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THE SPACE OF TRAFFICKING-RELATED-VULNERABILITY IN THE EUROPEAN LEGAL ORDER

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Introduction

Vulnerability constitutes a concept widely deployed in moral[1] and social sciences[2] to describe the proneness of individuals and social groups to be harmed in their subsistence, safety and human rights. Differently than traditional "objective" accounts of societal risk, vulnerability is understood to constitute a "subjective", human-mediated variable, which addresses the condition of particular hardship of certain strands of society in anticipating, opposing and/or coping with the consequences of a external threat.[3] The detection of- and response to vulnerabilities, thus, represent crucial components of a public policy response to structural disadvantage and injustice.

The following thesis aims to investigate the role of vulnerability as a legal concept involved in the definition and policing of trafficking in human beings (THB). THB and connected practices of severe exploitation are addressed internationally as critical threats to individuals' interests of relational autonomy and human security. In legal terms, THB is defined as "both a cause and a consequence of the violation of human rights".[4]

The international legal discipline of THB is characterized by multiple references to the language of vulnerability:[5] first of all, a victim's "position of vulnerability" and its "abuse" are considered central characters[6] of the mechanism of domination which lies at then basis of THB as a crime and as a severe human rights violation. "Abuse of a position of vulnerability", in this regard, constitutes a requisite element of the international definition of THB, enshrined in the additional UN trafficking Protocol to the Convention against Transnational Organised Crime (henceforth "Palermo Protocol").[7] Vulnerability, thus, plays a crucial role in the determination of the wrongness of THB as a crime of

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[1] R.E. Goodin, *Protecting the vulnerable. A Reanalysis of Our Social Responsibilities*, (Chicago: The University of Chicago Press, 1985). Catriona Mackenzie, Wendy Rogers, Susan Dodds, *Vulnerability. New Essays in Ethics and Feminist Philosophy,* (Oxford: Oxford University Press, 2014). Martha Albertson Fineman, "The Vulnerable Subject. Anchoring Equality in the Human Condition", *Yale Journal of Law and Feminism* 20 (2008): 1-23.

[2] Estelle Ferrarese, "Les vulnérables et le géomètre", *Raison Publique* 14 pp (2011): 17-37; Michael J. Watts and Hans G. Bohle, "The space of vulnerability: the causal structure of hunger and famine", *Progress in Human Geography* 17 (1994): 43-67.

[3] Robert Chambers, "Editorial Introduction. Vulnerability, Coping and Policy", *IDS Bulletin* 20, no. 2 (1988): 1-7. International Organisation for Migration, "IOM guidance on response planning for migrants vulnerable to violence, exploitation and abuse", 2009, https://www.iom.org. Jonathan Herring, *Vulnerable Adults and the Law,* (Oxford: Oxford University Press, 2016), 25.

[4] Conny Rijken, "The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings", Connecticut Journal of International Law 25, no. 49, (2009): 52.

[5] See in general terms, Shahrzad Fouladvand and Tony Ward, "Human Trafficking, Vulnerability and the State", *The Journal of Criminal Law* 83, no. 1 (2019), 39-54; Emilio Santoro 2021.

[6] Working Group on Trafficking in Persons, Vienna, 16-18 November 2015, "Key concepts of the Trafficking in Persons Protocol, with a focus on the United Nations Office on Drugs and Crime issue papers on abuse of a position of vulnerability, consent and exploitation", CTOC/COP/WG.4/2015/4, §9.

[7] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319.

international concern and in the delimitation of States' duties of multinational cooperation in the fight against it.[8]

While the expected international response to THB was addressed in the Palermo Protocol as predominantly criminal-justice-oriented, the broader adverse societal effects of the phenomenon were expressly considered, too. Specifically, States were required to target the root causes of societal disadvantage which enable THB through the development of policies of prevention.[9] THB in this sense is addressed as a threat to human security which can be contrasted through "addressing vulnerability".[10] The Palermo Protocol specifically qualifies "women and children" as categories which are particularly vulnerable to THB, which shall be made the object of targeted protection efforts.[11]

Finally, THB is understood under human rights law as a severe form of injustice, which is suitable to call into place the responsibility of the State as the guardian of fundamental democratic liberties. Trafficked persons, in this sense, are the victims of a form of private domination, which exacerbates their hardship in enjoying human rights.[12] The legal status of trafficking victims is thus characterised by a critical component of human rights ineffectiveness, the undoing of which requires the development of targeted and proactive responses on the side of States.[13] Trafficking survivors, in this regard, are addressed as "vulnerable victims" who hold "special protection needs".[14]

Vulnerability, thus, describes a continuum of adverse experiences which are connected with the phenomenon of THB and which mobilise a plurality of State duties. This spectrum of iusgenerative facts will be henceforth called "trafficking-related-vulnerability" (TRV).[15] The present thesis will try to address the relevant junctures among the different dimensions of TRV, with the aim of clarifying

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[8] Anne T. Gallagher, Marika McAdam, "Abuse of a position of vulnerability within the definition of traffiking persons", in *Routledge Handbook of Human Trafficking,* Eds. Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl, (London: Routledge, 2018), 185-197.

[9] See e.g. art. 9 of the Palermo Protocol.

[10] Office of High Commissioner for Human Rights, UN Recommended Principles and Guidelines on Human Rights and Human Trafficking. A Commentary, 2010, 105, in www.un.org. See also F. N. Yousaf, Forced migration, human trafficking, and human security, in *Current Sociology*, (2017): 1-17.

[11] See, in critical terms, G. Noll, "The Insecurity of Trafficking in International Law", in *Mondialisation, migration et droits de l'homme: le droit international en question*, Eds. V. Chetail, M. Carlos-Tschopp (Bruxelles: Bruylant, 2007), 343-362.

[12] UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 6.

[13] V. Waisman, Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard, *Hastings Journal of International Law,* Vol. 33, n. 2, 2010, 385-429.

[14] United Nations Office on Drugs and Crime, An Introduction to Human Trafficking: Vulnerability, Impact and Action, 68, in https://un.org. M. Y. Mattar, "Incorporating the five basic elements of a model anti-trafficking in persons legislation in domestic laws: from the United Nations Protocol to the European Convention", Tulane Journal of International and Comparative Law, vol. 14, No. 2 (2005), 385-7.

[15] See for a first use of the concept, A. T. Gallagher, *The International Law of Human Trafficking,* Oxford University Press, 2010, 419.

the content, definitional role and normative effects of the concept of vulnerability in shaping States' response against THB.

The following thesis will focus on Europe as a regional legal order of anti-trafficking. Here, TRV occupies a particularly pivotal role: as a concept capable of capturing the different layers of disadvantage and need which describe the injustice of human trafficking processes, vulnerability is crucially involved in the implementation of European States' *comprehensive* and *integrated* response to THB. These general objectives of anti-trafficking governance were originally affirmed in the Palermo Protocol: a "comprehensive" approach against THB, on the one hand, is understood to entail the development of strategies of contrast which are multi-national and which take into account the different aims of trafficking prevention, victim protection and prosecution of traffickers.[16]

The idea of a comprehensive response to THB has been strongly developed in Europe through the action of the regional organisations of the European Union and of the Council of Europe: the regional contrast to THB is thus at the center of a particularly penetrant form of multinational cooperation, based on the elaboration of periodically updated general strategies and the action of ad hoc supervisory bodies. The need to jointly address vulnerabilities within the said comprehensive response is expressly considered in regional policy documents against THB.[17] Moreover, the EU and the CoE have crucially contributed to an evolution of the international legal response against THB through the adoption of a series of binding legal instruments, which promote a regional response to THB which is based on the harmonization of domestic anti-trafficking legislations, through the development of interstate cooperation in the monitoring, prevention and prosecution of THB; and through the attribution of special protection guarantees to trafficked persons.[18]

The progressive insitutionalisation of the European legal order against THB, in turn, has enabled a notable development of the so-called "*integrated* response" to the phenomenon: under this principle, States are required to ensure that the human rights of individuals are always protected in the

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[16] See most notably the Preamble of the Palermo Protocol: "*The States Parties to this Protocol, Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights, Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons, Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected*"

[17] European Commission, Directorate-General Justice, Freedom and Security, "Report of the Experts Group on Trafficking in Human Beings", Brussels, 22 December 2004, available at https://www.eur-lex.europa.eu, 62-63. Organization for Security and Co-operation in Europe Permanent Council, *Decision No. 557 OSCE Action Plan to Combat Trafficking in Human Beings,* PC.DEC/557, 24 July 2003, available at https://www.osce.org, paras. 1.2, 4.7, 7.3, 13.1.

[18] Paulette Lloyd and Beth Simmons, "Framing for a New Transnational Legal Order. The Case of Human Trafficking", in *Transnational Legal orders,* Eds. Terence C. Halliday and Gregory Shaffer, (Cambridge: Cambridge University Press, 2015), 407-408.

implementation of the said comprehensive anti-trafficking strategies. National and regional efforts shall thus be questioned in their suitability to ensure an adequate protection to trafficking survivors; the risk of interferences between the aims of anti-trafficking policies and individuals' interests of human rights protection, moreover, shall be at the centre of multilevel processes of adjudication. The European legal order in this regard constitutes an *unicum* in the global response against THB, in light of the strong integration between a harmonized legal framework of anti-trafficking guarantees and the binding jurisprudence of regional courts.

This said, the implementation of a human rights-based approach against THB in the European legal order can be considered as an ongoing process: trafficking in human beings, in this regard, has just recently been recognised as entailing a violation of the right to be free from slavery, servitude and forced and compulsory labour, enshrined in art. 4 ECHR. The need to develop an effective State response against the human rights threats descending from THB, moreover, has been understood to ground a series of *positive* human rights obligations. States, in this regard, can be said to have violated the right of individuals to be free from trafficking not only when they are directly involved in the practice of THB, but also when their policies and the action of their agents fail to adequately protect the human rights of individuals, leaving them prone to a trafficking risk or to ongoing victimisation. The abovementioned legal duties of prevention of trafficking, prosecution of traffickers and protection of victims, specifically, have been declined in the jurisprudence of the European Court of Human Rights as integral components of States' due diligence in the management of trafficking-related-risks. This system of anti-trafficking obligations has been developed in several instances through the adjudication of the concept of vulnerability as an innovative element of a working theory of substantive justice and human rights effectiveness.[19]

Describing the space of TRV in Europe thus requires a juxtaposition of different legal conceptions of THB as a transnational crime, as a human rights offence and as the source of a special victim status. The analysis provided in this thesis will focus mainly on international and regional legal sources, taking into account not only binding legal texts but also a number of soft law documents which can be considered essential in reconstructing the progressive affirmation of TRV as an international legal concept.

[19] See for a general reconstruction of the role of vulnerability in the ECtHR jurisprudence, Lourdes Peroni and Alexandra Timmer, "Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law, *International Journal of Constitutional Law* 11: no. 4 (2013), 1056-1085. In critical terms, S. Besson, "La vulnérabilité et la structure des droits de l'homme. L'exemple de la jurisprudence de la Cour Européenne des droits de l'homme", in *La Vulnérabilité saisie par les juges en Europe,* Ed. Laurence Burgorgue-Larsen (Paris: Editions Pedone, 2014), 59-85.

The different chapters of the thesis constitute the product of an effort of legal interpretation which aims to be transdisciplinary and multi-level in addressing the European anti-trafficking legal order as a developing system of vulnerability-informed duties. While the methodological perspective adopted in the thesis aims to be 'internal' to the language of EU and CoE law, the reconstruction of the normative content and effects of TRV provided therein is based on a coordination of various legal and extra-legal sources. The recent reception of the language of vulnerability in anti-trafficking law is thus analysed in a law-in-context perspective, having regard to the longstanding elaborations of the concept which have been developed, among others, in the fields of victimology, human security and public ethics.

Chapter 1. The victim's position of vulnerability as an object of abuse in the international definition of trafficking in human beings

1. The multi-level system of anti-trafficking in Europe

Art. 3 of the Additional Protocol on trafficking in human beings (Palermo Protocol) to the United Nations Convention on Transnational Organised Crime (UNCTOC) defines trafficking in persons as:

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

This international norm lies at the centre of the global regulation of a social phenomenon (trafficking in human beings) which is currently the object of a complex intersection of legal disciplines.[20] The present chapter will investigate the trafficking definition under its *criminal legal effects*, i.e., the framing of a transnational crime, the affirmation of international obligations of criminalization, investigation, cooperation in criminal matters, the legal representation of particular figures of perpetrators (traffickers) and victims (trafficked persons).

The following analysis will specifically focus on the state of the art of the criminalisation of trafficking in the European legal space; it will delve into the specificities of human trafficking as an international criminal offence, without investigating the particular domestic experiences of reception and implementation of the international definition. Differently, this chapter will focus on the normative effects that project from the international level on domestic legal orders' functions of criminalisation of THB, investigation of trafficking cases and "regulatory" protection of trafficking victims.

For what concerns the European legal space, the process of international criminalisation of THB is notably influenced by the approach to anti-trafficking contrast developed by regional legal sources. The following chapters will focus mainly on the provisions of the Council of Europe Convention on Action Against Trafficking in Human Beings (henceforth European Convention Against Trafficking,

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[20] See A. Edwards, *Trafficking in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour,* Denver Journal of International Law and Policy 36, no. 1, (2008), 9-53.

ECAT) and of the Directive 2011/36 of the European Parliament and of the Council on preventing and combating trafficking in human beings and on protecting its victims (henceforth EU Anti-Trafficking Directive, EUATD). Both legal instruments replicate, with some minor additions, the definition of art. 3 of the Palermo Protocol, which is now further incorporated in the legal frameworks of all EU and CoE Member States.[21]

This said, a preliminary distinction is due to explain the different roles that the criminalisation of trafficking plays in the three international instruments, in order to better understand the challenges brought by their parallel interpretation in the European legal order.

1.1. The criminalisation of trafficking in human beings in the Palermo Protocol

The introduction of a "contemporary" definition of trafficking in human beings in the Palermo Protocol represented an unprecedented cooperative effort of the international community in finding a common ground for the contrast of forms of crime that had emerged as particularly flourishing in the wake of economic globalisation, as a consequence of the increased international mobility of people that characterized the post-cold war era.[22] Both the UNCTOC and its additional protocols, in this sense, promoted an approach which was aimed at criminalizing and prosecuting global illegal markets which were understood to be characterised by a strong involvement of organised crime.[23] THB, therefore, was addressed in the Palermo Protocol as an eminently transnational offence, suitable to dangerously undermine international and human security.[24] Besides the obligation to criminalize human trafficking, the Protocol specifically introduced new international duties of investigation and prosecution of trafficking cases across borders; the obligation on States to impose effective and proportionate sanctions, to seize and confiscate the proceeds of trafficking; to cooperate in the extradition (*aut dedere aut iudicare*) of traffickers and in the provision of mutual legal assistance; the obligation to address the demand of trafficking, especially through the prevention of the corruption of public officials.[25] Just few and notably vague provisions of the Protocol require States Parties to

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[21] For comparative studies of selected European Countries, see D. B. Jansson, *Modern Slavery. A Comparative Study of the Definition of Trafficking in Persons,* Brill, 2015; see also the insightful monitoring of CoE Member States' legislation and practice in the field of Anti-Trafficking in the Country monitoring (coe.int) of GRETA's website.

[22] See P. Lloyd – B. Simmons, *Framing*, 400.

[23] see D. McClean, *Transnational Organized Crime. A Commentary of the UN Convention and Its Protocols,* OUP, 2007. A. Aronowitz, *The Human Trafficking – Organized Crime Nexus,* In *Routledge Handbookn of Transnational Orgnanized Crime,* 217 ss.

[24] *Ibidem;* see also B. Simmons – P. Lloyd – B.M. Stewart, *The Global Diffusion of Law: Transnational Crime and the Case of Human Trafficking,* in *International Organization,* 2018, 1-33: the authors highlight the prominent role of this originary framing of trafficking as first and foremost a problem of transnational security in favouring the subsequent fast and widespread process of national reception of the criminal definition and harmonizarion of domestic national laws at the global level.

[25] See. A. T. Gallagher, *The International Law of Human Trafficking,* Cambridge, 2010, 370.

ensure the protection of the human rights of victims and their subsequent assistance and recovery;[26] the main focus of the international instrument arguably consisted in the inauguration of a response to trafficking conceived as eminently criminal, prosecutorial, and in the solving of some of the main problematic issues that are connected with the objective of international cooperation in criminal matters.

1.2. The CoE Convention on the Fight Against Trafficking in Human Beings

The European Anti-Trafficking Convention was the first regional instrument at the European level to incorporate the "modern" international framework on Anti-Trafficking inaugurated with the Palermo Protocol. Its definition of the offence of THB (art. 4),[27] coincides with the one provided at art. 3 of the Palermo Protocol. The ECAT, on the other side, explicitly targets human trafficking as both an internal and a transnational criminal phenomenon.[28] Instead of focusing on the transboundary element of the crime, therefore, the Convention addresses *any* form of human trafficking as an offence which endangers the core of the founding rights and freedoms of the Council of Europe. State duties of contrast of are thus integrated in a human-rights based "regulatory" response to THB,[29] and their implementation is monitored by the Committee of the Parties and by a international group of experts (GRETA).[30]

Under the ECAT, the cited international obligations of criminalisation, prosecution and cooperation in criminal matters are sidelined with a number of binding survivor-centred duties,[31] aimed at favouring the identification of trafficked persons and the effective protection of their human rights

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[26] See A. T. Gallagher, *Human Rights and Human Trafficking,* in A. Nollkaemper – I. Plakokefalos – G. Schechinger, *The Practice of Shared Responsibility in International Law,* Cambridge University Press, 2017, 563.

[27] ECAT, art. 4.1 (a): "*"Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*".

[28] The regional treaty is applicable to 'all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime; this element of relevance of internal trafficking in the CoE Convention has arguably no influence on the qualification of the international definition as a norm of transnational criminal law: as acutely observed in N. Boister, *Further Reflections on the Concept of Transnational Criminal Law,* in *Transnational Legal Theory,* 6:1, 2015, p. 12.

[29] A. T. Gallagher, *Recent Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments,* in *European Journal of Migration and Law,* n. 8, 2006, 163. See also H. Sax, Art. 4. Definitions, in H. Sax – J. Planitzer, *A Commentary on the Council of Europe Convention on Action Against Trafficking in Human Beings,* Elgar, 2020, 68.

[30] See J. Planitzer, *Greta's First Years of Work. Review of the Monitoring of Implementation of the Council of Europe Convention on Action Against Trafficking in Human Beings,* in *Anti-Trafficking Review,* 2012 (1), 31.

[31] The Explanatory Report to the Convention clarifies this aspect, identifying the instrument's regulatory objective in the striking of '*a proper balance between matters concerning human rights and prosecution'*. See also Stoyanova , *Human Trafficking*, p. 27.

to security, recovery, access to justice and reintegration.[32]As it will be later observed, the Council of Europe's perspective on THB has been further enriched by the recent case law of the European Court of Human Rights (ECtHR), which, while not holding any interpretative jurisdiction on the text of the ECAT, has significantly built its jurisprudence on human rights effectiveness from the standards of protection enshrined in the said Convention. Specifically, the Strasbourg Court first has included THB among the forms of violation of the right to be free from slavery, servitude, and forced labour (art. 4 European Convention of Human Rights);[33] and has further derived from that right a number of positive State obligations, which are triggered by facts of THB (or the risk thereof) as described un the cited international definition.

1.3. The EU Anti-Trafficking Directive

The international definition of THB has been then reproduced in art. 2 of the EU Anti-Trafficking Directive.[34] While largely relying on the same language of the Palermo Protocol and of the ECAT, the EUATD has contributed to promote an extension of the definition of trafficking for what concerns the element of "exploitation", expressly including the practices of "forced begging" and "exploitation of criminal activities",[35] "forced marriage" and "illegal adoption"[36] among the typical purposes of THB.[37]

In the EU legal framework, trafficking in human beings is included in the list of the so-called "euro-crimes" (art. 83 TFEU), which identify 'particularly serious crimes with a cross-border dimension'. The European Union holds a special competence in the determination of some key elements of the the criminalization of such offences ("minimum rules concerning the definition of criminal offences and sanction"), which are made the object of community-wide duties of harmonization of domestic

[32] This mixture of operative rationales is deemed inevitable by those authors who focus on the "modern", multidisciplinary character of international repression treaties: see e.g. A. di Martino, *Sfruttamento del lavoro. Il valore del contesto nella definizione del reato,* Il Mulino, 2020, p. 187; see also L. Farmer, *Trafficking, the Anti-Slavery Project and the Making of Modern Criminal Law,* in R. Haverkamp -E. Herlin Karnell - C. Lernestedt, *What is Wrong with Human Trafficking? Critical Perspectives on the Law,* Hart, 2019, 26. This synergy between humanitarian and prosecutorial rationales has not rarely been criticised as "paradoxical" in legal literature: see e.g. F. Tulkens, *The Paradoxical Relationship Between Criminal Law and Human Rights,* in *Journal of International Criminal Justice,* 9, 2011, 577; as it will be clarified in the following pages, this syncretism of disciplinary perspectives on the same cannot be reasonably avoided in the framing of a crime, such as human trafficking, where a major part of the "moral weighlifting" of the offence is bore by the victimological position of the traffickee, whose socio-legal condition inevitably falls under a broader regulatory spotlight.

[33] See Stoyanova, *Human Trafficking*, 322.

[34] EUATD, art. 2(1): Member States shall take the necessary measures to ensure that the following intentional acts are punishable: The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

[35] EUATD, art. 2(3).

[36] EUATD, Recital 11.

[37] See e.g. E. Symeonidou-Kastanidou, Directive 2011/36/EU on Combating Trafficking in Human Beings. Fundamental Choices and Problems of Implementation, in *New Journal of European Criminal Law,* Vol. 7, Issue 4, 467-468.

legislations.[38] Differently from the other international anti-trafficking instruments, moreover, the EUATD is officially interpreted by a regional judicial body (the Court of Justice of the European Union). The EU anti-trafficking legal framework, therefore, can be considered a "reinforced" system of cooperation in criminal matters, inscribed in the highly integrated criminal justice sector of the EU Area of Freedom, Security and Justice.[39] On the same, the EUATD promotes a human-rights based focus[40] and a level of victim-centred guarantees comparable to the one displayed in the CoE Convention.[41] Moreover, the legal status of victims of trafficking is regulated in depth under EU law, through the combination of the special norms of the Anti-Trafficking Directive with the legal framework of the EU Victims of Crime Directive.[42]

The following analysis of the content and scope of the international definition of trafficking in human beings in Europe will take the CoE Anti-Trafficking Convention as the main legal framework of reference. The ECAT provides a baseline of rules valid for all European states and its definition of trafficking in human beings represents an express implementation of art. 2 of the Palermo Protocol, to which this thesis will frequently refer as an originary source of interpretation. The further analysis will then specify the additional legal effects on EU Member States, for what concerns the process of criminalisation of THB, which descend from the EU Anti-Trafficking Directive.

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[38] See Stoyanova , *Human Trafficking*, 30.

[39] See V. Mitsilegas, *The transformation of criminal law in the Area of freedom, security and justice*, in Yearbook of European Law, 2007, 1. For a post-Lisbon perspective, see A. Klip, *European Criminal Law,* 3rd Edition, Intersentia, 2016, 21.

[40] Recital 7 of the Preamble clarifies the EUATD's "*integrated, holistic and human rights based approach to the fight against trafficking in human beings*".

[41] See S. H. Krieg, *Trafficking in Human Beings: The Eu Approach Between Border Control, Law Enforcement and Human Rights,* in European Law Journal, 15:6, 2009, 775. Vladislava Stoyanova has however clarified that this convergence of regulatory perspectives does not always practically ensure an homogeneity of protection of trafficking victim's rights under the differentiated jurisdictions of the CoE Convention and the EU Directive: see Stoyanova *, Human Trafficking*, 435.

[42] See *Infra,* Chapter 2.

2. Preliminary observations: the nature and structure of the international definition of trafficking in human beings

2.1. Nature

As already mentioned, the aim of the present chapter is to analyse the content and scope of the offence of trafficking in human beings as the object of an international duty of criminalization.[43] This kind of duty constitutes the expression of transnational criminal law as a multi-level model of legality, which redefines the ordinary rules governing criminalization, a legal process which generally falls under the exclusive power of States.[44] While international norms of criminalisation do not entirely invade States' monopoly over the exercise of the criminal function,[45] on the same, they contain a series of binding indications to domestic legislators, which descend from States' prior adhesion to international agreements of cooperation in criminal matters.

These processes of criminalisation, thus, necessarily give rise to a "*double layered structure of domestic criminal offences and international offences*",[46] where an offence defined at the international level finds its ultimate source of contrast in domestic criminal law, and is concretely prosecuted by national criminal justice authorities. While some aspects of the relationship between international and domestic norms of criminalisation are clearly defined in legal texts (the binding provisions of transnational criminal treaties, national rules of reception of international norms, national principles of criminal legality), a high level of ambiguity nonetheless residuates for what concerns the nature, function and limits of international criminal definitions.[47] On the one hand, these norms are not connected with the direct exercise of criminal justice powers, and they are subjected to the rules of interpretation of the international law of the treaties, they are thus certainly not *criminal* in nature. On the other hand, international definitions play an evident role in orienting national processes of criminalisation, and thus arguably incamerate certain elements of the *legality* of the derivative domestic criminal offences.

