements: a situation of vulnerability, a causal relationship between the vulnerability of the person and the trafficking experience, and the breaking of contact with the trafficking network (or at least the desire to break contact).²¹⁶ One positive practice is that, in the decision-making process, relevant information available from organisations with accredited experience in assisting victims of trafficking is taken into account. In addition, information from police reports on the identification process, as well as from the State Secretariat for Security, which is responsible for issuing permits in exchange for cooperation,²¹⁷ is considered. National research shows that in some cases very demanding criteria are applied in assessing applicants’ victimhood, despite the fact that laws and regulations do not require strict criteria, but rather reasonable grounds for victim identification.²¹⁸ This to some extent prevents residence permits being granted on the basis of the personal situation, because being formally identified as a victim by the police is a prerequisite for such application.²¹⁹ When assessing the personal situation of trafficked persons, great care should be taken to ensure that a law enforcement perspective does not prevail over the necessary victim protection perspective.

While in principle Spanish law provides for the possibility of initiating both procedures in parallel – for residence in exchange for cooperation and on the basis of the personal situation, in practice, the decision on the permanent residence and work authorisation is not taken until the outcome of the criminal proceedings is known, and thus depends on it.²²⁰ Therefore, ensuring the cooperation of trafficked persons appears to take precedence over taking their personal situation into account. This seems to be reflected in the figures. Between 2013 and 2016, a total number of 209 victims of trafficking received a residence permit on the basis of their cooperation with the authorities. In the same period only 65 victims of trafficking obtained a residence permit on account of their personal situation. However, one positive trend is that the number of permits issued on the basis of the personal situation of victims has increased steadily over the years.²²¹

On a highly positive note, once the proceedings against traffickers have terminated – depending on the outcome of the proceedings – trafficked persons may still apply for a permit on account of their personal situation.²²²

213 See CoE, GRETA(2013)16 Spain para 211; CoE, GRETA(2018)7 Spain para 196, 200; National Research, Spain, p. 45.

214 See CoE, GRETA(2018)7 Spain, para 200; National Research, Spain, p. 49.

215 See CoE, GRETA(2018)7 Spain, para 198.

216 Persons who have been trafficked for the purpose of sexual exploitation are required to be completely disconnected from the sex work environment. In practice, for these persons, even engaging in sex work independently can be problematic in terms of access to residence permits, although this is not formally established in any law or regulation. National Research, Spain, p. 43.

217 See CoE, GRETA(2018)7 Spain, para 198.

218 In practice, victim identification is within the competence of police units especially trained in the prevention and combating of THB, as well as the identification of, and assistance to, victims. These specialised units are responsible for both investigating the crime and identifying the victims, and in some instances they require that victims provide detailed and useful information for a possible police investigation.

219 National Research, Spain, p. 45.

220 National Research, Spain, p. 43-45.

221 The number of residence permits granted on the basis of the victim’s personal situation was four in 2013, 12 in 2014, 19 in 2015 and 30 in 2016. See CoE, GRETA(2018)7 Spain, para 200.

222 National Research, Spain, p. 45.

As mentioned above, one of the main criticisms of the criterion of cooperation with the authorities is that the criteria are neither clearly defined nor transparent. In practice, this leaves room for arbitrariness, and creates legal uncertainty. It is highly positive that the Immigration Department of the Prosecution Service has stressed that the requirement of cooperation has a low threshold, and is satisfied by the provision of information potentially useful for the investigation or prosecution of a crime. Accordingly, while victims of human trafficking may not fraudulently provide information to the authorities, their cooperation need not be effective either in the sense that it leads to arrests and/or convictions.²²³ However, what is demanded of victims in practice sometimes goes far beyond this. National research shows that this varies depending on the stage of proceedings. In order to be eligible for a provisional permit, trafficked persons must in practice file a complaint with the police. It is expected that this will include detailed information that is verifiable and allows authorities to open an investigation into a THB offense. On a positive note, legal proceedings against traffickers must not yet have started. Furthermore, trafficked persons are required to ensure their collaboration throughout the proceedings, and to make themselves available to respond to the requests of police, prosecutors and courts. Only when traffickers have been convicted is it certain that victims will receive a residence and work permit valid for five years. When the case is shelved, the accused acquitted or if there is a conviction of a crime other than THB, the permanent permit may be refused. Only if the acquittal is due to a lack of evidence and the victim's testimony has not been discredited, may the victim be granted a permanent permit – provided that she or he has at all times remained willing to cooperate and has met all requirements of the penal process. Thus, in practice obtaining a permanent residence permit in Spain is highly dependent on the outcome of proceedings against traffickers. But national research also shows that for the 18 months at the time of writing, a highly promising practice of the State Secretariat for Security could be observed: victims of trafficking have been granted permanent permits on the basis of the evidence they have given in court, without having to wait for a verdict.²²⁴

Regarding the application procedure for a residence and work authorisation, trafficked persons should enclose a copy of their passport or travel permit with their application. But an exception can be made where the production of these documents endangers the victim. Furthermore, the passport may be replaced by a valid registration card, which in principle can be obtained with relative ease from local authorities. However, in practice, trafficked persons may face problems in accessing such documents due to different practices and requirements at the regional level.²²⁵

In the event of a refusal of the permanent residence and work permits in exceptional circumstances on both grounds, trafficked persons have two further possibilities to apply for a residence permit under the regular Spanish aliens law. They may apply for a residence and work permit due to 'arraigo social', i.e. social roots. In order to be eligible they have to prove that they have resided in Spain (legally or illegally) for three years or more. It is particularly onerous that they must also substantiate some level of integration and show an employment contract. The permit is issued for one year. After that, and provided that they meet all the general conditions, including a minimum income, they can apply for another one-year permit and enter the regular residence regime. Once the permit expires, they can then apply for a two-year permit and thereafter for an uninterrupted legal residence of five years. The residence permit is automatically extended (upon application), can only be withdrawn under very exceptional circumstances, and thus gives the person concerned security of residence in Spain. Once the long-term residence permit is granted, the holder is eligible to reside indefinitely in Spain.²²⁶

National research suggests that, as a last resort, trafficked persons may also apply for an exceptional

²²³ See GRETA(2018)7 Spain, para 198.

²²⁴ National Research, Spain, p. 47-50

²²⁵ See CoE, GRETA(2018)7 Spain, para 201; National Research, Spain, p. 40.

²²⁶ Also, they must not have a criminal record from the previous five years. To prove their integration into Spanish society they have to prove that they have family ties in Spain, or can produce a report attesting to their integration issued by the Autonomous Community in which they reside. The employment contract must be signed and for at least a year when they apply for the permit. As per Art 124.2 Royal Decree 557/2011 (Spain). National Research, Spain, pp. 45, 48.

residence and work permit due to circumstances of an economic, social or employment nature. To be eligible, the person must not have any other permit available, and be in a highly vulnerable position. The decision to grant such a permit is at the discretion of the competent authority. The permit is not renewable, but – like the permit due to social roots – opens the way to the regular residence regime and, after five years of residing legally in Spain, the holder gains the right to reside indefinitely in Spain.²²⁷

A.4. Conclusion

In order to provide victims of trafficking with an accessible durable solution in terms of their rights, safety and dignity through the implementation of the provisions on residence permits, it is necessary for some States to change their general approach, to move away from the migration control and criminal law approach still prevalent in most of the countries studied. Treating trafficked persons as mere elements of criminal proceedings against traffickers ignores their rights as victims of crime. In line with a victim-centred approach, the focus must be on putting the needs, problems and fears of victims at the centre, finding a new balance between their needs and the interests of law enforcement. Efforts must be intensified to recognise trafficked persons as victims of crime and bearers of certain human rights. This is crucial not only with regard to the human rights of victims of trafficking, but may also increase the likelihood of successful prosecutions.

To ensure that this necessary change can take place, it is of the utmost importance that – and this cannot be stressed enough – States be able to, and do indeed, grant victims of trafficking residence on the basis of their personal situation. This must include the explicit objective of social inclusion of trafficked persons, in particular the right to work, to family reunification and to health and social care on the same basis as for other permanent residents and nationals. And, as discussed in the following chapters, States must guarantee trafficked persons access to international protection. Under the residence permit system, they must make use of the possibility of granting residence on the basis of their personal situation as provided by the CoE Anti-Trafficking Convention, and take into account their recovery, safety, state of health, family situation as well as other relevant factors and circumstances; not least because it has become apparent that where residence is made dependent on the cooperation of trafficked persons, their access to protection, assistance and justice also depends on it.

In order to make access to residence permits truly independent of the ability or willingness of trafficked persons to cooperate, this option must be available to them from the beginning. Currently, applications for residence on the basis of the victim's personal situation are not entirely disconnected from the prospects of the investigation and prosecution of traffickers. However, from a human rights-based perspective, they should be detached from legal proceedings against traffickers. It is neither in the spirit, nor within the letter, of the law to allow victims of trafficking to apply for residence on the basis of their personal situation only after unsuccessful proceedings against traffickers. From a victim protection perspective, it is admittedly preferable to grant a right of residence to victims of trafficking at least when legitimate reasons prevent them cooperating. Cooperation is then at least not a mandatory requirement. However, this should not hide the fact that the primary concern then remains to ensure that victims cooperate in the prosecution of traffickers, and in that case the rights of victims of trafficking are ignored. It must be reiterated that, in line with a human rights-based approach, States are obliged to provide legal alternatives for the return of victims of trafficking if their health, their safety or that of their families is at risk.²²⁸ This includes the obligation to ensure access to asylum and complementary forms of protection for victims of trafficking. A risk assessment must be carried out before any repatriation of trafficked persons, in order to comply with the obligation of non-refoulement.

²²⁷ Additional Provision 1.4 Royal Decree 557/2011 (Spain). National Research, Spain, p. 46.

²²⁸ See next chapter B.1.3 on cases where an individual; medical condition may be exacerbated by the expulsion to the point of resulting in such severe suffering that it reaches the threshold established under Article 3 of the ECHR.

In line with the CoE Anti-Trafficking Convention, no distinction should be made according to the type of exploitation of which a person has been the victim. For the granting of residence on account of the victim's personal situation to happen in a consistent and transparent manner, defined criteria are needed. As a minimum, competent authorities should use appropriate and standardised sets of indicators when assessing the personal situation of trafficked persons. However, the personal situations of trafficking victims are highly individual and complex. Therefore, it seems all the more appropriate to continue the practice already partly used in some of the countries studied, and to have the personal situation of trafficked persons assessed by independent multidisciplinary expert commissions. This would also have the welcome effect that victims of human trafficking could actually be granted residence truly independent of the criminal justice system and the investigation of irregular migration.

It is clear that strong involvement of the police can stand in the way of granting residence to victims of trafficking on account of their personal situation. While in many cases, law enforcement officers can provide important information, great care should be taken to ensure that a law enforcement perspective does not prevail. Were it to do so, this would make the assessment of the personal situation of victims dependent on their cooperation. Rather, a victim-protection perspective must be the primary consideration when assessing the personal situation of trafficked persons. To this end, it is necessary to take due account of the expertise of specialised organisations with experience in providing assistance to victims of trafficking. Good communication between the competent authorities and organisations working with trafficked persons is essential. Due consideration should be given to the assessment of specialised victim-protection organisations in relation to the personal situation of trafficked persons, as well as to possible factors that may hinder cooperation of trafficked persons in proceedings against traffickers. Their expertise should be formally recognised in the application procedures for residence permits. At the same time, care should be taken to ensure that this does not become an obstacle for those victims who do not wish to be supported by a specialised institution.

In States where a migration control and criminal law approach is still prevalent, residence is granted solely in exchange for cooperation. This creates pressure on trafficked persons, that is directly contrary to their needs, problems and fears. It also excludes the many trafficked persons who for various reasons cannot or do not wish to cooperate in the investigation and/or prosecution of their traffickers. As has been well demonstrated, making residence exclusively dependent on the cooperation of trafficked persons, is not consistent with a human rights-based and victim-centred approach, not least because – and this cannot be over-emphasised – it also makes access to assistance and support dependent on the cooperation of trafficked persons. In so doing, it erodes the standard of unconditional assistance, and contradicts the duty to ensure the safety of, and protection for, trafficked persons, as well as the prevention of further harm. That being said, the question remains what level of cooperation is required from victims of trafficking and what is offered to them in return.

In most of the countries studied, the broad concept of cooperation in the CoE Anti-Trafficking Convention is interpreted restrictively in practice. Generally, trafficked persons must file a formal complaint with the police and testify in court in order to be eligible for a residence permit. It is generally required that the information given is verifiable and useful for the initiation of criminal proceedings against traffickers. Many victims will want to see their traffickers prosecuted. However, many of them do not have detailed information about their traffickers. Furthermore, in order for trafficked persons to be granted residence in exchange for cooperation, some things are required, over which they actually have no influence. In some countries, their contribution to criminal proceedings against their traffickers must also be considered necessary. Partly, residence permits are only granted if a THB offence – and not other related offences – also becomes the object of investigation and prosecution. This is despite the fact that the qualification of crimes by the public prosecutor's office and the de facto possibility of initiating criminal proceedings against traffickers is linked to criteria that are beyond the control of the victims and disconnected from their cooperation. It takes no account of the legitimate interest of trafficked persons in legal proceedings, including civil action against their traffickers, being pursued.

As a result, not only the many victims of trafficking who for various reasons cannot or do not wish to

cooperate with the authorities are in effect excluded from access to residence permits. Even those who do cooperate may also be excluded from access to residence for reasons beyond their control. While it may seem justified to require victims to provide information to show that they are victims of trafficking, as many rights are attached to this, it is not necessarily an indication of lack of victimhood if a trafficked person cannot provide sufficient information from the perspective of law enforcement. Nor do victims of trafficking have power over whether or not criminal proceedings can be brought against traffickers. Victims who have provided specific information and verifiable data should not be harmed if their cooperation is ineffective for reasons beyond their control. In any case, the threshold of cooperation required of them should be low, and include providing information only potentially useful for the investigation or prosecution of a crime. While it is clear that victims of human trafficking should not be dishonest in the provision of information to the authorities, their cooperation should not have to produce tangible results. A report that they have been victims of human trafficking should be sufficient. In any case, their access to legal residence should not depend on whether the public prosecutor initiates proceedings for THB or other related crimes, or no proceedings at all.

In order for the granting of residence in exchange for cooperation to take place in a consistent and transparent manner, defined criteria are much needed. Currently, the level of cooperation required from victims of trafficking varies greatly. This leaves room for arbitrariness, and creates legal uncertainty for trafficked persons. Furthermore, it was found that victims of trafficking are sometimes confronted with distrust and suspicion on the part of the authorities. This may be due to the fact that the same authorities are partly responsible for combating irregular migration. However, this is unacceptable from a victim-centred perspective and because of the high risks of secondary victimisation. Furthermore, it is problematic from a law enforcement perspective, because it increases victims' distrust of the authorities and thus undermines their willingness to cooperate. Instead, trafficked persons and possibly also their families should be offered comprehensive witness protection measures, explicitly designed for their highly vulnerable situation and special needs.

In all the countries studied, residence permits are initially granted for a limited period. Access to long-term residence permits for trafficked persons is highly dependent on legal proceedings against their traffickers. In many cases, victims of trafficking are granted residence only for as long as legal proceedings against traffickers are on-going. The residence of trafficked persons is therefore not renewed once legal proceedings have been terminated, irrespective of their outcome. This cannot be considered a sufficient incentive for trafficked persons to cooperate. Their legal right to protection is ignored; in many cases, they risk their own and their family's safety when testifying against their traffickers. They should therefore be protected from possible reprisals. This includes the right to a residence permit that allows them to remain in the country after the proceedings against the traffickers have been concluded. It includes also the granting of international protection if return would expose them to a real risk of serious harm (as discussed in the next chapters). Moreover, and contrary to current practice in all countries examined, it also makes it necessary to facilitate preferential and swift procedures for family reunification.

In some countries, trafficked persons are offered a long-term perspective to stay in the country only after their traffickers have been convicted. However, the outcome of prosecutions is beyond the control of the victims. The possibility to remain in the destination country should not depend on whether sufficient indications and evidence can be presented to enable successful prosecutions. In line with a victim-centred approach, a lack of evidence, or mistakes made by the investigating or prosecuting authorities, should not make it impossible for victims to obtain a long-term residence permit. At the very least, victims of trafficking should not be held in legal uncertainty for the entire duration of legal proceedings against traffickers. When trafficked persons are kept in an uncertain position for extended periods, it makes their social inclusion difficult. It also impedes their access to stable housing and the labour market. Therefore, legally established timeframes for the processing of trafficked persons' applications for residence are much needed. Furthermore, temporary residence permits should not be renewed for several years without even clarifying the criteria for when and how they can become permanent.

In many of the countries studied, trafficked persons can apply for a permanent residence permit within the framework of the regular law on aliens. For some, this may be a viable option. However, most trafficked persons are actually excluded from these permits. This is because the requirements to obtain such permits are usually very onerous, and do not take into account the specific situation and needs of victims of trafficking. For non-THB specific residence permits to become a realistic option for more victims of trafficking, they would have to be exempted from general conditions, such as minimum income, at least for the initial application. In any case, it seems unjustifiable that the right of residence, even if victims of trafficking meet the general conditions, should in some cases be made additionally dependent on proceedings against traffickers.

In most countries, victims of trafficking can also apply for residence permits on humanitarian and social grounds. In some cases, these can serve as a last resort to regularise the legal status of the most vulnerable. But such permits are usually not offered to trafficked persons when they have to decide whether to cooperate or not. For many other reasons, discussed in detail above, they cannot be seen as a substitute for taking into account the personal situation of trafficking victims from the outset. Nor are they a substitute for a complete and competent risk assessment, which must in any case be carried out before anyone is returned to their home country.

A human rights-based approach requires that victims of trafficking be offered a genuine prospect of being granted long-term residence at an early stage. They should be enabled to (re)build a stable, secure and independent life. To this end, it will in many cases be necessary to grant them access to permanent residence on account of their personal situation, irrespective of criminal proceedings against traffickers. At present, this seems to be best assured by giving victims of trafficking access to a permanent residence permit specifically designed for them. In this way, the focus can be placed on the recovery, safety, health and family situation of the persons concerned.

B. INTERNATIONAL PROTECTION:

A POTENTIAL DURABLE SOLUTION FOR TRAFFICKED PERSONS

This chapter discusses international and European standards to guarantee access to international protection and protection from refoulement for victims of trafficking and persons at risk of being trafficked. It draws upon anti-trafficking, asylum and human rights law. It adopts a human rights-based approach that places victims' rights at the centre, and examines how to apply these various protection regimes in a holistic and integrated manner. The rationale is ensuring that these legislative frameworks operate in a coherent and synergic way to maximise the protection of the rights of the individual concerned.

Refugees, asylum seekers and migrants may fall victim to trafficking like any other person. Trafficked persons may have escaped their own country because of their trafficking or fear of being trafficked and may seek international protection. Moreover, people may become refugees or asylum seekers precisely because they have been trafficked to another country.

Where victims of trafficking satisfy the requirements to qualify as a refugee under the 1951 Refugee Convention, this can provide them with an appropriate durable solution. In other instances, where they do not satisfy the criteria but would risk ill-treatment if returned, the non-refoulement obligation enshrined in international and European law provides an additional justification for requiring the State to permit long-term residence.

The international protection regime is based on human rights and humanitarian considerations, centred on recognition of the person's need for protection from persecution. This protection regime aims at finding a durable solution, and offers a long-term perspective of social inclusion. Most schemes for

residence permits for victims, as discussed in Chapter A.1, are premised on the person's willingness or ability to cooperate with criminal justice and hence diverge from a human rights approach.

Trafficking victims' access to asylum and the recognition of their claims remains problematic. All too often, victims are denied the protection they deserve, either because they fail to meet the strict criteria of the refugee definition or the requirements around the availability of effective state protection. Handling asylum claims of trafficking victims and persons at risk of being trafficked is complex, and requires drawing on a variety of legal regimes; asylum authorities are often not familiar with the many facets of trafficking, and encounter challenges in examining and recognising the international protection needs of victims. In fact, as the European Court of Human Rights observed in a case brought against Austria by three citizens of the Philippines who claimed that they had been trafficked by their employer, a citizen of the United Arab Emirates: "... (potential) victims need support even before the offence of human trafficking is formally established, otherwise this would run counter to the whole purpose of victim protection in trafficking cases".²²⁹

This chapter begins with an examination of the criteria for the granting of international protection and various possible ways through which victims may fit these criteria; it then discusses the potential for protection deriving from non-refoulement obligations under Article 3 ECHR, which seems underutilised in the countries examined. The chapter continues with a concise overview of the main procedural guarantees to safeguard access to asylum for victims of trafficking in Europe.

B.1. Victims of trafficking in need of international protection

Victims of trafficking, like any other individual, have a right to seek asylum and to enjoy protection from refoulement. International and European legislation on THB contains a specific saving clause to safeguard the right to asylum of trafficked persons and to provide protection from refoulement.²³⁰ Furthermore, the CoE Anti-Trafficking Convention explicitly requires States to ensure that victims have appropriate access to fair and efficient asylum procedures.²³¹ The Convention also postulates that granting a residence permit to a victim 'shall be without prejudice to their right to seek and enjoy asylum',²³² which is necessary to ensure a coherent application of both the asylum and the anti-trafficking legal frameworks. In addition to a saving clause, the EU Anti-Trafficking Directive makes a direct link to foster referral of victims to asylum procedures. To this end, it requires States to inform, where relevant, a presumed victim of the possibility of being granted international protection.²³³ This is an important measure in the process of identification and initial counselling of victims about their rights and options. However, it is left to the discretion of state authorities to establish when it is relevant to inform victims about this option.²³⁴

Notably, the explicit recognition of victims' right to asylum is helpful also when dealing with situations of irregular entry. Whether they entered legally or not, whether they had fraudulent documents or not, victims of trafficking should not be denied access to asylum or refugee status.²³⁵ More complex situations where victims have been involved in unlawful activities in the course, or as a consequence, of or being trafficked, should also not jeopardise their right to asylum. These cases require careful handling

²²⁹ *J and Others v Austria*, ECtHR, Application no. 58216/12, 17 January 2017, para 115.