All the cited international legal instruments, for instance, describe the offence of trafficking in human beings as characterized by a combination of three distinct requisite elements: *acts* ("recruitment, transportation, transfer, harbouring or receipt of the person"), *means* ("threat of use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or of a position of

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[43] See Stoyanova, *Human Trafficking,* 75.
[44] N. Boister, *An Introduction to Transnational Criminal Law,* OUP, 2012, 11.
[45] See N. Boister, *The Concept and Nature of Transnational Criminal Law,* in *Id., Routledge Handbook of Transnational Criminal Law,* Routledge, 2014, 15.
[46] See A. Weatherburn, *Labour Exploitation in human trafficking law,* Intersentia, 2021, 8.
[47] See A. di Martino, *Interlegality and Criminal Law,* in G. Palombella - J. Klabbers, *The Challenge of Inter-legality,* Cambridge University Press, 2019, 259-266.

vulnerability or of the giving or receiving of payments to achieve the consent of a person having control over another person"); and *purposes* ("for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs").[48] This tripartite structure of the offence represents a key definitional feature of THB emerging from the international norm of criminalisation: its importance can be drawn *a contrario* from the express derogation to the said combination of acts, means and purposes which is made, in both international and European law, in the case where the victim of the offence is a child. In this case, a mere combination of acts and purposes is deemed sufficient to constitute THB – thus presupposing that in all the other cases the presence of a distinct trafficking *means* represents a key feature of the offence, to be maintained in national criminal norms.[49] The international norms of criminalisation, moreover, specify that, in the case of trafficking in adults, the element of the victim's consent shall be considered in any case as irrelevant for the perpetration of THB, "where any of the means set forth in [the international definition] have been used.[50]

The cited definitional features of the international norms of criminalisation play a critical role in discerning what "trafficking in human beings" shall mean in international legal terms. This notwithstanding, the autonomous character and the expected guiding effects of the international definition of THB remain nowadays very contested, especially for what concerns those instruments, such as the Palermo Protocol and the CoE Convention, where no express indication has been made of the elements of the definition which must be maintained through the process of domestic reception of the international norm of criminalisation.[51] The *vertical dimension*[52] of transnational criminal law, in other words, is largely undefined: should international offences be seen as "doppelgangers" of national criminal offences, aimed primarily at ensuring the respect of the domestic criminal legal principles of precision, determinacy, personal responsibility, proportionality and fair labelling? Or, on the contrary, do they express a mere international agreement to criminalize a harmful transnational phenomenon, the description of which in domestic criminal offences is to be understood as necessarily variable and inherently discretionary?

[48] A. T. Gallagher, *The International Law,* 25.
[49] Palermo Protocol, art. 3(c) and ECAT, art. 4(3); see, in substantially identical terms, EUATD, art. 2(5).
[50] See *Infra,* 2.4.
[51] This vertical relationship of transnational criminal norms is arguably quite different in the legal framework of the EU trafficking directive, where the process of reception is clearly regulated in its necessary conditions: see Stoyanova , *Human Trafficking*, 79.
[52] See N. Boister, *Further Reflections on the Concept of Transnational Criminal Law,* in Transnational Legal Theory, 1, 2015, 19.

Each of these two opposite perspectives arguably carries the risk mystifying the aims of transnational criminal lawmaking. On one hand, it looks clear that the repressive objective at the basis of international duties of criminalisation assimilates international offences with national criminal norms in the objective of delimiting the subject elements of a crime and of explicating its wrongness. The definitions of crime enshrined in international treaties are often addressed in legal doctrine and in the work of international organisations as "templates"[53], "model offences",[54] "schemes of illicitness".[55] The role of international norms of criminalisation cannot arguably be limited to the issuing of a loose sum of normative inputs to the domestic criminal legislator: on the contrary, international offences shall be able to address and describe a human practice as a *crime* through the enumeration of a chain of subjective and objective elements, connected through cause-effect relationships. A purely "positivistic" interpretation of international norms of criminalisation would arguably deprive transnational criminal instruments of one of their essential aims, i.e., the expression of an internationally-shared criminal *typicity*, which in turn represents a necessary condition for the cooperative contrast of transnational crime and for a sufficient harmonization of criminal legislations.[56]

On the other hand, treating transnational criminal norms as "doppelgangers" of national offences would misunderstand what international criminalisation efforts are about, i.e., expressions of a multi-lateral *consensus* about the opportunity of jointly contrasting societal problems that affect international security.[57] International criminal definitions embrace a certain level of terminological vagueness and elasticity as a default strategy[58] for conciliating opposite national conceptions of the common good and differentiated models of criminal law-making.[59] Differently from national criminal

[53] See e.g. R. M. Jaleel, *The Wages of Human Trafficking,* Brooklyn Law Review, Vol. 81, 2, 2016, 574.
[54] This orienting function of transnational criminal law is particularly evident in the field of human trafficking, and is generally governed by the action of international and regional organisations: notable examples in this field can be found in non binding acts of guidance such as the international Model Law of Trafficking produced by UNODC in 2005, which reproduces the elements of the international definition adapting it to variable conditions of domestic criminal lawmaking; in the CoE legal framework, a similar role of guidance has been played by the Committee of the Parties, which produced an Explanatory Note of the Convention in 2009, provided with a number of pragmatic indications concerning the process of national reception.
[55] See A. di Martino, *Sfruttamento del lavoro. Il valore del contesto nella definizione del reato,* Il Mulino, 2020, 185-186.
[56] The perils of this approach, in terms of an absence of sufficient guidance flowing from the international to the domestic level, have been widely noticed in the academic literature. See e.g. Boister, *Further Reflections,* 21. Stoyanova*, Human Trafficking*, 80.
[57] This element of absence of State control over multinational criminal phenomena is identified by Nadelmann as the "transnational hook" of international criminalization regimes, i.e. the originary reason which lead to widespread national adhesion to the international instruments of contrast: E. A. Nadelmann, *Global prohibition regimes: the evolution of norms in international society,* in International Organization, 44, 479-526. .
[58] This was clearly recognized for example by Anne Gallgher in her close monitoring of the drafting process of the Trafficking Protocol: see A. T. Gallagher, *Trafficking in Transnational Criminal Law,* in A. Gallagher - R. Piotrowicz, *Routledge Handbook of Human Trafficking,* Routledge, 2018, 74.
[59] States' margin of manipulation of the international definition was explicitly recognised in both European regional anti-trafficking instuments: see the Explanatory Report to the CoE Trafficking Convention: "Parties would not be obliged to

provisions, they are not aimed at orienting individuals' behaviours (general/special-prevention) through the clear delimitation of the spheres of penally relevant and irrelevant facts[60] and the consequent foreseeability of the criminal consequences of one's actions. On the contrary, they exclusively serve as guidelines for the implementing States,[61] aimed at favouring an interpretation of the elements of the criminal definition which is coherent with the objectives of the international treaty; these include, most notably, the effective contrast of menacing transnational phenomena whose suppression is impossible absent a coordinated international criminal response.[62] International norms of criminalization, therefore, will always appear as "incomplete" offences, in that they explicitly leave the task of identification of a number of necessary elements of a "proper" crime to the national legislators. In this sense, the breadth of the protection of the legally protected interest, the precision and determinacy of the subject elements of the crime, the level and nature of the penalty, are all elements which fall beyond the intended scope of transnational criminal definitions.[63]

Of course, this is not to say that international criminal definitions can be reasonably interpreted as contrary to the basic democratic principles of criminal law.[64] While the evaluation of the criteria of validity of criminal norms is arguably best placed at the national-constitutional level, and the matter of the core principles of transnational criminal law is still very debated,[65] due relevance must be given, on the same, to the inclusion, in most transnational criminal treaties, of saving clauses[66] which explicit

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copy verbatim into their domestic law the concepts in Article 4, provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it. On the same, as already emphasized, the EU directive is explicitly limited to the expression of 'minimum rules concerning the definition of criminal offences and sanctions in the area of criminal law".

[60] See A. di Martino, *Sfruttamento del lavoro*, 187.

[61] In the specific EU context, see 'Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law', 20 September 2011, COM(2011)573 final: " an EU directive on criminal law does not have any direct effect on a citizen; it will have to be implemented in national law first. Th erefore, the requirements for legal certainty are not the same as for national criminal law legislation. The key is the clarity for the national legislator about the results to be achieved in implementing EU legislation.'

[62] See for instance Nadelmann, *Global Prohibition Regimes,* 482. The transnationality of crime must not be here be reduced to a mere phenomenological fact which is objectively recognized by contracting States. As Neil Boister acutely argues the normativity expressed at the international level must be reasonably understood as well as the manifestation of a "*cosmopolitan moral concern, generating a legal norm* [...] *In other words, the actions and ideas of those who clarify, normativise and apply the norms transcend territorial boundaries. The actions of the lawmakers are as transnational as the actions of the lawbreakers"*: see Boister, *Further Reflections,* 13.

[63] See di Martino, *Interlegality and criminal law,* 262.

[64] For a specific analyisis of the role of general principles in the EU criminal legal sphere, see M. Kaiafa – Gbandi, *The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law,* in European Criminal Law Review, 2011, 7ss.

[65] See on this specific issue the relevant scholarship of Prof. Sabine Gless. S. Gless – A. Vervaele, *Law Should Govern: Aspiring General Principles for Transnational Justice,* in Utrecht Law Review (online), 9:4, 2013.

[66] See e.g. art. 14 of the Palermo Protocol: "Saving clause": Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination

the commitment of ratifying states to not violating international human rights. This relationship is particularly emphasized in the CoE anti-trafficking framework, where the Warsaw Convention is explicitly committed to the protection of the rights enshrined in the European Convention of Human Rights and of all the other guarantees that descend from international law. Consequently, especially in the European public space,[67] the conformity to the protection of the substantial and procedural rights of the offender will arguably require that international norms of criminalisation adhere to an idea of personal criminal responsibility, materiality of the object of blameworthiness, innocence beyond any reaonable doubt, etc.[68]

The abovementioned element of terminological vagueness has been frequently identified as an evident and intended character of the international offence of THB described in the Palermo Protocol.[69] However, the acceptable level and breadth of this vagueness was insightfully discussed in a number of subsequent institutional and academic debates, which highlighted the necessity of posing some basic coordinates suitable to orient the application of the definition in the domestic sphere, and to make sense of the joint interaction of the different elements of the crime.[70] These coordinates cannot arguably be reduced to the ordinary legal requirements for the legality of a national criminal definition, as they hardly capture the *changing structure of power*[71] at the international level, i.e., the creation of a "legality for States" as an act of criminal legal framing prior to, and distinct from, the "legality for individuals" enacted at the national level.[72] On the contrary, they must arguably be extended to include those "*necessary and sufficient conditions*"[73] suitable to ensure the fulfilment of the objectives of harmonization of national criminal legislations and of implementation of the

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[67] This operation, as signalled correctly by Neil Boister, cannot as easily be taken for granted in the broader international space (e.g. the space of application of the Palermo Protocol): any projection in this domain of the principles of liberal criminal law will come at the price of overimposing the cultural and normative structures of Western criminal law making on a community of States where a strong legal pluralism evidently reigns. This could in turn be read, on the one side, as a form of silent "civilizing" influence of powerful States through the means of international criminal framing; on the other, as a hazard from the point of view of the harmonization of the international norm in local contexts where the abovementioned principles are not usually cogent. See Boister *Further Reflections*, 24.

[68] This looks as a necessary consequence of the integration of a human right protection function in the exercise of the criminal function in the CoE, as clearly stated e.g. in art. 5 and 6 of the European Convention of Human rights. See for general remarks A. Ashworth, A McDonald, *Human Rights and Criminal Justice*, Sweet and Maxwell, 2012.

[69] A. T. Gallagher, *Trafficking in Transnational Criminal Law,* in Piotrowicz *et al.,* Routledge Handbook, 34.

[70] Stoyanova*, Human Trafficking,* 77.

[71] N. Lacey, In Search of Criminal Responsibility: Ideas, Interests and Institutions (Oxford: Oxford University Press, 2016), underlines this aspect: "*it is not so much the development of the political values underlying legality as the institutional preconditions for realizing them, which underpin the changing contours of the concept"* […] *"emerging ideas of legality, particularly in the context of public law, are closely connected to the changing structure of power.*

[72] See di Martino, *Interlegality*, 254.

[73] See on this, specifically referring to the human trafficking definition, M. Jovanovic, *The Essence of Slavery. Exploitation in International Law,* in *Human Rights Law Review,* 2020, 00, 8, who argues for the need to "*identify the necessary and sufficient conditions for the use of the concept that serve as frames of reference to be further specified at the national level*".

additional investigative, cooperative and protective objectives enshrined in international anti-trafficking instruments.[74]

The need for an "interpretative guidance"[75] in the sector of anti-trafficking appears particularly relevant, considering that the expression "trafficking in human beings" is not immediately evident in its shared meaning: as extensively documented,[76] the Palermo definition marked a profound discontinuity in the evolution of the international contrast of the activities of supplying slave, servile or severely exploited workforce. The legal imaginations of THB which dominated the XXth Century referred to the ideal-types of transatlantic slavery,[77] on the one side, and of white slavery,[78] on the other. The unaptness of these templates to capture the complex structural and relational mechanisms that in ordinary life lead individuals to be severely exploited has been frequently highlighted, both before[79] and after[80] the drafting of the Palermo Protocol, in the critical-legal and legal-historical literature.

The subsequent distancing of States and international organisations from the abovementioned stereotypical and stigmatizing ideal-types of the crime of trafficking have on the same rendered the "new" trafficking definition of the Palermo Protocol a site of harsh interpretative struggles.[81] During the first decades of the 21st Century, the open texture of the trafficking definition has been caught in a variety of multi-level processes of crime-framing, each aimed at targeting a specific perceived societal problem or at protecting a specific interest: the legal space of anti-trafficking, in other words, became a *"continuously transfiguring terrain*".[82] Among the most important processes of "re-

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[74] See in the same sense Boister, *Further Reflections*, 20.
[75] See E. Bruch, *Models Wanted: the Search for an Effective Response to Human Trafficking,* in Stanford Journal of International Law, 1, 2004, 1-45.
[76] See e.g. J. O'Connell Davidson, *Editorial: The Presence of the Past: Lessons of history for anti-trafficking work*, Anti-Trafficking Review, issue 9, 2017, 1—12.
[77] See e.g. D. Wilkins, *Understanding Historical Slavery, its Legacies, and Its Lessons for Combating Modern-Day Slavery and Human Trafficking,* In Jones, *The Palgrave,* 4-14. J. Allain – K. Bales, *Slavery and its Definition,* in *Global Dialogue,* 14(2), 2012, 6.
[78] See e.g. N. J. Siller, Human Trafficking in International Law Before the Palermo Protocol*, Netherlands International Law Review*, 2017 (online), available at https://doi.org/10.1007/s40802-017-0099-9. A. Reanda, Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action, in *Human Rights Quarterly*, 13(2), 1991. D. Otto, *Lost in Translation: Rescripting the Sexed Subjects of International Human Rights Law,* in A. Orford, *International Law and its Others,* Cambridge, 2006, 318.
[79] See e.g. J Chuang, Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts 11 *Harvard Human Rights Journa*l, 1998, 65, 77; J Doezema, *Forced to Choose? Beyond the Voluntary v. Forced Prostitution Dichotomy* in K Kempadoo and J Doezema (eds), Global Sex Workers: Rights, Resistance and Redefinition (Routledge, 1998) 39.
[80] See e.g. K. Rittich, *Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking,* in P. Kotiswaran, *Revisiting the Law and Governance of Human Trafficking, Forced Labour and Modern Slavery,* Cambridge, 2017, 238; J. Chuang, Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*,* in *University of Pennsylvania Law Review,* 158, 2010, 1655.
[81] See Rittich, *Representing*, 238.
[82] The expression is brought from R. Jaleel, The Wages of Human Trafficking*, Brooklyn Law Review*, 2015, 81:2, 566.

signification" of this particular criminal policy area[83] were the qualification of trafficking as a form of "modern-day-slavery"[84]; the equation of trafficking with conceptually distinct criminal phenomena such as "exploitation"[85] or "organized crime";[86] the reduction of the idea of trafficking to one or few of its epiphenomena, such as "forced prostitution",[87] "forced migration"[88] "unfree labour".[89]

Each of these framings of the crime of trafficking influenced notably the processes of interpretation of the elements of the international definition, which were alternatively curtailed, expanded or suppressed in their normative implications, so to make them match with the particular model of the crime adopted in each specific institutional or critical perspective.[90] These exegetic operations, it must be noted, were often guided by a partial, stereotypical understanding of the transnational practices of exploitation observable on the ground, which still remain vastly unknown in their quantitative and qualitative characters even in the empirical literature.[91]

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[83] See Lloyd – Simmons, *Framing, passim,* for an analysis of the strategic relevance of these processes of crime framing in the international regime of anti-trafficking.

[84] See e.g. K. Bales, Understanding Global Slavery. A Reader*, University of California Press*, 2006, 126. See for a historical investigation on the linkages between past and contemporary anti-slavery regimes, D. Wilkins, *Understanding Historical Slavery, Its Legacies, and Its Lessons for Combating Modern-Day Slavery and Human Trafficking,* in J. Wynterdik – J. Jones (Eds.), *The Palgrave International Handbook of Human Trafficking,* Palgrave Macmillan, 2020, 3. A. Boukli, H. Yanacopulos, G. Papanicolaou, *Genealogies of Slavery, ivi.,* 207. J.Wynterdik, *Explaining Human Trafficking: Modern Day Slavery, ivi*, 1257.

[85] See e.g. for a critical appraisal of the process of omologation of the distinct criminal phenomena of trafficking in human beings and exploitation of persons in the U.S. legal framework of the Trafficking Victims Protection Act, J. Chuang, Exploitation Creep and the Unmaking of Human Trafficking Law, in *American Journal of International Law,* 2018, 108:4, 609.

[86] See e.g. A. Aronowitz, *The Human Trafficking-Organized Crime Nexus,* in F. Allum – S. Gilmour, *Routledge Handbook of Transnational Organized Crime,* Routledge, 2011, 217.

[87] See e.g. the historical reconstruction of this underlying ideological frame in H. Askola, *The History of the Global Anti-Human Trafficking Agenda, with a Focus on Prostitution and Sexual Exploitation,* in *Histories of Transnational Criminal Law*. Edited by: Neil Boister, Sabine Gless and Florian Jeßberger, Oxford University Press, 2021, 151.

[88] J. Bhabha – M. Zard, Smuggled or Trafficked?, *Forced Migration Review* 25, 2006, 6-8

[89] See *ex multiis* Jaleel, The Wages of Trafficking, *passim*.

[90] In fact, addressing trafficking as a modern form of slavery necessarily implies the qualification of the situation of the trafficked person as a condition of coercion and unfreedom; identifying trafficking as a form of exploitation/unfree labour represent very extensive forms of interpretation of the international definition, which lead to the collapse of the distinction between the *means* and the *purposes* of trafficking; adopting international migration as a template of trafficking leads to the restrictive interpretative positions which sees the crossing of an international border as tantamount to the integration of the crime of trafficking, while this element is not explicitly emphasized in the international definition. Finally, targeting sexual exploitation as the primary concern of anti-trafficking policy means singling out a particular idea of victimhood (where the victim is typically seen as female *and* helpless) and equiparating it to severe forms of unfreedom such as slavery and servitude. This operation thus had often the worrying simplifying effect of representing all sex work as a modern form of slavery and in obscuring the connection of exploited sex work with other forms of labour and personal exploitation, turning trafficking in a form of symbolic, highly moralized crime. See e.g. A. Ricard-Guay – J. Hanley, *The Challenge of Addressing Both Forced Labor and Sexual Exploitation,* in Wynterdik (2020), 287.

[91] See e.g. J. Van Dijk, *Measuring Trafficking in Persons Better: Problems and Prospects,* in Wynterdik, *The Palgrave*, 1671. C. Vorheyer, *Knowledge Production on Human Trafficking and Everyday Governance Practices,* in Piotrowicz *et al*, *Routledge Handbook*, 395.

2.2. Structure

Having described the nature and scope of the international definition of THB, it is now necessary to make sense of its subject elements, (acts, means, purposes) and of their reciprocal interaction in describing the international offence.[92] As previously mentioned, THB can be perpetrated through a *numerus clausus* of conducts (acts), enacted through a series of typical abusive *means* which are considered instrumental to the implementation of a *purpose of exploitation*.[93] Trafficking in human beings is, therefore an anticipatory crime, aimed at the repression of conducts suitable to lead to a future and uncertain situation of *exploitation.* It is, therefore, reasonable to say that trafficking does not constitute a form of exploitation in itself,[94] and that its repressive function seemingly resides in ensuring an early contrast of threats of exploitation.

2.2.1 Trafficking as a transnational crime of supply: the acts

All international Anti-trafficking legal sources describe the material element of THB as entailing a conduct of "recruitment, transportation, transfer, harbouring or reception of persons". These acts, as frequently observed in the legal doctrine, do not appear to hold in themselves an autonomous offensive character, amounting to largely "neutral" conducts.[95] On the other hand, such typical conducts constitute a *numerus clausus* in the international definition: the acts of trafficking, in other terms, do not cover all possible conducts of favouring the exploitation of another person, focusing instead on specific forms of preparatory conducts. In this regard, all the acts listed seem to describe the phases of a process of supply[96] of individuals to illegal criminal markets of exploitation, through their *recruitment* in their contexts of origin, through the organisation of their *travel* (*transport*, *transfer*, *reception*), and through the arrangement of the conditions of subsistence and housing (*harbouring*) of the victim along the process. The specific traits of this process of supply are suitable to be variably interpreted in different international legal frameworks: for instance, in the Palermo Protocol, the *movement* of the trafficking victim between different places is considered as a key element of THB as a crime conceived exclusively in transnational terms.[97] In this case, the said supply

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[92] See e.g. Sax, *Definitions*, 70, for an appraisal of the relevance of the tripartite structure of the international definition in preserving the international consensus around the concept of trafficking in further national and regional drafting initiatives.

[93] See e.g. UNODC, *Issue Paper. The Concept of Exploitation,* Vienna, 2015.

[94] See e.g. Stoyanova, *Human Trafficking,* 33; C. Rijken, Trafficking in Human Beings for Labour Exploitation: Cooperation in an Integrated Approach, *in European journal of Crime, Criminal Law and Criminal justice* 21, 2013, p. 13.

[95] See Sax, *Definitions* 73. Symeonidou-Kastanidou, *The European Directive,* 474.

[96] See in this sense Stoyanova, *Human Trafficking*, 34: "*the five actions can be defined as 'links in the chain of supply', thus referring to the act of supplying of migrants in host countries*".

[97] Art. 4 of the Palermo Protocol "*This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of*

always entails the arrangement of a victim's crossing of an international border. In the CoE and EU legal frameworks, given the explicit inclusion of internal trafficking inside their respective regional definitions of THB, this element of movement does not appear to be particularly essential.[98]

Of course, the "closest" the conduct of trafficking lies to the subsequent fact of severe exploitation, the more the contours between the two wrongs appear to blur. In many cases, it will be difficult to distinguish between trafficking and forms of attempted reduction into slavery, servitude, forced labour, etc.[99] This appears to be a natural consequence of the *pre-emptive* nature of the crime of trafficking, the criminal typicity of which arguably identifies a *continuum* of conducts which are suitable to be put in place at variable levels of proximity to the final purpose of exploitation: the victim can arguably be recruited in a different country than the one where they will be subsequently exploited, and go through a process of trafficking which lasts several months; or, on the contrary, they can be forced to move to a controlled facility inside their hometown, where they are harboured for some days and subsequently intimated to perform prostitution through the subjection to, let's say, a debt.[100] If the usefulness of THB as an offence tends to be erased where its perpetration materially overlaps with the enactment of an immediately subsequent act of exploitation, its repressive function is nonetheless evident where the supplying acts are very remote from the final purpose, and thus no substantial attempt of exploitation is yet committed.[101] The objective of a large-spectrum, inclusive contrast of all entrepreneurial initiatives, individual and collective, of supplying of persons for the markets of sex, labour and organs finds clear confirmation in the preamble of the Palermo Protocol, as well as in the travaux préparatoires.[102]

2.2.2. The pluralistic character of transnational criminal law and the limits of the trafficking definition

While the previous sketch of the structure and function of the trafficking offence represents a clear common in international law, any further interpretation of the structure of the international definition of THB is to be considered inevitably context-dependent in a pluralistic sector of normativity as is

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such offences". See Stoyanova *Human Trafficking*, 39; Siller-Van Doore, *Establishing the Constituent Elements, passim,* for a commentary on the relevance of the elements of transnationality and organized crime in the legal framework of the Palermo Protocol.

98 See e.g. Weatherburn, *Labour Exploitation*, 251.

99 See e.g. Stoyanova, *Human Trafficking* 41, for a critical appraisal of this implication of the expansion of the regional CoE anti-trafficking strategy to forms of internal trafficking.

100 See e.g. for a concrete example of litigation of a similar internal trafficking dynamics, European Court of Human Rights, 25 June 2020, S.M. v. Croatia, Appl. 60561/14).

101 Stoyanova, *Human Trafficking*, 277.

102 United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations to the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, New York, 2006, 337.

transnational criminal law.[103] Specifically, any systematic attempt of interpretation of the international definition must take into account the structures of power and the common values of the legal orders where the criminalization is being enacted. These factors are suitable to prove extremely influential when it comes to the understanding of the other constituent elements of the offence of THB, i.e. the means element and the purpose of exploitation. Both these classes of requisite elements in fact share the burden of delimiting THB as a severely harmful offence, the wrongness of which largely depends on the fundamental values of each implementing legal system.

The Palermo Protocol in this sense determined a confluence of repressive efforts of States which have profoundly different understandings of the role and function of the penal power; which promote sometimes irreconcilable conceptions of dignity and liberty; where, at times, the tolerance of practices of grey labour, debt, commercial sex, social dependency is strongly rooted in domestic specificities (economic, political, moral). The safeguard of such domestic particularities represents one of the key objectives of transnational criminal law as a system of "differentiated harmonisation" of repressive efforts. In this light, international organisations have been very insightful in acknowledging the role of the socio-cultural and economic factors of different countries when it comes to the domestic framing of the criminally relevant purposes of trafficking.[104] While in fact the repression of slavery, practices similar to slavery, servitude and forced labour represent the object of *jus cogens* norms of international law;[105] the larger bundle of practices deemed to constitute exploitation in the international definition of THB (sexual exploitation, exploitation of the prostitution of others, removal of organs) are expected to be defined domestically, taking into account the specificities of each implementing legal system. This, in turn, can hopefully mitigate the strong *projection* effect, largely acknowledged in the studies on human trafficking[106], of powerful States' economic-moral standards on the criminal policy of weaker bargaining parties in international relations.