²³⁰ Art 14 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Art 40.4 CoE Anti-Trafficking Convention require States parties to respect their obligations under international humanitarian law, international human rights law and refugee law. See also Preamble para.9 EU Dir 2011/36/EU.

²³¹ CoE, Explanatory Report to the Anti-Trafficking Convention, para 377.

²³² Art 14.5 CoE Anti-Trafficking Convention.

²³³ Art 11 EU Dir 2011/36/EU.

²³⁴ Stoyanova, V (2015), *Victims of Human Trafficking. A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Phase of the EU Asylum Legislation*, in Bauloz et al (Eds), *Seeking Asylum in the European Union*, Martinus Nijhoff Publishers, p.10-11.

²³⁵ Gallagher, A. (2010), *The International Law of Human Trafficking*. Cambridge: Cambridge University Press, p.198.

of victims' asylum claims to reconcile provisions on exclusion under the Refugee Convention and on non-punishment under the anti-trafficking legal regime.²³⁶

The mere fact of being a victim of trafficking or at risk of being trafficked is not per se a criterion for international protection. Yet, depending on the individual circumstances of the case, a victim's trafficking experience may be relevant for consideration on entitlement to refugee status or other forms of complementary protection,²³⁷ either based on the 1951 Refugee Convention or the non-refoulement obligations under international law, EU law and the ECHR.²³⁸

B.1.1. When does a victim or potential victim qualify for refugee status?

To qualify for refugee status, a victim or potential victim of trafficking must satisfy the criteria of the refugee definition under the 1951 Convention²³⁹ A refugee is any person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.”

The definition can be broken down into the following elements, which are discussed below, drawing upon the UNHCR Guidelines on trafficking.²⁴⁰

Presence in a foreign country: She or he may have escaped from the country fearing trafficking persecution or may have been victimised abroad and in need of refugee protection (*sur place* refugees). It is irrelevant whether the person arrived legally or not in the country.²⁴¹

A well-founded fear of persecution: There is no universal definition of persecution, but generally, it comprises serious violations of non-derogable rights and freedoms, or repetitive or systematic infringements of other human rights or different kinds of intolerable predicament.²⁴² Persecution is generally at the hand of the State, but may also be recognised as such when caused by non-State actors, where the State is unable or unwilling to provide protection. Persecution in a trafficking context tends to encompass repeated and extended violations of human rights spanning through the continuum from

236 UNGA, Convention Relating to the Status of Refugees and its 1967 Protocol, 28 July 1951, UNTS, vol. 189, (hereinafter Refugee Convention), Art 31; Art 26 CoE Anti-Trafficking Convention, Art 8 EU Dir 2011/36/EU.

237 The focus here is on ECtHR case law under Art 3, which is equally relevant for subsidiary protection under the EU Dir 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L377/9 (hereinafter Qualification Dir).

238 Non-refoulement obligations are established under Art 33 of the 1951 Refugee Convention; Art 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR); Art 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Art 14 of the UN Trafficking in Persons Protocol, which refers to the principle of non-refoulement in the context of asylum. In European law, non-refoulement is set in: Art 2 and 3 of the European Convention on Human Rights (ECHR); Art 78 (1) of the Treaty on the Functioning of the EU; Art 4, 18 and 19 of the EU Charter of Fundamental Rights (EU Charter); Art 21 of the Qualification Dir; Art 9 Asylum Procedures Dir (APD) 2013/32/EU; Art 5 Return Dir 2008/115/EC.

239 Art 1A Refugee Convention, reiterated in Art 2 Qualification Directive.

240 UNHCR, (2006), Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, HCR/GIP/06/07. See also Piotrowicz, R, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 International Journal of Refugee Law p. 242.

241 Art 31 1951 Convention deals with the non-penalisation of refugees for illegal entry as long as the person makes herself known to the authorities and puts forward a claim for protection upon arrival. Furthermore, Art 26 of the CoE Anti-Trafficking Convention establishes the non-punishment of victims for their involvement in illegal activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

242 Hathaway defines persecution as “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection” in Hathaway, J C (1991), The Law of Refugee Status, Toronto, Butterworths, p. 104-105.

recruitment to exploitation. The UNHCR Guidelines n.7 point out how the trafficking experience fundamentally may threaten the very right to life and encompasses serious human rights violations. “[S]evere exploitation, abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment” are among those violations that trafficked persons experience, and they generally amount to acts of persecution.²⁴³ When assessing the risk that such persecution would occur in case of return (forward-looking test), the individual’s trafficking experience is to be taken into account as it impacts upon his or her fear of returning home. In THB cases, consideration needs to be also given to the cumulative harm to the individual that may be caused by a persistent and repeated pattern of discrimination, ostracism, rejection or punishment by the family and community or by the authorities, which in turn could create an intolerable situation for the traumatised victim, amounting to persecution.²⁴⁴ In other cases, if returned home, a victim of trafficking could be exposed to direct or indirect retaliation by traffickers and or persons linked to the trafficking network because, for example, she or he has escaped, or because she or he has not paid their debt, or because she or he has cooperated with law enforcement authorities. In these situations, the individual may also be exposed to a higher risk of being re-trafficked, that would amount to a well-founded fear of serious harm.²⁴⁵ Examining the well-founded fear entails considering both the person’s state of mind (i.e. his or her fear) supported by the objective situation (well-founded).²⁴⁶

Over the past decade, adjudicators have become familiar predominantly with how trafficking for sexual exploitation may amount to persecution. More efforts and research are required into how other forms of trafficking (such as forced labour, domestic servitude, forced criminality) may constitute acts of persecution.

The causal link with the Refugee Convention grounds. The well-founded fear must be linked to one of the Convention grounds (race, religion, nationality, political opinion or membership of a particular social group). Traffickers may take these factors into account when targeting victims; for example, recruiting victims from a specific ethnic or minority group or a particular race. Yet, in most trafficking cases, the causal link is established by arguing that victims belong to a particular social group. To this end, “[it] is [...] necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one’s human rights.”²⁴⁷ This common background cannot be defined by the fact that persons in that group are targeted for persecution; it must give them a distinct identity in the society in question. Trafficked persons may be perceived as being different from others in some way, for example, based on their gender. There may be situations in which it is appropriate to recognise women who have been trafficked for sexual exploitation as a particular social group. In other situations, women generally could be recognised as such a social subset.²⁴⁸ However, adjudicators are more resistant to the latter. In THB cases the agent of persecution is usually a non-state actor. In such cases, the causal link exists either a) if the reason for persecution is connected to a Convention ground or b) if the State’s inability or unwillingness to protect the person is linked to a Convention ground.²⁴⁹ This notion is very important because it may be challenging to prove that the traffickers were motivated not merely by profit but by

243 UNHCR, (2006), Guidelines on International Protection No. 7, para 15.

244 Ibid. para 18.

245 UNHCR, (2006), Guidelines on International Protection No. 7, para 18.

246 Hathaway, J C & Foster, M (2014), Well-founded fear, in *The Law of Refugee Status*, Cambridge University Press, p.91-181.

247 UNHCR, (2002), Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Art I(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 11, HCR/GIP/02/02, para. 37.

248 Ibid. para 12.

249 UNHCR, Refugee Status Determination, Self-study module 2, 2005, p. 35. Hathaway, J C (2002), *The Michigan Guidelines on Nexus to a Convention Ground*, 23 Mich. J. Intl L. 211.

intending to harm the person for whom she or he is.²⁵⁰ It might, however, be possible to prove that the State is unwilling or unable to protect members of a particular social group or individuals belonging to a certain race or ethnicity. This understanding is significant also for cases of trafficking for forced labour where the nexus may be connected with race, or for trafficking for forced begging, in which causal link may be established with a membership of a particular social group defined as persons with disabilities.²⁵¹

Although gender is not listed in the Convention as a ground for refugee status, international law now recognises that some forms of gender-based violence, such as trafficking for sexual exploitation, amount to gender-related persecution.²⁵² The Istanbul Convention on violence against women clearly requires that gender-based violence against women is recognised as a form of persecution.²⁵³ The EU Qualification Directive also specifies that persecution can include acts of sexual violence and acts of a gender-specific nature.²⁵⁴

Availability of state protection. In trafficking scenarios, where non-state actors are usually the agents of persecution, it is necessary to assess whether the State will intervene to protect this particular person. It may well be the case that the country has adopted anti-trafficking legislation and developed some programmes and measures of protection, but the law is not implemented in practice, or protection is not accessible because there is no real commitment or because resources and support services are lacking. There may also be situations in which protection cannot be provided due to corruption, impunity or lawlessness.

Internal flight or relocation alternative: In the case of a trafficked person, when examining their personal circumstances for such assessment, competent authorities should verify both the general situation and the specific circumstances,²⁵⁵ i.e. whether the trafficker/s will persecute them there, whether the person can actually access the area and be effectively safe there. Besides the safety and security of the person, the authorities need to consider whether the person can reasonably be expected to access necessary support and has a possibility of normal life and economic survival there.²⁵⁶

Exclusion considerations: Victims may be compelled by traffickers to commit serious crimes, e.g. recruit other victims or otherwise assist traffickers in their operation, carry or sell drugs. In such cases, when they seek asylum, their involvement in serious offences may raise exclusion considerations and even lead to the denial of their refugee status, unless a defence of duress or a state of necessity is established.²⁵⁷ It is important that competent authorities take into consideration that victims of trafficking may have been compelled to commit unlawful activities while or because of their trafficking and in such cases, they are entitled not to be prosecuted or punished in line with the non-punishment provi-

250 For a critical discussion see Pomeroy, M, (2010), *Left out in the cold: trafficking victims, gender and the misinterpretation of the Refugee Convention's Nexus Requirement*, Mich. J. Gender & L. 453, p. 476-480.

251 CoE GRETA, (2020) *Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection*, GRETA(2020)06, para. 23.

252 UNHCR (2002), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, paras 10, 18; CEDAW (2014), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/GC/32, para 45; Pomeroy (2010).

253 See CoE, (2011), *Convention on preventing and combating violence against women and domestic violence*, ETS 210, Art 60 (hereinafter Istanbul Convention). It does not refer explicitly to THB but among the forms of gender based violence includes sexual violence, (Art 36) psychological and physical violence (Art 33, 35) which are part of trafficking. See also, Hooper L, (2020), *Gender-Based Asylum Claims and Non-Refoulement: Art 60 And 61 of the Istanbul Convention*, CoE..

254 Art 9 Qualification Dir

255 Qualification Directive 2011 preamble para 27 and Art 8.

256 Stoyanova V, (2011), *Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights*, Goettingen Journal of International Law 3 (2011) 2, p.23. For guidance see UNHCR, (2003), *Guidelines on International Protection No. 4: Internal Flight or Relocation Alternative within the context of Art 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/03/04.

257 Art 1D, 1E, 1F Refugee Convention, Art 12 Qualification Dir.

sion, as established in international and European law.²⁵⁸ These cases need to be assessed carefully and in light of all the circumstances where a person may be unable to act with free will because of the control and abuse exerted on them by traffickers. The assessment of the individual responsibility in such cases needs to interpret compulsion in the trafficking context, i.e. broadly meaning that it includes “the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will; not only under the threat of physical violence or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability”.²⁵⁹ Exclusion may be a form of punishment, States need to reconcile their obligations under refugee law with those anti-trafficking law to ensure sufficient and adequate protection of victims of trafficking.

B.1.2. When does a victim or potential victim qualify for complementary protection?

Under the ECHR and EU law, complementary forms of protection offer an additional avenue to securing a long-term residency status for victims of trafficking. They provide protection from removal in cases of a real risk of treatment contrary to Article 3 of the ECHR (prohibition of torture and inhuman or degrading treatment or punishment) or serious harm.²⁶⁰

ECtHR case-law on non-refoulement sets out legal criteria that can guide the application of Art 3 in asylum cases, including those in which the applicant is a victim of trafficking.²⁶¹ The most relevant criteria are discussed below.

General nature of obligations under Article 3: No derogation from Article 3 is permitted. This means that Article 3 also applies in cases where the person has allegedly committed an offence.²⁶² The latter is particularly important for victims who may have been compelled to commit a crime because of their trafficking. Furthermore, Article 3 does not require the nexus with one of the five 1951 Convention grounds, and this renders it more readily applicable to claims by trafficking victims.

The principle of non-refoulement also applies in case of indirect removal to an intermediary country including a member State of the Council of Europe (e.g. Dublin return). As will be illustrated below, many victims of trafficking are returned under the Dublin Regulation to the first country of asylum. In such cases, it is necessary to assess risks of onward refoulement and the conditions in the place of proposed return.²⁶³

Risk of ill-treatment by non-State actors, not only public authorities: Protection obligations under Article 3 also cover those situations in which the risk of ill-treatment emanates from non-state agents.²⁶⁴ This can include traffickers and their affiliates.

Assessment of the existence of a real risk: The focus shall be on the foreseeable consequences of the applicant’s removal, in light of the general situation there and of his or her personal circumstances.²⁶⁵ The assessment has to take into account not only the evidence submitted by the applicant but also all

258 Art 26 CoE Anti-Trafficking Convention and Art 8 EU Dir 2011/36/EU. See OSCE, (2013), Policy and legislative recommendations towards the implementation of the non-punishment provision with regard to victims of trafficking, para 14.

259 See OSCE, (2013), Policy and legislative recommendations towards the implementation of the non-punishment provision with regard to victims of trafficking, para 14.

260 The ECtHR has interpreted Art 3 as including an obligation not to expel a person where substantial grounds have been shown for believing that the person concerned if removed would face a real risk of harm –such that it would reach the severity of torture or inhuman or degrading treatment. See ECtHR, Saadi v. Italy, Application No. 37201/06, 28 February 2008, para 125.

261 ECtHR, J.K. v. and Others v. Sweden, Application No. 59166/12, 23 August 2016.

262 ECtHR, Chahal v. United Kingdom, Application No. 22414/93, 15 November 1996, para 79-80; ECtHR, Labita v. Italy Application No. 26772/95, 2000 para 119; ECtHR, Selmouni v. France, Application No. 25803/94, 28 July 1999, para 95, 1999; ECtHR, K. and Others v. Sweden, para 77.

263 ECtHR, K. and Others v. Sweden, para 78.

264 ECtHR, K. and Others v. Sweden, para 80. See also ECtHR – Tarakhel v. Switzerland, Application No 29217/12, Judgment of 4 November 2014, para 104. The source of the risk of ill-treatment is irrelevant when assessing the situation, any source of risk may be relevant.

265 ECtHR, F.G. v. Sweden, para 115.

other relevant facts and materials from other reliable and objective sources such as UN and reputable NGOs.²⁶⁶ In the THB context, as shown in the case examples in the next chapter, specialised NGOs may well provide valuable expertise and evidence to inform such an assessment. The assessment should take into account all circumstances of the case, such as the duration of treatment, age, sex, state of physical and mental health of the person.²⁶⁷ The risk must be assessed not only on the basis of individual factors, considered separately but also cumulatively.²⁶⁸ Such a thorough risk assessment is particularly important when dealing with asylum seekers that the ECtHR considers as “a particularly underprivileged and vulnerable population group in need of special protection”.²⁶⁹ One can undoubtedly argue that this is also crucial for asylum seekers who are victims of trafficking and, as such, particularly vulnerable and with specific rights and needs.

Distribution of the burden of proof. It is, in principle, for the individual to provide a substantiated account of a real risk of ill-treatment upon deportation that distinguishes his or her situation from the general perils in the country of return.²⁷⁰ Yet, also the competent domestic immigration authorities have to establish proprio motu what is the prevailing situation in the receiving country and the State’s ability to provide protection.²⁷¹ The ECtHR has found that “it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case”.²⁷² A victim of trafficking may face particular challenges in adducing evidence of the risk of ill-treatment. They may fear retaliation by traffickers and may also appear as non-credible, because of the difficulties in providing clear and consistent accounts as well as apparent contradictions caused by their traumatic experience. They may feel particularly ashamed and be resistant to disclosing their experiences fully. For these reasons, it is particularly important to underline that state authorities also have a responsibility to gather information regarding such risks to trafficking victims.

Past ill-treatment as an indication of risk. Past ill-treatment may be relevant for assessing the level of risk of future ill-treatment. This is particularly important in THB cases in which the trafficking experience is relevant to the risk of future ill-treatment, for example, retaliation at the hands of traffickers.

Membership of a targeted group. The protection of Article 3 enters into play also when it is established that there are serious reasons to believe in the existence of a practice of ill-treatment which systematically exposes members of a group to which he or she belongs.

B.1.3. What types of harm may amount to treatment contrary to Article 3 in the trafficking context?

Torture and inhuman or degrading treatment require high thresholds of severity. Human trafficking may potentially amount to torture and inhuman or degrading treatment, as illustrated in the box below. A finding of torture will depend on the individual case, including its physical or mental effects, its duration and the personal circumstances, such as sex, age and health of the victim.

OSCE, Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment, 2013

“This is the case if the trafficker inflicts severe pain or suffering on a powerless victim under his/her control for the purpose of intimidation, punishment or discrimination, and when the state is not

266 ECtHR, *K. and Others v. Sweden*, para 90.

267 EDAL, ECtHR, *Tarakhel v. Switzerland*, Application No. 29217/12, 4 November 2014, para119.

268 ECtHR, *K. and Others v. Sweden*, para 95.

269 EDAL, ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011, para. 251 - 263.

270 ECtHR, *K. and Others v. Sweden*, para 94-96.

271 ECtHR, *K. and Others v. Sweden*, para 98.

272 ECtHR, *K. and Others v. Sweden*, para 96.

taking necessary measures under the concept of due diligence to protect the victim against this treatment. State responsibility for acts of torture committed by private persons can be established, and acts of trafficking in human beings can in many cases, be seen as committed with the intent to inflict severe pain and suffering. The level of pain and suffering inflicted on victims of trafficking can often be compared to the level inflicted on victims of torture in the context of police interrogation. Torture requires a specific purpose. Exploitation within the context of trafficking in human beings implies intimidation, punishment and coercion, which are all purposes of torture. Furthermore, discrimination as a purpose of torture can be linked to trafficking in human beings when the act of trafficking clearly shows a discriminatory element. Even if one of the requirements of torture such as the powerlessness of the victim or the existence of a specific purpose cannot be sufficiently proven, these acts of trafficking in human beings may amount to other forms of ill-treatment. Depending on the facts of each individual case, trafficking in human beings can amount to torture or to other forms of ill-treatment."²⁷³

Combined with the receiving country's inability and or unwillingness to take operational measures for effective protection and support²⁷⁴ to the particular victim, different types of harm may amount to inhuman or degrading treatment and require that the person is not returned. These may include different situations, such as the following:

- A situation of extreme material poverty that does not allow the person "to meet his most basic needs, such as, among other things, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity"²⁷⁵ would reach the level of severity required for Article 3 to apply. Victims of trafficking may lack access to basic and essential support and protection in the receiving country and face extreme material poverty resulting in violation of their dignity and rights.
- A person's medical condition may be exacerbated by the individual's expulsion and result in suffering, reaching the level of severity of Article 3.²⁷⁶ The trafficked person's state of health, both mental and physical, and the ensuing medical needs should be taken into consideration.²⁷⁷ For example, victims may suffer complex trauma (e.g. Post-Traumatic Stress Disorder), as a result of prolonged inter-personal violence, which requires targeted and effective approaches to treatment, recovery and long term support.
- A real risk of re-trafficking may attain the severity of Article 3 due to its inherent severe violations of a person's dignity and fundamental rights. The risk of harm needs to be not general but specific and distinct for the person concerned. A single factor or a few factors cumulatively may give rise to a real risk. For example, in case the person has escaped without paying her or his debt to traffickers, or if she or he comes from a particular area of a country, or has a specific background or age that render them part of a group that is systematically exposed to trafficking.²⁷⁸

273 OSCE (2013), Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-Treatment, p. 26-27.

274 The risk assessment should consider the availability of, and access to, social assistance programmes, including safe accommodation, medical, legal and psychological aid, and the opportunities for employment and sustainable means of existence. See Art 10 and 12 of the CoE Anti-Trafficking Convention, and Art 11 EU Anti-Trafficking Dir; see also ECtHR, *LE v Greece*, Application No 71545/12, 21 January 2016 para 78; ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 10 October 2010.

275 EDAL, CJEU – Case C-163/17 *Jawo*, Judgement of 19 March 2019, para 92.

276 EDAL, CJEU – Case C-578/16 PPU *C.K. and others*, Judgment of 16 February 2017. It shows that if there is a real and proven risk that the state of health of an applicant who suffers from serious mental or physical illness would significantly deteriorate, the transfer would amount to a breach of Art 4 EU CFR.

277 See also *Stoyanova* (2011), p.801-804.

278 *Stoyanova* (2011), p.792.