These observations highlight the limits of the following reconstruction of the role of vulnerability in the international definition of THB, as an analysis focused on the legal and moral standards of the regional legal orders of the Council of Europe and of the European Union. As previously mentioned, in the European legal space the normative effect of the international definition of THB exorbitates the description of a transnational security threat, and entails, on the contrary, the qualification of THB as an unacceptable violation of the fundamental human rights which the said legal orders are based upon. It can thus be said that international duties of criminalization are not homogenous in their nature

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[103] See Boister, *Further Reflections*, 24.

[104] International Organization for Migration, *Is trafficking in human beings demand driven? A multi-country pilot study,* Anderson, B. - O'Connell Davidson, J., Migration Research Series, 2003, 8.

[105] See Weatherburn, *Labour Exploitation in Human Trafficking Law*, Chapters 4-5.

[106] See e.g. J. Doezema, *Sex slaves and discourse masters. The legal construction of human trafficking*, Springer, 2010.

of "schemes of illiceity", but arguably drag their orienting effects from the context where they are meant to be applied: in the legal framework of the Palermo Protocol, the introduction of an international definition of THB arguably responds to the the necessity of governing the two basic objectives attributed by Neil Boister to transnational criminal law, i.e., "*i) substantial criminalisation; ii) international cooperation*;[107] in the European legal system, differently, extra-penal issues of human rights-based regulation come prominently to complicate the challenge of treaty interpretation.[108] While the spheres of criminalization and of victim protection and/or social contrast of pervasive phenomena of exploitation strongly diverge in both their methods of intervention and aims, it is on the same necessary to acknowledge the prominent role of European trafficking definitions in defining not only the limits of a *criminal* offence; but also the legal basis for the identification of categories of bearers of particular forms of material and legal assistance under European law ("victims/potential victims of THB");[109] and the relevant framework of obligations of prevention, protection and prosecution which are regionally expected to govern States' response to THB as a *human rights* offence.[110]

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[107] Boister, *Further Reflections,* 17.
[108] See e.g. Sax, Definitions*,* point 4.30.
[109] See *Infra,* Chapter 2.
[110] See *infra,* Chapter 3.

3. Trafficking purposes and means

3.1. The role of exploitation in the criminalisation of trafficking in Europe

Before approaching the role of the concept of vulnerability in the international definition of THB, a closer look must be dedicated to the *purpose* element of the offence. As anticipated, THB is defined as a connection between acts and means, put in place "for the purpose of exploitation". Art. 4 of the ECAT enumerates those practices that "at a minimum" must be considered as integrating exploitation:

"*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*".[111]

This list features, on one side, severe violations of personal freedom (slavery, forced labour and servitude) which are since long regulated by international law, in many cases constituting the object of *ius cogens* principles[112]. On the other side, the purpose of trafficking is understood to include practices, such as "exploitation of the prostitution of others" and "removal of organs", which, while already known to international law,[113] appear dubious in their relationship with individuals' right to liberty.[114] Finally, the expression "other forms of sexual exploitation" appears notably ambiguous in its content, given its open-ended character and its reliance on the general notion of *exploitation*, which is presented in the norm as an "umbrella term",[115] suitable to embrace all the practices listed in the purpose element, but which constitutes itself a newly introduced concept in international law.[116]

All this considered, it can be understood why so far great uncertainty at both the institutional and academic level has surrounded the questions of the meaning of exploitation in the trafficking definition;[117] of the *trait d'union* underlying among the different trafficking purposes;[118] and of the

[111] The EU Directive's definition expands further the list of exploitative practices, including begging and the exploitation of criminal activities: see art. 2 Anti-Trafficking Directive.
[112] These is clearly affirmed for what concerns the practice of the slave trade: see J. Allain, *Slavery in International Law,* Martinus Nijnoff, 2012, 110. The issue is more contested with regard to the international status of the prohibition of forced and compulsory labour: see *Ivi,* 246.
[113] For an historical account of the legal and political debates which characterised the inclusion of prostitution of women as the target of the International Community's early anti-trafficking legal instrument adopted in the first half of the 20th Century, see H. Askola, *The History of the Global Anti-Human Trafficking Agenda, with a Focus on Prostitution and Sexual Exploitation,* in N. Boister – S. Gless – F. Jessberger, *Histories of Transnational Criminal Law,* Oxford University Press, 151-161.
[114] See *Ivi,* 326
[115] Art. 4 Anti trafficking Convention: *Exploitation shall include, at a minimum,* [...].
[116] See United Nations Office on Drugs and Crime (UNODC), *Issue Paper. The International Definition of Trafficking in Persons: Consolidation of Research Findings and Reflection on Issues Raised,* Vienna, 2018, p. 18.
[117] Jovanovic, *The Essence of Slavery, passim*.
[118] See Weatherburn, *Labour Exploitation*, 139.

potential expansion of the list of practices of exploitation in domestic experiences of criminalization of THB.[119]

Given the elusive formulation of the purpose element of trafficking, the various institutional and academic analyses of the international definition of THB brought to the affirmation of at least two main interpretations concerning the function and substance of "exploitation".

3.1.1. Exploitation as an "umbrella concept" of international law

On one side, early interpreters of the Palermo Protocol such as Jean Allain[120] expressed the view that no self-standing meaning should be attributed to the general concept of "exploitation" in the trafficking definition. The expression was considered to represent, on the contrary, a void legal term aimed to embrace all the different abusive practices which, in light of their relevant gravity *and* their widespread international condemnation, are materially included in the list of trafficking purposes.

This interpretation highlights the importance of an explicit multilateral *consensus* in the description of internationally criminally relevant practices: given the express definition of the "purpose of exploitation" through the reference to a discrete list of practices in the text of the international norm of criminalisation, exploitation as a legal concept is understood to be lacking any further self-standing meaning. On the same, such a positivistic reading of the international definition of THB arguably risks to deprive the list of trafficking purposes of any meaningful conceptual unity, disregarding the importance of the internal coherence of the offence and of the conditions for its harmonic reception in national legal orders.[121] Under this perspective, several academic and institutional analyses in the last years have come to acknowledge not only the "theoretical" missing role of the concept of exploitation in the trafficking definition, but also the emergence of a number of "practical", regulatory shortcuts that from this void are suitable to project on regional and domestic experiences of contrast.[122]

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[119] See e.g. J. Allain, No effective definition of trafficking exists: domestic implementation of the Palermo Protocol, *Albany Government Law Review*, 2014, vol. 7, 111.

[120] See e.g. Allain, *Slavery and its definition,* 350.

[121] The objective of gaining a coherent reading of the interaction between the different elements of the crime of trafficking has constituted the basis of the abovementioned international regulatory efforts, which saw the UNODC very active in the framing of the Model Law against trafficking, on the one side, and of a series of Issue Papers aimed at addressing the most analytically complex elements of the international definition, namely the concept of "abuse of a position of vulnerability", the role of consent, the meaning of "exploitation": See United Nation Office on Drugs and Crime, *Issue Paper. Abuse of a position of vulnerability and other means within the definition of trafficking in persons,* in www.unodc.un.org; United Nations Office on Drugs and Crime*, The role of 'consent' in the trafficking in persons Protocol,* Vienna, 2014, *ivi*; United Nations Office on Drugs and Crime, *The Concept of 'Exploitation' in the Trafficking in Persons Protocol,* 2015, *ivi.* For an overall synthesis of the findings of the cited issue papers, see *Id, The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised,* 2018, *ivi.*

[122] See recently Weatherburn, *Labour Exploitation, passim*; Jovanovic, *The Essence of Slavery, passim*; Di Martino, *Sfruttamento del lavoro, passim*.

3.1.2. Exploitation as an autonomous concept in the trafficking definition

In the European legal space, most notably, exploitation has recently come to prominence as the target of regional strategies against THB and related offences.[123] In the field of anti-trafficking, a number of CoE[124] and EU bodies[125] have repeatedly addressed labour exploitation, a phenomenon not explicitly considered in the Palermo Protocol definition, as a typical purpose of trafficking. On the same, a number of European countries have adopted new and more comprehensive criminal measures to target underexplored forms of exploitation (forced marriage, exploitation in criminal activities, labour exploitation among others).[126] The jurisprudence of the European Court of Human Rights has further unveiled the relevant nexuses which connect the wrongfulness of THB as a violation of the right to be free from slavery, servitude and forced labour (art. 4(1) ECHR), and labour exploitation as a self-standing violation of art. 4(2) ECHR *and* as a potential outcome of THB.[127]

It is in this context of increased legal attention to the concept of exploitation at the European level that an alternative conception of the purpose element of the definition of trafficking has come to prominence. This perspective understands exploitation as an autonomous concept inside of the trafficking definition,[128] which, in light of the explicit phrasing of the norm, must be capable of including in its meaning all the practices listed in the purpose element. Furthermore, given the *open-ended* character of the list of trafficking purposes, the definition of exploitation is expected to guide the potential expansion of the subject matter of the trafficking offence to identify other harmful forms of trafficking purposes which can fit the typical characters of the crime.

Recognizing that the meaning of exploitation in the discipline of human trafficking is nowadays at the centre a very complex international debate, the further analysis adheres to the abovementioned interpretive position, and will address exploitation as a self-standing legal concept of European law. As it will be soon clarified, a sufficient understanding of the characters of the concept of exploitation is essential for the further investigation of the nature, substance and function of the concept of "position of vulnerability" and of the abuse thereof in the international definition of THB.

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[123] See e.g. for what concerns the EU legal space, G.G. Lodder, *Protection of Migrants Against Labour Exploitation in the Regulation of Migration in the EU,* in Jones, *The Palgrave*, 1361. European Parliament, Directorate General for Internal Policies, *Sexual Exploitation in Prostitution and its impact on Gender Equality,* Brussels, 2014.
[124] Council of Europe, *7th General report of GRETA's activities*, 2018, 34, 5.
[125] European Commission, *Study on case-law relating to trafficking in human beings for labour exploitation: Final* report, 2015. European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States' obligations and victims' rights,* June 2015.
[126] Jansson, *Modern Slavery, passim*; Council of Europe, *Compendium, passim*. See more generally UNODC, *The concept of exploitation, passim,* for a broad international overview.
[127] European Court of Human Rights, 30th March 2017, *Chowdury and others v. Greece,* Appl. 21884/15.
[128] See for a similar approach Jovanovic, *The Essence of Slavery, passim*; Weatherburn, *Labour Exploitation, passim*.

3.1.3. Exploitation and (modern) slavery: a basic distinction

In order to define the substance of exploitation within the crime of trafficking, it is necessary to adopt an approach *per distinctionem*, highlighting its similarities and differences with the "rival" concept of (modern) *slavery,* which has been traditionally regarded, and is still considered by some, as the bearer of the "moral core" of the definition of trafficking. As it will be soon noticed, addressing trafficking as an exploitation-based crime contributes to a redefinition of the general wrongfulness of the offence as well.

Slavery, practices similar to slavery, and forced labour are traditionally considered as situations of unfreedom, where an act of *coercion* is involved in the countering (as in the case of forced labour, which must be exercised "where the victim has not consented to it") and/or in the annihilation of the will of an individual (as in the case of slavery, where the prerogatives of the right of ownership are exercised over a person). Exploitation, on the other side, is traditionally understood to mean "*to take unfair advantage of* [a person]"; "[T]*o use another person's vulnerability for one's own benefit*".[129]. As frequently noticed in the relevant literature, exploitation does not always run counter the will of the victim, nor is always objectively unbeneficial for them.[130] The basic mechanism of exploitation, in other terms, is commonly thought[131] to reside in the exploiter's instrumentalization of an interpersonal leverage for personal benefit; this leverage can have its basis in the previous relationship between exploiter and exploited, their economic/informative disparities, the exploited person's situation of need and the exploiter's effective or alleged possibility to alleviate it.[132] In the

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[129] See A. Wertheimer, *Exploitation,* in Stanford Encyclopedia of Philosophy (online), 2016, 1. This understanding of exploitation has been explicitly embraced in the international soft law initiatives of harmonisation of the content and scope of the trafficking definition: see UNODC, *The concept of Exploitation*, 39: "*Despite the absence of an international legal definition – including in the Protocol itself – the concept of exploitation as it relates to trafficking appears to be broadly consistent with its general meaning of one person taking unfair advantage of another person, their vulnerability or their situation*".

[130] A.W. Wood, Exploitation*, *Social Philosophy and Policy*, 12(2), 1995, 136-158.

[131] The overlapping between the elements of coercion and exploitation has been deeply investigated in the philosophical literature, with specific reference to the concept of "coercive offers": See e.g. D. Lyons, Welcome Threats and Coercive Offers, *Philosophy*, 50:194, 1975, 425; D. Zimmermann, Coercive Wage Offers, *Philosophy and Public Affairs*, 10:2, 1981, 121; for a contemporary use of the notion of coercion of circumstances in the legal analysis of the trafficking definition, see K. Kim, The Coercion of Trafficked Workers, Legal Studies Paper 2010-53, *Iowa Law Review* 96, 2011, 409. For some practical examples of overlapping between the two concepts in real life cases, see S. Green, *Crime, victimisation and vulnerability,* in S. Walklate (Ed.), *Handbook of Victims and Victimology,* Routledge, 2007, 96.

[132] As accurately noticed in the recent literature, the abovementioned conception of exploitation represents only one of the accounts of the phenomenon that have been elaborated on in socio-moral studies. Arguably, qualifying human trafficking as an offence and addressing it through criminal law entails a relational conception of exploitation aimed at singling out the relevance of the conduct of a single agent (or of a discrete group of agents) - the trafficker – to assess the responsibility for a societal fact of human exploitation through the abuse of a person's needs, weaknesses, vulnerability. This perspective is arguably ill-fit for recognising and denouncing those background, public, economic, governmental, and security-related factors that *structurally* create the conditions of imbalance of power that subsequently lead to exploitation. For a distinction between structural and relational exploitation, see Wertheimer, *Exploitation*.

philosophical literature, this instrumentalization is considered suitable to turn into wrongful[133] exploitation when the exploited person is treated in a way deemed as morally *wrong*, or contrary to their fundamental interests.[134]

3.1.4. The purposes of THB as forms of severe personal exploitation

The abovementioned definition of the concept of exploitation is suitable to include a set of practices which goes well beyond the subject matter of THB: while it is difficult to clearly state what trafficking is about, it can certainly be said that it is considered to be one of the most threatening and offensive practices to be criminalized in national legal systems. This notable level of gravity constituted the justification of the unprecedented efforts devoted to the institution of a international cooperation in the prevention of THB, protection of trafficked persons and of individuals ar risk of trafficking, and prosecution of perpetrators.[135] THB, moreover, when committed in particular circumstances of widespread violence, constitutes a crime against humanity under art. 7(2) of the 1998 Statute of the International Criminal Court (ICC).[136] Clearly, a broad conception of exploitation as the "taking unfair advantage of another person" cannot be considered useful in justifying the extreme gravity attributed to the crime of THB in international law. "Exploitation" as a field of study in the social and moral sciences covers a wide range of human interactions which in many occasions are not even considered unlawful, least of all internationally criminally relevant.[137]

A further determination of the key characters of "exploitation" as a subject element of THB, therefore, is due in order to make sense of the wrongfulness of the international offence. A taxonomy adopted in the extra-legal literature can be of use here: political philosophers' distinction between "exploitation of a situation" and "exploitation of a person". This taxonomy, originally adopted in the works of Robert Goodin,[138] holds that, while the generality of cases of exploitation can be defined as forms of "exploitation of a situation", "exploitation of a person" does not only have at its basis the

[133] In the elaboration of some authors, while wrongful exploitation is the object of interest of law and policy, exploitation as a philosophical concept *in se* is a neutral term, suitable to embrace all those practices, independently from their moral character, that entail the instrumental use of the weaknesses, needs of another individual for personal benefit. See Wood, Exploitation*, *passim.*

[134] The grounds of this wrongness are nonetheless very contested: see for a insightful problematisation of the issue, R. Mayer, What's Wrong with Exploitation?*, Journal of Applied Philosophy*, 24, 2007, 137.

[135] See e.g. UNODC, *The International Definition,* 25.

[136] Rome Statute of the International Criminal Court (1998), 2187 UNTS 90, entered into force 1 July 2002 (ICCSt.). See e.g. I. Atak – J. Simeon, *Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice,* in International Journal of Criminal Justice, 12:5, 2014, 1019.

[137] The wrongfulness of the extraction of value from a person in situation of weakness is widely debated in both the fields of business- and bioethics, where a number of unequal and/or invasive practices are taken into account which not rarely fall in the realm of lawfulness: see e.g. M. Zwolinski, Sweatshops, Choice, and Exploitation*, Business Ethics Quarterly*, 689-727; A. Wertheimer, *Rethinking the Ethics of Clinical Research,* Oxford University Press, 2010.

[138] See R. Goodin, *Exploitation of a situation or exploitation of a person,* in A. Reeve (ed.), *Modern Theories of Exploitation,* Sage Publications, 1987, 166.

distribution of profits or benefits between two persons; on the contrary, a *person* can be said to be exploited when the exploiter's act of advantage-taking of the exploited leads or is meant to lead to a situation where the *individual* itself is used as a source of value. While Goodin's original account was originally meant to pose the basis of a *public ethical* theory of exploitation and vulnerability,[139] the idea of "personal exploitation" was later adopted in a number of recent philosophical studies, where it is used to address a class of relational and/or economic practices where the exploiter "*gain*[s] *substantial control over the person's life or labour;*[140] personal exploitation as a political-philosophical concept, therefore, has nowadays come to identify a particularly unjust *outcome* of the advantage-taking process, where the wrongful treatment *encompasses a sufficiently wide range of what the person does or is.*[141]

The wrongfulness of personal exploitation, thus, does not only reside in substantial and unfairness of a transaction: additionally, it revolves around the imposition of a *control* over the life of an individual for egoistic reasons, identifying the hallmark of what in neo-Republican theory is addressed as a relationship of *domination.*[142]

Practices such as enslavement, forced labour and servitude can be understood to entail the imposition of a monopoly over a person's time, work, and daily activities in the frame of a relationship of domination enforced through coercion (physical or psychological). They can thus be considered as *severe* forms of personal exploitation, the severity of which resides in their suitability to create an extremely penetrant and prolongued control aver an individual's life. On the other hand, biologically and personally invasive activities such as sex and organ removal, as well as precarious and/or dangerous forms of subsistence, such as irregular and underpaid labour, begging, petty crime, are suitable to form the object of a particularly threatening relationship of domination once a severe exploitative *process of taking advantage* has been put in place.

"Severe forms of personal exploitation", thus, seems to constitute an accurate formula for describing the variety of practices included in the purpose element of THB.

3.1.5. The determinants of the "severity" of exploitation: the case of the criminalization of labour exploitation in Europe

In the previous section, "severe personal exploitation" has been described as the combination of a process of taking advantage of a person and their subsequent subjection to intrinsically coercive or

[139] See *Ivi,* 167.
[140] See Honderich (ed.), *The Oxford Companion to Philosophy*, 2nd ed, 2005.
[141] Wood, *Exploitation**, 146.
[142] See e.g. N. Vrousalis, Exploitation, Vulnerability, and Social Domination*, Philosophy and Public Affairs*, 41(2), 131.

otherwise severely harmful practices of value extraction. It is now necessary to further clarify the role of these two "legs" of the purpose element in determining the wrongness of trafficking as a form of anticipated contrast of exploitation.

The recent European legal bebate around the criminalization of labour exploitation arguably provides a good example of how the features of a severe advantage-taking process can mobilize collective disdain and possibly lead to an agreed-upon legal conception of wrongfulness. Moreover, such a debate clarifies that not only the matter of whether the person *wants* to be exploited, but also the matter of *how* the person is exploited plays a crucial role in the gatekeeping of "severe personal exploitation" as the exclusive object of international efforts of criminal contrast. As accurately noticed,[143] the recent criminalization of labour exploitation as an autonomous offence in a number of European countries has clarified the centrality of "thresholds of severity" in this particular sector of criminal lawmaking. The setting of these thresholds, on one hand, is crucial for safeguarding the *determinacy* of the crimes of trafficking and of labour exploitation; on the other, it amounts to a operation of self-restraint of criminal law in the regulation of a range of situations (black/grey labour, irregular migrant labour) which consistently rest on an overall *structural* inequality of the societies where they manifest. Criminal law, in this field, faces its limits[144] as a purely repressive instrument constructed around individual responsibility. The deployment of criminal law to counter structural injustices is commonly understood as an extreme and largely insufficient form of public response, which must not interfere with more protective forms of regulation, such as the ones promoted through labour[145] and human rights law.[146] In this sense, the criminal contrast of exploitation shall be limited to the condemnation of practices which present a level of abusiveness so unacceptable and severe to present criminal punishment as a necessity for the purpose of the restoration of conditions of freedom, security and justice.

In a recently published volume,[147] Amy Weatherburn has tried to bridge the divide between the regimes of trafficking and labour exploitation in Europe, highlighting the relevant similarities between the criminal legal disciplines of labour exploitation adopted in Belgium and UK and connecting the impact of such recent reforms with the growing effort of the Council of Europe in targeting human trafficking for the purpose of labour exploitation. The aim of Dr. Weatherburn's analysis was to provide an model definition of labour exploitation suitable to serve as a guidance for

[143] di Martino, *Sfruttamento del lavoro, passim.*
[144] See e.g. L. Collins, Exploitation of persons and the limits of the criminal law*, Criminal Law Review*, 2017 (3), 167.
[145] H. Shamir*,* A labour paradigm for human trafficking*, UCLA Law Review*, 60, 76
[146] C. Rijken, A human rights-based approach to trafficking in human beings*,* 2009, *Security and human rights,* 3, 212; A.T. Gallagher, *Human Rights and Human Trafficking,* in Nollekaemper *et al., The Practice*.
[147] Weatherburn, *Labour Exploitation, passim.*

the interpretation of the purpose element of trafficking, in order to synergically link the two spheres of contrast. The notion of "labour" is interpreted extensively in the book, to include any kind of material activities, paid and unpaid, that an individual is required or induced to put in place through personal exploitation. These include, therefore, most typical "final" activities envisaged in the trafficking definition, such as sex work, organ removal, criminal activities. begging, etc.

The author expressly addessed the necessity of threshold-setting in the delimitation of her account of labour exploitation in human trafficking law,[148] underlining the role of several indicators in the assessment of the severity of facts of labour exploitation. These indicators are meant to measure, specifically, the pervasiveness of the control exercised over the worker; the severity of the working conditions; the level of risk implied in the exploited work; the level of labour guarantees, including pay, accommodation, resting hours/days; and the level of disproportion between this set of conditions and the standards of decent work commonly accepted in the domestic legal system.[149]

At the end of her analysis, Weatherburn formalized a model definition of "labour exploitation" to be adopted the European anti-trafficking law:

The provision of work or services wherein A knowingly takes unfair advantage of B's position of vulnerability by means of the exercise of control in order to gain a benefit and shows a lack of respect for B's human dignity.

In our subsequent analysis, the abovementioned definition will be used as a "template" of exploitation,[150] suitable to highlight the *proprium* of the purpose element of THB and to unveil the hidden connection between practices listed among trafficking purposes and trafficking means.

3.2. The means of THB: content and definitional role

As previously noticed, THB manifests through the recruitment, transportation, harbouring, transfer or reception of a person. Considered that the mentioned conducts do not express any self-standing harmful character, the international trafficking definition requires States to criminalize only those facts that are committed through the adoption of certain abusive *means.* Trafficking means are, therefore, specifications of the objective and subjective characters of the criminal fact, which include *the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse*

[148] *Ivi,* 65.
[149] See *Ivi,* 225; these indicators are regularly used in the law framing of the crime of labour exploitation, as in the case of Italian legislation - see di Martino, *Sfruttamento del lavoro,* 59 - and in current judicial practices of assessment of facts of exploitation, such as in the case of the UK - see Weatherburn, *Labour Exploitation*, 229.
[150] J. Wolff, Marx and Exploitation, *the Journal of Ethics*, 3, 1999, 108.

of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

Some of the means listed include forms of coercion, both physical (such as "*force"*) and psychological ("*threat of use of force"*), or of material capture ("*abduction*"). Others, such as "*abuse of power*", "*giving or receiving of payments or benefits to achieve the consent of a person having control over another person*", identify an instrumentalization of the authority of an individual over another, aimed at influencing the behaviour of the subject of authority through the expression of a command. Conversely, the means of "deception", "fraud" and "abuse of a position of vulnerability" identify circumstances where the victim is not ordered or explicitly forced to submit to the trafficker's will, but where, on the contrary, they respond to an *offer* of the perpetrator apparently exercising their agency.

As it has been observed,[151] even in the absence of a purpose of exploitation, the adoption of any of the abusive means of the trafficking definition is suitable to qualify alone as a criminal offence (violence, threat, compulsion, fraud), or at least as a social or economic practice deemed unlawful in domestic legislations (grooming, predatory market practices). This consideration arguably allows us to make sense of the role of the means element within the international definition of THB. If, as previously stated, the *acts* of trafficking serve to qualify the criminalization of trafficking as a strategy of *pre-emption* of facts of severe personal exploitation; and the purposes of trafficking enucleate this (future and uncertain) threat of exploitation; the means element provides a connection between the "criminally neutral" acts and the severely offensive trafficking purposes. The different forms of means listed arguably identify a sufficiently broad and diverse series of abusive supply practices, adequate for capturing the variety of trafficking dynamics in the different contexts and market sectors where they take place; additionally, their intrinsic abusiveness introduces an element of *actual* harm already at the early stage of the trafficking acts, suitable to justify the said anticipation of the criminal response under the principles of legality and personal responsibility in criminal matters.[152] This element of offensiveness of the trafficking conduct is, therefore, essential for preventing the repression of the mere intention of exploiting.

These two key functions of the means element (inclusivity of the offence, *locus* of blameworthiness of the criminal acts) deserve a further elaboration. Their intersection is particularly relevant in stating not only which supply conducts for the purpose of exploitation "count" as trafficking, but, way more

[151] Sax, Definitions, 74.
[152] V. Bergelson, *Vulnerability, Exploitation, and Choice,* in R. Haverkamp, E. Herlin-Karnell, *What is Wrong with Human Trafficking? Critical Perspectives on the Law,* Hart Publishing, 2018, 196.

importantly, it sets an international threshold of criminal relevance within a bundle of market and relational behaviours where a purpose of interpersonal exploitation is already clearly visible.