- Retaliation at the hands of traffickers may result in threats to life or serious harm for the person and her or his loved ones. Traffickers may retaliate because the person collaborated with criminal justice authorities or because of her or his indebtedness to the trafficker/s.
- Rejection by family and or community may lead to stigmatisation and ostracism of the person because of her or his trafficking experience. This will depend on the particular situation in the receiving country, and the way society perceives trafficked persons. For example, this risk has been documented for women and girls trafficked for sexual exploitation, as discussed below.
- When victims have spent long periods in the country of destination and developed strong community and family ties and a reasonable degree of integration, their removal may constitute a breach of Article 8 “where there are sufficient adverse effects on physical and moral integrity”, even though the harm feared does not attain the severity required by Article 3.²⁷⁹ In the ECtHR interpretation, the right to respect for private life (Article 8) protects a person’s right to physical and psychological integrity. It includes “a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”²⁸⁰ Hitherto there has been limited use of Article 8 to provide an additional opportunity to trafficked persons to secure long-term residence.²⁸¹

ECtHR jurisprudence recognises that a trafficked person may be exposed to such risks of serious harm also in case of a Dublin transfer. Hence, such risks should be thoroughly assessed in the context of Dublin transfers of victims of trafficking. Risk assessment is necessary to ensure that there are guarantees of safety, adequate reception and protection of the person in line with ECtHR and CJEU jurisprudence (for EU member States) and victims’ protective obligations established in the CoE and EU legislation related to trafficking and victims’ rights. Where such guarantees are absent, the Dublin transfer should be suspended.²⁸² Nevertheless, as will be illustrated in the next chapter, domestic courts in Europe do not uniformly apply the requirements stemming from the case-law of the ECtHR and the CJEU. As a consequence, in some instances, a transfer proceeds despite the risks.²⁸³ An interesting development in the context of Dublin returns relates to a recent proposal of the EU Parliament to include the real risk of a serious violation of fundamental rights as a reason to suspend a Dublin transfer.²⁸⁴

279 ECtHR, *Bensaid v. The United Kingdom*, Application N. 44599/98, 6 February 2001, para 46.

280 Stoyanova (2011), p. 38. ECtHR, *Bensaid v. The United Kingdom*, Application N. 44599/98, 6 February 2001, para.47.

281 Stoyanova (2011), p.38, 40. National research Austria, France, The Netherlands, Serbia, Spain.

282 See i.a. ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011, para 342; ECtHR, *Saadi v. Italy*, Application No 37201/06, 28 February 2008, para147. For a discussion on the protection of victims in Dublin returns see Frei, N (2018), *Human Trafficking and Asylum: The implementation of International Standards for Victim protection in the Swiss Asylum Procedure*; Frei, N, Hruschka C, *Access to Asylum for Victims of Trafficking under a Human Rights-based Approach*, in O’Sullivan M et al, (2017), *States, the Law and Access to Refugee Protection: Fortresses and Fairness*, Oxford: Hart Publishing, Bloomsbury Collections.

283 EU Parliament, *Dublin Regulation on international protection applications. European Implementation Assessment*, EPRS, February 2020, p. 62-63. The EU Parliament has suggested amending the wording of Art 3 (2) of the Commission’s proposal for a new Dublin Regulation to include the real risk of a serious violation of the applicant’s fundamental rights as a reason to suspend a transfer.

284 EU Parliament, (2020) *Dublin Regulation on international protection applications. European Implementation Assessment*, EPRS, , p. 62-63. The EU Parliament has suggested amending the wording of Art 3 (2) of the Commission’s proposal for a new Dublin Regulation to include the real risk of a serious violation of the applicant’s fundamental rights as a reason to suspend a transfer.

B.2. Procedural safeguards for victims in asylum procedures

Ensuring fair and efficient asylum procedures is essential in the process of determination of the international protection needs of a person. In other words, the effective exercise of the right to seek and enjoy asylum requires that individuals be afforded procedural safeguards and guarantees at all stages of the asylum procedures. Where the asylum applicants are trafficked persons, it is necessary to ensure the protection of their rights both as victims of trafficking and as vulnerable asylum applicants.

The European acquis on asylum contains several provisions that deal with vulnerable applicants and are applicable to trafficking victims. Effective implementation of these procedural guarantees is premised on the recognition of their vulnerability and victimhood. The key issues, therefore, are first, how trafficked persons may be identified in asylum procedures, and second, what are the implications in terms of protection of their rights, access to assistance and recognition of their international protection needs, both as asylum seekers and as victims of trafficking.

Trafficked asylum applicants will need the assistance of a qualified legal advisor to secure their procedural rights and to articulate the elements relevant to their asylum claim. They cannot be expected to be familiar with the legal system and the requirements to qualify for international protection.

In the following, a brief overview of the main procedural safeguards available to victims of trafficking in asylum procedures is presented. The next chapters then consider how these procedures are implemented in practice and how they relate to the existing national referral mechanisms for victims of trafficking.

For handling asylum claims lodged by victims of trafficking, safeguards are established in four main legislative tools of the Common European Asylum System (CEAS), namely the Qualification Directive (QD),²⁸⁵ the Recast Reception Conditions (RCD) Directive,²⁸⁶ the Recast Asylum Procedures Directive (APD)²⁸⁷ and the Dublin III Regulation.²⁸⁸

The Qualification Directive specifically mentions victims of trafficking amongst those vulnerable categories of persons, whose specific situations States should take into account in asylum determination.²⁸⁹ Analogously, in the Reception Conditions Directive, victims of trafficking are deemed vulnerable applicants with special reception needs.²⁹⁰ The very application of this provision is contingent upon recognising that the person is a victim, and hence on how the vulnerability assessment is organised and whether it is done on an ongoing basis, given that some special needs may emerge at different stages of the asylum process (e.g. registration, reception, lodging of the application, personal interview, Dublin procedure).²⁹¹ This process needs to be reconciled with existing national referral mechanisms for victim identification and support. For example, it is necessary to ensure the involvement of expert NGOs or other specialised actors, and establish referral mechanisms to respond appropriately to victims' health, psychosocial and legal needs.²⁹² However, a challenge may emerge given the prevailing law enforce-

285 Dir 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L377/9 (hereinafter Qualification Directive)

286 Dir 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180/96 (hereinafter Reception Conditions Dir or RCD)

287 Dir 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60 (hereinafter Asylum Procedures Dir or APD)

288 EU Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31.

289 Art 20 RCD

290 Art 2.k and Art 21 -22 RCD; it requires the state first to assess whether the applicant has special reception needs in light of their vulnerability and then to identify the nature of such needs.

291 EASO, (2016), Guidance on reception conditions: operational standards and indicators, EASO. For more details on relevant operational standards on the assessment, see Section 7 at p. 45 and Annex Table p.56.

292 Ibid. Vulnerable applicants, and in particular victims of serious violence, are entitled not only to emergency care but also to necessary

ment approach that often renders access to support dependent on a victim's willingness and ability to cooperate with the authorities, in contradiction to existing legal obligations (ADD CROSS-REFERENCE TO CHAPTER 1).²⁹³ Additional challenges stem from the lack of awareness and recognition of certain typologies of trafficking, e.g. for forced labour and forced criminality. In case a victim is not recognised as such, he or she could appeal such a negative decision based on States' obligation to provide the reasons for their negative decision.²⁹⁴

The RCD does not exclude the possibility of detention of vulnerable applicants, but requires that it be used as a measure of last resort and ensuring primary consideration for their health, including mental health.²⁹⁵ It is left to States' discretion to determine how to implement such requirements in practice. In the trafficking context, this provision needs to be reconciled with non-punishment obligations towards victims.²⁹⁶

The recast **Asylum Procedures Directive (APD)** recognises that individual applicants may require special procedural guarantees, inter alia, as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.²⁹⁷ Victims of trafficking are not explicitly mentioned but may fall into one of these categories.²⁹⁸ Such guarantees include the possibility of avoiding accelerated procedures or procedures at the borders which are inadequate for handling claims lodged by victims.²⁹⁹ States may prioritise the examination of an application by a victim or may allow more time depending on individual circumstances.³⁰⁰ Notably, the APD sets out procedural guarantees for the personal interview, which are particularly relevant to enable victims of trafficking to speak about their experiences of victimisation, and also to allow the competent determining authority to understand and assess the circumstances of their case properly. These include, for example, measures to ensure confidentiality,³⁰¹ gender sensitivity,³⁰² and the possibility of having a support person present at the interview.³⁰³ As will be demonstrated in the next chapter, the provision allowing the consultation of experts (such as experts on trafficking, gender-based violence, psychologists.) can be crucial in fostering proper understanding of victims' behaviour, and in assessing their credibility.³⁰⁴ At the national level, these guarantees for victims vary significantly depending on States' discretion and on how they are combined with protection obligations under the anti-trafficking regime.³⁰⁵

The **Dublin III Regulation** does not include specific provisions on trafficked persons, except for child victims³⁰⁶. Yet, it is often applied to complex situations involving victims of trafficking, and its time efficiency logic is often at odds with the protection obligations under the anti-trafficking and human rights legal regimes.³⁰⁷ A human rights-based approach should, therefore, be applied to the implementation of the

medical or other assistance, appropriate mental health care and psychological treatment as per RCD Art 19.2 and 25.1.

293 Art 10 CoE Anti-Trafficking Convention, and para 134 Explanatory Report thereto; Art 11.3 EU Anti-Trafficking Directive

294 Stoyanova (2015), p. 20. Art 41 (2) Right to Good Administration of the EU Charter.

295 Art 8 RCD. Detention needs to be necessary based on an individual assessment and if other less coercive alternative measures cannot be applied effectively. It is subject to speedy judicial review.

296 Art 26 CoE Anti-Trafficking Convention and Art 8 EU Anti-Trafficking Directive require States not to penalise trafficking victims for their involvement in unlawful activities to the extent that they have been compelled to do so. OSCE, (2013), Policy and legislative recommendations towards the implementation of the non-punishment provision with regard to victims of trafficking, para 14.

297 Recital (29).

298 Art 24 APD.

299 Art 24.3 APD; See also CoE (2016), Fifth General Report on GRETA's Activities, p. 40.

300 Art 31.7 APD.

301 Art 15.2 APD.

302 Recital 32 APD.

303 Art 15.4 APD.

304 Art 10d APD.

305 See provisions on identification and assistance: Art 10 and 12 CoE Anti-Trafficking Convention, and 13 and EU Art 11-12

306 Art 6.3 Dublin III Regulation.

307 CoE, UNHCR (2016), International Conference on the interface between trafficking in human beings and asylum - Report, 23, p. 16-

Dublin III Regulation. For example, the requirement of conducting a personal interview³⁰⁸ to determine the State responsible for the asylum may provide opportunities for recognising a THB situation and triggering protective obligations. Therefore, the personal interview should not be omitted in cases involving vulnerable applicants, or persons at risk of being trafficked. When in the course of a Dublin procedure, there are reasonable grounds to believe that the person may be trafficked,³⁰⁹ States must also comply with their due diligence obligations under anti-trafficking and human rights law. These include taking operational measures for victim identification and assistance, suspending removal and granting a temporary residence permit.³¹⁰ Furthermore, States have a duty to effectively investigate possible cases of THB, regardless of whether or not there has been a complaint to the authorities. Depending on the factual circumstances of the case, it would seem that such an investigation cannot take place if the applicant is removed to another country and, as a consequence, can neither assist nor cooperate with the investigation and prosecution.³¹¹

The decision on a Dublin transfer of a victim of trafficking should take into account due diligence obligations under Art 4 of the ECHR and the anti-trafficking legal regimes. In light of such obligations, the State should apply the sovereignty clause, and examine the asylum application lodged by the victim even if such examination is not its responsibility under the Dublin criteria.³¹² The vulnerability assessment of the applicant should also inform the decision on a Dublin transfer and ensure compliance with non-refoulement obligations, as will be discussed below.³¹³ Further, it is noted that where the victim is formally granted a temporary residency permit, such as for recovery and reflection, the State becomes responsible for the asylum application, and the Dublin procedure is automatically excluded.³¹⁴

The scope and effectiveness of the procedural and reception guarantees foreseen in the asylum acquis leave ample margins of discretion to States. A human rights-based approach should, therefore, inform their implementation, and ensure that individuals have effective access to protection and support according to their entitlements, whether as victims of trafficking, victims of crime, victims of gender-based violence, asylum seekers or refugees.

In summary, protection of the rights of victims of trafficking and ensuring their right to seek and receive asylum is the responsibility of the State. States are therefore required to ensure that trafficked persons have access to asylum procedures and that their national referral mechanisms and asylum systems provide for effective protection of their rights, as well as fair decision-making concerning their asylum claims.

Due diligence requires state authorities to comply with their positive obligations. These obligations include the duty to take all reasonable steps and appropriate operational measures to protect victims of trafficking when they know or should have known of a real risk of harm to their life or physical integrity, as well as obligations to ensure independent, prompt and effective investigation of alleged rights'

308 Art 5 Dublin III Regulation. The personal interview may be omitted where the applicant has already provided relevant information by other means (Art 5.2), yet the applicant is entitled to present additional information that may be relevant to such decision (e.g. about their THB situation) and has the right to an effective remedy (Art 26).

309 In *Rantsev*, the Court stated that operational measures of protection are required when State authorities 'were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked or exploited'. ECtHR, (2020), Guide on Article 4 of the European Convention on Human Rights. Prohibition of slavery and forced labour; ECtHR, *Rantsev*, para 286.

310 See provisions on identification and assistance under CoE Art 10 and 12, and 13 and EU Art 11-12; ECtHR *Rantsev*, ECtHR (2020).

311 UK Supreme Court, (2020), *JMS (Pakistan) (Appellant) v Secretary of State for the Home Department (Respondent)*, UKSC 9, para 34-36; Stoyanova (2015), p. 36.

312 Art 17

313 EASO, 2019, Practical guide on the implementation of the Dublin III Regulation: Personal interview and evidence assessment, EASO, p. 60-61. See also Stoyanova (2015). As per Art 22 RCD, Art 24 APD, States' obligation to assess whether the applicant is a person with special reception needs requiring special procedural guarantees remains relevant and applicable during the Dublin procedure.

314 Art 19.1 Dublin III Regulation. The sovereignty clause applies even in the case of discretionary decisions taken under Art 17.

violations, and effective remedies.³¹⁵ Such obligations are significant for the protection of trafficked persons seeking asylum both in substantive and procedural terms. In substantive terms, the refugee legal regime and the non-refoulement obligations under the ECHR prohibit States from returning victims to countries where they would face serious harm (including as a result of failing to comply with due diligence obligations under Article 4) and give victims of trafficking the possibility to receive international protection.³¹⁶ In procedural terms, these obligations need to be operationalised within asylum procedures to ensure a systematic and practical application of both victim protection standards and asylum procedural guarantees, improving the overall protection of trafficked persons seeking asylum.³¹⁷

With the granting of international protection, not only do trafficked persons receive a long-term residence permit, a pathway to their social inclusion in the country of asylum is opened. In EU member States, the granting of refugee status or subsidiary protection enables the person to access a renewable residence permit of varying length, as well as the right to work and other socio-economic rights, including equal access to healthcare and vocational training as nationals (see Table 2 in chapter B.4).³¹⁸ Victims are then also entitled to additional support measures, such as psychological counselling and legal aid, under the CoE Anti-Trafficking Convention and the EU Anti-Trafficking Directive.

At the same time, the potential for protection that the refugee legal regime and the non-refoulement obligations provide for victims of trafficking has until recently been underutilised and often dismissed as inadequate to provide a durable solution for trafficked persons in many countries. But during the recent years of increasing mixed migration flows in Europe, the nexus between asylum and trafficking has become more apparent, and more asylum seekers are trafficked persons. The awareness and understanding of such potential for long-term protection of trafficked persons needs to be strengthened and tested further with many more individual cases.

315 ECtHR, (2020). See also UN Committee Against Torture, (2008), General Comment No. 2: Implementation of Art. 2 by State parties, CAT/C/GC/2, para. 18.

316 Stoyanova (2011), p. 34, 42; ECtHR (2020)

317 Frei N., Human Trafficking and Asylum: The implementation of International Standards for Victim protection in the Swiss Asylum Procedure, *Swiss Review of International and European Law*, Vol. 28 (2018), N. 1.

318 EU Qualification Directive, Art 24, 25, 26, 28, 30, EU Anti-Trafficking Directive Art 11, CoE Anti-Trafficking Convention Art 10-12.

B.3. National Implementation: Promising Practices, Gaps and Challenges

Although statistical evidence is limited, there are indications that over the past five years, NGOs working with and for trafficked persons in Europe have assisted growing numbers of asylum seekers who had been trafficked.³¹⁹ As previously noted, these individuals are entitled to adequate protection as victims of trafficking, and to a fair opportunity to present their asylum claims. To this end, States must ensure that their asylum systems and their national referral mechanisms for trafficking victims are fully equipped to guarantee the protection of the rights of these individuals. Besides, the two protection systems need to function in a coordinated and coherent manner so that individuals can enjoy the rights and benefits attached to both statuses, i.e. both as a trafficked person and as a refugee. In a very recent resolution the European Parliament has similarly called upon Member States “to ensure that the anti-trafficking and the asylum procedures are interconnected and complement each other”.³²⁰; para 33

This chapter considers how current provisions on asylum and trafficking are put into practice to ensure adequate and effective protection of the rights of trafficked persons seeking asylum, and to enable their access to asylum. It also discusses the relationship between the asylum system and the NRM for trafficked persons, and highlights conflicting priorities, challenges and promising practices.

As recently pointed out by GRETA, “[a]ccess to fair and efficient asylum procedures, early legal counselling and specialised assistance [...] is essential if victims of trafficking are to be enabled to present an asylum claim effectively”.³²¹ Accordingly, the analysis begins with a discussion of existing mechanisms and current practices for the detection of victims throughout the various stages of the asylum process in the six countries examined. It then considers what procedural guarantees are implemented to take into account the specific protection needs of asylum applicants who are victims of trafficking. These two questions – identification and procedural guarantees – are then explored in the context of Dublin procedures because of the particular challenges that emerge for asylum applicants who are victims of trafficking. Overall, identification, support and procedural guarantees are deemed preconditions to enable both access to asylum and the protection of a trafficked person in asylum procedures.³²²

B.3.1. Identification of trafficked persons in asylum procedures

Victims of trafficking seeking asylum can only be offered the necessary support and procedural guarantees if their trafficking situation is detected and special needs identified. The first question here is, therefore, whether there are effective mechanisms to ensure detection of trafficked persons amongst asylum seekers. In each of the countries reviewed, opportunities for the detection of trafficking indicators emerge at the borders, during the various stages of the asylum procedure (e.g. registration, reception, lodging of the application, personal interview), as well as in pre-removal detention. It would go far beyond the scope of this report to describe national regulations and practices related to victim identification in detail. In the following, an overview of the critical issues in each country is provided, building on national research and NGO experience.

319 For example, in Spain asylum seekers accounted for 39% of total trafficking survivors assisted by Proyecto Esperanza in the period 2013-2019. In France, 20% of the new beneficiaries supported by CCEM in 2019, had lodged an asylum application. In the Netherlands, 53% of victims registered with Comensha were involved in Dublin procedures in 2018. In Austria, 28% of trafficked persons assisted by LEFÖ-IBF were involved in asylum procedures and 6% out of the total were beneficiaries of international protection (i.e. they were granted refugee status or subsidiary protection). The lack of data on the number of identified THB victims in international protection has also been recently pointed out by the European Parliament, see European implementation assessment – ‘Implementation of Directive 2011/36/EU : Migration and gender issues’, Directorate-General for Parliamentary Research, Ex-Post Evaluation Unit, 15 September 2020, p. 4.

320 European Parliament resolution of 10 February 2021 on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI)), para.33

321 CoE GRETA(2020)0620, para.38.

322 The topic of procedural safeguards for victims of trafficking as vulnerable applicants warrants additional research attention. National studies only partially explored this issue. It remains unclear whether this is a reflection of shortcomings in implementation or of other factors.

The national legislation of all countries studied, except for Moldova, recognises victims of trafficking as a vulnerable group entitled to special procedural and reception guarantees in asylum procedure, in accordance with the Reception Conditions Directive (RCD) and the Asylum Procedures Directive (APD). The vulnerability assessment – foreseen under these two Directives – in theory provides opportunities for the identification of victims of trafficking. However, as is illustrated below, screening for detection of trafficked persons as vulnerable applicants is challenging in most countries examined.

In Austria, as noted by GRETA, victim identification amongst asylum seekers is limited, particularly in the early stages of the procedure.³²³ In a recent report on the human rights situation of migrants, UNHCHR highlighted how “the identification of people in vulnerable situations throughout the asylum and return procedures, including pre-removal detention, tends to be random and unsystematic, for instance, only when vulnerabilities are clearly visible, or dependent on disclosure by the individual themselves”.³²⁴ There is no specific regulation on screening for THB vulnerabilities. However, there are efforts to train and raise awareness of actors in the asylum system, particularly staff of the Federal Office for Immigration and Asylum (BFA), social workers in reception centres and pre-removal detention facilities, and legal advisors for asylum seekers.³²⁵ Further, staff from the BFA are provided with checklists for the practical identification of victims of human trafficking and first response.³²⁶ Yet, at the stage of registering an asylum application with the BFA, THB situations are rarely detected. Later on, NGOs and staff working in reception centres for asylum seekers or supporting asylum seekers in their applications may detect potential victims and inform them of the possibility of receiving support from specialised NGOs. Sometimes, staff working in pre-removal detention centres also recognise potential victims and refer them for help. Indications of trafficking are communicated to the competent office of the Federal Criminal Police, which in turn should inform potential victims of their right to assistance, and contact the specialised NGOs LEFÖ-IBF and MEN-VIA. In some instances, staff from asylum reception centres and detention centres may directly seek LEFÖ-IBF’s intervention for the first counselling with a potential victim of trafficking; this is a promising practice that can enable early detection and support.³²⁷ These referrals are a positive outcome of efforts invested in multidisciplinary training of asylum officers and staff from reception and detention centres, to which LEFÖ regularly contributes.

In France, as in other countries, GRETA observed that victim identification at the borders remains quite difficult despite training of border police on THB.³²⁸ Only very rarely are trafficking signs detected in waiting areas before admission to the territory by the Red Cross. However, these indications are often deemed insufficient by police to identify victims. More often, asylum seekers who are trafficking victims are recognised in the course of the asylum procedure, particularly at the stage of examination of their claim. Authorities have reported that since 2015 growing numbers of women and girls victims of trafficking, mainly from Nigeria, have submitted asylum applications.³²⁹ The amended legislation on asylum has established a procedure for vulnerability screening of asylum seekers that include the detection of victims of THB as one of its purposes.³³⁰ At the stage of registration of the asylum application, the French Office on Immigration and Integration (OFII) conducts a vulnerability assessment through a questionnaire-based interview to identify special needs of applicants. The focus in this first interview is

323 CoE, GRETA(2015)19 Austria para 101, 104-105.

324 UNHCHR, (2018), Report of mission to Austria focusing on human rights of migrants, particularly in the context of return 15-18 October 2018“. Available at: <https://www.ohchr.org/Documents/Issues/Migration/AustriaMigrationMissionReport.pdf> , para 22.

325 Training is mostly conducted within the project “Asyl-Train” which is implemented through a partnership between IOM, the Austrian Police, UNHCR, specialised lawyers, and the NGOs LEFÖ-IBF, Drehscheibe and MEN VIA.

326 Austria, Report as per Article 20 of Directive 2011/36 submitted by Austria on the progress made in the fight against trafficking in human beings, 2020.

327 National Research, Austria, p.23, 33-34.

328 National Report France, p. 35; CoE, GRETA (2017)17 France, para 120-122.

329 France, (2020), Rapport de la France à la Commission européenne sur les progrès réalisés en matière de lutte contre la traite des êtres humains. En application de l’article 20 de la directive 2011/36/UE du Parlement européen et du Conseil.

330 France, Code of Entry and Residence of Foreigners and of the Right to Asylum (hereinafter CESEDA), Art L.744-6

on objective grounds such as disability, sickness, dependency, pregnancy. The questionnaire does not include THB specific questions. This first interview is not always conducted, and when it takes place, it is usually concise; sometimes, interpreters are not available.

Consequently, it is quite challenging to identify whether someone is a potential victim of trafficking and assess his or her special needs at this initial stage.³³¹ Unless the person self-reports trafficking, it is unlikely that the victim is identified.³³² Also, it seems that in some cases when NGOs identify a victim who is seeking asylum and inform OFII, this indication does not always influence decisions on the individual reception and procedural needs, due to resource shortages.³³³

Victims may be identified during the examination of their application by the asylum determination authority, i.e. the Office for the Protection of Refugees and Stateless Persons (OFPR). OFPR has established a network of THB focal points to detect victims of THB amongst asylum seekers and determine the specific procedural safeguards necessary to the examination of claims by trafficked persons as vulnerable applicants. A set of tools (guidelines and practical forms, indicators) is available to assist in the handling of asylum applications submitted by potential victims of trafficking. These tools also include recommendations on conducting interviews with trafficked asylum seekers, instructions and guidance concerning asylum cases relating to human trafficking, and an overview of the applicable legal regime. Training is also provided to asylum officers on these issues, and OFPR focal points on THB support protection officers on individual files.³³⁴ Cooperation has also been established with specialised NGOs. Another important channel for the identification of victims is through the work of NGOs supporting asylum seekers, which detect signs of trafficking and initiate referrals to specialised anti-trafficking NGOs. In practice, NGOs identify the majority of victims. Formally, the competence for victim identification lies solely with law enforcement agencies and, in theory, victim identification does not depend on cooperation in the investigation. Nevertheless, in practice, trafficked persons are expected to lodge a complaint and cooperate with the police.³³⁵

In Moldova, the Asylum Law does not refer to victims of trafficking as possible asylum applicants but rather more broadly, to victims of inhuman and degrading treatment and victims of violence. There are no specific procedures for the identification and protection of victims at the border or during their asylum application. This is probably due to multiple factors, including low numbers of asylum seekers, limited experience with mixed movements, as well as low levels of awareness among competent authorities and NGOs about the fact that asylum seekers may be victims of trafficking.

In the Netherlands, the police and the Immigration and Naturalisation Service (IND) conduct screening for detection of trafficked persons as vulnerable applicants at the start of the asylum procedure. Furthermore, the Central Agency for the Reception of Asylum Seekers (COA) has established a network of focal points on trafficking, and all reception locations have a human trafficking officer.³³⁶ Relevant actors are regularly trained and provided with specific indicators and tools to detect signs of THB. For example, a toolkit has been developed through the STEP project involving COA, the Dutch Red Cross, the Dutch Refugee Council, and the specialised anti-trafficking NGOs CoMensha and Nidos. The toolkit provides practical information on how to handle suspected cases of THB, inform the person about the options and assistance available for victims and vulnerable asylum applicants, and how to arrange referrals. The toolkit also aims at raising awareness and understanding of the protection options among asylum seekers.³³⁷ In return procedures, the Repatriation and Departure Service (DT and

331 AIDA ECRE, (2020), Country report: France.

332 Forum réfugiés-Cosi, (2018), TRACKS Identification of Trafficked Asylum Seekers Special Needs, p.35.

333 National Research - France, p. 34.

334 France, Rapport de la France à la Commission européenne sur les progrès réalisés en matière de lutte contre la traite des êtres humains. En application de l'article 20 de la directive 2011/36/UE du Parlement européen et du Conseil, 2020.

335 CoE, GRETA (2017)17 France, para 128-130.

336 National Research - The Netherlands, p. 27, CoE, GRETA(2018)19 The Netherlands, para. 35, 112.

337 The Netherlands Red Cross, (2019), Toolkit Discussing Human Trafficking and Exploitation with Asylum Seekers.

V) has also been trained on THB, and can detect trafficking indicators and refer presumed victims. At present, this is just a theoretical possibility. There are no precise data on victims identified among asylum applicants or in return procedures. According to the police, over recent years, growing numbers of victims of trafficking from African countries are seeking asylum. They have often lodged an asylum application in another EU country and are placed in Dublin procedures (see next section on Dublin cases).³³⁸

In the Netherlands, decisions on victim identification and access to protection are the sole competence of the police, KMar³³⁹ and the labour inspectorate,³⁴⁰ and the referral of victims for recovery and support tends to depend on the prospects of the investigation and prosecution. This approach impacts on the protection of rights of trafficked asylum seekers. For example, when an asylum seeker was trafficked in the country of origin or en route, evidence of the crime may be limited or insufficient for the investigation. Consequently, cases are dismissed due to lack of evidence, and victims are not recognised and protected as such.³⁴¹

In Serbia, a 2016 specific procedure defines the steps for preliminary victim identification at the borders. Upon detection of trafficking indications, the border police have to notify the specialised anti-trafficking police, the competent Prosecutor's Office and the Centre for Protection of Trafficking Victims (CPTV). The Law on Asylum and Temporary Protection³⁴² makes specific reference to victims of trafficking amongst vulnerable groups. The Standard Operating Procedures for the treatment of victims of trafficking include staff from the Asylum Office, the accommodation facilities for asylum seekers as well as NGOs among the actors that may preliminarily identify trafficked persons. Where they detect indicators of trafficking, they must notify the CPTV, which is the competent authority for victim identification and referral to support. In practice, screening for vulnerability is primarily done by NGOs supporting asylum seekers, who may detect their situation and initiate their referral. To date, only a few cases of presumed victims of trafficking have been identified among asylum applicants.³⁴³ This is indicative of the challenges of victim identification in mixed movements.

In Spain, the Asylum Act³⁴⁴ makes reference to victims of trafficking amongst vulnerable groups entitled to specific protection measures and assistance. However, these measures are not defined, due to the lack of an implementing regulation. There is no specific procedure for identification of trafficking victims amongst asylum seekers, except for a promising pilot procedure at Madrid International Airport (see box below).

Detection at the airport and prompt intervention

In October 2019, the Department of Migration of the Ministry of Labour, Migration and Social Security, together with the Government Delegation against Gender Violence of the Ministry of Equality, launched a pilot procedure for the identification and referral to support of potentially trafficked persons seeking asylum at the Madrid Barajas Airport. It is based on cooperation between the Asylum Office and five NGOs.³⁴⁵ The main objective of this procedure is to ensure timely referral and access

338 The Netherlands, (2020), Report submitted by the Netherlands as per Article 20 of Directive 2011/36 to the Office of the EU Anti-trafficking Coordinator on the Third Report on the Progress made in the fight against trafficking in human beings.

339 KMar stands for Royal Netherlands Marechaussee i.e Military Constabulary.

340 At the slightest indication of human trafficking and/or on the intercession of the labour inspectorate (ISZW-DO), the police or KMar can formally offer the reflection period.

341 CoE, GRETA(2018)19 The Netherlands para. 109, 112.

342 Serbia, Law on Asylum and Temporary Protection, Sl. Glasnik RS br. 24/2018, Art 17.

343 National Research Serbia, p. 43-44.

344 Spain, Ley de Asilo, Ley 12/2009 of 30 October 2009, Art 46.

345 .These are the Spanish Red Cross, Proyecto Esperanza, Association for the Prevention, Rehabilitation and Care for Women Prostituted (APRAMP), Diaconía and the Fundación Cruz Blanca.

to support of asylum seekers who are potential victims of trafficking.

Where asylum officers detect signs of trafficking amongst asylum applicants at the airport, they inform the Red Cross, which has a team at the airport providing social support to such applicants. The Red Cross, in turn, contacts one of the NGOs specialising in assistance to victims of trafficking. The NGO on duty promptly arranges a visit to the airport to meet the potential victim, assess her or his situation and needs and confirm whether there is evidence of trafficking. The NGO informs the victim about their rights and options, as well as the possibility of being referred to general reception for asylum seekers or a reception centre for vulnerable applicants or to a specialised facility for trafficked persons. The NGO further prepares a report with findings and recommendations on referral for the Asylum Office. Initial data indicate that 15 potential victims (of which nine were women and six men) were detected between July and December 2019.³⁴⁶

In Spain victim identification at the borders is difficult, particularly in case of sea arrivals or placement in Migrant Temporary Stay Centres (CETI) in Ceuta and Melilla. Early identification within mixed movements in CETI is particularly challenging because if a person's asylum application is deemed inadmissible, and the police do not start a formal process of identification, then entry to the Spanish mainland is denied. The individual is placed in forced return procedures.³⁴⁷ Yet, an adequate assessment of an asylum claim by a vulnerable person, such as a victim or potential victim of trafficking, can hardly be done in the context of a border procedure. It requires more time and proper conditions for a personal interview, as illustrated in the case below.

Admission to asylum procedure of a Congolese woman possible victim of trafficking

The case concerns a woman from the Democratic Republic of the Congo. She was 19 years /old, and arrived with a child. Her asylum claim was dismissed in a border procedure. The case was appealed for admission into the regular asylum procedure. In the appeal, a UNHCR border report confirmed that there were indications that she was a potential victim of THB. The court ruled that the asylum application should be admitted to enable an adequate assessment of her possible need for international protection. The court referred to the UNHCR report, which highlighted the need to admit the case in the ordinary procedure to carry out a new interview of the applicant and allow a correct and adequate assessment. UNHCR highlighted how the conditions at the border were not conducive to the applicant being able to express her arguments, nor for the competent authorities to deal with the complexity of this type of case in a very short time span. UNHCR further highlighted the importance of referring the vulnerable applicant for specialised support and counselling.

Source: CEAR, *Boletín de Jurisprudencia de Protección Internacional* (Núm. 5), 2018 p. 12-13; Audiencia Nacional (Sala de lo Contencioso), 6 octubre 2017, núm. rec. 256/2016, (JUR 2017/268576)

Opportunities for the identification of trafficked persons usually emerge once an asylum application has been lodged. During registration, reception or refugee status determination, asylum officers, NGOs or lawyers assisting asylum applicants may detect indicators of trafficking, and initiate referrals to the police for formal identification and to specialised NGOs for victim support. Also, the Social Work Unit of the Ministry of Labour Migration and Social Security, which is competent for assessing the social

³⁴⁶ Spain, (2020), Spanish contribution to the Third Report on the Progress made in the fight against trafficking in human beings Reports to be submitted by the Member States as per Article 20 of Directive 2011/36 Report EU, p. 36

³⁴⁷ Over the past two years, NGOs (e.g. CEAR and Save the Children) in collaboration with UNHCR have been developing outreach legal counselling to detect vulnerable applicants, including trafficked persons, amongst those arriving by sea. In Ceuta and Melilla, identification is even more complicated, since there are limited resources and people tend to stay for short periods in overcrowded facilities, and are often denied access to the Spanish mainland. See AIDA ECRE, (2020) Country Report Spain, 17/04/2020.

protection needs of vulnerable applicants, may detect signs of THB and initiate referrals to specialised NGOs. Moreover, UNHCR also plays a role in victim identification while advising competent authorities on asylum matters and individual cases.

Victims are sometimes identified in return procedures. Generally, there are no proactive and systematic efforts to identify victims in immigration detention centres for foreigners (Centros de Internamiento de Extranjeros - CIE). However, indications of trafficking may be detected by NGOs assisting migrants in CIE. Indeed, when NGOs are regularly present in these Centres, they may be able to observe these situations and establish some minimum relationship with migrants to detect potential victims. In many instances, information about potential victims is reported to the specialised police units, which are competent to assess the case and decide on victim identification, and may involve specialised NGOs in the identification process. In some cases, a referral is made to specialised NGOs, such as Proyecto Esperanza, which in turn interviews the person, assesses protection needs and provides information on their rights and options. Where the person agrees to initiate a process of formal identification, as a victim of THB, then the NGO prepares a detailed assessment report that is submitted to police to suspend removal proceedings, allow the granting of a recovery period and referral of the person to NGO support.

According to Spanish law, the identification of a victim of trafficking must be based on the existence of reasonable grounds or evidence that a person is a potential victim of trafficking. There is no requirement of a formal complaint by the victim, nor the formal initiation of judicial proceedings. The specialised anti-trafficking police unit is competent both for victim identification and for preventing and investigating trafficking. Upon the detection of THB indicators, the police decide whether to initiate a formal identification process. Should it be decided to do so, a specialised NGO must be engaged to provide victim support. In practice, however, sometimes a strict law enforcement approach may prevail, and identification may depend on a victim's collaboration and ability to provide information to enable the initiation of a criminal investigation.³⁴⁸ This law enforcement approach may have negative implications for victim protection. For example, where exploitation has occurred in transit before arrival in Spain or other countries, it may be challenging to start a police investigation. Hence, in such cases the victim is not always formally identified.³⁴⁹

Overall, the law on entitlement of trafficked persons and those at risk of being trafficked to international protection notwithstanding, the establishment of effective mechanisms for the timely identification of trafficked persons as vulnerable asylum applicants remains difficult in all the countries surveyed, hindering their protection and swift access to tailored reception conditions. Indicators of vulnerability to trafficking are often not immediately visible. They frequently become apparent at later stages of the asylum procedure. Discerning the consequences of the trafficking experience is complex, and requires time and a thorough assessment. In most cases, only female victims of sexual exploitation are identified among asylum seekers and referred for specialised support, where such support is available. Victims of trafficking for labour and other forms of exploitation seem to be neglected. Only rarely are they identified.

Efforts are made to train the actors in the asylum system on human trafficking, and to provide them with dedicated tools and guidance. Nonetheless, there remains insufficient capacity, as well as a lack of awareness amongst many stakeholders. This is coupled with a shortage of resources and interpreters. Moreover, timelines and settings for initial screenings are inadequate to foster trust and encourage the person's disclosure of their experience. Another important practical consideration concerns the fact that in reception centres, trafficked persons may still be under the control of their traffickers and very afraid of retaliation; hence they may be reluctant to report their situation. Trafficked asylum applicants may also not fully understand their situation, or face significant difficulties in recalling their experience of victimisation due to the trauma. When victim identification is made dependent on the prospects of the

³⁴⁸ CoE, GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain – Second Evaluation Round, GRETA(2018)7, 20 June 2018 paras 131-151.

³⁴⁹ National research - Spain, p. 57, 63.

criminal proceedings against traffickers, there is little chance that victims will be recognised as such. EU law requires national authorities to provide protection as soon as they have a reasonable indication of trafficking. A low threshold should be applied to ensure prompt assistance, procedural guarantees, and reception conditions tailored to their specific needs, regardless of where their trafficking occurred and of their ability or willingness to cooperate. The identification of trafficked persons amongst asylum applicants needs to be focused on addressing their vulnerability and protecting their rights. The involvement of protection staff from the asylum system provides an opportunity to disconnect victim identification from criminal proceedings. It is hence of utmost importance to ensure the following objectives. First, vulnerability assessment should be an ongoing process, as mandated under the Reception Conditions Directive. Second, upon reasonable suspicion of trafficking, protection should be immediately afforded. Third, the individual should have the right to be heard, and to submit observations or explanations regarding his or her situation. Fourth, cooperation with anti-trafficking NGOs needs to be secured so that they can provide the early counselling and support that is crucial to the identification of trafficking victims.

B.3.2. National referral mechanisms and Asylum systems: compatibility and conflicting priorities

Assistance and protection of rights are at the core of screening and identification. It is necessary to understand whether and how trafficking vulnerability is taken into account, once an asylum seeker is recognised as a potential victim. Access to support and procedural safeguards under both the European anti-trafficking legal regime and the asylum system are prerequisites for the protection of trafficked asylum applicants. They impact on the individual's prospects of obtaining international protection and hence securing a long-term residency status.

Of equal importance is ensuring coherence and compatibility between protection foreseen within the National Referral Mechanism for trafficking victims and protection with the asylum system. This means guaranteeing that a person can enjoy the rights and benefits attached to the two procedures, and that the best available assistance and solutions are found in every case. What emerges from the national studies is a great variation in the ways the two protection systems operate for asylum seekers who are trafficked. Also, the scope of protective measures and procedural safeguards differ. Here, the main aspects and practices related to reception conditions, procedural guarantees and compatibility between the two systems are briefly discussed for each of the six countries studied.

In Austria, asylum applicants who are victims of trafficking generally are accommodated in asylum reception facilities. In some cases, asylum authorities refer them for relocation to a victim protection facility managed by LEFÖ-IBF or MEN-VIA, on a case-by-case basis, usually for safety reasons.³⁵⁰ There are good practices of cooperation and coordination between LEFÖ-IBF and NGOs providing legal counselling to asylum seekers. NGOs work together to secure protection and support for trafficked asylum seekers, coordinate legal aid and build on THB expertise, to inform the refugee status determination process, and document the situation and risks in the country of origin.

There are some incompatibilities between benefits attached to the asylum track and protection as trafficking victims; in particular, an asylum applicant cannot apply at the same time for a THB residence permit and international protection. It is left to BFA - as the competent authority - to examine the international protection application of the trafficked person and, in case this is denied, to further assess whether the requirements for the granting of a residence permit linked to their trafficking are met.³⁵¹ Positively, where an asylum applicant is referred for specialised support as a victim of trafficking, she or he may also access social services for asylum seekers (Grundversorgung). For example, if the indi-

³⁵⁰ National Research – Austria, p.6.

³⁵¹ Austria: Federal Act Concerning the Granting of Asylum (2005 Asylum Act - Asylgesetz 2005), para.57.

vidual joins the protection programme for victims, she or he can attend free German language courses for asylum seekers.

In the course of the asylum procedure, a victim may be entitled to certain procedural guarantees which are generally applied to vulnerable applicants and in particular to victims of violence, rape and torture. These include the possibility of exempting the applicant from the accelerated procedure and avoiding dismissal in the admissibility procedure where it is highly probable that the person suffered serious forms of violence. Moreover, when the claim concerns interference with sexual self-determination, a trafficked asylum applicant may be interviewed by a person of the same-sex and also the interpreter may be of the same sex.³⁵²

In France, the law requires that where asylum applicants are victims of trafficking, the competent authority, OFII, should consider their special needs in determining their reception conditions.³⁵³ In practice, most trafficked asylum seekers are referred to accommodation within the asylum system, which has some dedicated places for them. It is also possible for OFII to refer trafficked asylum seekers either to facilities of the National Reception and Protection Programme for Victims of trafficking (AC. Sé) or to other specialised victim support NGOs. However, in practice this is rarely done. Referral to AC.Sé requires that the person be at risk of an imminent threat to their safety, and hence in need of being accommodated in a distant place. Generally, accommodation is lacking, and there are only a few NGOs assisting trafficking victims, mostly those trafficked for sexual exploitation. Sometimes the assistance provided is limited or inadequate to respond to victims' needs.³⁵⁴ Trafficked asylum seekers are often referred to remote asylum locations distant from the place of their exploitation. They cannot refuse such relocation because to do so would risk automatic withdrawal of their asylum support (mainly housing and a financial allowance).³⁵⁵ Reportedly, in some instances, trafficked women victims have been accommodated in centres mostly occupied by single men.³⁵⁶

In theory, the asylum process and the protection scheme for victims of THB can run in parallel. In practice, there are challenges in accessing both protection schemes in parallel and it depends on the particular situation of the victim.³⁵⁷ A specific challenge encountered by victims concerns the time-limits for lodging an asylum application. Where an individual lodges an asylum application later than 90 days from his or her arrival in the country, then his or her case is placed for examination in the accelerated procedure unless the person had legitimate reasons not to respect the term. The accelerated procedure foresees less support and fewer procedural safeguards for the applicant. For example, very often, the person does not receive a financial allowance and housing benefit, and is left in a very precarious social situation. The accelerated procedure is unsafe and not suitable for trafficking victims. They risk being discriminated against in their access to international protection because of a delay in lodging their asylum claim. Yet, it is the very exploitative situation they are in that causes the delay in applying, and this should not negatively impact on their rights as asylum-seekers. Where an asylum applicant who is a victim is placed in the accelerated procedure, it is necessary to contest the decision before OFII and, in case of refusal or no answer, the case can be brought before the Administrative Court.