How, then, are trafficking means intended to be "representative" and "selective" of the complex dynamics of exploitative supply? Differently from the purpose element of the definition, the means of trafficking are identified as a *numerus clausus*. This leads us to wonder how these six forms of abuse are meant to delimit the subject matter of this "crime of international interest".[153]

3.2.1. The means of THB as agency-suppressing behaviours?

Some authors have observed that, given the intrinsic gravity and abusiveness of most of the means of THB, it is reasonable to say that the drafters of the Palermo Protocol intended to qualify as trafficking only those conducts of supply which are supported by an element of *extreme* harmfulness.[154] This character is, in turn, frequently identified in the "forced" nature of the recruitment, transport, reception, harbouring, etc, suitable to qualify the process of trafficking as a "modern slave trade": the means, in this reconstruction, would therefore identify a *continuum* of coercive practices.[155] The victim would, consequently, qualify as a helpless actor in the trafficking process, whose will is nullified in order to make them submit to exploitation.[156]

This latest perspective has been largely criticised under many fronts: from a strict criminal legal point of view, it represents a "partial" interpretation of the text of the criminal definition, in that it singles out those elements which are explicitly coercive, (violence, threat of violence, abduction, abuse of power) extending the character of "force" which lies at their basis to other forms of abuse listed (fraud, deception, abuse of a position of vulnerability, etc.). Furthermore, in the same perspective, this reconstruction is suitable to run counter the ordinary sense of the wording of other parts of the Protocol, especially where it's stated that "the consent of the victim is deemed *irrelevant* when any of the means are present".[157] Affirming the irrelevant nature of consent reasonably implies that a consent can have been present in the process of supplying for exploitative purposes.[158] This interpretation is supported by the text of the Travaux Préparatoires to the Palermo Protocol, where it

[153] See Boister, Further Reflections*, passim*.
[154] See Weatherburn, Labour Exploitation*,* 75.
[155] Allain, *Trafficking and Human Exploitation,* 131.
[156] See for a critique of this legal representation of victimhood, J. Lima de Pérez, A Criminological Reading of the Concept of Vulnerability: a Case Study of Brazilian Trafficking Victims*, Social and Legal Studies*, 2015, 1-20.
[157] UNODC, *The International Definition,* 23, "*A disregard for the principle of irrelevance of consent [...] clos[es] the door to investigations or prosecutions where there is some indication that the alleged victim consented to some aspect of her or his exploitation or her or his getting in this situation*".
[158] See e.g. di Martino *Sfruttamento del lavoro.*

is specified that the structure of the trafficking definition aims at excluding the relevance of any defence of consent on the side of the trafficker.[159]

Finally, this restrictive interpretation of the means element can be criticized under a more systematic perspective, in that it fails to fulfil the *purposes* of international cooperation, i.e., to effectively prevent serious forms of exploitation that take place both nationally and transnationally and to suppress the key mechanisms of florid criminal markets of supply of people for profit. In this sense, the framing of the typical factual manifestations of THB as inherently coerced has been widely countered in criminological studies,[160] in legal studies focused both on the particular markets of labour[161] and sexual exploitation,[162] and in the critical literature on the intersection between trafficking and international migration.[163]

These evidences brought, in turn, international overviewing bodies such as UNODC[164] and GRETA[165] to share an understanding of the process of trafficking which explicitly contemplates the case of non-coerced trafficked persons, whose process of criminal victimization is deemed to be concretized through the adoption of "subtler" means of supply.

3.2.2. Obliterating the means of THB?

A different kind of explanation of the harmfulness of the means of THB is thus required: this necessity emerges as particular cogent for what specifically concerns the reception of the means element of the international definition which took place at the domestic level. While many countries have thoroughly included (and sometimes extended) the list of trafficking means inside of their national legislations,[166] several others have seen the means element of the definition as an obstacle against criminalization and have thus introduced a domestic definition of THB made up of acts and purposes only.[167]

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159 See *infra,* para. 5.

160 See e.g. P. Campana – F. Varese, *Exploitation in Human Trafficking and Smuggling,* European Journal of Criminal Policy Research, 2015, online, DOI 10.1007/s10610-015-9286-6. Perez, *A criminological reading, passim.*

161 See e.g. J. Fudge, *Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization,* in *Social and Legal Studies,* XX(X), 1.

162 See e.g. Chuang, *The Challenges and Perils of Reframing Trafficking as 'Modern-Day Slavery',* Anti-Trafficking Review 5, 2015, 146-149.

163 See e.g. D.F. Haynes, *Exploitation Nation. The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Labourers,* in *Notre Dame Jounal of Law, Ethics and Public Policy,* 23:1, 2012, 1.

164 See UNODC, *The International Definition*, 11.

165 See, for instance, GRETA, Report on Austria, II GRETA(2015)19, para 164.

166 See e.g. UNODC, *Abuse of a position of vulnerability,* 26-43.

167 *Ivi,* 43-51. See Section 2, 2015 Modern Slavery Act (United Kingdom); Group of Experts Against Trafficking in Human Beings, Report Luxembourg, GRETA (2013)18, 15 January 2014, 15; *Id,* Report Belgium, GRETA (2013)14, 25 September 2013, 19; *Id.,* Report France, GRETA (2012)16, 28 January 2013, 20; *Id.,* Report Bulgaria, GRETA (2011)19, 14 December 2011, 17; V Stoyanova, The Crisis of a Definition: Human Trafficking in Bulgarian Law 5(1) *Amsterdam Law Forum* (2013), 64.

In the academic literature, some authors have criticised the means element of trafficking as a source of undue exclusion from State protection of those individuals at risk of who have wilfully submitted to their abuse.[168] Others have proposed to adopt an extensive reading of the means suitable to capture basically any form of supply practice where exploitation is involved.[169]

These forms of "silencing" of the means element in the doctrinal interpretation of the international norms of criminalization show how fragile the legality of transnational offences can turn where such strong ambiguity is present at the international level concerning the subject matter of multilateral agreements in criminal matters.[170]

The present analysis envisages the integrity and coherence of international norms of criminalization as necessary values to be safeguarded in order to ensure a harmonic process of multilateral criminal cooperation. Therefore, the abovementioned elaborations of the means element shall be considered ill-founded in their relationships with the principle of legality.

3.2.3. The means of THB as fragments of the purpose element

In the perspective of the present work, a deeper understanding of the functional role of the means of trafficking can be reached through a comparison of the conducts which define the abovementioned means and the subject matter of the exploitative *purposes* of trafficking. As it has been highlighted in the legal doctrine, the abusive behaviours listed in the international definition as typical forms of trafficking means arguably include some of the key characters of the purpose element of the definition.[171] In this sense, the means of force, threat of use of force, abduction and other forms of coercion constitute the core of the processes of subjection which lie at the basis of practices of slavery, servitude and forced labour. Deception, fraud and abuse of power and of a position of vulnerability, on the other side, identify typical manifestations of an act of *taking unfair advantage of another's vulnerability,* which, in turn, as already mentioned, constitutes one essential segment of the structure of wrongful exploitation.[172]

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[168] J. Hathaway, The Human Rights Quagmire, 7.
[169] A Gallagher, Human Rights and Human Trafficking, 789, 814. For a critique, see Stoyanova, *Human Trafficking*, 56.
[170] This trend has been strongly adversed by the institutions that oversee the implementation of international trafficking definitions: see e.g. UNODC, *The International Definition,* 24, "*"Means" are an essential aspect of the definition of trafficking in adults – exploitative conditions alone are not sufficient to establish trafficking*". GRETA has often stigmatised the lack or incompleteness of the means element within the national legislations of COE member States: see e.g. GRETA, Report on Germany, I GRETA(2015)10, para 46 (abuse of power missing); GRETA, Report on Ireland, II GRETA(2017)28, para 194 (abuse of vulnerability missing); GRETA, Report on Sweden, I GRETA(2014)11, para 47 (abduction missing).
[171] See e.g. Weatherburn, *Labour Exploitation*, 251, for an examination of this aspect of "duality" of the means and purpose elements of the trafficking definition.
[172] Wertheimer, *Exploitation**, *passim.*

This conceptual link between means and ends of trafficking, in turn, seems particularly well suited for explaining the *pre-emptive* nature of the trafficking offence. These forms of offences tend to move the threshold of criminality of conducts in the space of *preparatory acts* of a particularly offensive *final* offence (in this case, severe personal exploitation). This anticipation of the criminal resposne goes hand in hand with a necessary selection of the preparatory acts which seemingly fulfil the liberal requirements of materiality and offensiveness of the criminal conduct, thus avoiding the incrimination of impossible crimes, mere intention or neutral forms of conduct. In this perspective, the means element is suitable to clarify the intention of the drafters of the trafficking protocol to cover a series of supply practices that, in the light of the above, amount *per se* to forms of exploitative *processes,* volitionally connected to a future and uncertain exploitative outcome.

It can be thus said that a systematic reading of the means element is likely to suggest that the crime of trafficking requires the presence of a *principium* of exploitation in the supplying conduct.[173] This solution appears suitable to safeguard the requirements of "criminological adequacy" and "contrast effectiveness" of the criminal definition. On the same, it ensures clarity and uniformity in the legal interpretation of the subject matter of trafficking means and purposes, thus possibly enabling a more harmonic reception and implementation of the offence at the domestic level.

This said, the question remains open about "what does the trafficker actually do wrong and towards what or whom?"[174]. How, in other words, is this "collapse of the ends into the means" suitable to be described in a discourse about blameworthiness? It's here that the concept of "abuse of a position of vulnerability comes to express its definitional role.

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[173] See, similarly, Allain, *Conceptualizing the Exploitation of Human Trafficking,* in J. B. Clark, S. Poucki (Eds.), *The SAGE Handbook of Human Trafficking and Modern Day Slavery,* SAGE, 2019, 8.

[174] See C. Lernestedt, *What does the trafficker do wrong and towards what and whom?,* in R. Haverkamp – E. Herlin-Karnell – C. Lernestedt, *What is Wrong with Human Trafficking?* Hart, 2018, 137.

4. Abuse of a position of vulnerability

4.1. APOV as a gatekeeper of the international offence

Although frequently addressed as a vague and inconsistent concept,[175] "abuse of a position of vulnerability" (henceforth "APOV") has acquired a progressive centrality in domestic and international responses against THB[176]. Specifically, the mechanism of APOV has been identified[177] to constitute a common feature of the abovementioned subtler, non-coercive forms of relational abuse criminalized under the international definition of THB. As an open-ended, all-encompassing legal concept,[178] APOV has been observed to act as a *gatekeeper* of the "typicity" of the international offence of THB in domestic experiences of reception.[179]

"Vulnerability" in this sense is intended as an element "*central to any understanding of trafficking and abuse of a position of vulnerability is an inherent feature in most, if not all, trafficking cases"*[180]. In the specific context of anti-trafficking law, vulnerability can prove very versatile in describing conditions of precarity and/or dependency that are both pre-existing and/or created by the trafficker with the intention of taking unfair advantage of the trafficked person. In this sese, the basic mechanism of APOV is capable to encompass the key features of all the other means listed in the trafficking definition. Abusive means such as violence, threat or fraud can in fact be seen to entail the wilful creation of a state of interpersonal vulnerability (physical, emotional, informative) suitable to influence the motivational process of a person so to make them submit to the will of the perpetrator. In other forms of relational abuse, such as abuse of authority, the trafficker profits from a pre-existent character of his relationship with the victim to impose their conditions.

As previously noticed, the concept of APOV represents a fragment of the structure of *exploitation,* which, in turn, represents the *trait d'union* of all the different practices of domination listed in the purpose element of the international definition of THB. An interpretive focus on the intersection

[175] See e.g. for an early comment of the international definition of the Palermo Protocol, G. Noll, *The Insecurity of Trafficking in International Law,* in V. Chetail, & M. Carlos-Tschopp (Eds.), *Mondialisation, migration et droits de l'homme: le droit international en question,* Bruylant, 2007, 349; for a critical account of APOV as a concept deployed in the EUATD, see Symeonidou, *The European Directive,* 471.

[176] UNODC, *Abuse of a position of vulnerability,* 2: "*The concept of abuse of a position of vulnerability, together with the other means listed in the Protocol has been accepted as a distinct and important part of the international legal definition of trafficking. It has survived intact in all major treaties adopted after the Protocol that incorporate a definition of trafficking in persons, as well as in policy documents and interpretative texts*".

[177] Bergelson, *Vulnerability, Exploitation,* 199.

[178] UNODC, *The International Definition*, 7: "*This particular "means" stands apart from others such as "force" or "fraud" in its essentially open-ended quality*".

[179] *Ivi,* 23: *Gatekeeper concepts including abuse of vulnerability and consent are being utilized by States to expand the parameters of what constitutes trafficking*.

[180] UNODC, *Abuse of a position of vulnerability,* 9.

between APOV and exploitation is, thus, the most suited to accurately grasp the essential features of THB which define the offence's criminal typicity.[181]

The next paragraphs will proceed by breaking down the legal concept APOV into its prime factors (position of vulnerability; abuse) and to further reconstruct its delimitative function as a means of trafficking, through the the examination of rival conceptions and common critiques of the legality of the criminal offence.

4.1.1. Defining "position of vulnerability"

As already mentioned, the expression "trafficking-related-vulnerability" (TRV) identifies a *continuum* of legal statuses that intercur between an "*existential*" situation of vulnerability, where an individual is found to lie in a personal and/or contextual situation of personal and/or social precarity and disadvantage, while not having (yet) been threatened with trafficking; and a situation of *vulnerable victimhood*, where the experience of trafficking is found to influence survivors' effective enjoyment of their human rights in the aftermath of their victimization. Abuse of a position of vulnerability describes the transition between these two conditions, capturing the relevance of the traffickers' acts in altering the agential and motivational situation of the trafficked person through a process of advantage-taking.[182]

In this sense, the "position of vulnerability" relevant for integrating the means of APOV refers to the *ex-ante* condition of the victim, prior to the exercise of an *abuse.* This condition is often described in international law as a "state of hardship",[183] "difficulty in exercising human rights"[184], with the frequent adoption of non-conclusive lists of situations which can qualify as examples of exploitable vulnerability, such as irregular migrant status, pregnancy, severe economic distress, emotional dependency, social isolation, etc.[185]

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[181] UNODC, *The International Definition,* 23.
[182] See Weatherburn, *Labour Exploitation,* 45.
[183] ECAT Explanatory report, §83: "*The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce*".
[184] See e.g. United Nations Office on Drugs and Crime (UNODC), *The Criminal Justice Response to Support Victims of Acts of Terrorism*. New York: 2011, 19. In the specific context of trafficking, see UNODC, *Abuse of a position of vulnerability,* 9: "*Vulnerability as a condition resulting from how individuals negatively experience the complex interaction of social, cultural, economic, political and environmental factors that create the context for their communities*".
[185] See e.g. UNODC Model Law Against Human Trafficking, where a POV is envisaged in circumstances such as "*having entered the country illegally or without proper documentation; pregnancy or any physical or mental disease or disability of the person, including addiction to the use of any substance; reduced capacity to form judgments by virtue of being a child, illness, infirmity or a physical or mental disability; promises or giving sums of money or other advantages to those*

In light of this, it is necessary to inspect how the international definition of THB describes the background personal and social conditions of potential victims as "exploitable" and/or "abusable".[186] First of all, it has been clarified that the mere fact that an individual lies in a situation of existential need does not suffice to qualify their recruitment process – even where future exploitation is at stake – as trafficking.[187] The trafficker must arguably *do* something to use this vulnerability to purse a purpose of exploitation. This clarification explicates a key trait of relationships of exploitation and/or domination under the perspective of vulnerability studies, i.e., their *pathogenic* nature.[188] The fact that an individual lies in a situation of need is not relevant alone for qualifying them as a potential trafficking victim, simply because lying in a state of hardship has nothing to do with being exploited, until someone decides to take advantage of a person facing such existential hardships. The harms directly connected to ideal-type situations of vulnerability such as destitution, illness and disability can be identified in the deplorable evolution and exacerbation of these situations of need into physio-psychical and social damage, in the absence of a societal *responsiveness* towards vulnerability. *Ex ante* vulnerability, therefore, can be understood as a *structural vulnerability* of individuals in a society which is unable or unwilling to provide them sufficient care. While these systemic forms of disadvantage manifest generally through *public inaction*, it is only the *private action* of a bad-intentioned individual that links this structural vulnerability to an actual, immediate threat of exploitation.[189] Even when an individual's condition of fragility has a relational origin (e.g., an emotive, economical or hierarchical position of dependency from another person), nothing in this relationship alone is suitable to bring to exploitation without a further *choice* of the prospective exploiter.

If, therefore, the fact of being involved in trafficking cannot be seen as a form of personal disadvantage, it may be misleading to qualify these background conditions as "vulnerability-to-trafficking": this expression is frequently adopted in the language of development studies,[190] where

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having authority over a person; being in a precarious situation from the standpoint of social survival; or other relevant factors".

[186] The inclusion of the elusive formula of APOV was arguably induced by the strong background tension between the different advocacy groups present at the trafficking negotiations, which were couterpoised especially on the issue of the acceptability of sex work and of human agency in their decision to sell sex. Thus, the element of APOV was deemed as politically rebuttable by some sex workers activists: see e.g. J. Halley, P. Kotiswaran, H. Shamir, C. Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism,* 359.

[187] See UNODC, *Abuse of a position of vulnerability*, 22 fn. 48, "*A victim's vulnerability can be an indicator of APOV, but it will not constitute a means of trafficking in persons unless that situation of vulnerability is abused*".

[188] See C. Mackenzie - W. Rogers - S. Dodds, Introduction: What Is Vulnerability and Why It Matters for Moral Theory, in *Id* (Eds.), *Vulnerability: New Essays in Ethics and Feminist Philosophy,* Oxford University Press, 2014, 9.

[189] See Vrousalis, Exploitation, vulnerability, *passim,* for this distinction between situational and relational vulnerability.

[190] See D. Durgana, A Theory of Human Trafficking Prevalence and Forecasting: Unlikely Marriage of the Human Security, Transnational Organized Crime, and Human Trafficking Literatures, *Slavery today* 1(2), July 2014, 1-21.

models are created to calculate and prevent large-scale threats to livelihood and human security by policing populations at risk. It has, instead, nothing to do with the legal reconstruction of a fact as a crime and the affirmation of an individual's responsibility for that fact. The abovementioned lists of typical "situations of vulnerability" currently included in Europan legal texts draw consistently on this human security perspective to trafficking: in this sense, they can play a strong role in the training of practitioners in dealing with potential trafficking victims and in recognising typical, statistically relevant trafficking dynamics.[191] On the same, they cannot suffice in unveiling criminally relevant processes of advantage-taking, where the personal and relational situation of both alleged perpetrators and victims are central in explaining the relevance of ex-ante vulnerability in a process of supply of exploited workforce.[192]

Under a criminal legal perspective, thus, the connection between a person's situation of vulnerability and their subsequent exploitation arises necessarily in the mind of the trafficker, and is brought into being through their action. The trafficker, in other terms, must be aware of a particular condition or state of the victim which can be instrumentalized by them for the future creation of a situation of exploitation.[193] This shall not necessarily mean that only members of "particularly vulnerable groups" are suitable to become victims of trafficking, while this condition might influence the evaluation of the gravity of the conduct of a perpetrator.[194] Anyway, nothing in the trafficking definition seems to prevent to qualify as trafficking forms of abuse suitable to target also categories of persons societally deemed as "ordinarily resilient" (e.g. young male workers not suffering particular diseases and a regular administrative status); individual and/or situational conditions, in fact, are suitable to be instrumentalized also in presence of needs and hardships that are *transversal* in contemporary societies (social anxiety, relational dependence, productivity creep, labour precarity, etc.). This specification is essential to favour an alignment of anti-trafficking law with the fundamental premise of contemporary vulnerability studies, i.e. the idea of *universality* of human vulnerability. Under this conception, the experience of existential vulnerability and the connected threats of interpersonal

[191] See UNODC, *Abuse of a position of vulnerability*, 15: "*Our understanding of those factors that increase susceptibility to trafficking is relevant to the extent that it provides some insight into the kinds of vulnerability that can be abused in order to make trafficking happen*".
[192] See Weatherburn, *Labour Exploitation*: *The understanding of vulnerability must therefore be sufficiently broad to capture the diverse forms of precarity and the complexity of the circumstances of those who are subject to exploitative working conditions*
[193] See UNODC, *Abuse of a position of vulnerability, passim.*
[194] In several anti-trafficking legal frameworks, the particular vulnerability of victims of crime who are members of particularly disadvantaged or marginalized groups is considered as an aggravating circumstance in a plurality of crimes against the persons. See e.g. Green, *Crime, Victimisation and Vulnerability,* in S. Walklate, *Handbook of Victims and Victimology,* 2007, Routledge, 92. This is, in particular, the case of the EU Anti-Trafficking Directive: see in this sense Stoyanova, *Human Trafficking*, 82.

abuse constitute intrinsic and shared characters of human life, which in turn provide normative justifications for the existence of a universal system of legal and social guarantees.[195]

Moreover, vulnerability can well be created[196] by traffickers through a wilful action: for instance the false depiction or exaggeration of the lifestyle in a destination country can constitute a motivational factor that later induces a migrant to submit to debt bondage.

It is, thus, the targeting of an individual, their observation, the adoption of strategies of influencing, that concretizes and actualizes the perspective of their future abuse, realizing their concrete exposure to the threat of exploitation.[197] APOV, therefore, can be seen as the juncture between the two layers that define the structure of pathogenic vulnerability: it intervenes on a situation of *ex-ante* vulnerability, turning it into a vulnerability to exploitation.

To sum up, thus, "position of vulnerability" in the international definition of THB identifies those characteristics of the situation of the potential victim that are targeted or appositely created by the trafficker in order to concretize a situation of *vulnerability to exploitation.* The transition between a situation of ex-ante vulnerability to one of vulnerability to exploitation is qualified in criminal law as *abuse.*

4.1.2. Defining "abuse"

As already noticed, APOV constitutes a "residual", open-ended expression in the trafficking definition: its field of application can thus reasonably be grasped by way of differentiation from the other typical practices composing the means element of the offence. As observed by Vera Bergelson, "*The trafficker's methods of abuse may not be reduced to force, threat of use of force, abduction, deception, or coercion; otherwise, the APOV as a separate means of trafficking would be superfluous".*[198] The inclusion of APOV in the trafficking definition has been deemed necessary[199] in order to adequately capture a series of abusive practices which are conducive to the creation of a situation of personal exploitation, which hinge on a personal situation of need, but which, on the same, do not entail the exertion of overt coercion on the victim. In many cases, exploited persons

[195] See *Supra;* see again M. A. Fineman, *The Vulnerable subject: anchoring equality to the human condition, passim.*
[196] UNODC, *Key Concepts*, 9.
[197] See in this sense Jovanovic, *The Essence of Slavery,* 11: *Since the trafficking offence is complete before any exploitation has materialised, being subject to human trafficking creates a real and immediate risk of being subject to exploitation*
[198] Bergelson, Vulnerability, Exploitation and Choice*,* 201.
[199] See e.g., UNODC, *The International Definition,* 9: "*Where abuse of a position of vulnerability is omitted from domestic definitions, situations that would otherwise fall within that definition may be excluded from it. […] cases in which a person seemingly knew that he or she be working in prostitution would not necessarily be viewed as a situation of trafficking […] and means of control […] may not be captured by the other means available*".

themselves confirm the uncoerced nature of their choices to submit to a situation of severe exploitation.[200]

In defining a situation of APOV, therefore, on one side, the act of the trafficker does not have to amount to a form of physical coercion or threat; on the other, the victim must be at least partially aware of the perpetrator's intent to exploit them (when this is not the case, the trafficker's conduct would be characterized by fraud or deception). In these situations, the trafficker's role is arguably the one of a persuader of the victim, who is induced to submit to exploitative conditions through a seemingly uncoerced and informed decision.