Another tension concerns the compatibility between the residence permits and the asylum procedure. In some cases, victims of trafficking with a pending asylum claim apply for temporary residence permits in accordance with the law.³⁵⁸ Their requests are rejected because they have to wait for their

352 National Research – Austria, p.45; AIDA ECRE (2020), Country Report Austria.

353 National Research – France, p.36. Art L 744-6 CESEDA.

354 National Research – France.

355 National Research France, p.36. Art L 744-6 CESEDA. It should be noted that where the person is referred to Ac sé this limitation is not present.

356 AIDA ECRE, (2020), Country report: France.

357 TRACKS, 2018 consolidated p. 39..

358 Art L 311-6 CESEDA.

asylum claims to be determined.³⁵⁹ This happens despite the 2018 legal provisions providing for both paths to be pursued in parallel.³⁶⁰

Concerning procedural guarantees, protection staff from OFPRA, the determining authority for asylum, have received some training on human trafficking and on interviewing applicants who may recall painful past expediciencies. They may allow the presence of a third person during the interview with a victim, and also provide for the interviewer and interpreter to be of a specific gender.³⁶¹

In Moldova, there is no experience in handling cases of asylum seekers who were trafficked. No foreign victim of trafficking ever applied for international protection or a temporary residence permit on THB grounds. The two protection systems are completely separate.

In the Netherlands, following the identification of a presumed victim amongst asylum applicants, the COA assesses her or his protection needs, for example together with a regional care coordinator, the Dutch Red Cross or Dutch Council for Refugees. The person stays at the COA-location. In some instances, CoMensha is directly involved in such assessment and coordination of support, for example when there is no regional care coordinator. Concerning procedural guarantees for trafficked asylum applicants, these are limited. They may include measures of support for the interview and same-sex interviewer in case of sexual violence.

In terms of compatibility between the NRM and the asylum protection systems, there are instructions for asylum officers on dealing with applicants who are victims or potential victims of trafficking. In all scenarios, any indication of THB has to be reported to the specialised law enforcement authorities. An individual may raise a complaint of having been trafficked, and at the same time lodge an asylum application. If the person is granted a temporary residence permit linked to his or her cooperation in the trafficking investigation, then she or he has also access to specialised support and social benefits for trafficked persons. In case the temporary permit is suspended or expires, the individual can remain in the country to await a decision on his or her asylum claim. However, the instructions provided to the asylum-determining authority seem to exclude a priori the fact that a trafficked person may fulfil the criteria for refugee status. The guidance instead emphasises how the mere fact of being a foreign victim of trafficking does not relate to any of the grounds listed in the Refugee Convention.³⁶² They disregard the UNHCR guidelines on trafficking completely. It should be noted that the instructions do refer to protective obligations of non-refoulement under Article 3 of the ECHR.

In Serbia, asylum applicants who are presumed victims are first referred to the Centre for Protection of Trafficking Victims for formal identification and coordination of support. Then, they are usually referred to the NGO Atina for shelter and assistance. There are no specific procedural arrangements for vulnerable applicants. In terms of compatibility between the asylum process and the NRM for victims of THB, an asylum seeker who has been trafficked can access specialised support. However, where the asylum applicant applies for a temporary residence permit on THB grounds, the asylum process is suspended. In case of denial of a temporary residence permit, there is a possibility to initiate a new asylum procedure.³⁶³

In Spain, trafficking victims may be referred to state facilities for vulnerable persons; female victims may be referred to specialised NGOs for shelter and assistance. However, resources for such support are limited, and mostly are available to women victims of trafficking for sexual exploitation. NGOs supporting trafficked persons work closely with NGOs assisting asylum seekers in coordinating the assessment of protection needs and ensuing assistance measures. For example, Proyecto Esperanza reg-

359 National Research – France, p.39.

360 Art L311-6 du CESEDA.

361 AIDA ECRE, (2020), Country report: France., p. 64-65.

362 IND, Work Instruction 2007/16 Victims of human trafficking in the asylum procedure, 18 December 2007, available in Dutch at: [http://bit.ly/\(google translation\), Section 3.1.4.](http://bit.ly/(google%20translation),%20Section%203.1.4)

363 National Research - Serbia, p.43-44.

ularly collaborates with CEAR (Comisión Española de Ayuda al Refugiado), providing specialised legal aid and other forms of support in both procedures as a victim of trafficking and as an asylum seeker.

Procedural guarantees for vulnerable applicants, including trafficking victims, are not specifically defined. As noted earlier, the 2009 Asylum Law recognises the need for specific measures for vulnerable applicants, but implementing regulation is lacking. As a result, the measures available are limited. For example, as a positive but limited practice, asylum officers often limit interviews with trafficked persons to avoid their re-victimisation.³⁶⁴ More efforts are necessary to train asylum officers on handling applications of vulnerable individuals.

Over the past three years, the coordination and referral between the asylum process and the NRM for victims of THB has improved. The two protection frameworks are no longer considered mutually exclusive. The asylum procedure and the victim identification and assistance process can now run in parallel. There is compatibility between the procedure for a residence permit as a victim and the asylum process. A person who has been granted a reflection/recovery period as a victim of THB can apply for asylum within three months, i.e. the usual timescale is extended on account of the applicant's vulnerability.³⁶⁵ A person who has a provisional residence and work permit as a victim of trafficking, either because of collaborating with the authorities or because of their personal circumstances, can simultaneously have a request for asylum admitted. If recognised as a refugee, then she or he must decide which of the permits to retain [see case study below].

Promising practice: compatibility between the asylum system and the NRM

The specialised anti-trafficking police unit detected Ms P, a young woman from Nigeria, during an investigation.

She reported being 19 years old, but looked younger. She stated that she had engaged in prostitution voluntarily but the investigation indicated that it was a trafficking case. The police referred her to Proyecto Esperanza. She accepted their support and moved into their shelter. She did not consider herself to be in a trafficking situation. There were contradictions and a lack of coherence in her story. Due to fear to her traffickers, she did not share detailed information about her case with Proyecto Esperanza, or the police. She stated that she was unable to make an official complaint against her traffickers due to insuperable fear.

Upon arrival in Spain, Ms P. had applied for asylum, following her traffickers' instructions. Hence, since she had a regular administrative status in Spain as an asylum seeker, the police were unable to offer her a recovery and reflection period. At Proyecto Esperanza's request, the police issued her a document recognising her as a presumed victim of trafficking. This enabled her to apply, in parallel to her on-going asylum request, for a residence and work permit based on her personal situation. Proyecto Esperanza prepared a detailed psychosocial report describing the trauma she had suffered, as well as her recovery and integration process in Spain. She was granted a provisional residence and work permits as a victim of trafficking on the basis of her personal situation.

Her asylum application was based on her well-founded fear of reprisals from her traffickers in case of return to Nigeria. She was granted refugee status in August 2019. Once she received refugee status, she renounced the provisional residence and work permit as a victim of trafficking.

Source: Proyecto Esperanza – National research Spain

³⁶⁴ National Research - Spain, p.66.

³⁶⁵ Forum refugiés-Cosi, (2018), p. 58.

Trafficked persons escaping an exploitative situation may be exposed to the risk of retaliation by their traffickers, for example because they have a debt to repay or due to their cooperation with the police. When they are not granted a temporary residence permit for trafficking, they may seek international protection due to the risk of suffering serious harm in case of return. The case below illustrates the difficult situation of a woman trafficked to Spain.

Spain: victim of trafficking from Nigeria applying for a temporary residence permit and then for asylum

A 27 year old woman from Nigeria lived with her mother and her six year old child after escaping a violent partner. She worked in a shop, and an acquaintance offered her a better job in Europe, arranged her trip and advanced the travel costs. Before departing, she participated in a voodoo ritual during which she committed to obeying and not to tell anyone, especially the police, who had helped her to get to Europe.

She travelled in a group through Niger and Libya before reaching Italy by boat. She was sexually assaulted multiple times during her journey. Upon arrival in Italy, she was hospitalised due to severe dehydration at sea. Then her traffickers arranged for her to go to Spain, where she had to engage in prostitution to pay off the debt for her journey to Europe. If she refused, she would be harmed through voodoo, and her trafficker would retaliate against her family in Nigeria. She was forced to submit to the situation. Police intercepted her as she was working on the street, and recognised her as a potential victim. She was offered a reflection and recovery period, but she immediately agreed to file a complaint and was included in the protection programme (LO 19/1994). Later, she applied for a temporary residence and work permit, based on cooperation with the authorities. This was refused since the specialised police considered that she had failed to provide enough information in her complaint. Afterwards, she requested a provisional residence and work permit based on her personal situation as a victim of trafficking. This request was also denied because the police no longer recognised her as a victim. Supported by Proyecto Esperanza, she applied for a judicial review, but her appeal was dismissed.

Meanwhile, traffickers started threatening her family in Nigeria because she had failed to pay her debt. Afraid of retaliation by the traffickers, she applied for asylum. Her claim is pending examination.

Source: Proyecto Esperanza

In summary, in all countries, there are challenges in accommodating the specific reception needs of trafficked persons as vulnerable applicants, despite the requirements to do so under the EU asylum acquis. Evidence shows that there is a shortage of accommodation for vulnerable persons, including victims of trafficking. In most cases, they are accommodated in asylum centres, which usually are unfit to their specific needs. In some cases, women victims of trafficking for sexual exploitation seeking asylum have even been placed in facilities for men, indicating a lack of gender sensitivity. Often, trafficked asylum seekers are accommodated together with their traffickers, they are unable to escape their influence, and their safety is further jeopardised. In asylum facilities, they may be reached by traffickers and, as illustrated in various cases, provided with instructions on what to say in their interviews, what to do and where to go.

Furthermore, as vulnerable individuals, they may be more exposed to risks of gender-based violence or other abuse by other residents. Last but not least, psychological and social counselling for their recovery may be scarce. It is necessary to foster stronger linkages and cooperation between the asylum system of protection and the anti-trafficking one, so to inform trafficked asylum seekers about their rights and options, and to provide them with the opportunity to make an informed decision about being referred for specialised support.³⁶⁶

³⁶⁶ Similar observations have also been made by GRETA in its monitoring work in various countries. See also CoE GRE-TA(2020)0620, para 43.

While European and domestic legislation recognises the need for specific procedural guarantees for asylum applicants who are victims of trafficking, in many countries these guarantees are not available in practice, or else are defined in minimal terms. For example, the border and the accelerated procedures are certainly unfit to accommodate the application of a vulnerable applicant such as a trafficked person. The law in most countries foresees the possibility of an exemption for victims, but practical implementation is lagging behind. The exemption depends on the authorities' ability to detect this kind of vulnerability, which is usually not immediately visible, as well as on their discretion. GRETA has also recently reiterated that "claims based on the harms associated with human trafficking are particularly unsuited to accelerated processing and may impede identification of victims".³⁶⁷ The complexity of the crime, coupled with the trauma experienced by the individual, makes necessary a proper examination on the merits of the claims put forward by trafficked asylum seekers in the regular procedure.³⁶⁸

In some countries, efforts are ongoing to train asylum officers on interviewing vulnerable applicants; this is often done in partnership with the European Asylum Support Office and NGOs. This work needs to be strengthened and carried out systematically. On a positive side, in various countries there are indications that the NRM for trafficked persons and the asylum system are being harmonised, and that people are being recognised as rights-holders under both protection frameworks. Continuous collaboration between anti-trafficking and asylum actors, and more precise arrangements for referral between the two systems, needs to be further developed.

³⁶⁷ CoE GRETA (2020)0620, para. 38.

³⁶⁸ *Ibid.*

Table 2. Procedural guarantees for victims of trafficking in asylum procedures

	Austria	France	Netherlands	Spain	Serbia	Moldova
Victims of THB as a vulnerable group	Yes	Yes but this is not systematically applied to all types of THB	Yes	Yes but exact procedural & reception safeguards are not defined	Yes but precise procedural and reception safeguards are not defined	No
Vulnerability screening	No specific mechanism established for vulnerability screening. Promising practice: early referral of potential victims to NGO from reception centres and detention centres	Yes, established in law. OFII runs a vulnerability assessment through a questionnaire-based interview at registration. OPFRA – the asylum determining authority- has a network of THB focal points	Yes, IND conducts a vulnerability screening at registration. The Central Agency for the Reception of Asylum Seekers (COA) has a network of focal points on THB. Promising practice: STEP Toolkit	No specific legally-established vulnerability mechanism. Promising practice: Pilot procedure for the identification and referral of potential trafficked persons seeking asylum at the Madrid Barajas Airport	Screening provided by law on an ongoing basis. No specific mechanism. Screening may be done by staff from the asylum office, NGOs working in asylum and reception centres, border police	No mechanism for identification of trafficked person among asylum-seekers or in reception centres for migrants
Access to special reception facilities for vulnerable applicants or victims of trafficking	Yes	Yes but in practice it is not systematically guaranteed	Yes	Yes Female victims may be referred to specialised NGOs for shelter and support	Yes, victims may be referred to the specialised NGO ATINA for shelter & support	No experience with these cases
Possibility of exemption from the accelerated procedure	Yes, on account of vulnerability for victims of violence, rape and torture. No information on whether it is applied to THB victims	Yes, possible on account of vulnerability	Yes, on account of vulnerability for victims of torture, rape or other serious forms of psychological, physical and sexual violence	Not provided in law or regulation	Not provided in law	No
Possibility of exemption from border procedure	Yes, if deemed highly likely that applicant is a victim of torture or other serious forms of psychological, physical and sexual violence	Yes, possible on account of vulnerability	Yes, on account of torture, rape or other serious forms of psychological, physical & sexual violence. No info. on its application to THB victims	Not provided in law or regulation but may be applied in individual cases	Not provided in law	Not provided in law

Possibility of examination by an official of the same gender	Yes, where the claim concern interference with sexual self-determination. No info. on its application to THB victims	Yes	Yes	Not provided in law	Not provided in law	Not provided in law
Possibility of a support person	Yes	Yes	Yes in theory	No information	No	No
Detention of asylum-seeking victims of trafficking	Yes	Yes, if application lodged in detention or in Dublin proc	Yes	Yes	No	No information

Source: AIDA ECRE, 2020, Country Reports Austria, France, The Netherlands, Serbia, Moldova

B.3.3. The Dublin Regulation and the protection of rights of asylum seekers subjected to trafficking

Trafficked asylum seekers are often moved by their traffickers from one country to another for exploitation purposes. Evidence at national level points to growing numbers of victims of trafficking seeking asylum and subjected to Dublin procedures. The identification and protection of their rights is problematic and deserve particular attention. As previously stated in chapter X, the time efficiency logic of the Dublin Regulation and its presumption of equivalent protection - under the asylum laws and practices of other EU member States - is often at odds with the protective obligations under the anti-trafficking and human rights legal regimes.³⁶⁹ National practices in the four EU countries studied underscore common challenges.

The main issues that emerge in the context of Dublin transfers of asylum applicants that are victims of trafficking are: the screening process with the personal interview, the individual guarantees of safety, adequate reception and protection, detention and risk assessment. These issues are first briefly discussed below; then, they are examined through case-law examples of appeals against the Dublin transfer of trafficked asylum seekers.

The screening process in Dublin procedures is usually not suited to identifying the complex protection issues that may arise in asylum claims by victims of trafficking. The personal interview, which is required to determine the State responsible for the asylum application (Article 5 Dublin III), is often carried out in a setting that is not conducive to the detection of trafficking vulnerabilities. Time pressure and shortage of resources for interpretation and counselling limit the possibilities of detection of trafficking, especially as in many countries, asylum authorities do not use THB indicators for the screening and assessment of vulnerability.³⁷⁰ Asylum officials have limited contact with the applicant, and lack time to establish a relationship of trust with the person so that she or he can disclose their experiences.³⁷¹ Only NGOs with a regular pres-

³⁶⁹ CoE, UNHCR, (2016), International Conference on the interface between trafficking in human beings and asylum - Report, 23 ", p. 16-20.

³⁷⁰ Forum réfugiés-Cosi, (2018), p.36.

³⁷¹ AIDA ECRE, (2017), The concept of vulnerability in European asylum procedures, p. 32.

ence in pre-removal facilities sometimes detect trafficking cases among applicants in Dublin procedures.

For example, in France, victims of trafficking – who may be in Dublin procedures - are sometimes identified by NGOs working in immigration detention centres (e.g. CIMADE) that upon detection of presumed victims immediately alert the management of the centre and specialised anti-trafficking NGOs (e.g. CCEM), so that the individual may be assisted in filing a complaint with the police regarding their trafficking experience. Once the person has filed a complaint, the victim identification process starts, and the person's removal should be suspended. This is not a routine procedure, and the success of this type of interventions often depends on personal relations, trust and goodwill of the professionals involved, as well as their ability to gain the trust of the victim.³⁷²

In the Netherlands, the situation of victims of trafficking in Dublin procedures is particularly grim. The screening interview mostly focuses on establishing the identity, nationality and travel route of the applicant. Even though IND - the competent authority - has received specific training on THB and has a particular protocol to follow in case of detection of THB indicators, third-country nationals, primarily from Nigeria and Uganda, face a culture of disbelief when reporting exploitation.³⁷³ This attitude is reflected in recent amendments to the residence scheme for human trafficking, which civil society organisations have sharply criticised. Since August 2019,, asylum seekers in Dublin procedures who filed a complaint about human trafficking would be granted a temporary residence permit only if their presence in the country is deemed necessary for the investigation and prosecution of human trafficking, i.e. if there are sufficient indications that exploitation occurred in the Netherlands. Police and prosecutors have just four weeks to make such assessment, and in most cases, they consider that the complaint from the victim provides insufficient information for the investigation, and consequently reject the application.³⁷⁴ This very tight timeframe hinders both the process of victim identification and the possibility of running an effective investigation of their trafficking, not only in cases where the victim was exploited abroad but also where the exploitation occurred in the Netherlands. Furthermore, this practice contravenes States' positive obligations under Article 4 of the ECHR, as well as obligations under the CoE Anti-trafficking Convention and the EU Anti-Trafficking Directive on identification, assistance and recovery period.³⁷⁵ When there are "reasonable grounds to believe that a person has been a victim of trafficking, that person shall not be removed [...] until the identification process as a victim has been completed".³⁷⁶ The person is entitled to assistance in their physical, psychological and social recovery. Not only victims are not granted a recovery period and related support, recourse to the sovereignty clause of the Dublin Regulation is avoided. The authorities do not take charge of the asylum application. Some of these cases have been challenged in court, as illustrated in the case below.

Court ruling: Dublin transfer and reflection period

The court considered an appeal against the Dublin transfer to France of a victim of trafficking and her child.

The claimant referred to a recent AIDA report on France, and argued that the living conditions and quality of asylum procedure for vulnerable applicants in France are contrary to Article 3 of the ECHR. Further, she argued that the authorities did not take into account sufficiently that in France she would risk being returned to the hands of the trafficker who brought her there in the first place; nor had they considered the best interests of the child. On these points, the Court found that the claimant had not demonstrated that the asylum procedure and the living conditions in France are contrary to interna-

372 National Research – France.

373 National Research – The Netherlands.

374 National Research – The Netherlands.

375 ECtHR (2020); Art 10 CoE Anti-Trafficking Convention; Art 11 EU Anti-Trafficking Directive in conjunction with Art 6 EU Directive 2004/81/EC.

376 Art 10.2 CoE Anti-Trafficking Convention; CoE Explanatory Report, para. 131;

tional obligations.

The claimant further argued that, despite her wish to report her trafficking situation, she was not given such opportunity, and was not granted the reflection period foreseen under the Temporary Residence Permit Directive and the Anti-Trafficking Directive. In this regard, the court found that the provision on the reflection period (Art 6 of the 2004/81 / EC Directive) was not implemented in Dutch law, nor its duration determined. The court considered that the new policy concerning victims of trafficking in Dublin transfers is a policy rule and not a generally binding regulation, and hence decided for direct application of Article 6 of the Directive 2004/81/ EC. The court ordered the suspension of the expulsion measure against the claimant and her child.

Source: Court of the Hague, N. NL19.30940, 9.3.2020 (google translation)

Undoubtedly, there are several drawbacks in the application of the Dublin procedure to vulnerable applicants who are victims of trafficking. In all the countries examined individual guarantees of safety, adequate reception and protection are not provided in the transfer of the trafficked asylum seeker to the responsible State. For instance, when trafficked persons are transferred to another European country under the Dublin regulation, often there is no information sharing and coordination of assistance to respond to their specific reception and protection needs as victims of THB. This contravenes Dublin requirements on information exchange to secure the rights and immediate special needs of vulnerable groups, particularly with regard to medical care and treatment.³⁷⁷ This is also not compliant with the ECtHR case law on transfer of vulnerable applicants, as discussed in Chapter B3.³⁷⁸

There is evidence that trafficked asylum seekers are being transferred to Spain under the Dublin III Regulation without explicitly informing the authorities there that these people are victims. Information on their health and safety needs is not provided; arrangements for safe accommodation and follow up assistance are not requested. NGOs sometimes find out about these victims through their cooperation with NGOs in other EU countries. However, challenges in ensuring respect for the victim's privacy often prevent them receiving detailed information about the circumstances of the case. Accordingly, NGOs start assessing the victim's situation anew upon arrival. It takes time and many efforts and coordination with law enforcement to enable the applicant's access to information about rights and assistance options as a victim of trafficking.³⁷⁹ Similarly, cases have been reported of asylum seekers who are victims of trafficking and are transferred to France under the Dublin III Regulation without adequate guarantees. Referral to competent authorities for care arrangements is not requested, and hence in such cases, their specific protection and assistance needs are disregarded. In Austria also there is evidence of lack of systematic implementation of individual guarantees for vulnerable applicants in Dublin procedures.³⁸⁰

Another critical shortcoming for trafficked persons in Dublin procedures concerns the fact that trafficked asylum seekers subjected to Dublin III are often placed in administrative detention. Detention is very problematic, as it leads to the re-victimisation of the person at the hands of the State. This indicates not only a failure to implement the obligations on the identification and assistance of trafficked persons; it also breaches the non-punishment provision established under the CoE and EU anti-trafficking law.³⁸¹ Victims cannot be penalised for having been compelled to seek asylum in the first country of entry under the influence of their traffickers. They must be provided with assistance, and this includes appropriate and secure accommodation. Placing them in administrative detention does not comply with the obligations of

377 Articles 31-32 of the Dublin III Regulation refer to victims of torture, rape or other serious forms of psychological, physical and sexual violence. Victims of THB are not specifically addressed under Dublin III.

378 ECtHR, *Tarakhel v. Switzerland*; ECtHR, *K. and Others v. Sweden*.

379 National Research – Spain

380 AIDA ECRE (2020), Country Report Austria.

381 Art 26 CoE Anti-Trafficking Convention, Art 8 EU Anti-Trafficking Directive.

the anti-trafficking protection regime.³⁸² Such detention is a form of punishment for acts committed under the control of the traffickers. It fails to take into account the fact that it is a deliberate strategy of traffickers to compel victims to apply for asylum with a fake story, and then rapidly move them across European countries to be exploited. Such a strategy undermines victims' credibility should they seek asylum of their own will, as they are no longer believed, and makes them even more dependent on their traffickers.

Besides, under the Dublin III Regulation, detention is a measure of last resort on the basis of an individual assessment and only in so far as detention is proportionate and other less coercive alternative measures cannot be applied effectively. It is also necessary to ensure that it is as short a period as possible (Art 28).³⁸³ The detention of vulnerable applicants such as victims must be avoided.

Another limitation for trafficked persons in Dublin procedures concerns the fact that, they may have reduced material and reception conditions, as they cannot access to the asylum accommodation centres.

In conclusion, in none of the four EU countries examined is there any systematic practice of identification and referral of trafficked asylum seekers in Dublin procedures to appropriate safe accommodation and support provided by specialised NGOs. Even more concerning is that victims of trafficking in Dublin procedures are often detained. Current practices in dealing with trafficked persons in Dublin procedures clearly contravene States' obligations under the CoE Anti-Trafficking Convention and the EU Anti-Trafficking Directive. They also fail to comply with the requirements of the Reception Conditions Directive.³⁸⁴ At the same time, clear examples of effective collaboration between anti-trafficking and asylum NGOs, as well as with other asylum actors, do exist. They can make a difference in securing assistance and providing legal protection for these vulnerable individuals. In this regard, a promising practice occurring in Germany was shared during the Focus Group meeting. In Germany specialised counselling centres play a positive role in seeking to reduce the risks attached to trafficked people being returned, or at risk of return, in accordance with the Dublin procedure. Free advice from a migration counselling centre is available, and these centres work together with the Special Representative for Trafficking in Human Beings at the Ministry for Migration and Refugees, with the aim of persuading the authorities to involve the sovereignty clause.³⁸⁵

B.3.3.1 Appealing decisions on Dublin transfers: risk assessment and non-refoulement

A trafficked asylum seeker might be in danger if returned under Dublin III to the country where she or he may have been previously trafficked. However, national practices indicate that the authorities do not engage in comprehensive risk assessment to ensure compliance with non-refoulement obligations, even although a Dublin transfer may result in bringing the individual back into the hands of the criminals who recruited and exploited her or him in the first place. Further, the fact that victims have not received assistance, lack a safety net and are not adequately referred for protection heightens the risks.

As discussed in the previous chapter, the legal criteria established in ECtHR case-law on non-refoulement are relevant to the assessment of risk in Dublin transfers. In particular, the existence of a real risk of serious harm needs to take into account the personal circumstances of the applicant³⁸⁶ and the evidence submitted by reputable NGOs.³⁸⁷ State authorities have a responsibility to gather information regarding risks upon return, and the individual also has to provide a substantiated account of a real risk of ill-treatment.³⁸⁸ However, this is sometimes quite challenging for trafficked persons, as they may fear retaliation

382 OSCE (2013); CoE GRETA (2020)0620, para 43.

383 AIDA ECRE, Country Report The Netherlands, p. 59.

384 Art 2.k, Art 21 -22, Art 19.2 and 25.1 RCD.

385 Sara Bluecher, "Returning Trafficked Persons and support from Specialised Counselling Centres", in: KOK, *Trafficking in Human Beings in Germany. Reflections on Protection and Rights* (Sara Bluecher, Severine Klie, Sarah Schwarze and S Dophia Wirsching eds), 298, at 300-301

386 ECtHR, F.G. v. Sweden, para 115

387 ECtHR, K. and Others v. Sweden, para 90

388 ECtHR, K. and Others v. Sweden, para. 96.

by traffickers and also face difficulties in providing a consistent and circumstantiated account because of their traumatic experience.

These challenges are coupled with a widespread culture of disbelief towards trafficked persons. This is particularly the case for women and girls from Nigeria and other African countries who are trafficked for sexual exploitation.³⁸⁹ Although NGOs provides evidence that trafficked asylum seekers are subject to exploitation in numerous European countries, they are often not believed. Authorities often deem t the arguments and facts concerning the risks upon transfer to the responsible Member State are not convincing nor sufficiently precise, as illustrated in the following case in France.

France: Court ruling rejecting a Dublin suspension

In a 2019 decision, the Paris Administrative Court rejected an application for suspension of Dublin return to Italy which was put forward by a victim of trafficking for sexual exploitation in Italy and was assisted by CCEM. The judge stated that the person did not explain her situation of exploitation in Italy during her first individual interview at the prefecture; besides she did not provide any convincing evidence in support of her allegations. The judge further noted that, upon her arrival in France, the person had been accommodated by a compatriot and for several months she took no steps to report this alleged crime to the authorities. Despite being a recipient of legal aid since December 2018, she never filed a complaint of THB, which could have given her the right to a temporary residence permit. The ruling is being appealed.

Source: CCEM; Paris Administrative Court Decision N ° 1919466/8, 29 October 2019.

This ruling is illustrative of shortcomings in appreciating the scope of States' positive obligations under the CoE Anti-Trafficking Convention and Article 4 of the ECHR. The decision questions the victim's credibility because she did not make a complaint about trafficking. Yet States have a duty to identify and assist potential victims and to effectively investigate possible situations of THB, regardless of whether or not there has been a complaint to the authorities.³⁹⁰ Furthermore, the effectiveness of an investigation can be questioned if the victim is removed to another country, and can neither assist nor cooperate in the investigation and prosecution of her alleged traffickers (see Chapter x). The court further rejected the arguments related to the extreme vulnerability of the person and her need for psychosocial and health support, as well as specific reception and protection guarantees. The court did not take into account that the person had been identified by an experienced victim support organisation. This case also shows the lack of appreciation of the difficulties that a trauma survivor faces in producing evidence of her trafficking in the screening interview with asylum and other competent authorities.

The approach of domestic courts to Dublin transfers is not uniform. There are instances where the court requires the State to take charge of the application for international protection lodged by a trafficking victim, even if such examination is not their responsibility.³⁹¹ In other words, the court may decide that the discretionary clause under the Dublin III Regulation be triggered. For example, in Austria, in several cases, the trafficked asylum seeker was granted a temporary residence permit linked to ongoing criminal investigations of their trafficking, and the authorities suspended the Dublin transfer taking charge of the asylum claim.³⁹²

In France, in some cases involving trafficked asylum applicants, the Dublin transfer has been suspended

389 National Research - Austria, France, The Netherlands, Serbia, Spain. See also Finnish National Rapporteur on THB, (2016), Women of Nigerian Origin in Finland who Have Been Subjected to Trafficking for Sexual Exploitation.

390 ECtHR (2020).

391 Art 17, Dublin III Regulation.

392 National Research – Austria.

to avoid the risk of infringing non-refoulement obligations. These cases often concern the suspension of Dublin transfer of Nigerian victims to Italy because of serious risks of re-trafficking or retribution by their traffickers, as well as due to the absence of adequate reception conditions for vulnerable applicants. The case below provides an illustrative example.³⁹³

France: suspension of a Dublin transfer

The ruling concerns a Nigerian woman who was a victim of trafficking for sexual exploitation in Italy, and who later reached France to claim asylum. Her application was rejected, and she was to be transferred in accordance with the Dublin regime, in conjunction with house arrest. She appealed the decision of the prefecture to the Administrative Court of Toulouse, arguing that if transferred to Italy, she would be at risk of inhuman and degrading treatment and inappropriate reception conditions due to systematic deficiencies in the Italian asylum system. The appeal referred to violations of Articles 3.2 and 17.1 of the Dublin III Regulation and Articles 3 of the ECHR and Art 4 of the EU Charter of Fundamental Rights, as well as procedural violations concerning the notification of the Dublin decision. In examining the claim of the risk of a breach of Article 3 ECHR, the court reiterated that it is up to the judge to assess the existence of such a risk based on the elements presented. The court further noted that the Italian authorities had been facing an unprecedented and massive influx of migrants and refugees, and we having great difficulties in handling asylum applications and ensuring compliance with asylum law. The court observed that the decision of the prefecture did not take into due consideration the problematic asylum reception conditions that the applicant would have faced in Italy, nor her situation of great insecurity through being a victim of a prostitution ring. It concluded that the prefecture made a manifest error by ordering her transfer to Italy without making use of the discretionary clause under Article 17 of the Dublin Regulation. It ordered the annulment of the decision on the Dublin transfer and the admissibility of the applicant's asylum claim before the competent French authority.

Source: Administrative Court of Toulouse, Decision N° 1805185, 9 November 2018

In another case, the Administrative Court of Grenoble suspended the Dublin transfer of a victim of trafficking to Portugal where the person had been previously exploited. This decision is of particular interest because the court found that return to the first country of entry would expose the woman to a serious risk of retaliation by her traffickers, amounting to a breach of Article 4 of the ECHR. Hence the non-refoulement principle was applied to the risk of a serious violation of fundamental rights such as through trafficking, which falls within the scope of Article 4.

France: Suspension of a Dublin Transfer on account of vulnerable situation and risk of violation of Article 4 ECHR

The court examined the request for suspension of the Dublin transfer of a young victim of trafficking on account of her personal situation. Ms L, a Congolese national, was recruited by a criminal network to be sexually exploited in Angola and then in Portugal when she was a child.

She managed to escape from the criminal network, and was assisted by a specialised NGO L'Amicale du Nid in Grenoble. She applied for asylum in France, but the Prefecture of Rhône ordered her transfer under the Dublin procedure to the Portuguese authorities for the examination of her claim. She appealed the decision.

Ms L was reported to be under persistent pressure from the criminal network that had already, twice, exploited her in Portugal. She argued that returning to Portugal would therefore increase the risks for her of falling prey to this network, and, therefore, to be in a situation contrary to Article 4 of the ECHR.

393 GRETA(2017)17 France, para 196.

The Court found confirmation of her statements in the communication of the NGO L'Amicale du Nid with the French Office for Immigration and Integration. The NGO had informed OFII that Ms L was in a situation of great vulnerability, materially, psychologically and medically. Further, the NGO had also requested the annulment of the Dublin procedure.

The court found that the Prefecture's decision concerning her Dublin transfer did not take into account the seriousness of her personal situation. The Prefecture manifestly erred by not invoking the discretionary clause under Article 17 of the Dublin Regulation, authorising a Member State to consider an asylum application, even if this is not its responsibility under the Dublin criteria. The court ordered the annulment of the decision on the Dublin transfer and the admissibility of the applicant's asylum claim before the competent French authority.

Source: Administrative Court of Grenoble, Decision ADMINISTRATIVE COURT of GRENOBLE No. 1904309, 16 July 2019

In other instances, for example in the Netherlands, it seems that restrictions resulting in a denial of temporary residence permits for reflection and recovery to trafficked asylum seekers in Dublin procedures are functional to avoid an automatic suspension of the Dublin return. In other words, by preventing the granting of a temporary permit, the State does not take charge of the application for international protection of the trafficked person and proceeds with the transfer. As noted above, this approach breaches existing obligations and contradicts the principle of non-discrimination under the CoE Anti-Trafficking Convention.

As noted by the Dutch Rapporteur on THB, "all victims of human trafficking deserve the same protection according to the same rules".³⁹⁴ Recently the Rapporteur also stated that it is worrying if victims of trafficking cannot find their way to the human trafficking system of protection. The protection scheme for victims of trafficking scheme has been set up for these victims so that they receive the right protection and support. When this does not happen, it also negatively impacts on criminal investigations.³⁹⁵

Trafficked asylum seekers in Dublin procedures should be identified as such and receive assistance as soon as there are reasonable indications to suspect that they are victims. They should not be discriminated against in their access to support and in the scope of protection of their rights solely because they fall within the realm of applicability of the Dublin III Regulation. In a recent ruling, the Court of the Hague considered the applicability of the Dublin Regulation to cases involving asylum seekers who are vulnerable on account of their having been trafficked. What is interesting in this ruling is that the Court took into account the particular personal circumstances of the applicant as a victim of trafficking. It also introduced a criterion of disproportional hardship to be assessed prior to a Dublin transfer to consider the necessity of applying the sovereignty clause. The case is described below.

The Netherlands: Appeal against Dublin transfer on account of positive obligations to protect victims of trafficking and vulnerable asylum seekers

The court considered whether a complaint of human trafficking precludes the Dublin transfer of an asylum seeker victim of trafficking and requires the State to exercise discretion under Article 17 of the Dublin Regulation. The case concerned an asylum seeker from Uganda, who applied for international protection in the Netherlands but was rejected because he had a Schengen visa issued by the Spanish authorities. The applicant had repeatedly expressed the wish to report being a victim of human trafficking, imprisonment and rape, but encountered difficulties in so doing. This was not his

³⁹⁴ Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, (2017), Tenth Report of the National Rapporteur. The Hague: National Rapporteur.

³⁹⁵ Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, Keuze buitenlandse slachtoffers mensenhandel voor asielpcedure onderzocht, 8 June 2020.

fault, and it took time for a first interview with the police. Without the police report, he could not apply for a temporary residence permit. The applicant claimed that the State had a positive obligation to combat human trafficking and protect its victims, as was made clear by the ECtHR in the Rantsev case and the EU Anti-Trafficking Directive. In addition, the applicant claimed that the State should have made use of the sovereignty clause under Art 17 of the Dublin Regulation, given his vulnerability as both a refugee and a victim of trafficking. The Court found that the transfer decision did not provide sufficient reasons as to why the transfer to Spain did not constitute disproportionate hardship in this case, given the special and individual circumstances of the claimant. The transfer decision did not properly substantiate why Article 17 (1) of the Dublin Regulation had not been applied. The Court ruled that the appeal was well-founded and annulled the Dublin transfer decision.

Source: Court of The Hague, case N. NL19.18360, 26 September 2019 (google translation; EDAL)

In light of the above case and NGO experience in assisting trafficked persons in the asylum procedure, the availability and accessibility of early legal aid are critical to the protection of their rights. National practices indicate that the provision of qualified legal aid free of charge at the early stages of the procedure makes a real difference. Such legal assistance is necessary to assist trafficked asylum seekers in understanding the procedure and providing relevant information about their trafficking experience and the risks they may face in case of transfer to the first country of entry, where their trafficking took place.³⁹⁶ Without legal representation, the applicant may fail to lodge appeals in time or at all, nor be able to make representations against /her or his Dublin transfer to another country. The provision of quality legal advice in Dublin procedures is also recommended by UNHCR.³⁹⁷

In conclusion, the application of the Dublin Regulation in cases involving asylum applicants who are victims of trafficking remains problematic in all the countries surveyed. GRETA has also reported on these challenges in many countries, and has repeatedly reiterated the obligation of States to ensure the identification of victims amongst asylum seekers in Dublin procedures. Of equal importance, GRETA recommends conducting a proper risk assessment before issuing a decision on the Dublin transfer of a trafficked asylum seeker, to avoid breaches of Article 3 and 4 of the ECHR that may result from re-trafficking or retaliation by traffickers in the country to which they were first trafficked.³⁹⁸ Furthermore, risk assessment is necessary with regard to onward refoulement and the conditions in the place of proposed return,³⁹⁹ ensuring that there are guarantees of safety, adequate reception and protection of the person in line with ECtHR and CJEU jurisprudence (see chapter X).⁴⁰⁰

396 Art 26 Dublin III Regulation.

397 UNHCR, (2017), *Left in Limbo*, UNHCR Study on the Implementation of the Dublin III Regulation, p. 5.

398 GRETA(2017)17 France, para 196, 224; CoE GRETA (2020)06.

399 ECtHR, *K. and Others v. Sweden*, para 78.

400 See i.a. ECtHR, *M.S.S. v. Belgium and Greece*, Application No 30696/09, 21 January 2011, para 342.; ECtHR, *Saadi v. Italy*, Application No 37201/06, 28 February 2008, para 147; CJEU C-578/16 PPU – *C.K. and Others*, paras 65 and 98.

B.4. Trafficked persons as beneficiaries of international protection

In this section, the report considers whether the implementation of, international protection obligations in the six countries examined provides victims of trafficking with an accessible durable solution in terms of protection of their rights, safety and dignity. It explores the experiences of trafficked persons and persons at risk of being trafficked, in having their claims to international protection considered. The analysis builds on the knowledge and practice of NGOs supporting trafficked asylum seekers in the process of determination of their international protection needs in the six countries.

NGOs' experience with asylum claims of victims varies significantly amongst the countries surveyed. This is reflected in the selection of cases discussed below. The report also draws upon asylum decisions in other European countries⁴⁰¹.

As stated in chapter X, trafficked persons, and persons at risk of being trafficked, have an entitlement to international protection. They have the same right to seek and enjoy asylum as any other person. In this chapter, the focus is on access to international protection or other forms of complementary protection by trafficked persons whose trafficking experience is the main basis of their claim. The cases examined concern for the most part individuals who were trafficked after leaving their country of nationality and later seek protection in the country of destination or another country. Some have been exploited en route, others have been exploited upon entry in the first country of asylum, while others have been trafficked across various European countries. They seek international protection, either because they have a well-founded fear of being persecuted in accordance with the criteria of the refugee definition, or because they cannot return to their country of nationality or to the first country where they applied for asylum due to an individual risk of serious harm.

Research conducted in the six countries indicates that in all except for Moldova, adjudicating authorities have begun to recognise the international protection claims of trafficked persons. In most States, trafficking is recognised as a form of persecution that occurs on the grounds of membership of a particular social group. In other instances, trafficked persons are granted complementary forms of protection, namely subsidiary protection, on account of a risk of serious harm should they return to their country of origin. In the Netherlands, the guidance provided to asylum authorities refers to non-refoulement obligations in the context of trafficking. But it seems to exclude the possibility of granting refugee status by emphasising that "the mere circumstance that a foreign national is (or has become) a victim trafficking is not related to any of the grounds of the Refugee Convention and therefore does not lead to asylum".⁴⁰² While it is indisputable that trafficking in itself is not a ground for refugee status, there are many circumstances in which trafficked persons seeking asylum may fulfil the criteria of the Refugee Convention.

The following analysis considers cases concerning the granting of refugee status. It then appraises those situations in which trafficked persons received complementary forms of protection. Finally, it seeks to learn from those cases in which the international protection claim was rejected.

An exhaustive analysis of the criteria that national courts have used in examining claims for asylum of victims of trafficking is beyond the scope of this report. The attempt here is to outline some critical matters that emerge in the examination of claims for asylum of victims of trafficking. These include the nexus between the reason for persecution and a 1951 Convention ground, the availability of sufficient protection in the country of return, and the notion of serious harm. Another critical aspect concerns the specificity of THB situations and the specific needs of victims in refugee status determination.

401 Case law examples were extracted from the European Database of Asylum Law (EDAL), Progetto Melting Pot Italia, and relevant literature.

402 IND, Work Instruction 2007/16 Victims of human trafficking in the asylum procedure, 18 December 2007, available in Dutch at: <http://bit.ly/1MjGx5i> (google translation).

B.4.1. Refugee status

Evidence from national research and relevant literature in four out of six countries examined indicates that there have been cases in which victims of trafficking seeking asylum were granted refugee status. This is the case in Austria, France, Serbia and Spain, as well as in other European countries (e.g. Italy, Germany, UK). In Moldova, there have been no such cases. In the Netherlands, there is a paucity of data and information concerning trafficked persons who have been recognised as refugees or granted other forms of international protection.

Whether the trafficked person has a well-founded fear of persecution on account of a Convention ground and whether she or he will be able to access sufficient state protection depends upon the individual circumstances of the case.