It shall thus be asked, under which conditions does such a subtle form of pressure amount to an *abuse* of a condition of *ex ante vulnerability*? Arguably, something in the conduct of the trafficker must qualify as the *commencement* of a process of exploitation. As already noticed, the notion of APOV figures as one of the founding elements of most generally shared definitions of exploitation:[201] taking *unfair advantage* of a person's individual or situational vulnerability ("Advantage-exploitation" or "A-exploitation");[202] this sub-conduct is understood to lead to the integration of a fact of exploitation when the exploiter materially profits from the unjust treatment of the person ("benefit-exploitation" or B-exploitation) through the abusive and/or harmful extraction of value from their work, services or body.[203]

When, as in the present case, advantage-exploitation is included as an objective element of a criminal definition, it is reasonably required that (1) the trafficker knows about the situation of vulnerability of the victim; (2) he intentionally *takes unfair advantage* of it.[204] "Taking unfair advantage", therefore, necessarily implies the *will,* on the side of the trafficker, to use the trafficked person's state of hardship in an immoral (*unfair*) and egoistic (*advantage*) way. The egoistic element of the conduct of the trafficker can be reasonably identified in their intention to gain from the process of supply and/or further B-exploitation: this arguably clarifies the necessity of a special *dolus* of profit on the side of the trafficker.[205]

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200 See, for instance, GRETA, Report on Austria, II GRETA(2015)19, para 164.
201 UNODC, *Key Concepts*, 9.
202 Woods, *Exploitation*, passim.* See in the same sense UNODC, *The International Definition*, 10: "*Apov occurs when an individual's personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of*; Stoyanova, *Human Trafficking, Abusing the vulnerability* […] *impli*[es] *that the alleged traffickers intentionally took advantage of the vulnerability*".
203 Woods, *Exploitation*, passim*.
204 UNODC *Key concepts,* 9: *Abuse of a position of vulnerability appears to comprise two evidentiary requirements: proof of the existence of a position of vulnerability on the part of the victim; and proof of intent to abuse that vulnerability as the means by which a trafficking act was undertaken*.
205 Lernestedt, *What Does the Trafficker do Wrong*, 18; see also, in the philosophical literature, A.Wertheimer, *Exploitation*, OUP, Oxford, 1995: *One cannot take unfair advantage of the exploitee (B) unless one gets at least some*

On the other side, the *unfairness* of APOV-based transactions can be reasonably linked to the *outcome* of the agreement and to the *process* through which the agreement is sought and reached.[206] From the point of view of the outcome, the trafficking agreement can *in itself* be considered as unfair because it subtends the further creation of an unjust situation of severe personal B-exploitation. The *object* of the agreement, therefore, defines at least in part its unfair nature.[207] Political philosophers have been dabating for long on the elements suitable to qualify the object of an exploitative agreement as wrongful, especially where its conditions are mutually advantageous for its parties. The most popular theories of exploitation alternatively identify a relational process of benefit-gaining as unacceptably unfair when one of the parties is submitted to conditions that a) are significantly worse than in the normality of societal relations of the same context ("deviation from the market norm" model);[208] b) are qualified as contrary to human dignity ("human dignity" model);[209] c) are unsuitable to warrant a sufficient and healthy subsistence of the person ("basic needs" model).[210]

The moral delimitation of the unfair outcome of the exploitative agreement can be reasonably considered as an easier task in the field of trafficking, where, as already noticed, all the forms of exploitation listed in the purpose element are meant to amount to forms of *personal* exploitation deemed as severe in the contexts of implementation, thus subtending a prior process of threshold setting of the purposes of trafficking operated at the domestic level.[211] While some countries might decide to refer to general notions of human dignity to define the threshold of severe exploitation,[212] the recent comparative legislative experience in the field of labour exploitation shows that a combination of the "deviation from the market norm" model and the "basic needs model" has been adopted in the legislative and judicial practice of several European countries[213]

This considered, while the unfairness of APOV resides in the agreement which it gives rise to, it still has to be explained why not all exploitative offers amount to human trafficking, and why APOV is

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advantage from B; See *infra,* 2.2.5, for a systematisation of the element of personal benefit in the double-sided structure of exploitation enshrined in the trafficking definition.

206 See for instance, Bergelson, *Vulnerability, Exploitation and Choice,* 201, "*The trafficker must use the traffickee's position of vulnerability wrongfully, i.e., in a wrongful way and for a wrong purpose*".

207 See, for instance, J. Elliott, *The Role of Consent in Human Trafficking,* Routledge, 2015, 156.

208 See e.g. the systemisation of Wertheimer, *Exploitation, passim.*

209 See, for instance, R. Sample, *Exploitation: what it is and why it's wrong,* Roman and Littlefield, 2003.

210 See e.g. J. Snyder, *Needs Exploitation, in Ethic Theory Moral Practice,* 11, 2008, 393. This whole taxonomy of exploitation theories is in large part drawn from Weatherburn, *Labour Exploitation* 30-34.

211 As already pointed out, the implementation of the trafficking protocol reasonably requires that the threshold of gravity of those acts domestically deemed as of severe exploitation shall be defined in the domestic legislation of every contracting parties, save the international legal prohibitions of slavery, acts similar to slavery, forced and compulsory labour, and servitude, and of all the other practices to whose prohibition the parties explicity bound themselves under international law.

212 See e.g. the Belgian legislation analysed in Weatherburn, *Labour Exploitation,* 156 ff.

213 See e.g. the Italian model of crime framing examined in di Martino, *Sfruttamento del lavoro, passim*; the UK judicial practice of operationalizations of indicators of severity analyzed in Weatherburn, *Labour Exploitation,* 200 ff.

considered as particularly wrong among the forms of recruitment so to require an anticipated criminalisation. The particular wrongness attributed to this *process* of supply can reasonably be explained through an appraisal of the gravity of the perpetrator's *mens rea* and of the harmfulness of the material conduct.[214]

Under the first perspective, when confronted with APOV as a supply strategy, the trafficker's behaviour is characterized by the psychological and material features of a *predatory* market practice: the recruiter acts abusively not only in offering conditions of subsistence that are considered as generally wrong; they also strategically select the recipients of the exploitative offer in order to *take advantage* of a situation of vulnerability. The trafficker, in other terms, identifies traits the of weakness or need of the potential victim that can be usually turned in a *relational* leverage to gain a position of substantial bargaining power.[215] Variable situations of hardship such as poverty, irregular status, social isolation, etc., are turned by traffickers into corresponding advantages in the process of recruitment, transportation, harbouring of prospective exploited workforce.

This account of abuse, in turn, brings about the issue of the harmfulness of APOV as a modal conduct. As said, APOV differs from other non-coercive offers in its wilful relational situation of *dependency* and power imbalance. The awareness of the precarious situation of the prospective victim allows the perpetrator to create a state of things where the trafficked person, while not coerced, arguably experiences a significant level of hardship in opting out his relationship with the trafficker: Where APOV is enacted, in other terms, relevant subjective and objective *costs* are associated with the victim's return to their *status quo ante* and to the corresponding loss the advantages, in terms of security, subsistence, existential perspectives, which the abusive relationship guarantees. This element of interpersonal dependency constitutes the indicator of an actual risk of exploitation, suitable to evolve in the imposition of variable forms of control over the person.[216]

The present understanding of APOV, thus, focuses mainly on the acts and *mens rea* of the trafficker, embracing vast plurality of supply practices, and presenting the unfair nature of abuse as somehow split between the process and the envisaged outcome of the transaction.[217] This systemisation prevents

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[214] See e.g. Wood, *Exploitation**, 142: "*The exploiter must do something, involving a degree of planning and manipulation to take advantage of the fortunate circumstance, bringing it into the exploiter's control or within the purview of the exploiter's plans or machinations*".

[215] Weatherburn, *Labour Exploitation*: "*The existence of an imbalance of bargaining power […] characterise[s] a situation that could be taken advantage of when it comes to making an offer*"; Elliott, *The role of consent*, 67: *Abuse of a position of vulnerability requires a counterpart position of abuse of power or authority.*

[216] The element of control is in turn seen in the Conventional framework of the CoE as a '*crucial element common to all the forms of exploitation of human beings covered by art 4* ECHR": see European Court of Human Rights, CN v France

[217] See e.g. Lernestedt, *What does,* 138: "*the decisive factor for the element of abuse is not how the situation was used, but the very fact that it was used at all. As a result, use is practically equivalent to abuse. Consequently, the use of a labourer who knowingly and intelligently opts to do the exploitative work will easily amount to abuse*".

the crime of trafficking from being unreasonably reduced to a form of stereotypical or symbolic contrast of severe phenomena of exploitation, to be mobilised only in presence of a helpless and/or bonded victim. Trafficking is, on the other side, framed here as a particularly harmful and predatory form of supply, which finds its roots in societal inequalities, which in turn give rise to harmful relationships of advantage-exploitation which can constitute the object of criminalisation before any further benefit-exploitation takes place.

4.2. Of "reasonable victims" and "poor decision-makers": a critique of APOV as "absence of real and acceptable alternatives".

The Interpretative Note to the Palermo Protocol provides a non-binding interpretation of the concept of APOV, defined as "*any situation where the involved person has no real and acceptable alternative but to submit to the abuse involved*". Such a definition, which has been reproduced, with minimal variations, in the CoE Convention Against Trafficking and in the EU Anti-Trafficking Directive advances an idea of APOV which revolves around the reconstruction of a victim's agential situation at the moment where the crime was committed. This explanatory clause seems to confirm that, in a context of APOV, the prospective exploitation of the victim is presented by the trafficker in the form of a *proposal*, to which the victim seemingly wilfully *submits*. On the same, the cited formulation refers to an idea of abuse in which the perpetrator "leaves no alternative" to the victim, who chooses the perspective of exploitation as a mere "lesser evil" compared to the *alternatives* they would be forced to accept in case of a denial of the said proposal.

As specified by the UNODC, defining APOV as the "lack of real and acceptable alternatives" is suitable to open a series of penetrant interpretative issues.[218] Most notably, it is necessary to ask whether the availability of alternatives must be subjected to specific scrutiny in criminal investigations and, in case, how it shall to be proved; what, on one side, does render an alternative "real"? Its mere abstract possibility or its concrete availability in the range of concrete options of the victim at a precise time? What, on the other side, does qualify an alternative as "acceptable"? Is this evaluation uniquely dependent on a State's assessment of the morally acceptable ways of life of individuals or is it dependent on the victim's perception of acceptability? What, finally, should be the cognitive perspective of the trafficker in these situations in order to affirm their criminal responsibility? Should perpetrators know – or at least be in reasonable conditions to suspect – that the victim has no real and acceptable alternatives, considered their state of mind and the objective circumstances?

[218] UNODC, *Abuse of a position of vulnerability, passim*.

Different responses to the cited questions are suitable introduce different "tests of alternatives" which oscillate between two extremes: on one side, APOV can be intended as a situation of *duress*, i.e., *objective* lack of choice of an individual who is exposed to the risk of an ("unacceptable") offence to their basic interests. On the other, APOV might entail an assessment of the victim's *subjective* perception of their available options when the trafficking conduct is put in place: in this case, *real* alternatives would be identified in those options that the victim has actually considered before submitting to the exploitative offer of the trafficker; *acceptable* alternatives would identify the subgroup of real options that the victim would have been available to choose alternatively to submitting to the exploitative offer.[219]

Both these interpretations are suitable to prove particularly problematic in the perspective such as the one embodied in European Anti-Trafficking instruments, which includes, most notably, an express attention to the protection of vulnerable victims of severe exploitation. On one side, reducing APOV to a situation of duress would arguably amount to a very underinclusive interpretation of the crime and to a very debatable method of victim framing. In this sense, the recruitment of trafficking victims through an exploitative offer only rarely amounts to a situation of objectively determined choice, where the individual is fleeing the perspective of a *certain* and severe harm to his fundamental interests; conversely, APOV is generally thought to comprehend "subtler methods" of inducement, which intervene on the victim's *representation* of their situation and take advantage of the person's subjective-objective situation of hardship. Furthermore, the adoption of the *rationale* of duress to define a requisite element of the offence of THB would debatably qualify trafficking victimhood as a condition which must be *justified,* delivering the idea of a general *protection-undeservingness* of individuals who voluntarily submit to exploitation. Modelling APOV as a form of "coercion of circumstances"[220] would therefore run counter the objective of inclusivity of the criminal definition and would moreover undermine the definitional role of APOV itself, as coercion is already listed among the other means of trafficking.

On the other side, adopting an entirely subjective perspective on APOV which defines it as a form of psychological compulsion of the trafficked person would make the judicial verification of this element of the crime entirely dependent on the reconstruction of the victim's state of mind at the moment of the fact. This evidentiary approach is suitable to create notable problems under the point of view of the potential conclusiveness of the criminal investigations and on the fairness of the trial

[219] See *mutatis mutandis*, A. S. Burke, Rational Actors, Self-defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman, 81 *N.C. L. REV. 211* (2002), 286-88; See also di Martino, *Sfruttamento del lavoro*, 162.
[220] See e.g. K. Kim, *The Coercion of Trafficked Workers,* Iowa Law Review, 2010, 450 for a critical discussion of this paradigm.

against alleged traffickers, who would be arguably deprived of any defence *in facto* concerning the harmfulness of their conduct.[221] Moreover, such forms of ascertainment would be suitable to prove very invasive for trafficking survivors, whose active participation in the trial would be rendered essential in order to get to a conviction, contrarily to the explicit indications of European anti-trafficking instruments.[222]

In consideration of the cited relevant criticalities, international acts of guidance were increasingly dedicated in the last year to address the issue of the interpretation of the formula "absence of real and acceptable alternatives". Specifically, the UNODC proposed to adopt an *objective* perspective on APOV, where, on the same, the evaluation of "*whether the victim's belief that he or she had no real or acceptable option is reasonable"* is tailored on *the personal characteristics and circumstances of the victim*.[223]

A distinction is thus posed between victims who, confronted with an exploitative offer, *do* have materially alternatives which, on the same, cannot reasonably be considered as acceptable in their circumstances;[224] and non-victims, who *choose* to be trafficked when they could reasonably have chosen to do otherwise even in their difficult *ex ante* conditions of hardship. Even some recent, comprehensive elaborations on the wrongfulness of trafficking rely at least partially on this exclusionary distinction between a reasonable, constricted victim's choice and a situation of "*poor decision-making"*,[225] where the exploited person allegedly wilfully chooses exploitation notwithstanding the presence of alternative options that could have been realistically available to them.

In the present perspective, it can be held that the "real and acceptable alternatives" *rationale* is of no use in explaining the criminal mechanism of "abuse of a position of vulnerability" in that it poses an intrinsically flawed test in representing abusive processes of supply of exploited workforce which can be observed in real-life scenarios.[226] This inadequacy of the explanatory clause emerges under many fronts: on one side, the "real and acceptable alternatives" *rationale* describes the trafficker's act of abusing as wrongful by making exclusive reference to its *effects* on the agential condition of the victim: the perpetrator abuses the victim "by leaving them no other alternative". This elusive

[221] Symeonidou, *The European Directive,* 471.
[222] Stoyanova, *Human Trafficking*, 81.
[223] UNODC, *The International Definition,* 10.
[224] UNODC makes the example of irregular migrants who find themselves in a situation of exploitation in a foreign, where often a possibility to denounce their exploiters to State authorities is abstractly present, but which is nonetheless deemed "unacceptable" for the exploited persons, because of their frequent intimidation, mistrust in the police and/or fear of deportation and/or incrimination because of their irregular status.
[225] Weatherburn, *Labour exploitation*, 246.
[226] See, for instance, GRETA, *Human Trafficking for the Purpose of Labour Exploitation*, 13. Kim, The Coercion, 460.

formula does not provide any account of which material conducts can concretely qualify as an "abuse", nor of how these conducts should connect to the situation of ex ante vulnerability of the victim. Moreover, considered that the *mens rea* of the trafficker should arguably cover all the elements of the crime at least at the level of *dolus eventualis,*[227] this implies that in any APOV-based trafficking fact the perpetrator is expected to know not only about the victim's hardships, but also about their available options and life perspectives, so to wilfully "leave the victim with no alternatives"; and that this knowledge is suitable to be somehow proved in a criminal trial which is often celebrated in absence of one or both parties and in a different country than the one where the victim was originally recruited.[228] This reconstruction of the mechanism of APOV, thus, is incredibly problematic even if considered under a merely evidentiary perspective, in that it renders the typicity of the crime entirely dependent on the "circumstantial awareness" of both the perpetrator and the victim, with no regard for the exterior traits of the criminal behaviour.

On the other side, the "real and acceptable alternatives" *rationale* depicts situations of dependency and risk-exposure in terms of material or perceived unavailability of exit options. This contradicts the common psychological explanations of the influence of feelings of precarity and/or dependency in orienting individuals' choices.[229] Such influence hardly manifests in the behaviour of vulnerable individuals as a careful weighing of their foreseeable life scenarios; on the contrary, the subjective experience of vulnerability generally expresses itself in an urge of changing one's life conditions (precariousness) or of preserving a particular source of subsistence or well-being (dependency). The "real and acceptable alternatives" *rationale*, therefore, disregards the reality that, in most trafficking cases, future exploitation is hardly the only existential perspective of a person, but it is *concretely* presented as a ready-made opportunity to escape a state of hardship which could be abstractly overcome through other, more complex means. Even more critically, this definition conceals the fact that, in some cases, the situation of perceived vulnerability of the trafficked persons *itself* might amount to an "acceptable alternative" in the eyes of the State, while concretely playing a role in securing a relationship of control of the trafficker over the victim.

Finally, under the "real and acceptable alternatives" *rationale,* the victim is expected to act "reasonably" in their weighing of the acceptability of alternatives, although this evaluation is required to be operated with due consideration of the person's characteristics and circumstances. Once more, the situation of someone who takes a decision to flee need, hopelessness, fear, is redefined legally as

[227] See UNODC *Abuse of a Position of Vulnerability,* 16.
[228] See for some guidance United Nations Office on Drugs and Crime, *Evidential issues in Trafficking in Persons Cases,* Vienna, 2017.
[229] See e.g. E. Hopper, M.D. Hidalgo Invisible Chains: Psychological Coercion of Human Trafficking Victims, *Intercultural Human Rights Law Review* vol 1, 2006, 185-209.

a form of “rationalizable” behaviour, i.e., a situation, however hard, where the quality of an individual (situationally constricted victim/ poor decision-maker) can nonetheless be grasped through the adapted application of the ordinary virtues that the legal system attributes to the free citizen.[230] The (western) legislator, consequently, adopts a benchmark of “adapted victim diligence” to assess the criminal relevance of material relational dynamics of domination which are concretely based on the manipulation of subjective expectations, needs and desires.[231]

This conceptual operation contestably shifts the perspective of the blameworthiness of trafficking from an appraisal of the severity of the envisaged exploitation and of the abusiveness of the material supply practice to a moralized test of “justification” of the victim’s conduct, thus vehiculating the idea that, in absence of a reasonable weighing of their alternatives, trafficked persons act as mere accomplices of those who traffick them.[232] The foreseeable result is the complete obliteration of the legality of the criminal norm in favour of a symbolic process of “ideal victim-creation" which is arbitrary in the approach and unfairly exclusionary in the effects.[233]

In light of this, under an exegetic perspective of international law of the treaties, it can be held that the “real and acceptable alternatives” clause can be deemed as conflicting with the aims and basic features of the crime of trafficking, thus hindering the systematic coherence of the international offence. On one side, the “no real and acceptable alternative” *rationale,* in its selection between “reasonable victims” and “poor decision-makers”, seems to strongly diverge in its approach from the will of the drafters of the Palermo Protocol not to make the criminalisation of trafficking conditional on the agential situations of victims,[234] asking, on the contrary, for a criminal definition centred on the trafficker's behaviour.

More specifically, the abovementioned clause presents itself as conflictual with the cited section of the Protocol that states the *irrelevance* of the consent of the victim where any of the trafficking means are used; the cited “mitigated” interpretation of the “real and acceptable alternatives” *rationale* by the UNODC, on the contrary, appears to subtly reintroduce a test of consent inside of the trafficking definition. The “real and acceptable alternatives” *rationale* has, in fact, the disturbing effect of

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[230] A. Norrie, *From Criminal Law to Legal Theory: the Mysterious Case of the Reasonable Glue Sniffer,* Modern Law Review, 65:4, 2002, 538.
[231] See e.g. D. F. Haynes, Exploitation nation, for a critical review of this legal representation of exploitation.
[232] See in this sense, Kim, The coercion, 430.
[233] In the migration scenario, this arbitrariness is particularly evident, as it reproduces the “voluntary-forced” migration dichotomy typical of the law on international protection. The relevant difference is that the evaluation of “force” is not meant primarily to validate a process of migration through international protection, but to decide about the systemic nocivity of practices of exploitative supply. See *Ivi*
[234] Stoyanova, *Human trafficking,* 81.

reconceptualizing the mechanism of trafficking in the terms of a "clinical" transaction,[235] where the perpetrator can be said to *exploit* the victim when they do not make sure that the trafficked person is in the material and subjective conditions to refuse the proposed treatment. This formulation of the criminal command against the trafficker arguably determines the implicit introduction of a requirement of verification of the objective conditions for consent at the judicial/prosecutorial level as a necessary element for affirming the criminality of the trafficking conduct.[236] As it will be argued, this public ethics rationale[237] is suitable to find application in other sectors the international legal response against trafficking, and most notably in the discipline of State responsibility under human rights law. On the other side, such a "bioethical" conception of exploitation seemingly does not have anything to do with the *criminal* wrongness of the trafficking offence, which is not in any way made conditional on the presence of an informed and uncoerced consent on the side of the victim. Such wrongness, on the other hand, arguably resides in the gravity of the exploitation with which the person is directly threatened and in the particular intensity of the perpetrator's *mens rea*.[238]

It can be thus recommendable, in the perspective of the present thesis, that the "real and acceptable alternatives" *rationale* is abandoned as a canon of interpretation of the trafficking definition.

4.3. Understanding the irrelevance of the trafficking victim's consent

In the previous sections, repeated references have been made to the enigmatic clause of art. 3, section (b), of the Palermo Protocol, where it is stated that "[t]*he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used*".

The relevance of this clause inside of the definition seems to be very variable, depending on which of the scenarios of supply foreseen in the norm actually manifests in reality: as previously observed, in fact, the recruitment, transportation, harbouring of a person through violence, threat of violence or abduction amount to inherently *coercive* methods of trafficking. Moreover, the use of means such as fraud, deception, abuse of power, while not directly coercive, certainly characterizes a situation where the victim is not put in the condition to express a free and informed consent, because of the effects of misinformation and/or of authoritative orders on their motivational process.

[235] See for instance E. Riveira-Lopez, *Consent and exploitation in bioethics: individual ethics and legal regulation,* in *Id*, Controversies in Latin-American Bioethics, Springer, 2019, 83.
[236] For a critical account of this *rationale,* see for instance, Elliott, *The role of consent*. Chapter 5. See also S.V. Jones, *Human Trafficking Victim Identifification: Should Consent Matter*, 45 Ind. L. Rev., 2012, 483-511.
[237] See e.g. R. Goodin, *Protecting the Vulnerable,* 1985, for an early affirmation of this doctrine.
[238] See in the same sense, in domestic case law, United States v. Calimlim, 538 F.3d 706, 710 (7th Cir. 2008), cited in Kim, *The Coercion,* cit., footnote 256.

Even APOV is suitable to qualify at times as a consent-suppressive conduct, especially where the situation of vulnerability of the victim is wilfully created by the trafficker, in order to force the person to submit to an exploitative offer.[239] Apparently, in all the cited cases where the conditions for a free, informed and uncoerced consent are not present *by definition* in a trafficking process, the abovementioned clause of the "irrelevance of the consent" appears void and superfluous. This said, it must be argued that the explicit introduction of such a clause in international anti-trafficking instruments expressly includes in the definition of trafficking facts where no evident violation of the consent of the victim is envisaged in the process of supply of the trafficked person.

This scenario of wilful submission of the victim is considered in the international norm of criminalisation mainly in those cases in which the trafficker acts through the means of APOV, in a situation where the trafficked person *already* lies in a pre-existing situation of vulnerability which was not instrumentally created by the trafficker. The juncture between APOV and consent-irrelevance comes to define, therefore, another crucial conceptual node of the gatekeeping of the international criminal offence. The "core wrongness" of trafficking is thus suitable to be identified elsewhere than in the presence of a vice in the decisional process of the victim. Consequently, consent-suppression must not be considered as a necessary trait of all trafficking means: otherwise, the consent irrelevance clause would lose any functional role in the definition.

This said, it shall be asked why the element of victim's consent is deemed to be *irrelevant* in the trafficking definition. Anti-trafficking legal texts and international documents of guidance are unclear on this issue: instead of making sense of the definitional role of the clause, many documents tend to stress the *procedural, applicative* usefulness of the consent-irrelevance clause.[240] This is certainly in line with the explicit will of the drafters as emerging from the *travaux préparatoires*, where the risk is clearly addressed that the law enforcement response against trafficking could be hindered by the traffickers' resort to a "defence of consent" in cases where coercion or fraud are not clearly proved.[241] While this historical interpretation of the norm confirms the cited thesis concerning the inclusion of consensual supply practices in the applicative scope of the international definition of THB, it seems nonetheless misplaced to explain *why* then trafficking is wrong and objectively harmful and *how* are these wrongness and harmfulness meant to be included in the object of inquiry of law enforcement authorities.

[239] See e.g. UNODC, *Issue Paper. Abuse of a Position of Vulnerability,* 71.
[240] See e.g. UNODC, *Issue Paper. The role of Consent,* 74 ff.
[241] See for a comment, Gallagher, *The International Law,* 28.

To approach this theoretical question, it can be useful to turn the problem upside-down and to ask whether and how the trafficked person's consent to be involved in severe forms of exploitation is suitable to influence the criminal relevance of the trafficking process overall. This perspective arguably allows to clarify two largely ambiguous issues about the crime of trafficking and to dispel a commonly shared myth about the effects of trafficking criminalisation.

First, it must be evidenced that consensual trafficking in any case amounts to consenting to a practice which is considered not just individually, but also societally wrongful.[242] THB in this sense constitutes a threatening criminal business which crosses State borders and which lies at the basis of practices of severe exploitation which are heavily offensive societally, in light of their suitability to alter the conditions of labour markets, influence the nature, price, modality of recruitment and employment of workforce, normalize abusive labour practices, etc.

In this sense, the affirmation of an international duty to criminalize THB as an offence of transnational interest seems to require a corresponding criminalization of the practices of severe personal exploitation mentioned in the purpose element of the trafficking definition, too. This effect, while not expressly foreseen in the international norms of criminalisation, looks on the same inextricably connected to a technical question of criminal coherence and fair labelling:[243] where a preparatory conduct of a violation is framed as criminal, then the "final" violation must be deemed criminal, too. Consenting to trafficking must, therefore, be envisaged as consenting to be involved in an exploitative practice which is prohibited and punished as criminal in the legal order where it takes place.[244]

This brings us to the myth: it's been argued that qualifying a person who wilfully submits to an offer of exploitation as a trafficking *victim* amounts to a legal misrecognition of their free will, suitable to restrict the already scarce possibilities of survival of those who lie in situations of need and ultimately to make their structural vulnerability even worse, generally without offering adequate guarantees in exchange.[245] This objection brings into the debate about trafficking issues which must rightfully strongly concern States' law enforcement strategies against exploitation, i.e., the question of the *limits*

[242] Elliott, *The Role of Consent*, 136.
[243] This mediated criminalization effect concerning the ends of trafficking has been sofar way less promptly receipted by national jurisdiction compared to the uniform adoption of national criminal definitions of trafficking. Strong disomogeneity concerning crimes of slavery, bonded and exploitative labour or servitude can be acknowledged even in the more legally harmonised European legal order: see Weatherburn, *Labour Exploitation*, p. 8-9; K. Skrivankova, Defining Exploitation in the context of trafficking – what is a crime and what is not, in Piotrowicz, *Routledge Handbook,* 109.
[244] See e.g. with reference to labour exploitation, Greta, *Human trafficking for the purpose*, 12; the relevant shortcuts which derive from a scarce coordination between criminalization of trafficking and criminalization of the purpose offences are analysed in V. Stoyanova, *The Crisis of a Definition: Human Trafficking in Bulgarian Law,* Amsterdam Law Forum, 5:1, 2013, 64.
[245] Noll, *The Insecurity of Trafficking,* 352

of criminal law in addressing structural phenomena of inequality which are strongly embedded in a society's system of production and reproduction.[246]

These problematic issues are suitable to ignite a strong national debate around public ethics concepts of legal paternalism, non-worseness of law enforcement interventions, thresholds of gravity.[247] On the same, such a domestic debate should take place *before* the criminalization of trafficking is discussed. In other terms, once severe personal exploitation is criminalized in a legal system, the trafficked person's consent is not suitable to express any validation of the purpose activity of trafficking as a subsistence option, as that activity *already* amounts to a practice subject to penal contrast.