As discussed in chapter X, in fulfilling the legal criteria of the refugee definition, establishing the nexus element of the asylum claim is often challenging. In the cases examined, the determining authority established the causal link between the persecution or the absence of state protection and one of the Convention grounds by demonstrating that the person belonged to a particular social group. A growing body of case law in Europe recognises survivors of trafficking as a gender-based social group that will suffer some form of persecution if returned to their country. In several cases examined, persecution is motivated by their membership in a particular social group that is defined by gender and nationality as immutable and innate characteristics. In other cases, the social group is defined through a social perception approach that shows how the defining characteristics of the group (e.g. the past trafficking experience) set them apart from society, makes them socially visible and recognisable.⁴⁰³ In several asylum cases, the adjudicating authority or the court has recognised women from Nigeria, or more restrictively from Edo state, as belonging to a particular social group, sharing a distinct identity, which they are unable to change.⁴⁰⁴ In other cases, “victims of trafficking whose return is perceived by the surrounding society as a failure, or who return with health problems” constitute the particular social group.⁴⁰⁵ Accordingly, in some countries, victims of trafficking for sexual exploitation from Nigeria have been granted refugee status.

Some adjudicating authorities also echo recent international legal developments and recognise trafficking in human beings for sexual exploitation as a form of gender-based violence that amounts to gender-related persecution.⁴⁰⁶ As an example, the case below concerns a girl from Nigeria who claimed asylum in Serbia, and the determining authority recognised her trafficking for sexual exploitation as a valid ground for claiming asylum.

Serbia: Victim of trafficking for sexual exploitation, granted refugee status

A Nigerian girl applied for asylum in Serbia in June 2018. She was recruited in her country under false promises of a better life and by means of deception and abuse of a position of vulnerability. Her traffickers forced her into prostitution for two months in Croatia. She was physically and mentally abused daily. She sought help from Croatian police but was deported to Serbia at night and traumatised further from this experience. While in asylum reception in Serbia, the competent local Centre

403 UNHCR Guidelines Social Group 2002.

404 Case law in France from EDAL: Court nationale du droit d’asile (CNDA), N°10012810 of 24-03-2015; National research – Serbia. Examples from case law in Italy: Tribunale di Venezia, Acc. N. 4243/2018 del 27/7/2018 RG n. 10118/2017; Tribunale di Genova, Acc. N. 370/2019 del 5/2/2019, RG n. 70/55/2018; See also Rigo, E, (2019), La vulnerabilità nella pratica del diritto d’asilo: una categoria di genere?, *Etica & Politica*, XXI.

405 EASO, Country Guidance: Nigeria, 2019, p. 60.

406 UNHCR, 2002, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, paras 10, 18; CEDAW, (2014), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, CEDAW/C/GC/32, para 45; Art 60, 61 CoE, Istanbul Convention.

for Social Work suspected that she could have been trafficked, and informed both the Centre for the Protection of Victims of Trafficking in Human Beings and the Asylum Office. She had a temporary legal guardian and a lawyer to represent her during the asylum procedure.

The Asylum Office, as the first-instance authority, pointed out her specific circumstances as a child requiring special procedural or reception guarantees and assessed her best interests. The Asylum Office further considered that trafficking in human beings for the purpose of sexual exploitation is a form of gender-based violence that amounts to persecution, and established that she had a well-founded fear of persecution because of her race, her membership of a particular social group - a group based on common characteristics of gender, sex, gender identity and sexual orientation, and her religion (Art. 24, 26 para 1 and 2). The Asylum Office recognised her refugee status.

Source: ASTRA National research

Since in trafficking the persecution in most cases is by non-State actors, to establish asylum eligibility, the decision maker must assess whether the State is able or willing to offer adequate protection from persecution. This assessment may rely both on evidence concerning the country conditions and information or documentation from the applicants. In some cases, the decision maker or court found that, despite having in place legislation and policies on THB, the State was unable to provide effective administrative and judicial protection of the applicant, especially due to lack of resources and widespread corruption.⁴⁰⁷ Some decisions explicitly mention the weakness of the rule of law and the involvement of organised crime in the trafficking of the person as factors heightening risks and reducing the ability of the State to ensure protection. Interestingly, asylum decisions refer also to the lack of support and assistance structures to protect the person and help her or him in the rehabilitation and reintegration.⁴⁰⁸ The notion of state protection hence includes consideration of the availability of, and actual access to, social assistance, health and psychological care, and the opportunities for sustainable means of existence. Also, in various cases, the determining authority considers the severity of discrimination against victims of trafficking in human beings for the purpose of sexual exploitation, who may lack state protection and be rejected and/or punished by their families and stigmatised in their communities, and hence find themselves in an intolerable situation, amounting to persecution. The following case of a young woman from Nigeria seeking asylum in Austria provides a vivid illustration of these issues.

Austria: Woman trafficked for sexual exploitation granted refugee status

Ms A. a 15 year old girl from Nigeria, escaped from home because of violence and rape within the family. She moved to a friend's place in Edo state. Sometime later, a woman offered to help her find work and study abroad. She had to pay 55,000 Euros for this help, but did not realise at the time that the sum was in Euros. The woman, called by nickname Auntie, had a good reputation for helping young girls in finding jobs abroad. Before leaving Nigeria, she was obliged to undergo a Juju oath-swearing ritual that committed her to pay the debt to the Auntie. She had to promise not to contact the police and not escape until she paid back her debt.

Her journey to Europe was well organised, she travelled to Italy by plane and from there to Austria by train. The Auntie instructed her at every step. Upon arrival, traffickers took her passport and made her seek asylum under a fake name and with a fake story. They forced her into prostitution to repay her debt, keeping her under pressure because of the Juju ritual. They also threatened her and her family with death and violence. She worked in prostitution for three years; she suffered severe violence and abuse. One day, she escaped due to intolerable pain. She approached the Caritas Return

⁴⁰⁷ National research - Austria; EASO (2019); ECRE EDAL, Decision of the Administrative Court Wiesbaden, 14 March 2011, 3 K 1465/09. WI.A, Forum réfugiés-Cosi, (2018). See also examples of case law from Italy supra note 167; Rigo (2019).

⁴⁰⁸ See case below; See also: Tribunale di Bologna, Accoglimento n. cronol. 3442/2019 del 29.07.2019, RG n. 18606/2018.

Assistance Office, and from there she was referred to LEFÖ-IBF. She was 18 years old.

She lived in the LEFÖ-IBF shelter for almost two years. She received psychosocial support, legal counselling and other assistance to help her in recovering and regaining independence. She cooperated in criminal proceedings related to her trafficking. She feared that she would be persecuted in Nigeria because she had run away from an organised criminal ring profiting from her exploitation. She was also terrified of having broken the Juju oath. She expressed her fears repeatedly during her counselling sessions. She applied for asylum. Her first asylum application was rejected, but as she was cooperating with the authorities, she was entitled to a one-year residence permit according to §57 of the Asylum Act. With support from LEFÖ-IBF and legal representation from Caritas, she appealed the first instance asylum decision before the Federal Administrative Court. LEFÖ-IBF contributed expert evidence to support her appeal, documenting her well-founded fear of persecution and highlighting the lack of available protection both from her family and from state authorities. The court revoked the first instance decision and granted her full refugee status.

The court found that A had a well-founded fear of being persecuted owing to her membership of a particular social group formed by victims of human trafficking who are persecuted in Nigeria. Members of this group are women returnees to Nigeria, who were victims of trafficking and escaped their trafficking situation. It is a group that can be clearly defined, is perceived as a distinct group and excluded by Nigerian society.

She had escaped from her traffickers and had also cooperated with the police in the trafficking investigation. The court noted that these factors heightened the risk either of retaliation in Nigeria or of being moved elsewhere for sexual exploitation. Concerning the availability of state protection, the court concurred with the assessment by LEFÖ-IBF that she was unable to avail herself of the support of her family, and that at the same time the State was unable to protect her and provide her with long-term support. Being in such a life-threatening situation, she would have no other option but to return to the hands of her traffickers if protection was not granted. Moreover, the court noted that, for a persecuted person, it makes no difference whether the source of persecution emanates from the State or a third party if the state is unable to provide sufficient and adequate protection.

Furthermore, the court noted the severity of the threats against A. as a young woman who found herself in a very vulnerable situation, without protection from both the State and her family. It further observed that the first instance decision did not take into account these factors. Of equal importance, it considered that to recover from her traumatic experience, A needed long-term care and protection.

The court dismissed as irrelevant the argument of the decision maker, that she had voluntarily left her country and emphasised that Ms A had been deceived, forced and threatened.

Source: LEFÖ-IBF National research

This case is particularly interesting, as it shows the appreciation of the Court of the significance of the trafficking experience in the asylum determination. A first element to note is the Court's awareness and consideration of persecution by non-state actors, which is critical to the examination of asylum claims by trafficked persons. Of equal importance are the Court's observations about the circumstances that impact on the person's risk of being persecuted. The court refers to her escape from the traffickers' control, her outstanding debt to traffickers, her cooperation with police in the investigation, the involvement of organised crime capable of continuing the trafficking operation in the country of origin and Europe, as well as the lack of a family or other support network. Further, the Court highlights her vulnerability due to her youth, the traumatic experience of trafficking and also to the very precarious situation in which she now was. Another critical aspect to note is that the decision acknowledges the necessity of providing long-term protection to victims to help them overcome trauma. In this regard, the granting of refugee status offers a real prospect of a durable solution. This case also demonstrates how the provision of specialised NGO support and legal aid is decisive in effectively protecting the rights of trafficked asylum seekers.

Concerning the fear of persecution, the cases refer to the risk of re-trafficking, the risk of ostracism and the risk of reprisal by traffickers against the victim or her or his relatives. The courts often noted the connection between those who exploited the person and the criminal group responsible for recruitment in the country of origin. Risks of serious harm may include intimidation, physical violence, and even murder of relatives. It is therefore not surprising that victims may be unwilling to reveal details of their ordeal and cooperate in the investigation. Threats of retaliation were particularly grave in the case described below, which illustrates the complex journey to the protection of a trafficked person.

Spain: Victim of trafficking for sexual exploitation granted refugee status

Ms M, 18 years old from Nigeria, was lured with promises of a job in Europe. She came from a low-income family and had no formal education, and agreed to pay back 40.000 Euros for travel expenses without realising the scale of her debt. To seal the agreement, the woman was subjected to a voodoo ritual. She travelled to Morocco with a man who abused her. She was several months pregnant when she crossed the Gibraltar Strait on a small boat to reach Spain. Upon arrival, she received humanitarian assistance; shortly after she gave birth to a child. She was instructed to apply for asylum but did not reveal her true story. Immediately afterwards, her traffickers moved her to another town and forced to engage in prostitution to pay her debt. When her asylum application was rejected, traffickers moved her to Switzerland and forced her to continue working. They threatened to kill her family if she did not repay her debt. She had to leave her son with a Nigerian woman.

Whilst in Switzerland, Ms M. filed another asylum application, but since her fingerprints had been registered in EURODAC, she was transferred to Spain under the Dublin III Regulation. In Spain, Ms M was placed in a temporary reception centre for vulnerable persons run by the NGO CEAR. CEAR staff detected trafficking indicators, and referred her to Proyecto Esperanza for an interview and support. She revealed the abuse she had experienced, and accepted to stay in Proyecto Esperanza's shelter. Staff from both CEAR and Proyecto Esperanza assisted her in filing a second asylum application providing relevant information about her ordeal. She was in an abysmal physical and mental state. Due to fear of retaliation by her traffickers, she refused to report her situation to the police for formal identification as a victim of trafficking. Her family in Nigeria lived under constant threat. One day a group of men burnt her family house and assaulted her brother. Afterwards, her parents were killed by gunshots. This information was presented to substantiate her asylum claim, and finally, in March 2018, Ms M. was granted refugee status.

Source, Proyecto Esperanza National research

As the case above shows, sometimes victims of trafficking do not reveal the real story in their first asylum interview. Only at a later stage, once they are supported, do they provide a more detailed account of their trafficking experience. This may raise questions concerning their credibility and their duty to cooperate in providing information to substantiate their claims. This is why it is crucial that asylum-determining authorities are aware that such situations reflect a victims' subjugation to the trafficker. Traffickers may direct victims towards the asylum system to regularise their status and move them across the Schengen area. It is a deliberate strategy of control to instruct their victims on what to say in the first interview. This does not mean that trafficked persons' claims are not valid.

With this in mind, decision makers should appraise the vulnerability, fears and trauma of victims of trafficking, and the challenges they face. In the course of the refugee status determination, the appreciation of victimhood and the consequences of trauma is vital to understand the victim's behaviour and difficulty in providing a linear account of her or his experience. Contradictions and variations in victims' accounts may raise suspicions about the credibility of claims.

A victim's manners and behaviour are not reliable indicators of credibility, as many other factors can intervene, influencing the victim's attitude. This was, for example, clearly appreciated in a recent judgment

of the Court of Bologna. The case concerned an appeal against a first instance negative decision of a claim by a person trafficked for sexual exploitation. The court observed: “the difficulty and reluctance to narrate some aspects of her experience can plausibly be justified because of the fear of exposing herself to judgment and the evident discomfort of recalling situations and events of profound physical and psychological suffering”.⁴⁰⁹ In this regard, it should be noted that a psychological evaluation or a mental health evaluation of the victim may prove significant for the asylum claim of an applicant who is suffering symptoms of trauma, such as Post Traumatic Stress Disorder. Difficulties in remembering facts, details or the chronology of events are indications of trauma. Trafficked persons may also exhibit an unexpected aggressive attitude or very passive and dismissive manners, or other behaviour that may affect their credibility. As has been shown, the expertise of reputable and experienced NGOs helps the determining authority in realising the reasonableness of the victim’s fear and the severity of the past persecution. Supporting and explanatory documentation from NGOs can contribute to substantiating the claim of the trafficked person, who as a vulnerable and traumatised applicant may be unable to relay in a coherent and detailed manner the facts and circumstances of the case. Moreover, this expertise can contribute to establishing the nexus element of the claim by providing insightful information on the conditions in the country of origin, the influence of traditional practices (eg Juju), and the government’s unwillingness or inability to protect the person.

A notable feature of the cases examined is that the trafficked person was in each case supported both by a victim support NGO and by an NGO specialising in providing legal aid to asylum seekers. The combination of shelter, counselling, psychosocial support and specialised legal assistance is effective in responding to the specific needs of trafficked asylum seekers and ensuring that the best interest of the persons is central. These cases demonstrate the importance of cooperation between actors in the asylum system and actors in the NRM for victims of trafficking. The collaboration and joint work of these NGOs is critical in supporting the person through the process of recovery and claiming of rights of the applicant, both as a victim of crime and as a refugee.

B.4.2. Complementary protection

A common challenge in trafficking-related asylum cases concerns establishing the causal link between the risk of persecution and a 1951 Convention ground. Where this nexus is not confirmed, but there is still a risk of serious harm in case of a return, and the State is unable or unwilling to provide effective protection, complementary protection may be granted. Proving a real and individual risk of inhuman and degrading treatment is often challenging for trafficked persons, but possible. The example below concerned a case of trafficking for domestic servitude in a diplomatic household.

France: Subsidiary protection for a person trafficked for domestic servitude in a diplomatic household

Ms S arrived in France as a domestic worker in a diplomatic household in Paris in 2015. The employer had promised her a salary of 1200 Euros net per month (approximately the French minimum wage) plus all travel expenses, boarding and lodging. Once in Paris, her working and living conditions quickly deteriorated. She worked 15 hours a day, from 6am till 11pm. She was not allowed to leave the house unless expressly authorised. She was given only eat leftovers to eat. Her salary was paid into a French bank account that she could not access directly.

Ms S was subjected to psychological and sexual violence by the son of her employer. In March 2016, following the umpteenth episode of violence, S managed to ask neighbours for help. They contacted CCEM, which identified her as a trafficking victim and offered her emergency accommodation. She made a complaint against her employer and her son on account of inhuman working and living

⁴⁰⁹ Tribunale di Bologna, Accoglimento n. cronol. 3442/2019 del 29.07.2019, RG n. 18606/2018.

conditions (CC 225-14) and sexual violence. Since the investigation was not initiated for the THB offence, she could not request a residence permit for trafficking victims. CCEM submitted additional information on her case to the prosecutor, and Ms S was interviewed again by the police. CCEM also informed the French Ministry of Foreign Affairs, which in turn reached out to the concerned embassy.

Desperate and discouraged because of her very precarious social and administrative situation Ms S reported her story to an NGO in France. Her story was broadcast online; the video was seen by very large numbers, provoking scandal in her home country.

Some time later, the Embassy approached Ms S, repeatedly offering assistance in exchange for withdrawal of her complaint, but she refused. Officials threatened to send her back to her country, where she would be left on her own and without any help. Subtle threats also reached the NGO that had tried to help Ms S. Following these episodes, Ms S had a nervous breakdown, and was hospitalised in a psychiatric hospital for two weeks. In June 2017, Ms S decided to apply for asylum. Earlier she had hesitated because her son was still in her home country. In February 2018, she was granted subsidiary protection due to a real risk of inhuman treatment in her country of origin. The decision took into account the attitude of the concerned embassy, and considered that it demonstrated a lack of consideration for Ms S's labour exploitation, and did not provide protection for her. However, she only received a four-year residence permit in October 2019. Since 2018, i.e. immediately after the granting of protection, S started the procedure for family reunification with her son. However, his visa request was denied, as she could not prove that she had full parental responsibility. She filed a new request submitting new documentation; however this attempt also failed due to the ongoing sanitary crisis.

Source: CCEM National research

This case is noteworthy for many reasons. Being a victim of trafficking and reporting her situation to the police, the applicant found herself at heightened risk of serious harm. Her fear was reasonable, especially because an influential public official was involved in her exploitation, and the authorities from her country of origin appeared to condone the situation. Indeed, the reasoning about the failure of state protection refers to the attitude of the national authorities and their lack of interest in protecting Ms S as a victim of labour exploitation. This case also exemplifies the challenges of investigating and prosecuting trafficking cases for reasons that are entirely independent of the individual's willingness or ability to collaborate (see chapter /Johanna). Yet, the conditionality mechanism that links support and residence to cooperation in the investigation may leave the individual without assistance and protection within the anti-trafficking framework, unless, as in this case, the person is found to be entitled to international protection.

Moreover, with regard to providing a durable solution for the individual, it should be noted that, even when international protection is granted, it may take considerable time, 18 months in this case, before the person's administrative status is resolved. Until then, the individual, who is already in a vulnerable situation, is unable to access stable social services, such as for housing and employment, which are crucial to foster her or his rehabilitation and social inclusion. Finally, many trafficked persons are single mothers who moved in search of opportunities to support their children, often left behind in the care of relatives. Once they obtain protection, they often wish to reunite with their children. Yet, in many countries, family reunification requirements for single parents are strict and challenging. Attaining a judicial declaration that they can be considered fully responsible for their child is often quite complicated; still, this is often a condition sine qua non for the issuance of a visa for the child.⁴¹⁰

410 National research – France.

B.4.3. Protection denied

There are also many complex cases in which victims are denied international protection as well as protection under the anti-trafficking regime. This may be due to multiple factors, including their unwillingness or inability to provide a detailed account of their experience or of the specific risks they face upon return. Trafficked asylum applicants often face a culture of disbelief, and encounter many challenges in documenting the real risk of serious harm or inhuman and degrading treatment upon return. These challenges are illustrated with some cases below.

For instance, in 2015, the ECtHR⁴¹¹ considered a request from a Nigerian victim of trafficking who alleged that return to Nigeria would expose her to a real risk of treatment contrary to Article 3 ECHR. The decision is interesting for its important observations concerning the credibility assessment of an applicant who is a victim of trafficking, and the need to grant them the benefit of doubt. However, the assessment of the risk of ill-treatment takes into account generic findings from the US TIP report and does not seem to reflect the reality of trafficking on the ground. Moreover, little consideration seems to have been given to the State's efforts to effectively investigate the trafficking of the applicant and the ensuing risk from a return to Nigeria.

ECtHR: L.O. v France

The applicant, S, a young woman from Benin city, was lured to France with false promises of a good job as a babysitter. She had stopped her schooling very early to support her family, which was in a difficult financial situation. Her family accepted for her to go under condition that she would not work in prostitution.

The trafficker arranged her travel, obtained a passport for her and made her undergo a "juju" ritual. She travelled to France by plane. Upon arrival, the trafficker raped her and forced her into prostitution. S had to repay him 50,000 Euros for travel and accommodation costs in weekly instalments of 1,000 Euros. When she failed to raise the money, she was beaten and raped. Her family in Nigeria received threats. After some time, she managed to leave and moved in with a friend, but continued to pay her debt, fearing for her life and for that of her family in Nigeria.

In 2011, the trafficker had instructed her to file an asylum application, citing a risk of female genital mutilation and arranged marriage. In 2013, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) rejected the application. S was arrested, detained and notified that she had to leave French territory. She requested a review of her asylum application, claiming that she was a victim of human trafficking. She explained that she had been unable to reveal her ordeal in the first asylum claim due to pressure from her trafficker. OFPRA rejected her application because the claim was deemed unsubstantiated; the facts and details provided were not considered credible.

S filed an urgent complaint with the ECtHR, alleging a risk of violation of Article 3. Her removal was suspended. The ECtHR stated that "in view of the special situation in which applicants often find themselves when seeking asylum, in many cases it is appropriate to grant them the benefit of doubt when we assess the credibility of their statements and documents submitted in support of them".⁴¹² Notably, the court further observed, that the fact that the applicant lied during her first asylum application and during her hearing by the police is a constant in the accounts of victims of prostitution networks and, therefore, the court considered that this circumstance did not deprive the applicant's statements of probative force.⁴¹³

The court considered the account of her trafficking into France detailed and compatible with many

⁴¹¹ ECtHR - L.O. v France (no. 4455/14), 18 June 2015, para 27. (Google translation).

⁴¹² ECtHR - L.O. v France (no. 4455/14), 18 June 2015, para 31.

⁴¹³ Ibid. para 31.

reports from reliable sources concerning human trafficking in Nigeria.

However, the court found that there were no serious and current grounds for believing that the applicant would be exposed to real risks contrary to Article 3 in the event of a return to Nigeria. The reasoning of the court for dismissing the applicant's application included the following:

- she was exploited by a single individual. There was no indication of organised crime involvement in her case;
- she had now managed to escape from the influence of the trafficker;
- the Nigerian authorities were deemed able to offer her sufficient protection to protect against any risks and provide her assistance upon return. The court referred to the US TIP report, as well as to progress being made by the Nigerian State in protecting victims of human trafficking, prosecuting those responsible and dismantling networks.

Source: ECtHR - *L.O. v France* (no. 4455/14), 18 June 2015.

Another interesting case is presented in the text box below. It concerns an applicant who was trafficked for domestic servitude in a diplomatic household and was denied protection, despite the fact that her exploitation occurred at the hands of influential public officials from her country of origin. The determining authority and the court were rather strict in their risk assessment, and considered the applicant's testimony and documentary evidence insufficient to substantiate direct threats and a real individual risk of serious harm. The court moreover questioned why she had not filed a complaint against her traffickers nor explained what threats specifically she had been subjected to. This is indicative of the scepticism and disbelief of the authorities towards victims, even in cases in which the diplomatic immunity of the employer poses challenges for the prosecution of the crime. Reporting to police that one has been trafficked is not a legal requirement to determine refugee status or other needs for international protection. These criteria signal a restrictive, discretionary and problematic approach to the interpretation of existing obligations under human rights law and refugee law.

France: Woman trafficked for domestic servitude in a diplomatic household. Asylum denied

K, a young woman from Ivory Coast, was offered a five-year contract to work as a domestic worker for influential diplomats that were about to be posted abroad. She accepted and, with their help, got a passport and visa and moved with them to France in 2015. She worked for them for three years.

She had to clean the house, cook and care for the family and the couple's three children. She worked 15 hours per day, from 6am to 9p., seven days per week. She had no rest. She was paid 400 Euros per month in cash. Her passport was confiscated by the employer. She could only go out to shop, take the children to and from school or to the park. She was not allowed to see a doctor. At the end of August 2018, talking with a woman about her situation in a park, while watching the children, she came to realise that her situation was not appropriate. This person then contacted CCEM, which managed to establish contact with K, and helped her to escape and move to safe accommodation provided through the Ac.Sé programme in October 2018.

K was terrified of her employers, and did not want to file a complaint against them. She applied for international protection based on her fear of being exposed to a real risk of inhuman and degrading treatment by her former employers as a result of her having been trafficked. K feared that her ex-employers, being very influential in Ivory Coast, would seek revenge on her if she returned there. Indeed, in December 2018, her mother had received telephone threats from her former employer, who threatened that K would never be safe. Further, she was asked to give back the resident permit granted for her employment in the diplomatic household. She had initially kept that resident permit, but then she decided to return it to the couple because she was afraid of reprisals by them.

K's asylum application was initially considered under the accelerated procedure due to the delay in the submission (ie more than 120 days after entry into France). As a consequence, she was not entitled to benefit from reception assistance. With the support of CCEM, these measures were contested, stating that she had legitimate reasons for the delay as she had been exploited in France until then. The OFPRA agreed to examine her claim under the regular procedure, and reception assistance was granted to her.

In a decision of April 2019, OFPRA rejected her asylum application. According to the Office, the woman's account of the work done as a domestic worker for the Ivorian diplomatic couple appeared credible. However, they considered that her account of the risks she would face in case of return was not convincing. Furthermore, according to them, as her family did not receive any threats since she had returned the residence permit, there were no current risks of inhuman treatment in her country of origin. Neither her statements nor the documents presented were deemed sufficient to establish the risk of serious harm.

K appealed the decision before the National Asylum Court, but the judges upheld the initial decision and rejected the appeal. The court explained that even though she could accurately describe her work conditions, she could not give precise information about the documents she had signed to go with the family in France as a domestic worker. The court also found that she could not provide sufficient justification for not filing a complaint against her traffickers. Furthermore, regarding the threats to her and her family in Ivory Coast, the court concurred with OFPRA and found them imprecise and not realistic.

Source: CCEM, National research

In some cases, prejudice and a pervasive culture of disbelief towards victims of trafficking influence decision-makers in their assessment of their protection needs. They frequently challenge the credibility of the victim because the account of their situation and their fears is not consistent or because they change their stories from the first interview. Another critical issue concerns the individual risks of harm they would face in case of a return; the circumstances and details victims report are considered inadequate or not specific enough. Sometimes, victims are even held responsible for what happened to them and judged as underserving of protection for their life choices and experiences. The case below concerning a woman trafficked to Austria illustrates these problematic issues.

Austria: Woman trafficked for sexual exploitation, residence permit not renewed, asylum denied

JM. married a Nigerian man in her home country. After the marriage, he asked her to move to Vienna,- where he had his residence, and promised to bring her two daughters later. She accepted and travelled first to Italy and then to Austria. Upon arrival, she was told that she had to pay 60,000 Euros for her travel costs and had to work in prostitution. To regularise her stay, her husband made her apply for asylum, but since she arrived through Italy, she was subject to Dublin procedures for transfer to Italy. A few months later, she was caught by the police and placed in administrative pre-removal detention in Vienna, where an NGO providing legal counselling, Diakonie, thought that she might be a victim of trafficking and referred her to LEFÖ-IBF.

LEFÖ-IBF identified JM as a trafficked person, and advised her on lodging a report that she had been trafficked with the police, so as to halt the proceedings for her forced removal. She was formally identified as a victim of trafficking, and entered the LEFÖ-IBF support programme. She applied for a temporary residence permit as a victim of trafficking, which she received eight months later. She encountered many obstacles. In the beginning, the competent authority, BFA, questioned her identity in spite of a birth certificate and other documents provided by the Nigerian Embassy in Vienna. BFA also interviewed her with a view to clarifying her identity. Given the length of the procedure, BFA requested a second statement from the police confirming that the investigation was ongoing. The in-

investigation was halted due to insufficient evidence. The victim's lawyer submitted additional evidence and requested a continuation of the proceedings, but this request was rejected. This meant that there was no possibility to renew her residence permit.

Meanwhile, the man she had married, still living in Austria, travelled to Nigeria, visited her family and threatened them by the use of Juju because she had not paid her debt and had reported him to the police. There were videos and audios recording of his threats. In these records, he also described how she arrived in Europe. He attacked JM's reputation, telling her family that she was voluntary working in prostitution. As a result, her family rejected her and broke off contact with her. JM was very afraid of her husband, and terrified of being returned to Nigeria. She reported these events to the police, requesting further investigation. The case is pending. Meanwhile, she also applied for international protection, owing to her well-founded fear of being persecuted in case of return. She feared serious harm by the trafficker and his friends, as well as ostracism by her family due to her involvement in prostitution. Her application was rejected, and the decision was appealed before the Administrative Court.

Source: LEFÖ-IBF, National research

It is particularly interesting to consider the reasoning of the decision maker when rejecting the asylum claim of this woman. The determining authority casted doubts regarding the validity of the evidence submitted by the applicant, and questioned her credibility, despite the detailed description of her circumstances and experiences that was provided. A particularly concerning aspect is the subjectivity of the reasoning, which gets to the point of questioning the morality of the applicant and implicitly suggesting that the person does not deserve protection. Indeed, the determining authority in its decision emphasises how the applicant is of working age and has family and other relations in Nigeria that can be strengthened upon return; it then continues stating:

"As far as your return situation is considered, it is pointed out that it is also possible for you to take care of your underage daughter in Nigeria in the future. Your egoistic thinking and acting, to start a new life in Austria alone and to leave your old life behind, will not be understood. If you return to Nigeria, it is possible for you to build a new life together with your minor daughter and to fulfil your duties as a carer".

Source: LEFÖ-IBF National research (unofficial translation of the asylum decision)

The fact that the applicant is a victim of trafficking is not taken into account. No special consideration seems to be drawn concerning the vulnerability of the applicant as a victim of trafficking. Actually, it appears that the halting of the investigation into trafficking is used as a basis to doubt the individual's victimhood, and to question her credibility. The decision also fails to take into account the fact that the person was formally identified as a trafficking victim, in disregard of the fact that a victim remains a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.⁴¹⁴

With regard to the establishment of a well-founded fear of serious harm, the risk of retaliatory actions by the trafficker/s is heightened by the fact that the victim escaped without fully paying the debt contracted and further by reason of her collaboration with the authorities in the investigation of the traffickers. Besides, the trafficker knew the whereabouts of her family and threatened them. These typical circumstances experienced by victims escaping the influence of their traffickers should be duly accounted in decision making concerning the risk they face. The declaration and evidence submitted

414 UNGA,(1985), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution / adopted by the General Assembly, A/RES/40/34.

by the applicant appeared plausible and consistent with the findings in various reports on Nigeria, including EASO's country of origin information. Yet, in spite of the evidence on the situation in Nigeria and the lack of sufficient and effective state protection for victims of trafficking, the assessment of the determining authority, in this case, deemed that the evidence was insufficient. The negative decision also indicates a lack of appreciation of the risk of ostracism that may well amount to persecution. The applicant, in this case, reported rejection by her family, stigmatisation and shame by the community due to the fact that she had been sexually exploited.

Overall, these negative decisions show that asylum determining authorities often are not familiar with human trafficking, and either do not recognise indications of trafficking or do not fully appreciate the complexity of victims' situations and how their trafficking experience impacts on the risk of ill-treatment in case of return.

B.4.5. A durable solution

The recognition of refugee status or the granting of subsidiary protection enables the person's access to long-term residence and to fundamental socio-economic rights, including the right to work, education and family reunification. In other words, it provides the person with a long-term perspective of social inclusion. The table below seeks to summarise the main content of international protection in the country studies. That there a number of important practical issues that come into play in ensuring the effective implementation of these rights. However, the research gathered limited information and evidence on these aspects, so some important factors are not discussed. In some countries, the differences in entitlements between subsidiary protection and refugee status are minimum; in others, they are significant.

Table 3. Content of protection

	Austria	France	Netherlands	Spain	Serbia	Moldova
Duration of residence permit to persons granted refugee status	3 years -if no change in Col, prolonged unlimited ex-officio	10 years	5 years	5 years	5 years	5 years
Duration of residence permit to persons granted subsidiary protection	1 year, renewable by 2 years	4 years	5 years	5 years	1 year	1 year
Right to work	Yes for refugees and beneficiaries of subs. Protection	Yes, same access as nationals for refugees & beneficiaries of subs. protection	Yes, same access as nationals for refugees & beneficiaries of subs. protection	Yes, same access as nationals for refugees & beneficiaries of subs. protection	Yes For subs. protection, work permit for the duration of status	Yes
Right to family reunification	Yes, immediately for refugees. Beneficiaries of subs. protection have to wait 3 years	Yes, immediately	Yes for both refugees & beneficiaries of subs. protection	Yes, immediately	Yes	Yes
Housing	Refs. 4 months of access to basic care. For beneficiaries of subs. Protection no time limit to basic care	Up to 6 months stay in reception centre	Access to social welfare as nationals	6 months	Up to 1 year stay in reception centre	Access to social welfare

Source: AIDA ECRE, 2020, Country Reports Austria, France, The Netherlands, Serbia, Moldova

Research in some of the countries examined indicates that the determination of the international protection needs of the person may be a lengthy process, leaving the person in a precarious and uncertain situation that may last years. This is why it is very important to ensure that the person receives the support and assistance that she or he is entitled to both as an asylum applicant and as a victim of trafficking. During the determination process and afterwards, the support of NGOs remains critical to helping the person in overcoming trauma, empowering and accompanying her or him in the rehabilitation process, finding employment, accessing remedies and becoming socially included.

CONCLUSIONS

The approach to, and appreciation of, the significance of the human trafficking experience in shaping the individual risk of persecution vary significantly among courts and determining authorities in the countries studied, as does the extent to which States recognise refugee status or complementary protection for trafficked persons.

In some countries, experience in dealing with asylum claims by trafficked persons is growing together with the recognition of their international protection needs. However, there remain still many countries in which these issues have received limited consideration, thus resulting in limited recognition of international protection needs of trafficked persons. Furthermore, such recognition, when it does happen, is almost exclusively with regard to asylum seekers who have been trafficked for sexual exploitation. Restrictive approaches, lack of gender-sensitivity and shortcomings in addressing vulnerability impact adversely on the evaluation of the international protection needs of victims and persons at risk of trafficking in many countries.

In several cases, States' efforts to ascertain the risk of serious harm to the individual appear limited; risk assessment is not always systematically and thoroughly conducted. The burden of proof, rather than being shared between the applicant and the competent authorities, seems to fall too much on the victim. The trafficked asylum applicant is required to disclose, explain and substantiate the feared future risk of serious harm and to provide a detailed account of the specific circumstances that justify the unavailability and accessibility of state protection in the country of return. The individual must also provide a convincing and comprehensive account of the exploitation and violence suffered, but often also of why she or he did not escape or did not report the abuse. It cannot be emphasised strongly enough that the assessment on the merits of the asylum claim should not be linked to the willingness or ability of the victim to cooperate in criminal proceedings against the exploiter(s); nor should it be conditional upon the quality and relevance of the victim's contribution to the identification and prosecution of traffickers.⁴¹⁵

Often there is a lack of gender-sensitivity on the part of the authorities, and the vulnerability caused by the trafficking experience is neither recognised nor addressed. For example, the applicant, having been trafficked and traumatised, may be unable to act in accordance with the common expectations of the asylum process, and provides incoherent and contradictory statements. In some instances, the adjudicating authority then does not consider the trafficked asylum applicant as credible, due to the inconsistencies and vagueness in the story. In other cases, those inconsistencies and difficulties in sharing the past experience of violence and exploitation are deemed indications of trafficking and vulnerability, leading to a finding of plausibility. Indeed, late disclosure of the true circumstances of the person's experience should not automatically lead to a conclusion that the person lacks credibility. Where vulnerability is not identified nor addressed, it may adversely affect the asylum determination. It should be the duty of the State to set the conditions for a victim's vulnerability to be addressed, and to provide an enabling, safe and confidential environment to foster the disclosure of the trafficking experience and the feared persecution. This is important also to prevent re-victimisation of the person at the hands of the State.

A gender-sensitive approach requires also recognising how men and women are affected by trafficking, as well as the specificities and differences of their experience in claiming protection as victims and asylum seekers. The overwhelming majority of cases in which international protection is granted to trafficked persons concerns women and girls who had been trafficked for sexual exploitation. The international protection needs of men and boys and persons with diverse gender identities, who are

⁴¹⁵ CoE GRETA (2020)06, para. 38.

also trafficked for sexual and other forms of exploitation, seem to be neglected. A gender-sensitive approach should inform consideration of asylum claims by people who have been trafficked for any form of exploitation.

Trafficked persons are too often denied the protection to which they are entitled. All too often, victims are detained and removed, even after lodging a complaint about trafficking and an asylum application. Protection may be denied because of a prevailing immigration control approach that fails to recognise victims, to investigate their trafficking and protect their rights effectively. Protection may also be denied due to a lack of understanding of how the trafficking experience may inform their asylum claims.

Trafficked persons are often denied international protection because of restrictive interpretations of the already rigorous criteria of the refugee definition. Trafficked persons may be left with the only option of returning to their traffickers, hoping to avoid retaliation against their loved ones and to be able with time to repay their debt.

It is crucial to recognise and give effect to the legitimate needs of trafficked persons, both in terms of protection as victims of crime and of international protection. They are not alternative to each other nor mutually exclusive. Each case needs to be assessed on its merits to establish the specific protection needs of the individual. Referral to the system of protection for trafficking does not preclude the possibility of seeking asylum; nor should being an asylum seeker preclude access to support and justice as a victim of trafficking.

There is still a long way to go to achieve consistent application in good faith of international and European refugee law and human rights law relevant to the situation and needs of trafficked persons seeking asylum. The implementation of the right to seek asylum and protection from refoulement needs to be strengthened. The recognition of refugee status or the granting of another form of complementary protection, such as subsidiary protection, provides the trafficked person with a durable solution and a long-term perspective of social inclusion. More targeted and systematic efforts are necessary to enable effective access of trafficked persons to international protection.

Each case needs to be examined on its own merits. Each victim's story is unique. Victims' stories need to be heard; the widespread culture of disbelief needs to be overcome, and States must devise distinct and individually tailored responses to the needs of victims, not just in the short-term but in the longer term, including international protection.

Annex I REST – Summary of Focus Group Outcomes

The meeting of the focus group took place online on 23-24 November 2020. The objective of the project was to produce a coherent response to bottlenecks and gaps in access to long-term protection for trafficked persons, in particular by assessing access to residence permits for trafficked persons, and the granting of international protection to trafficked persons and persons at risk of being trafficked. It was intended that the results of the study would enhance access to long-term residence for persons trafficked abroad, as well as durable solutions through access to international protection in appropriate cases.

NGOs from six countries took part: LEFO-IBF (Austria), ASTRA (Serbia), CCEM (France), CoMensha (Netherlands), La Strada (Moldova) and Proyecto Esperanza (Spain).

The legal framework under European law (EU and Council of Europe instruments) was set out.

The starting point was that there is a contradiction between the protection of the rights of trafficked persons, on the one hand, and the operation of the systems of residence permits and international protection, on the other.

Common challenges were identified at the practical level, as well as promising practices. A model for best practice regarding residence permits was proposed: it should be granted either for cooperation with the law enforcement authorities or because of the individual's personal situation, subject to renewal, and there should be a right of appeal in the event of refusal to grant the permit.

Procedural safeguards in the six countries were listed, and problems in the protection of the rights of vulnerable and trafficked persons identified. The Dublin III Regulation was highlighted as an instrument that States used to justify removing trafficked persons, even though this could put their safety at risk, including through exposing them to being re-trafficked.

Access to international protection for trafficked persons, as well as those at risk of being trafficked, was considered.

The conclusions reached were:

- There was a limited number of recognitions of international protection
- Risk assessment was not carried out systematically
- An overly onerous burden of proof was placed on the individual
- The treatment of those affected was insufficiently gender-sensitive
- The processing of claims to international protection took too long
- It was crucial that those affected receive appropriate support throughout the period that they were in the process of applying for a residence permit or international protection
- There needed to be more consistent and coherent application of all protection regimes.

Many recommendations were made.

Four break-out sessions were held during the meeting, on:

- One: International protection for trafficked persons: determination process, procedural safeguards
- Two: International protection for trafficked persons: identification, referral and protection
- Three: Residence permits for trafficked persons: access and unconditional protection
- Four: Dublin Regulation: relocation and return of trafficked persons.

The following conclusions were reached.

Group 1

- Vulnerability assessment should not only be related to the country of origin, but to any country to which it is proposed to remove the individual
- Importance of a multi-agency approach for the assessment of vulnerability
- Particularly highlighted: risk assessment should take into account the situation of the family (e.g. pressure/threats by traffickers), situation of debt, risk of re-trafficking
- COVID-19 impact: measures affecting access to shelters; additional obstacle to access services and assistance
- Impact of systematic training should be monitored: monitoring on the
- implementation of training and relating the outcome to advocacy activities

Group 2

- Multi-disciplinary teams are required for identification of victims of trafficking
- Monitoring and data collection of registration of persons who show indicators of trafficking in human beings
- Cooperation of asylum actors with NGOs working on trafficking in human beings: needs assessment, risk assessment
- Compatibility of residence permit and asylum claims: important that both paths be pursued in parallel
- Special reception centres for vulnerable groups

Promising practice

Trainings of asylum officers in Italy: attention on provision of information to trafficked persons/persons at risk. When a person is detected, they are provided with information; there are multilingual leaflets

Group 3

- Common and agreed indicators between all agencies involved in the anti-trafficking field for the identification of victims of trafficking: helps to establish a level of trust
- Shift the burden from the police: access to residence permits decided by a different entity
- Broaden the concept of "victim": the outcome of the criminal proceeding, as well as under which provision or law a complaint is filed should not be the victims' responsibility
- Conflicting provisions: Article 12 (unconditional assistance) and Article 14 (residence permit for cooperation) of the CoE Convention: without access to residence permit, unconditional assistance cannot be offered
- Reduce bureaucracy for the victims, especially related to obtaining identity documents

Promising practice I

In France, focal points in all provinces are established at the administrative authorities responsible for determining residence permit procedures.

Promising practice II

In Spain, a provisional identity document can be provided by the government for the first identification, to allow victims more time to obtain their identity documents; this enables the start of the process of

identification and victim's access to support.

Group 4

- Develop and monitor compliance with guidelines, ensuring coherence with the asylum system and the NRM
- Importance of recovery and reflection period, particularly in detention centres
- Dublin screening must entail further assessment of risk and vulnerability
- More cooperation between agencies applying the Dublin III regime and NGOs working with victims of trafficking: clear coordination by these agencies in case of return of victims of trafficking, exact location of place of relocation, follow up on adequate reception of victims of trafficking
- Periodic data collection of victims of trafficking relocated under Dublin III Regulation

Promising practice I

In Switzerland, when the crime scene was in Switzerland, trafficked persons receive assistance to obtain support and access to residence permits.

Promising practice II

Gather information and contacts of Dublin units (in national institutions) and urge them to obtain systematic information on the reception conditions for victims in the country of return.

The next steps to be taken are the publication of the report, the policy paper and a guide to promising practices, then training of national stakeholders.

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