In summary, the joint criminalisation of THB relies on the setting of adequate thresholds of gravity for a sustainable multilateral criminal contrast of serious phenomena of exploitation. While the international definition of THB identifies the key elements of the crime (an act of supply, a purpose of severe personal exploitation, a means of abuse), each country is free in calibrating the gravity of these elements in order to meet the standards of gravity that are suitable to qualify trafficking as a phenomenon of criminal relevance. The criminalization of trafficking, therefore, is not suitable alone to favour societal change or to contrast labour exploitation and interpersonal abuse of vulnerability as structural phenomena. Its main function, on the other side, must be envisaged in the contrast of specific, extremely severe forms of exploitation through the anticipation of their criminal contrast to the early phases of supply of prospective exploited individuals. The consent-irrelevance clause in the international definition of THB arguably reaffirms this necessary, wide spectrum pre-emption of the threat of severe exploitation at the level of international relations.

[246] See L. Collins, *Exploitation of Persons and the limits of the criminal law*, Criminal Law Review, 2017(3), 167-184.
[247] See for instance Weatherburn, *The Role of Consent* 56-60, for an insightful analysis of the most important public ethics dilemmas connected with the criminalization of exploitation.

5. Conclusion: making sense of the double-sided structure of the international definition of THB

While the previous analysis has provided an in-depth assessment of the key coordinates of the international offence of THB, one final element seems to remain missing: the role of the concept of coercion within the definition of trafficking. As previously noticed, an element of physical, psychological and motivational coercion is central in those practices (slavery, servitude, practices similar to slavery, forced labour) which are expressly prohibited under international legal instruments and which define the standard of wrongful exploitation condemned in most of the world's legal systems. The relevance of the element of coercion in the contemporary international law of THB is confirmed by recent analyses of the State of anti-trafficking contrast in different domestic legal systems. Specifically, several studies reveal that the evidence of a victim's lack of agency often plays a key function in grounding judicial findings of trafficking concerning concrete facts of recruitment and/or transfer of exploited individuals.[248]

The identification of a coherent role of coercion in the structure of the crime of trafficking seems, therefore, necessary. A useful analytical approach, in this context, can arguably be found in the abovementioned conceptualisation of THB as a preemptory offence aimed at the early contrast of "final" practices of severe personal exploitation. In this sense, Allen Wood's abovementioned understanding of exploitation as the interaction between distinct acts of advantage (A) and benefit (B) exploitation looks suitable to explain the definitional role of coercive practices such as force and threat, which are presented in the trafficking definition as typical forms of *advantage-taking* of the victim.

It can thus be suggested that the concept of severe personal exploitation shall be represented as a plurality of combinations of practices of A- and B-exploitation. Following the previous interpretation of the text of the international definition of THB, each of these combinations, in order to integrate the offence of THB, must (1) amount to a situation where the *person* is made object of a severely unfair practice of domination; (2) display already in the supply phase a character of *offensiveness* suitable to justify criminalization; (3) this offensiveness must be by the objective behaviour of the trafficker and of its effects on the motivational situation of the trafficked person.

In this sense, several forms of trafficking purposes don't entail a form of B-exploitation which can be seen as *per se* severely harmful: think just about the case of "forced marriage", where, in the words of UNODC, *the question whether a person consented, and at what stage, to an act that would*

[248] UNODC, *Evidential Issues,* 133.

otherwise be lawful, is critical to establishing the existence of an offence.[249] But this observation can be easily extended to other purposes of trafficking such as forced labour: as accurately noticed in the specialised literature,[250] the wrongness of this form of severe exploitation does not reside in the nature of the labour provided by the person, but rather in the fact that this labour was imposed without the consent of the person. While, then, B-exploitation always amounts to a form of "use" of the victim's body, time and services suitable to describe a core aspect of their life (*personal* exploitation), the *severe and exploitative* aspects of this behaviour reside arguably in the coercive process of advantage-exploitation. In other words, the severity and abusiveness of these forms of exploitation can be appreciated only once the influence of the abusive practice on the situation of the victim is reconstructed, revealing an actual nullification of the trafficked person's will. Once teleologically connected to the "neutral" purpose activity (work, marriage, etc.), in fact, a process of coercive recruitment is suitable to display the core element of wrongness of severe personal exploitation, through the deprivation of the victim of the control of one of their fundamental components of their life as an individual - i.e., their personal autonomy - and translating it under the control of the exploiter. In presence of a coercive supply conduct, this element of domination easily emerges in its key elements of wrongness already at the preparatory stage of exploitation, thus constituting a relatively recognizable manifestation of THB.

What the previous analysis has tried to specify, though, is that a legal preemption of practices of severe exploitation is possible even when the process of A-exploitation does not reach a level of actual coerciveness. As already noticed, processes of advantage-taking of others' vulnerabilities are widespread in individualistic and competitive societies. In some cases, they are plainly accepted as mere corollaries of lawful processes of "playing for advantage"; in other cases, they are considered as unfair, sometimes unlawful, but only rarely in themselves criminal. Therefore, the process of trafficking someone by way of the abuse of their position of vulnerability arguably leads to display a risk of severe personal exploitation when an intrinsic character of wrongness and harmfulness is foreseeable not only in the process of A-exploitation (APOV), but crucially in the subsequent outcome of B-exploitation.

The *purpose* of trafficking in these cases must necessarily amount, as already argued, to an activity which is considered unacceptable *and* criminal in the considered legal system, thus displaying the abovementioned elements of severity and wrongfulness at the level of abstract risk. Still, the principle of materiality of criminal offences imposes that such risk is concretized in the process of A-

[249] UNODC, *The Role of Consent,* 11
[250] Weatherburn, *Labour Exploitation,* 124.

exploitation (APOV in this case), which constitutes the material substratum of the trafficking conduct. The wrongfulness of APOV has been found to reside in the combination between a particular serious form of *mens rea,* emerging from the trafficker's wilful targeting of a potential victim, "selected" on the basis of their weaknesses and vulnerability; and the objective instrumentalization to those needs and expectations to formulate an exploitative offer, suitable to create a leverage and a consequent dependency of the trafficked person on the trafficker. APOV is thus seen as the hallmark of future acts of subjection of the trafficked person, suitable to materialize the purpose activity of severely exploitative labour, sexual exploitation, organ removal.

In conclusion, this internal dichotomy observable in the trafficking definition is suitable to make sense of those purpose elements of the definition where a character of wrongfulness is difficult to attribute either to the *process* of supplying or to the *outcome*. In this sense, practices such as (trafficking for the purpose of) "*sexual exploitation*" and "*organ removal*" carry a notable component of ambiguity, suitable to include in the realm of THB supply practices that are considered as legal or tolerated in some national jurisdictions, such as the selling of organs on the free market or the exercise of sex work.[251] On the same, the abovementioned expressions don't say anything about the peculiarities of the supply process suitable to lead to a situation of severe personal exploitation of sex work or exploitative removal of organs. It can therefore be held that, in these cases, an offence of trafficking will be *always* present when a coercive process of A-exploitation is adopted. On the other side, where no coercion is exerted, a supply practice will arguably amount to trafficking when, the purpose activity (i.e., the future and uncertain exploitation of sex or removal of organs) is already foreseen as to entail a level of harmfulness and wrongness suitable to qualify it *in itself* as a form a severely harmful B-exploitation. "Sexual exploitation" in this case will necessarily amount to conditions of interpersonal domination comparable to the ones required for the identification of a situation of severe exploitation of labour. Similarly, organ removal will constitute a form of severe B-exploitation when it is made object of a transaction which, although voluntary, abuses the weak bargaining power of an individual to subject them to unsafe clinical practices and/or puts them in a way worse economic position compared to the one of an ordinary organ seller in a legal market.

[251] This of course was the sign of a significant evolution of the common values, which emerges clearly when we consult the text of the previous International Act against Trafficking in Human Beings, the 1949 Trafficking Convention: *'prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person . . .'*.

Chapter 2. Trafficked persons as “vulnerable victims” under European law

PART 1: WHO ARE TRAFFICKING VICTIMS AND WHY ARE THEY VULNERABLE? AN ANALYSIS OF EU-COE LEGISLATION AND CASE LAW

This section focuses on the condition of trafficking victims under European law, a legal status which has been for a long time understood as under-developed in the supranational legal response against trafficking in human beings.[252] During the last 20 years, the European Union and the Council of Europe have progressively developed a complex regional anti-trafficking system, which is commonly understood to promote an integrated, comprehensive approach based on human rights, which finds among its main pillars the objective of ensuring the protection of trafficking victims. Interestingly enough, the function of victim protection in Europe has developed side by side with various intersecting discourses concerning vulnerability.

The subsequent analysis will first examine the EU anti-trafficking legal framework, which promotes what has been addressed as a “special needs approach” to individual and collective trafficking-related-vulnerability. After the examination of the key characters of such a *rationale,* its underlying logic will be subjected to critique, unveiling its various problematic implications on both the methodological and substantial sides of victim protection.

The analysis will subsequently focus on the CoE Anti-Trafficking legal framework, through the exploration of various “concealed” and “displayed” manifestations of vulnerability[253] within the 2005 CoE Convention Against Trafficking and the ECtHR case law on art. 4 ECHR.

1. The experience of THB as a source of “special needs” in the EU Area of Freedom, Security and Justice

The status of trafficking victims within the EU legal order has arguably moved along evolutive and often critically ambiguous policy lines.

On one side, while the anti-trafficking-strategies adopted by the European Union present a notable variety of approaches (criminal-prosecutorial, human-rights-based, immigration-managerial), EU law has always been explicit in qualifying the trafficking process as a *particularly* victimizing and disempowering experience.

[252] As already observed, the Palermo Protocol does not contain any binding clauses concerning victim protection.
[253] This understanding of vulnerability as a rationale rather than a stable category in international law has been drawn from F. Ippolito, “*Understanding vulnerability under International Human Rights Law”,* Editoriale Scientifica, 2021.

The 2002 Council Framework decision on Trafficking in Human Beings (hereafter "Framework Decision") states in this sense: *Trafficking in human beings comprises serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion.*[254]

Similarly, the 2004/81/EC Directive on the residence permit issued to third country nationals who are victims of trafficking (hereafter "Residence Permit Directive", "RPD") affirms that: *Given their vulnerability, the third-country nationals concerned should be granted the assistance provided by this Directive. This assistance should allow them to recover and escape the influence of the perpetrators of the offences. The medical treatment to be provided to the third-country nationals covered by this Directive also includes, where appropriate, psychotherapeutical care.*[255]

From these early definitions of the condition of VoTs, it is already possible to grasp some of the distinctive features of the trafficking experience, which, in turn, inform the legal qualification of survivors as "vulnerable persons": THB is understood as a form of violation of the victim's dignity and integrity; moreover, the experience of victimisation is generally regarded as a serious human rights violation, under the point of view of trafficked persons' entitlement to freedom and security. On the same, both the Framework Decision and the Residence Permit Directive make victims' access to assistance, recovery and protection substantially conditional upon their assumption of a role in domestic criminal procedures: not all trafficking victims, in other terms, are entitled to protection under such instruments, but only those who are identified as such in criminal justice proceedings.

The Framework Decision in this sense envisages the victim as a subject of protection only insofar they are under the spotlight of criminal justice authorities. Therefore, the guarantees identified for what concerns victim assistance were limited to those relating to the status of victims in criminal proceedings (art. 7, co. 2-3); and the victim's entitlement to protection was declined exclusively as an obligation to provide effective criminal investigation on the alleged trafficking facts they were involved in (art. 7, co.1). The Residence Permit directive, on the other side, recognises a right to protection only to those trafficking victims *who accepted to collaborate with national authorities* in the prosecution of traffickers. The source of victim assistance and protection appears thus to stem from a qualified relationship intercurring between the State and some trafficking survivors in the context of law enforcement: no self-standing entitlement to protection, instead, is affirmed to descend

[254] 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Preamble, (3).

[255] 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, Preamble, (12).

directly from the abovementioned violation of the dignity, integrity and human rights of all trafficked persons.

The entry into force of the Lisbon Treaty and the establishment of the European Area of Freedom, Security and Justice have brought notable innovations in the EU's perspective on the status of trafficking victims. This profound change is particularly visible in the current legal definitions of the vulnerability of VoTs in EU second-generation legal instruments.

1.1. The Anti-Trafficking Directive 2011/36/EU and the general status of trafficking victims and potential victims in the European Union

The Anti-Trafficking Directive 2011/36/EU includes the first comprehensive discipline at the EU level of the function of victim protection: trafficking in human beings, in this sense, is defined to constitute "a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union".[256]

While the directive does not define the notion of "victim of trafficking" as a self-standing legal status, it is on the same explicit in affirming an entitlement of VoTs to assistance and protection ehich *directly* arises from their factual experience of abuse, rather than from formal State recognition. The Directive in this respect provides that:

Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3.[257]

Victim protection and assistance, in this sense, is envisaged as a key priority of an adequate anti-trafficking response, to be activated as soon as any resonable grounds of a trafficking risk come to the attention of competent authorities. The status of victim under the directive thus comes to include the legal situation of *potential victims,* i.e. individuals the victimization of whom has not been ascertained but who nonetheless lie in a visible situation of trafficking-related-risk.[258]

Moreover, the EUATD expressly affirms the independence of State duties of victim protection from the role acquired by survivors in criminal justice proceedings: *Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's*

[256] 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, Preamble, (1).
[257] Directive 2011/36/EU, art. 11(2).
[258] See e.g. United Nations, *Human Trafficking. Joint UN Commentary on the EU directive*, 2011, 47.

willingness to cooperate in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC or similar national rules.[259]

On the same, such an "unconditional assistance and support" does not entail all-encompassing victim protection guarantee, as clarified by the insertion of the cited "without prejudice" clause within the text of the norm.[260] Such a clause, as it will be observed, is suitable to subject trafficking survivors' access to forms of State protection related to the issuing of a residence permit concretely *conditional* on their cooperation with criminal justice authorities.[261] The Directive in this sense is problematically caught in a middle ground between the universalist, human rights-based approach to victim protection and the prosecutorial and migration-management-oriented attitude displayed in the previous EU anti-trafficking legal instruments.

As an instrument of supranational harmonization, the directive goes only insofar as setting minimum standards of compliance of States with the abovementioned objective of guaranteeing the effective exercise of victims' human rights. In this regard, the directive is clear in stating that

[t]*he assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers.*[262]

The *pris en charge* of trafficked persons' victimological condition of insecurity and vulnerability is in this sense affirmed as a necessary baseline of any adequate assistance and support response.[263]

The fulfilment of victim protection and assistance guarantees, in this sense, is understood as crucial for enabling trafficking survivors to effectively enjoy their rights in the aftermath of their experience of victimisation and in their participation in subsequent processes of justice.[264]

Furthermore, the elaboration of an effective victim-centred response to is understood under the directive to require an *ad hoc* assessment of the risks faced by each individual survivor:

Me*mber States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection*

[259] Directive 2011/36/EU, art. 11(3).
[260] See *infra,* Chapter 3, 3.1.
[261] See also Directive 2011/36/EU, Preamble, (20): *assistance and support should be available to* [victims] *before, during and for an appropriate time after criminal proceedings.* […] a *person should be provided with assistance and support […] irrespective of his or her willingness to act as a witness. In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period.*
[262] Directive 2011/36/EU, Preamble (18).
[263] United Nations 2011 Joint Commentary of the EU Anti-Trafficking Directive, p. 41: *victims who break free from their traffickers often find themselves in a situation of great insecurity and vulnerability, and the harm experienced does not cease when they come to the attention of the authorities*.
[264] Directive 2011/36/EU, Preamble, (18).

programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures.[265]

This said on the general characters of the status of victims and potential victims of trafficking under the 2011/36 Directive, a further analysis must be dedicated to a set of provisions dedicated therein to special categories of victims. The EUATD in this sense adopts in various instances the language of vulnerability to qualify the victimological situation of groups of individuals which are understood to hold *special needs.* Art. 11(7) in this sense clarifies that:

Member States shall attend to victims with special needs, where those needs derive, in particular, from whether they are pregnant, their health, a disability, a mental or psychological disorder they have, or a serious form of psychological, physical or sexual violence they have suffered.[266]

In the context of the directive, the character of "vulnerability" is explicitly attributed to children, who are considered "more vulnerable than adults and therefore at greater risk of becoming victims of trafficking". Unaccompanied children, moreover, are considered as *particularly* vulnerable and thus in "need of specific assistance".[267] The concepts of "vulnerability" and of "special needs" in this sense present a relevant character of circularity without clear explanations being provided on the sources and effects of the specific vulnerabilities targeted in the directive.[268]

This recognition of the existence of special need is connected in the EUATD to the attribution to vulnerable victim of an entitlement to additional guarantees[269]; moreover, vulnerability is understood as constituting a relevant element to be taken into account in the assessment of the gravity of a trafficking fact. The Preamble of the directive in this sense states:

[w]*hen the offence is committed* [...] *against a particularly vulnerable victim, the penalty should be more severe. In the context of this Directive, particularly vulnerable persons should include at least*

[265] Directive 2011/36/EU, art. 12.3. See also Preamble (19) [t]*he practical implementation of such measures should, on the basis of an individual assessment carried out in accordance with national procedures, take into account the circumstances, cultural context and needs of the person concerned.* [nota] […] *on the basis of an individual risk assessment carried out in accordance with national procedures, victims should be protected from retaliation, from intimidation, and from the risk of being re-trafficked.*

[266] Directive 2011/36/EU, art. 11(7).

[267] Directive 2011/36/EU, Preamble, (23). Similarly, the European Parliament legislative resolution of 23 April 2024 on the proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM(2022)0732 – C9-0431/2022 – 2022/0426(COD)) has addressed the particular situation of "*children placed in residential and closed-type institutions*" as *"particularly vulnerable to trafficking in human beings*" at para. 7 of its Preamble.

[268] See e.g. V. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 82.

[269] See e.g. art. 13-16 of the Eu Anti-Trafficking Directive.

all children. Other factors that could be taken into account when assessing the vulnerability of a victim include, for example, *gender*, *pregnancy, state of health and disability.*[270]

The 2011/36/EU Directive thus arguably displays a peculiar intersection between a general, victimological approach to trafficking victimhood and a "special needs approach" based on the presumptive identification of particularly vulnerable categories of individuals. The subsequent analysis will show how such a latter *rationale* of special needs assumes a peculiar relevance in other sectors of EU law to describe the position of victims of trafficking themselves as a vulnerable group within specific legal procedures.

1.2. The Victims' Rights Directive 2012/29/EU and the status of "victim with specific protection needs"

Within the criminal justice block of the AFSJ, the 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 (henceforth "Victims' Rights Directive", "VRD") includes trafficked persons among the categories of "victims with specific protection needs", whose participation in legal procedures is subjected to the activation of a series of enhanced support measures.[271]

Such a legal characterization builds on the instrument's general definition of the status of "victim", which was understood as crucial to improve the standing of crime survivors under EU law:[272] *'victim' means: (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss caused directly by a criminal offence; (ii) family members of a person whose death was caused directly by a criminal offence and who have suffered harm as a result of that person's death.*[273]

In this sense, art. 18 of the VRD affirms the general obligation for States to ensure that *measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation*;[274] art. 22, moreover, requires States to provide an *individual assessment of victims* […] *to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, […] due to*

[270] Directive 2011/36/EU, Preamble, (12).
[271] Directive 2012/29/EU, art. 23.
[272] European Parliament, *The Victims' Rights Directive 2012/29/EU. European Implementation Assessment*, December 2017, 13.
[273] Directive 2012/29/EU, art. 2.1 (a).
[274] Directive 2012/29/EU, art. 18.

their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.[275]

The directive thus presupposes that all victims experience to a certain extent a risk of further violation of their rights after their victimization, as a consequence of the inadequate *pris en charge* of their trauma by State authorities (also) in the course of criminal proceedings ("secondary victimisation"); and/or of their exposure to the risk of falling prey of further private offenses directly connected to their prior experience of victimization ("repeat victimization", "intimidation", "retaliation").

Firm this general obligation of protection, the VRD specifies that certain categories of victims are exposed to a higher risk of violation of their human rights. In this regard, the Preamble of the Directive states:

Victims of human trafficking, terrorism, organised crime, violence in close relationships, sexual violence or exploitation, gender-based violence, hate crime, and victims with disabilities and child victims tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. Particular care should be taken when assessing whether such victims are at risk of such victimisation, intimidation and of retaliation and there should be a strong presumption that those victims will benefit from special protection measures.[276]

While, therefore, the exact extent of a victim's special needs can be understood only after the conduction of an individual assessment, some forms of crime, in light of their suitability to determine a particular trauma and danger, impose on the authorities a duty of "particular care". Such a duty specifically entails the diligent taking into account of the situation of victims in the context of the said assessment through the determination of their procedural needs of special protection. Art. 22 of the directive is particularly clear in this sense:

[I]*n the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered*.[277]

[275] Directive 2012/29/EU, art. 22.
[276] Directive 2012/29/EU, Preamble, (57).
[277] Directive 2012/29/EU, art. 22(3).

The crime of human trafficking, in other terms, is addressed in this instrument as the origin of a particularly high level of alert on the side of public authorities for what concerns its enduring harmful effects on victims. This presumption of special protection needs can be arguably traced back to some of the key traits of THB itself, which include most notably the relational character of the offence, its connection with a situation of interpersonal dependence, its gender-based[278] and violent character and the frequent involvement of third country nationals as victims:

Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents, should be provided with specialist support and legal protection.[279]

While, therefore, the "ordinary" legal position of victims of crime is understood to require the legal implementation of a baseline of support services and procedural guarantees;[280] and the provision of broader forms of protection is conditioned upon the emergence of particular needs in the course of an *ad hoc* assessment which takes into account each victim's personal characteristics as well as the type, nature and circumstances of the crime;[281] the detection of a crime of trafficking acts *in itself* as a presumption of *special need*, which in turn informs the preventive identification of a set of services of *specialist support and legal assistance*.[282]

These specialist support services, therefore, represent legal guarantees deriving from the general awareness of the extra-offensive effects of certain forms of crime or individual victimization experiences. Such services entail multiple duties of *special care* towards "vulnerable victims", namely: the requirement on criminal justice authorities to adopt an *integrated and targeted approach*

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[278] Directive 2012/29/EU, Preamble, (17): *Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.*

[279] Directive 2012/29/EU, Preamble, (38).

[280] Directive 2012/29/EU, art. 8; See also A. Klip, On Victim's rights and its Impact on the Rights of the Accused, *European Journal of Crime, Criminal Law and Criminal Justice,* 23, 2015, 180.

[281] Directive 2012/29/EU, Preamble, (56): *Individual assessments should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience of crime. They should also take into account the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive, sexual violence, violence in a close relationship, whether the offender was in a position of control, whether the victim's residence is in a high crime or gang dominated area, or whether the victim's country of origin is not the Member State where the crime was committed;* Klip, On Victim's rights, 180: *Article 8, paragraph 1 stipulates that the support must be in accordance with the needs of the victim and the harm suffered as a result from the criminal Offence.*

[282] See e.g Klip, *On Victims' Rights,* 181.

[in] *tak*[ing] *into account the specific needs of victims, the severity of the harm suffered as a result of the criminal offence, as well as the relationship between victims, offenders, children and their wider social environment*.[283] Moreover, a number of material conditions are identified as tantamount to the fulfilment of the main objective of the abovementioned services, i.e. favouring the *recovery* of the victim, a process which implies, in the immediate, to *overcome potential harm and trauma.* These conditions include specifically the *inform*[ation of] *victims about their rights* [,] *shelter and safe accommodation, immediate medical support, referral to medical and forensic examination* […], *trauma care, legal advice, advocacy and specific services for children*.[284]

Moreover, once an individual is identified as a victim with special protection needs, their *detected* situation of trauma and/or endangerment grounds their legitimation to a special *right of protection within the criminal proceedings*, which are meant to be adapted accordingly for ensuring the safe and active participation of the "vulnerable victim". In this sense, the Directive imposes the adoption of a number of measures which are deemed useful to avoid further trauma and secondary victimization: these include special protective rules concerning the premises, actors and procedure of victim interviews;[285] the avoidance of visual contact between victims and offenders; the availability of measures allowing for remote hearing of victims during trials; the avoidance of unnecessary questioning concerning the victim's private life not related to the criminal offence; the possibility of holding hearings without the presence of the public.[286]

1.3. VoTs as "vulnerable persons" and/or "migrants with special protection needs" in the instruments of the Common European Asylum System

A similar understanding of the effects of trafficking on victims' legal status can be observed in the instruments of the Common European Asylum System: here, the definition of the procedural standards of treatment of foreigners in a number of legal procedures (reception, international protection, administrative detention and return to home Countries) goes along with the affirmation of the necessity to safeguard the special needs of particular categories of individuals.

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[283] Directive 2012/29/EU, Preamble, (38).
[284] *Ivi.*
[285] Directive 2012/29/EU, art. 23.2: *The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22(1):*
(a), interviews with the victim being carried out in premises designed or adapted for that purpose;
(b), interviews with the victim being carried out by or through professionals trained for that purpose;
(c), all interviews with the victim being conducted by the same persons unless this is contrary to the good administration of justice;
(d), all interviews with victims of sexual violence, gender-based violence or violence in close relationships, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes, provided that the course of the criminal proceedings will not be prejudiced.
[286] Directive 2012/29/EU, art. 23.3.

The approach to vulnerability adopted under the said instruments can be understood again as "mixed" and "compound". On the one side, EU law addresses the position of foreigners as entailing characters of vulnerability due to their common status addressed by the considered legal instruments as a whole. This is especially evident in the case of asylum seekers, who are entitled to several targeted guarantees arising from the threat of persecution they experienced in their home countries and from the condition of particular dependency on State support while their request for international protection is pending.[287]

On the other side, the existence of particularly needy categories of applicants is acknowledged in the CEAS; in light of this, VoTs are addressed variably as "vulnerable persons" in the Qualification Directive; as "migrants with special reception needs" in the Reception Conditions Directive. Moreover, while no explicit reference to victims of trafficking can be found in the 2008 Return directive and in the Asylum Procedures directive, "serious forms of psychological, physical or sexual violence" are included in both instrument's definitions of "vulnerable applicants"[288] and of "vulnerable persons", a phrasing that has been understood to include at least those cases of trafficking enacted through the means of force, threat and other forms of coercion.[289]

As previously observed, EU law tends to address VoTs' vulnerability in light of its influence on the functioning of *particular* legal procedures, each governed by a different legal instrument. Vulnerability is, consequently, conceived in a context-dependent perspective: different legal procedures are adapted in their level of guarantees around different kinds of vulnerabilities.[290]

Moreover, the status of trafficked persons is never addressed autonomously in EU migration law:[291] instead, trafficking victims are included in different lists of groups legally associated to the existence of special procedural needs.

[287] See U. Brandl – P. Czech, *General and Specific Vulnerability of Protection-Seekers: Is there an Adequate Response to their Needs?* In F. Ippolito –S. Iglesias-Sánchez, *Protecting Vulnerable Groups. The European Human Rights Framework,* Hart, Oxford, 2015, 261.
[288] Directive 2013/32/EU, Recital 29.
[289] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008, art. 3(9).
[290] See in this sense J. Petin, Exploring the Role of Vulnerability in Immigration Detention, *Refugee Survey Quarterly,* 2015, 0, 7: *Apart from being subjective, the notion of need is also highly relational. It depends on the context. The determination of someone's needs implies an operation of contextualization. Individuals do not have the same needs at the same time. The EU asylum directives reflect this point. While the recast RCD mentions "special reception needs", the recast APD uses the wording "need of special procedural guarantees".*
[291] Specific, targeted provisions focusing on the peculiar condition of victims are generally rare in the considered legal instruments: see for an exception EU Reception Conditions Directive 2013/33/EU, article 25: *Victims of torture and violence 1. Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care. 2. Those working with victims of torture, rape or other serious acts of violence shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.*

So, for example, the Reception Conditions Directive states that *'applicant with special reception needs': means a vulnerable person […] who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.*[292]

These "vulnerable persons" are identified specifically in the same instrument as including *minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation.*[293]

Again, the belonging to one of these categories is linked by EU law to a special duty of care of State authorities towards the vulnerable, which in the frame of the EU Reception Conditions Directive (recast) entails once again the obligation of States to adopt an individual assessment of the *special reception needs* of vulnerable persons.

In order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs.

That assessment shall be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure.[294]

The Procedures Directive 2013/32/EU instead refers to a duty to assess applicant's needs for "special procedural guarantees":

Member States shall assess within a reasonable period of time after an application for international protection is made whether the applicant is an applicant in need of special procedural guarantees.[295]

Special needs assessments thus are directly connected to the activation of further special procedural duties:[296] in this sense, while some instruments of the CEAS limit themselves to state a general obligation of special needs being "taken into account";[297] or to require that the persons concerned

[292] Reception Conditions Directive (recast) 2013/33/EU, art. 2(k).
[293] Recast Reception Conditions Directive 2013/33/EU, art. 21.
[294] Directive 2013/33/EU, Art. 22.
[295] Directive 2013/32/EU, art. 24.
[296] See e.g. J. Petin, Exploring the Role of Vulnerability in Immigration Detention, *Refugee Survey Quarterly,* 2015, 7.
[297] See Artt. 11 and 22 Reception conditions Directive; Art. 14 (d) Return Directive.

receive "adequate support" within the specific procedure;[298] others identify some mandatory or facultative measures aimed at meeting the abovementioned needs.

The Asylum Procedures Directive (recast), for example, provides that *Member States may prioritize an examination of an application for international protection in particular where the applicant is vulnerable.*[299]

The Returns Directive, with regard to the condition of detention of foreigners pending return, states: *Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.*[300]

Finally, the affirmation of the abovementioned assessment duties and procedural obligations of "special care" determines a derivative obligation on Member State to enrol public officers which are competent for the response to vulnerabilities in the various phases of the procedures.[301]

The Procedures Directive in this sense provides that *Member States must ensure that those who conduct asylum interviews are competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability.*[302]

1.4. The EU special needs *rationale*: a preliminary critique

The previous analysis of the EU Anti-Trafficking directive has underlined the instrument's unitary conception of the status of victims as descending from the individual experience of crime-related harm; and the correlative necessity on the side of the State to safeguard survivors' rights through enabling their early-alert access to special protection measures aimed at safeguarding their recovery and security.

On the same, the "vulnerabilisation"[303] of the position of VoTs within the VRD and the legal instruments of the CEAS has revealed a diffuse labelling approach based on the *rationale* of "special needs". Such needs, as highlighted by Petin, can be distinguished from all other ("normal") individual

[298] see Art. 24 co. 3 Asylum Procedures Directive: *Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.*
[299] Directive 2013/32/EU, art. 31(7).
[300] Directive 2008/115/EC, art. 16 (3). See also, for what concerns reception conditions, directive 2013/33/EU, *A*rticle 25.
[301] The Recast Asylum Procedures Directive, art. 15(3) also uses the concept of vulnerability in relation to the conditions under which a personal interview with the applicant has to be conducted. Specifically, Member States have to ensure that the person who conducts the interview is competent to take account of the vulnerability of the applicant.
[302] Directive 2013/32/EU, art. 15.
[303] See for a general analysis of the vulnerability 'turn' in the AFSJ, F. Ippolito, Vulnerability as a normative argument for accommodating 'justice' within the AFSJ, *European Law Journal,* 2019, 25, 544-560.

needs in light of their particular suitability, when not immediately satisfied, to negatively impact the course of a particular *procedure.*[304]

The said context-specific approach to vulnerability has been found[305] to rely on the identification of a list of vulnerable groups which are legally presumed to be in need of special procedural protection. The EU legislator in this sense identifies the beneficiaries of special protection in relatively taxative terms,[306] while, on the same, the scope and limits of such protection are left notably vague. Regional law most often merely requires States to "adequately take into account" the situation of vulnerable subjects, and the determination of the content of their specific procedural guarantees is understood to fall within each State's margin of discretion.

Such a deferential approach, consistent with the AFSJ founding principles of subsidiarity and mutual recognition,[307] arguably presents a number of flaws when it comes to the determination of the attributes of the legal status of trafficking victims in the EU.

On the one hand, the inclusion of trafficking victims within discrete lists of "vulnerable groups" arguably amounts to a form of normative labelling which renders quite contestable the very conceptual basis of a distinction between vulnerable and non-vulnerable persons. The CEAS legal framework is quite illustrative in this sense, considering that VoTs are explicitly identified as vulnerable in some procedures (e.g. reception conditions, asylum procedures), while not being directly addressed in other regulations, such as, for instance, in the case of return procedures. Here, some victims of trafficking might be included in the "vulnerable group" of victims of violence, but, as already observed, the core of trafficking victimization arguably transcends the infliction of violence, and many trafficking victims might thus fall outside the scope of special protection in this sector.

The said labelling approach is suitable, in turn, to essentialize each "vulnerable group" as an isolated collectivity of bearers of "special needs", disregarding the possible intersections that take place

[304] J. Petin, Exploring the Role of Vulnerability in Immigration Detention, 7: "*Special needs have thus to be distinguished from normal needs. As an illustration, a need of dental treatment does not impact the course of the procedure, and thus cannot be considered as a special need within the meaning of the EU approach of vulnerability, whereas a need of representation for minors, a need of physical and/or psychological recovery for victims of torture, or a need of a rest period for victims of human trafficking are clearly special needs that should be satisfied*".
[305] F. Ippolito, Vulnerability as a normative argument, 546.
[306] See e.g. art. 22(3) Reception Conditions Directive (recast): *Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive*. See also V. Stoyanova, *Victims of Human Trafficking*, 73.
[307] See e.g. R. Letschert - C. Rijken, Rights of Victims of Crime: Tensions Between an Integrated Approach and a Limited Legal Basis for Harmonisation, *New Journal of European Criminal Law*, Vol. 4, Issue 3, 2013, 243.

between different procedures and/or different forms of vulnerability and that materially shape each individual's experience of enjoyment of their human rights.[308]

Under a different point of view, where a situation of trafficking victimhood emerges within a certain sector of EU law, the context-specific approach of the special needs rationale is suitable to prevent the translation of the needs assessments conducted within a particular procedure to the broader, comprehensive scope of victim protection arguably implied in the Anti-Trafficking Directive. In this sense, the identification of a foreign (P)VoT by prosecutorial authorities and their subsequent needs assessment under the Victims' Rights Directive is not explicitly linked to the further investigation of their migration status and the subsequent determination of their special needs under EU migration Law. As already observed, moreover, the assistance of victims under the EU trafficking Directive remains problematically linked to a logic of usefulness of the individual for Member States' objective of contrast of transnational crime, an element which might once more hinder the general aim of a comprehensive protection of the individual's victimological status.[309]

Generally speaking, thus, the lacking explication of a coherent concept of vulnerability in the instruments of the AFSJ renders the the determination of the *quantum* and of the *quomodo* of the expected legal response vis-à-vis vulnerability particularly problematic. Moreover, in several instruments, the ascertainment of an individual's condition as a VoT is considered as the starting point for the activation of special protection measures; this model of special needs response arguably fails in addressing the vulnerability of trafficked persons in some of its most distinctive characters, i.e., its hidden and non-evident character, which, in turn, requires that special protection measures are activated before an individual is conclusively identified as a trafficking victim by *ad hoc* mandated State authorities.[310]

Such a necessity of an effective early-alert response to trafficking victimization is arguably not suitable to find an adequate implementation at the level of domestic anti-trafficking law alone. Specifically, the absence of clear guidelines concerning the method and aim of vulnerability policing opens the possibility for an instrumentalisation of special needs reasoning to advance States' strategic interests. For instance, in the Victims' Rights Directive, the affirmation of the special needs of victims

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[308] See e.g. F. Ippolito Vulnerability as a Normative Argument, 548-550.

[309] See in this sense V. Stoyanova, Victims of Human Trafficking. A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Phase of the EU Asylum Legislation, in Bauloz C., Ineli-Ciger M., Singer S., Stoyanova V., *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System,* Martinus Nijhoff, 2015,22: *there is no uniform status of a victim of human trafficking, since different bodies at the national level can make identifications and assessments in pursuance of their own objectives. This sits uncomfortably with the objective of having a legal system which strives for consistency and coherency.*

[310] V. Stoyanova, Victims of Human Trafficking*,* 75.

in the criminal justice process has been deemed to constitute a form of "individualisation of security"[311] which in turn constituted a justification of the expansion of State authoritative powers against presumed criminal offenders.[312]

A second, strategic implication of EU Member States' use of vulnerability arguably resides in the opportunity of restriction of the scope of States' duties through a process of exceptionalisation of protection needs. In this sense, the internal distinction, operated within disadvantaged population groups such as asylum seekers and undocumented immigrants, between "ordinary" and "particularly vulnerable" rights-bearers has been frequently deemed instrumental to favouring the waiving of key protections for those who formally fall outside of the vulnerable category.[313]

Even not considering such relevant, strategic implications of vulnerability policing for State public security and administrative agendas, the EU's normative approach to special needs is arguably to be considered as "toothless" and "narrow-sighted" for what concerns its overall effectiveness. On the one side, the guarantees provided in most of the examined legal instruments are notably vague, and thus lacking any direct effect onn the situation of the identified rights-bearers. The protection of vulnerable persons thus will be concretely determined having regard of the particular standard deemed adequate by each Member State.[314] Moreover, the binding nature of such norms appears notably limited by the frequent introduction of exceptional clauses: the EU Victim's Rights Directive in this sense states that *A special measure envisaged following the individual assessment shall not be made available if operational or practical constraints make this impossible, or where there is a an urgent need to interview the victim and failure to do so could harm the victim or another person or could prejudice the course of the proceedings*.[315]

The fact that such flaws in the procedure might be the consequence of a broader State inaction or negligence is arguably unaddressed in the directive.

More broadly, leaving a substantial *carte blanche* to Member States in the determination, implementation and justification of vulnerability policing arguably renders quite hard to address those vulnerabilities that are "State-enabled", i.e., those situations of hardship, fragility and dependence that directly descend from an individual's legal status or by States' tolerance territory of widespread forms of discrimination and social exclusion. Given the recurrence of the said systemic forms of

[311] See V. Mitsilegas, The Place of the Victim in EU's Area of Criminal Justice, in F.Ippolito - S. Iglesias-Sanchez, *Protecting Vulnerable Groups. The European Human Rights Framework,* Hart, 2015, 343.
[312] A. Klip, On Victim's Rights, cit., 185.
[313] See in this sense, E. La Spina, Migrant vulnerability or asylum seeker/refugee vulnerability? More than complex categories, *Onati Socio Legal Series*, Vol 11, Issue 6(S), 2021, 82-115.
[314] See e.g. V. Stoyanova, Victims of Human Trafficking, 97.
[315] Directive 2012/29/EU, art. 23.

vulnerability in trafficking cases, the overall perspective of vulnerability-as-special-needs in the EU appears thus dangerously narrow-sighted.

2. The particular vulnerability of trafficking victims in European Human Rights Law

The qualification of victims of trafficking as right-bearers under International Human Rights Law is not an uncontroversial operation. Generally speaking, the position of victims of crime towards the State where the criminal offence was committed, planned, or where its consequences produced their effects, can well be seen as an ambiguous relationship. This ambiguity arguably resides in the fact that the harmful consequences of the crime on the victim are usually the product of the action of private parties, with no direct involvement of the State in the violation of individual interests. Differently from the perspective of criminal law, therefore, adopting a IHRL viewpoint on trafficking equates to affirming that crimes are not simply private facts that deserve a public affirmation of blameworthiness and individual responsibility, but also *social* phenomena which, under certain conditions, can mobilize the responsibility of States. In particular, questioning the State's role in the field of private offences subtends the idea that the State's action or failure to act can be seen as causally and legally relevant in the production of an offense to the fundamental rights of individuals. In this sense, the State can be seen as "indirectly" responsible for a crime when it fails in contrasting the risk or the material fact of criminal victimization, or when it does not sufficiently assist those who are found to be victimized after the offence was produced.

As stated by Vladislava Stoyanova, [f]*rom the perspective of human rights law, [...] we are interested in the overall situation of the victim and the abuses he/she has suffered, irrespective of who inflicted those abuses and what intention each specific perpetrator had. In human rights law, the focus is on the state and its system of protection, and in the specific context of positive human rights obligations, on identifying failures by the state.*[316]

Trafficking in human beings, therefore, presents a dual nature as a transnational crime and as a serious human rights offence. The 2005 Miami Declaration of Principles on Human Trafficking in this sense clarifies: *Trafficking in persons is a human rights violation that constitutes a contemporary form of slavery*.[317] [...] *Trafficking in persons also typically violates other basic human rights, especially the right of the victim to be free from slavery or servitude, the right of the victim to life, liberty and security of person, the right of the victim to be free from torture or cruel, inhuman or degrading treatment or punishment, the right of the victim to health, the right of the victim to freedom of movement and residence, and the right of the victim to free choice of employment. It also includes the commission of serious crimes against persons, in many cases rape, assault, and torture, as well as*

[316] V. Stoyanova, Human Trafficking and Slavery Reconsidered, 337.
[317] Miami Declaration of Principles on Human Trafficking, I.1.

crimes against states, often including money laundering, tax evasion, and violations of immigration rules.[318]

Under this point of view, the extreme harmfulness of trafficking in human beings qualifies it as a particularly *serious* offence to be safeguarded under IHRL, a character which has brought several international instruments to address it as a gross violation of human rights and, under certain circumstances, as a crime against humanity.[319] This character of seriousness grounds a particularly penetrant duty on States under IHRL to investigate, prosecute and provide redress against gross criminal offences such as torture, enforced disappearences, extra-judicial executions and trafficking in human beings.[320]

This said, the peculiar weight of the trafficking offence, when seen under a victim-centred-perspective, determines a series of relevant consequences for what concerns the overall legal status of trafficked persons under IHRL. Such aspect is arguably best captured in the UN 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 ("the 2005 Basic Principles and Guidelines"). The commission of a serious violation of IHRL in this sense is understood to amount to a radical breach in a State's security texture, which imposes to consider the victims as key actors within a process of *restorative justice,* where they hold legitimate claims for their suffering to be acknowledged; the damage suffered to be repaired; guarantees of non-repetition to be provided; and a process of public remembrance on the facts to be activated.[321]

Principle 8 of the 2005 Basic Principles and Guidelines defines 'victims' of gross violations of international human rights law and serious violations of international humanitarian law as follows:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[322]

[318] Ivi, I.2.
[319] Miami Declaration of Principles on Human Trafficking, 1.3
[320] See M. C. Bassiouni, International Recognition of Victims' Rights, 2006, *Human Rights Law Review,* 6(2), 2006 226.
[321] *Ivi*.
[322] UN 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, Principle 8.

The 2005 Basic Principles and guidelines in turn identify the three key rights of victims under IHRL, i.e.: the right to equal and effective access to justice; the right to adequate, effective and prompt reparation for the harm suffered; and the right to truth.[323] Such three pillars can be arguably seen as crucial in the conceptualization of the vulnerability of VoTs and in the determination of special rules of State responsibility towards them under European Law.

This said, the key traits of a human-rights-based response to THB at the international level have been first conceptualized in the 2006 UN Principles and Guidelines on Human Rights and Human Trafficking (RPGHRT). This instrument can be deemed particularly relevant in the present perspective in light of its important declination of what constitute the main functions of the victim-centred approach against THB, i.e. States' non-interference with the human rights of trafficking victims, prevention through addressing vulnerability and need-based protection.

Under the first point of view, the RPGHRHT provide for a general duty of States to *ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.*[324]

The RPGHRHT, specifically require that anti-trafficking measures do not infringe victims' freedom of movement;[325] affirm the right of all victims to effectively seek asylum;[326] require the protection of trafficked persons from prosecution for facts connected with their illegal entry in the territory or for facts they have committed while under the control of traffickers;[327] affirm the prohibition of summary deportation or returns of VoTs in violation of the principle of *non-refoulement*;[328] require that "rescue" operations shall be conducted only insofar they are not suitable to adversely affect the rights of

[323] See M.C. Bassiouni, International Recognition, 260.
[324] Principles and Guidelines on Human Rights and Trafficking of the High Commissioner on Human Rights, E/2002/68/Add.1 (2002), Guideline 1.
[325] Guideline 1.5: *Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.*
[326] Guideline 1.6: *Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.*
[327] Guideline 4.5 *Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons*.
[328] Guideline 4.6: *Ensuring that the protection of trafficked persons is built into antitrafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.*

trafficked persons;[329] and that trafficked persons cannot be held in immigration detention centres, other detention facilities or vagrant houses.[330]

The role of the State in shaping trafficked persons' status as victims of human rights violations is thus explicitly taken into account in the instrument. Key in such a conception of victim status is the definition of the human rights offense of trafficking as a *cycle* to be broken: Guideline n. 6 in this sense states: *The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked.*[331]

Furthermore, Principle 5 of the RPGHRHT reads as follows: *States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination*.[332]

Vulnerability, in the instrument's understanding, is conceived as the bundle of all possible factors that render individuals more likely to be trafficked[333] and it is broadly understood in its "short- or long-term, specific or general, procedural, economic, political or structural" forms.[334] Key manifestations of such proneness are understood to entail poverty, inequality, discrimination and violence against women.

Addressing vulnerability in this sense is key in the shaping of the position of victims as subjects of human rights: the UN Commentary to the RPGHRHT in this regard states: *Principle 5 recognizes that empowering vulnerable people through guaranteeing their human rights will reduce their susceptibility to being trafficked and exploited. It is addressed to States and others in a position to effect change.*[335]

Finally, the RPGHRHT devote a particular attention[336] to the personal condition of VoTs as specific individuals characterized by special protection needs. Principle 8 in this sense affirms: *States shall*

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[329] Guideline 6.6 *Implementing measures to ensure that "rescue" operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.*

[330] Guideline 6.1. *Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.*

[331] *Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking.*

[332] UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 5.

[333] This conception arguably builds on Article 9 (4) of the Trafficking Protocol, which requires States parties to *take or strengthen measures* [...] *to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.* See also A.T. Gallagher, The International Law of Human Trafficking, Chapter 8.

[334] See U.N. Recommended Principles and Guidelines on Human Rights and Human Trafficking: a Commentary, 2010, p. 105.

[335] UN Recommended Principles and Guidelines on Human Rights and Human Trafficking. A Commentary, 107.

[336] Ivi, 127.

ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.[337]

The entitlement to protection is thus understood to constitute a non-negotiable right of the victim,[338] the safeguard of which is explicitly placed under the responsibility of States. Irrespective of the presence of a State involvement in trafficking facts, in other terms, the post-trafficking condition of survivors in any case represents a situation where the individual can raise legitimate human rights claims against the State.[339]

In the following, the analysis will focus on the human rights-based legal frameworks of the ECAT and of the ECHR, highlighting the relevant advancements in the institutionalisation of the said victim-centred perspective of anti-trafficking protection in contemporary Europe.

2.1. The CoE Convention Against Trafficking in Human Beings and the substance of trafficking victim status in Europe

The previous Chapter has introduced the key trait of the 2005 Council of Europe Convention Against Trafficking in Human Beings (ECAT), which arguably resides in its inauguration of a "*comprehensive international legal instrument focusing on the human rights of victims of trafficking and setting up a specific monitoring mechanism"*.[340]

This integrated human-rights-based and victim-centred approach favoured a disentanglement of the European anti-trafficking legal response from a purely criminal-prosecutorial perspective: the Preamble of the ECAT in this sense clearly identifies *respect for victims' rights and protection of victims* as *paramount objectives* of European anti-trafficking cooperation alongside the *action to combat trafficking in human beings.*[341]

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[337] Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 8.
[338] UN Commentary, 141.
[339] See *Ibidem, Principle 8 acknowledges that the harm experienced by victims of trafficking does not necessarily cease when they come to the attention of national authorities […] The harm already done to victims can be compounded by failures to provide medical and other forms of support – or by linking the provision of such services to an obligation to cooperate that victims may not be willing or able to meet.*
[340] See OHCHR, Commentary to the Recommended Principles and Guidelines, 49: *As a conceptual framework for dealing with a phenomenon such as trafficking, a human rights-based approach is one that is normatively based on international human rights standards and is operationally directed to promoting and protecting human rights. Such an approach requires an analysis of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States' obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking, that maintain impunity for traffickers, and that deny justice to victims of trafficking.*
[341]ECAT, Preamble: "*Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives*".

A central tenet of this comprehensive approach is the Convention's definition of the wrong of trafficking in explicit human rights-based terms. While, in fact, the ECAT's safeguard of State border control and international security interests alongside the victim protection objective arguably renders contested its qualification as a pure human rights legal instrument, it is still nonetheless the first binding legal instrument[342] which defines trafficking in human beings as a human rights violation. The Explanatory Report to the Convention recognises the legal instrument's "added value" in the *affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims.*[343]

The scope of this greater protection is, in turn, innovatively formalized in a self-standing section of the Convention dedicated to victim protection (Section III). The ECAT represents in this sense a *unicum* in its framing of personal security, recovery and assistance of VoTs as mandatory individual entitlements that States Parties must recognise to all trafficked persons.[344]

This principle is further reinforced by the introduction of a non-discriminatory clause at art. 3 ECAT, which clearly frontlines specifically victims' protection interests against all possible distinctions of sex, race, status, etc.[345]

Victim protection is therefore conceived as the object of States' human rights obligations under the ECAT, an approach which has been particularly strengthened through the Convention's inauguration of the first independent anti-trafficking monitoring mechanism, made up of the COE Committee of the Parties and of the Group of Experts on Action against Trafficking in Human Beings (GRETA).[346]

A central component of the ECAT protection framework is its introduction of a formal definition of trafficking victim, which comprises *any natural person who is subject to trafficking in human beings as defined in this article.*[347] This formulation notably specifies the concept of victim protection under

[342] See in this sense P. Nestorova, Foreword, in J. Planitzer - H. Sax (Eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings,* Elgar, 2020, xxi, *The Council of Europe Convention on Action against Trafficking is the first legal instrument concerning trafficking in human beings that frames trafficking in human beings as a matter of human rights protection.*
[343] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, §36.
[344] See J. Planitzer - H. Sax, Introduction, in *Id,* Commentary, 2: *Framing trafficking in human beings as a human rights matter in the CoE Convention against Trafficking has several implications. For instance, assistance to trafficked persons is obligatory 6 and State Parties have to grant a recovery and reflection period for trafficked persons*.
[345] ECAT, Article 3. *Non-discrimination principle. The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
[346] J. Planitzer - H. Sax, Introduction, 2.: *Furthermore, the monitoring process of the CoE Convention against Trafficking is unique compared to any other international or regional instrument on combating trafficking in human beings. By installing the first independent anti-trafficking monitoring mechanism in the world, the Convention contributes to strengthened accountability of States, a basic principle of the human rights-based approach*.
[347] See CAT, art. 4(e).

the ECAT, in linking the status of VoT to the *material experience* of trafficking victimization: in other terms, it is the *fact* of exposure to the abovemention private forms of domination which gives rise to the individual's entitlement to the special protective guarantees foreseen in the third section of the Convention. It can be derived, therefore, that the lacking provision of protection or assistance to any trafficking victim or survivor constitutes a violation of their fundamental interests safeguarded under the ECAT.

The said substantialist approach to the protection of victims' rights consequently brings with it the challenge of ensuring that, anywhere possible, trafficking victims are provided with such measures of assistance which are adequate to prevent a severe violation of their human rights. This objective, in turn, requires CoE Member States to adequately take into account victims' protection needs on an individual level. This, in particular, requires a special diligence on States in assessing the impact of victimization in each trafficking case: art. 12 in this sense clarifies that, in order for an adequate assistance to be provided, *each Party shall take due account of the victim's safety and protection needs.*[348]

Trafficking victimhood, in this sense, is envisaged as an individual condition which is detached from its formal recognition: on the contrary, the ECAT overtly tackles the well-known possibility of a *misrecognition* of factual trafficking victims as a real risk of inadequate anti-trafficking responses, which in turn gives rise to human rights accountability. The Convention, therefore, qualifies the practice of victim *identification* as the first essential objective of the comprehensive approach to victim protection. If, therefore, the definition of victimhood under art. 4 ECAT amounts to the formal attribution of a status, art. 10 of the Convention, in imposing on States a number of mandatory arrangements *so that trafficking victims can be identified in a procedure,* sets out the conditions for the effective enjoyment of this status.[349]

As frequently highlighted in empirical studies,[350] the legal ascertainment of a trafficking fact is a difficult and lengthy process, conditioned to a finding of civil and/or criminal responsibility on the side of the trafficker. While this process is arguably indebted to a logic of legal certainty and effective deterrence of crimes, the ECAT's conception of victimhood relies instead on the connection between a victimization experience and the emergence of *protection needs.* In other terms, States' responsibility to protect (P)VoTs exclusively relies on authorities' correct exercise of due diligence in recognising *situations* of victimization and related need. More specifically, the Convention

[348] ECAT, art. 12.
[349] See *Infra* Chapter 4.
[350] See e.g. A. Brunovskis - R. Surtees, *A fuller picture. Addressing trafficking-related assistance needs and socio-economic vulnerabilities*, Fafo, 2012.

innovatively understands VoTs protection as a early-alert duty: the said art. 10 of the Convention clarifies that, wherever *reasonable grounds to believe that an individual is or might have been exposed to trafficking* are present, the State must act consequently providing a number of immediate or essential guarantees to the individual, in order to avoid the undesired outcome of a violation of their rights. Specifically, artt. 10 and 12 of the ECAT provide for a prohibition of removal of these individuals from the territory of the host State and their prompt provision with a "recovery and reflection period".

Assistance, therefore, is understood to precede legal certainty in what concerns the relationship between CoE Member States and trafficked persons, embracing a number of situations where rights are attributed to individuals who are *at risk* of being and/or of having been trafficked (presumed/potential victims).[351]

2.1.1. Unveiling the vulnerability-based discipline of the ECAT

Differently from the above-analysed EU instruments, the use of the legal concept of vulnerability in the ECAT is fragmentary: the term recurs in different and often irrelated norms, its rare *in claro* appearances often leave space to segments of discipline where victims' ability to cope with trafficking-related risks are taken into account through different phrasings.

Moreover, any examination of the vulnerability *rationale* embedded in the ECAT must depart from an understanding of the deep differences that the above-mentioned comprehensive approach to victim protection marks with the one adopted in the special-needs-focused EU legal framework. As previously mentioned, the legal instruments of the AFSJ understand "vulnerability" as the marker of a particular assistance-deservingness of VoTs within targeted procedures. On the other side, the ECAT squarely envisages VoTs as bearers of rights towards the State who must be facilitated in their access to rights both before, during and after their victimization:[352] these rights must be safeguarded independently from any official recognition of a particular protection interest of the individuals concerned.[353]

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[351] ECAT, Explanatory Report, §124.

[352] See J. Planitzer - H. Sax, Introduction, 6: "*In contrast to charity- or needs-based approaches, trafficked persons are entitled to assistance and not simply because they 'deserve' it. [...] The basic idea of the human rights-based approach in the context of trafficking in human beings is that trafficked persons get empowered in order to claim their rights and States are enabled to meet their obligations towards the trafficked persons. [...] Application of a human rights-based approach follows certain basic principles: the universality, inalienability and indivisibility of human rights as well as the inter-dependence and inter-relatedness of human rights. Further principles are non-discrimination and equality, participation and inclusion aswell as accountability and the rule of law*".

[353] See J. Planitzer, Article 1. Purposes of the Convention, in J. Planitzer - H. Sax, *Commentary*, 67: "*The Convention defines trafficked persons as rights-holders who can claim their rights from the state and its organs. By this, the Convention empowers trafficked persons and helps to reduce the notion of 'passive victims*".

The ECAT structures its integrated approach through a combination of measures aimed at preventing and combating trafficking, at protecting the human rights of its victims, and at promoting international cooperation against the crime.[354]

All these objectives, as it will be further highlighted, have the response to victims' vulnerability as a key aim.

The Explanatory Report to the ECAT clarifies the instrument's requirement *to bear in mind the specific needs of the victims, whether women, children or men. While applying to women, children and men, the Convention recognises that specific measures to prevent and combat trafficking in human beings also require guaranteeing gender equality and a child-rights approach to children. […] Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment.*[355]

While trafficking is, therefore, envisaged as a unitary kind of crime to be contrasted through criminal law, the way victims experience it, and the likelihood of their abuse are arguably always differentiated and strictly connected with the underlying social structure. Paragraph 1 in this sense clarifies the particularly vulnerable status of some categories to victimization, namely women and children.[356]

A specific attention towards the profiles of societal disparity which are suitable to degenerate in interpersonal abuse is then devoted in the ECAT's art. 5, concerning the prevention of trafficking. Here, the abovementioned dimensions of gender discrimination and minor age, together with irregular migration status, are addressed as conditions to be actively taken into account in the development, implementation and assessment of anti-trafficking policy. More generally, the Convention specifies the necessity of strengthening effective anti-trafficking policies and programmes "*in particular for persons vulnerable to trafficking".*[357] In its further reports on the issue, GRETA specified that: [*v]ulnerability to exploitation and trafficking is determined by a combination of factors, many of which are structural and are linked to economic, labour and immigration policies*.[358] The policing of the broader societal sources of this vulnerability is understood to fall within state preventive

[354] ECAT, Article 1 *"The purposes of this Convention are: a to prevent and combat trafficking in human beings, while guaranteeing gender equality b to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; to promote international cooperation on action against trafficking in human beings*".
[355] Explanatory Report, cit., §53.
[356] Ivi.
[357] ECAT, art. 5(1).
[358] Group or Experts on Action against Trafficking in Human Beings, *Human Trafficking for the purpose of labour exploitation*, Council of Europe, 2019, 22.

obligations, which have been often found to require the adoption of targeted *social, economic and other measures for groups vulnerable to THB*.[359]

For what concerns victim protection and assistance measures, the Convention specifies that *for the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.*[360]

The same approach arguably informs the *pris en charge* of the specific victimological needs of trafficked persons when they are involved as collaborators in prosecutorial and judicial procedures: the Convention in this case specifies that *[e]ach Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for: a) Victims* […].[361]

The *due regard* for the individualized interests of safety, dignity and access to rights of victims are in turn envisioned as necessary conditions for the return of VoTs to their home countries.[362] Specifically, States are required to examine the individuals' risk of revictimization after removal and their perspective of reintegration in the frame of ad hoc repatriation programmes.[363] For what concerns the legal condition of trafficked children, finally, a specific assessment is imposed with regard to the compatibility of the return with their best interest.

In conclusion, and more generally, art. 14 of the ECAT arguably includes a vulnerability-based evaluation among the possible discretionary grounds for granting a residence permit to identified trafficking victims, which shall be issued when *the competent authority considers that their stay is necessary owing to their personal situation.*[364]

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[359] GRETA Report on Bosnia and Herzegovina, II GRETA (2017)15, §70.
[360] ECAT, art. 12(9).
[361] ECAT, art. 28.
[362] ECAT, art. 16 par. 1 in this sense clarifies that return must be enacted *with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim.*
[363] ECAT, art. 16 par. 5: *Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non-governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society.*
[364] ECAT, art. 14: *Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: a the competent authority considers that their stay is necessary owing to their personal situation.*

2.2 The anti-trafficking jurisprudence of the European Court of Human Rights

As previously pointed out, IHRL affirm a duty of due diligence on States in their exercise of their powers in response to serious crime. This conception of State responsibility has been notably specified in the anti-trafficking case law of the European Court of Human Rights (ECtHR).

Individuals who are exposed to the threat of THB in this sense are frequently addressed in the case law as "vulnerable", and are understood by the ECtHR to hold particularly penetrant claims vis-à-vis the State for what concerns the safeguard of the effective enjoyment of their human rights. States, consequently, are expected to take adequately into account the vulnerability of survivors for what concerns, among others, their protection from secondary and repeat victimization, the investigative and prosecutorial response to the offence they were subjected to, their specialized assistance both in terms of physical and psychological recovery and effective participation in legal proceedings.

The absence of an adequate response to these needs can determine a violation of several rights of trafficked persons under the ECHR: the right to be free from slavery, (art. 4 ECHR) the right to be free from torture and other inhuman and degrading treatment (art. 3 ECHR); the right to private and family life (art. 8 ECHR); the right to a fair trial (art. 5 ECHR); the right to an effective remedy (art. 13 ECHR).

Since its 2011 landmark judgment in *Rantsev v. Cyprus and Russia,* where THB has been found to fall under the European Convention's prohibition of slavery, servitude and forced or compulsory labour, the ECtHR has adopted an integrated approach to trafficking victims' needs through the interpretation of art. 4 ECHR. While the Court has recognized the fact that an inadequate State response vis-à-vis THB can give rise to a violation of multiple interests protected under the Convention,[365] it has held nonetheless that art. 4 ECHR and its derivative obligations are best placed to jointly address trafficking victims' specific difficulties in enjoying and accessing human rights.[366] Under this point of view, the developing trafficking case law under art. 4 ECHR can be considered as a special human rights-based discipline of victim vulnerability.[367]

The Court's inclusion of THB among the offences prohibited under art. 4 ECHR contributes to qualify trafficking victims' entitlement to State protection as an *absolute right*: art. 4(1) ECHR, in this sense, together with art. 2 and art. 3 ECHR, is expressly regarded as a key democratic safeguard, the limitation of which is expressly prohibited *in any circumstance* under art. 15 of the Convention. In this sense, States do not enjoy any margin of appreciation in balancing the said basic rights with other

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[365] See e.g. V.T. v. France, §26; M. and Others v. Italy and Bulgaria, §106; V.C. v. Italy, §84-85.
[366] Rantsev v. Cyprus and Russia, §252; S.M. v. Croatia (Grand Chamber), §241.
[367] See *infra,* Part 2.

conflicting interests, and no derogation from the full protection of such rights can be enacted even in situations of national emergency.

The following paragraphs will introduce the recent construction of the legal guarantees of trafficking victims under art. 4 ECHR for what concerns specifically the notion of trafficking victimhood and the content of States' positive obligations under the Convention.

2.2.1. Human trafficking victimhood and the positive obligations of States under art. 4 ECHR

The subject matter of the legal status of trafficking victims is at the centre of a rich elaboration in the ECtHR' jurisprudence. Conformly to the cited International legal *acquis* on victims' rights[368], the ECtHR understands trafficking victimhood as a material fact: the status of trafficking victim in this sense goes beyond the official recognition of victimhood by State authorities. Trafficked persons can thus file complaints before the ECtHR by alleging their factual experience of victimization; the Court, in turn, will be called to autonomously evaluate whether the existence of a trafficking offense is "arguable", having regard of the details provided in the said complaint.

At the basis of the system of positive human rights obligations under art. 4 ECHR lies the consideration that an effective protection of human rights must extend beyond the State's mere abstention from subjecting individuals into slavery, servitude or forced labour. On the contrary, in its early decision of *Siliadin v. France*, the Court clarified that States must take proactive steps towards the eradication of the abovementioned forms of domination, through the adoption of proactive duties, which, in the subsequent decision of *Rantsev,* were extended to safeguard the prohibition of human trafficking, too. These obligations replicate analogous duties affirmed in the previous Court's jurisprudence on other absolute rights, namely the right to life (art. 2 ECHR) and the right not to be subjected to torture or other inhuman or degrading treatment or punishment (art. 3 ECHR). They include the duty to put in place an adequate legal and administrative framework to contrast human trafficking; the duty, in certain circumstances, to take operational measures to protect victims of trafficking; and the procedural obligation to investigate potential trafficking cases, to prosecute traffickers and to safeguard victims' rights of access to justice.

[368] See *supra,* 2.1, 2.2.

2.2.2. The obligation to adopt an adequate legislative and administrative framework to punish trafficking and to protect trafficking victims

The violation of fundamental human rights by way of serious forms of private offences has frequently been addressed in the ECtHR jurisprudence as a critical societal risk which requires an active contrast of States through their domestic laws and policies.[369]

This duty has been particularly defined in the ECtHR's case law, as part of the positive obligation of States to criminalize trafficking and the other forms of exploitation prohibited under art. 4 ECHR. In this sense, the Court in its decision of *Siliadin v. France* has crucially clarified the nature of art. 4 ECHR as a so-called *coercive human right,*[370] i.e., a right the effective protection of which under the Convention imposes an *ad hoc* mobilization of domestic criminal law.[371] The absolute condemnation of the abusive practices listed in art. 4 ECHR, it has been held,[372] must be seen as implying the need for the creation of a particularly high level of deterrence against those who perpetuate them, a necessity which arguably can only be satisfied through the inclusion of the abovementioned practices within Member States' national criminal law frameworks.

The subsequent decision of *Rantsev v. Cyprus and Russia* has extended the abovementioned coercive obligation to the contrast of trafficking in human beings, in accordance with the existing international obligations stemming from the Palermo Protocol and the ECAT.[373]

The said coercive obligation arguably entails notable limitations of European States' legislative discretion in criminal matters: on the one side, domestic criminal provisions must embrace all the constituent elements of the international definitions of slavery, servitude, forced and/or compulsory labour and trafficking, without leaving space for ambiguities.[374] The presence of gaps in the domestic criminal-legal response to the said severe forms of exploitation, in other terms, can be found to ground a violation of art. 4 ECHR. Nevertheless, the Court has never mandatorily required that domestic criminal legislations adopt the specific labels of slavery, servitude, forced and compulsory labour,

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[369] See e.g. Söderman v. Sweden [GC], § 81; M.P. and Others v. Bulgaria, § 108; and Z and Others v. the United Kingdom [GC],§ 73.

[370] For a broad overview of the topic of the duties to coerce arising under the ECHR, see L. Lavrysen – N. Mavronicola, *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR,* Hart, 2020.

[371] Siliadin v. France, §112: *The Court reiterates that Article 4 enshrines one of the fundamental values of democratic societies [...]. In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation.*

[372] C.N. and V. v. U.K., §66-67; Rantsev v. Cyprus and Russia, §283.

[373] Rantsev v. Cyprus and Russia, §278.

[374] Siliadin v. France, §142. C.N. and V. v. France, §106.

trafficking within domestic law; this formal approach, nonetheless, has been indirectly supported in the ECtHR jurisprudence.[375]

Furthermore, the case of Court has clarified that each specific form of severe exploitation prohibited under art. 4 ECHR must be the object of a self-standing offence, in order to allow for an effective contrast of such severe violations of human rights[376] and not to let serious facts be addressed under lesser offences.[377]

The obligation to criminalize has been, finally, found to entail a subsequent duty of providing effective penalties[378] connected to the abovementioned abusive practices: the Court has particularly specified in this sense that the position of "children and other vulnerable individuals" requires all the more a strong commitment on behalf of Member States to ensure effective deterrence through their domestic criminal norms.[379]

In case of a partial or under-deterrent definition of the offence of THB in domestic criminal law, a *systemic failure* can be found on behalf of the State in ensuring an effective protection of art. 4 ECHR.[380]

This said, the Court's decision of *Rantsev v. Cyprus and Russia* has clarified that *the duty to penalise and prosecute trafficking is only one aspect of member States' general undertaking to combat trafficking and that the extent of the positive obligations arising under Article 4 must be considered within this broader context.*[381]

In this sense, the diligent *pris en charge* of the risks posed by THB to fundamental human rights imposes the adoption of a *comprehensive* perspective on protection, which goes beyond the pure

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[375]See e.g. *Siliadin v. France,* §141. Professor Vladislava Stoyanova has argued that such a requirement must nonetheless be deemed as indirectly cogent under the ECHR, as only a correspondent labeling of such practices of the domestic level allows for an interpretation of their constituent elements which is compliant with international legal standards. See V. Stoyanova, *Human Trafficking and Slavery,* cit., 341.
[376] C.N. v. the U.K., §76.
[377] ECHR, Press Release, *Allegations of sexual exploitation: inadequate legal framework at the relevant time and several shortcomings in the conduct of the proceedings*, 2: "*Regarding the existence of an appropriate legal and regulatory framework, the Court observed that there had been some shortcomings in the applicable legislation prior to the entry into force of Law no. 3064/2002 on 15 October 2002* [...] *Human trafficking for the purposes of sexual exploitation had not constituted a separate criminal offence. Hence, the fact that the alleged acts of human trafficking constituted lesser indictable offences at the material time had led the Indictments Division of the Athens Criminal Court to terminate the proceedings against two of the accused as being time-barred. Accordingly, the Court was unable to conclude that the legal framework governing those proceedings had been effective and sufficient either to punish the traffickers or to ensure effective prevention of human trafficking. There had therefore been a violation of Article 4 on that account*".
[378] Siliadin v. France, §142.
[379] Siliadin v. France, §143.
[380] See for a "positive" evaluation of a domestic anti-trafficking criminal framework, Rantsev v. Cyprus and Russia, §290: *The law reflects the provisions of the Palermo Protocol and prohibits trafficking and sexual exploitation, with consent providing no defence to the offence. Severe penalties are set out in the legislation*.
[381] Rantsev v. Cyprus and Russia, §285.

criminal-prosecutorial response. This holistic perspective has been developed in the Court's case law through the affirmation of the broader obligation to *put in place an adequate legislative and administrative framework to prevent and punish trafficking and to protect victims*.[382]

This duty finds its origin in the existence of a *general risk* within one or more Member States: authorities in this sense are expected to be able to prevent both THB as a transnational criminal threat, and the peculiar manifestations of such threat in national and local contexts. In order to have an affirmation of human rights responsibility vis-à-vis a general trafficking-related-risk, State authorities must be found to have known – or at least to have found themselves in the condition to acknowledge – about the existence of the said risk. The State, in other terms, cannot be blamed for risks which it has inculpably ignored.

Some general trafficking-related risks in this sense can be easily presumed to be *known* by State authorities in light of their acceptance of international anti-trafficking duties: for instance, international law is explicit in requiring the enactment of several legal and administrative guarantees for VoTs such as an *ad hoc* procedure of identification of trafficking victims;[383] the granting of a *recovery and reflection period*;[384] the *prohibition of removal from State territory* of a victim pending identification;[385] the availability of the legal possibility of *not punishing* those trafficking victims who have committed crimes as a consequence of their situation of exploitation.[386] Moreover, necessary arrangements of State *preparedness* towards general trafficking-related-risks, such as the prior training[387] of immigration officers, prosecutors, judges, victim support teams, inform nowadays the core of the internationally assessed institutional *best practices of trafficking risk prevention and response.*

In addition, the ECtHR's jurisprudence has highlighted that States' obligation at the regulatory level can also be triggered by more context-dependent, yet generalised, situations of risk which invest particular States, market sectors or social systems. Specifically, the ECtHR has found human rights violations stemming from precarizing and disempowering national laws and policies. In cases such as *Rantsev v. Cyprus and Russia, Chowdury and others v. Greece, Zoletic and others v. Azerbaijan,* the Court has highlighted how some sectors of State regulation, most notably the legal discipline of

[382] V.C.L. and A.N. v. the United Kingdom, §151.
[383] See *infra,* 4.2.
[384] See *infra,* 4.3.
[385] See *infra,* 4.4.
[386] See V.C.L. and A.N. v. U.K, §158-9.; see *infra,* 4.5.
[387] Rantsev v. Cyprus and Russia, §296.

labour migration[388] and of irregular migrant status,[389] are likely to produce situations of disparity and interpersonal dependency suitable to degenerate in severe exploitation. In light of this *common knowledge,* therefore, States are expected to adapt the said legal and policy frameworks so to actively prevent the eventuality of THB.

While most findings of a State's *systemic failure to protect* trafficking victims and potential victims have so far found their basis in disempowering and under-protective domestic laws and policies, a lot might be said also about the States' inaction *vis-à-vis* situations of general trafficking-related risk.[390] As repeatedly stated in the Court's jurisprudence, any national situation of risk of serious crime must be envisaged as particular and unique. The detection of patterns of country-specific trafficking-related-risk is therefore a key component of the due diligence of Member States in shaping their institutional responses to THB. In this sense, the ECtHR has extended its overview on situations of national risk to find the existence of a common knowledge of general criminal threats towards particular societal categories or in particular relational sectors through the analysis of the behaviour of state officials and of relevant documents of awareness rasing. Where, for example, the condition of exposure of a particular minority to THB was found to have been denounced in widely circulated documents from trustworthy sources such as IOs or ngos, a common knowledge of a situation of general risk was affirmed.[391]

The identification of a State responsibility, in this sense, does not amount to a easy finding for the Court. While art. 4 ECHR is commonly understood to constitute an absolute right in the Conventional system, the Court has repeatedly held that positive obligations under art. 4 ECHR should not be interpreted to the extent that they create an *impossible or disproportionate burden* on States in terms of costs and degree of diligence required for their enactment.[392] Any required institutional response to a general trafficking-related risk, therefore, must display a character of reasonability of the institutional due diligence required, having regard of States' financial, administrative and technical capacities. It can thus be held that, where no clear international consensus about the scope of an

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[388] Rantsev v. Cyprus and Russia, §292.
[389] Chowdury and others v. Greece, §95, §97.
[390] See V. Stoyanova, Human Trafficking and Slavery Reconsidered, 363: "*examples of systematic failures could be absence of guidelines on the particularities of crimes against migrants; lack of training of the investigative authorities; failure to maintain the confidence of victims in the integrity of the investigative process; undue focus on migrants' undocumented status and on whether migrants comply with national immigration rules, which might undermine any prospects for establishing circumstances of abuses*".
[391] nota V.C.L. and A.N. v. U.K., §171; Zoletic and others v. Azerbaijan, §134.
[392] Rantsev v. Cyprus and Russia, §287.

expected anti-trafficking response exists, a violation of State legal-regulatory obligations will be way less likely to be found by the Court.[393]

Moreover, as already pointed out, THB as a human rights violation finds its primary source in the conduct of a private perpetrator. A vicarious State responsibility under human rights law will be identifiable only when the State is found to have contributed through its legal-regulatory framework to a breach of fundamental rights descending from a *general risk* which the State itself knew or should have known about.[394] In this sense, it has been held that it would be unreasonable to expect applicants to prove that the absent adoption of an adequate general legal or administrative framework against THB had constituted a *condicio sine qua non* for the production of an offense to their fundamental rights in order to find a responsibility on behalf of the State. Differently, in line with the Court's jurisprudence on art. 2 and. 3 ECHR,[395] the State will be found responsible when the implementation of an adequate legal-regulatory response will be found to have had *real prospects* of avoiding or significantly mitigating the harm.[396]

In light of the abovementioned hardships, the legal-regulatory obligation has been often neglected in the ECtHR art. 4 jurisprudence: the Strasbourg Court in this sense has frequently revealed a difficulty in handling structural/systemic patterns of trafficking-related-risk which can be often found to lie in the background of specific trafficking cases.[397] In these instances, the Court has often limited itself to censure States' response to trafficking-related risks at the operational and procedural levels. This approach was particularly evident in the judgment of *L.E. v. Greece*, where the inadequate treatment of a VoT by immigration and police authorities took place in a legal-regulatory background of ineffective assistance guarantees for migrants at risk of exploitation and absent training of anti-trafficking personnel. As highlighted by Valentina Milano, the Court's handling of the case sensibly blurred the contours of the expected State response to trafficking risk, concealing general-systemic issues under a superficial judicial finding of operational negligence of targeted State officers.[398]

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[393] This seems to have been sofar confirmed by the ECtHR's very restrictive account of Member States' duties of protection in the field of return of irregular migrants.

[394] See V. Stoyanova, *Human Trafficking*, 327: "*In the case of failure to incorporate and apply an effective legislative framework, knowledge that a particular identifiable individual could be harmed is not required. What is required is that the state is aware or should have been aware of the existence of a general problem*".

[395] Cfr. *Mutatis mutandis* C. Heri, Shaping Coercive Obligations Through Vulnerability: the Example of the ECtHR, in L. Lavrysen - N. Mavronicola (Eds.) *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law under the ECHR*, Hart, 2020, 102.

[396] See *infra,* 3.2.4.

[397] See e.g. for what concerns the lacking finding of a lacunae in Greek anti-trafficking criminal legal provisions in the case of Chowdury and others v. Greece, V. Stoyanova, Sweet Taste with Bitter Roots. Forced Labour and Chowdury and others v. Greece*, European Human Rights Law Review*, 2018, 73.

[398] V. Milano, *The Human Rights,* 726-7.

2.2.3. The obligation to take operational measures to prevent trafficking-related-victimization and to protect trafficking victims

In addition to the abovementioned obligation to adopt an adequate legal and regulatory framework against THB, the ECtHR's decision in *Rantsev* has recognised that Member States, in certain circumstances, are required to adopt *operational measures* which are suitable to prevent the commission of the crime or to protect a particular victim or potential victim.[399]

In order for such an operational obligation to arise, in other terms, it is not sufficient for a State to know about a *general risk* of trafficking. In addition, it must be found that State authorities *knew or ought to have known 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*.[400]

This duty thus focuses on the operational contrast of THB through the *prevention* of an individual risk of victimization or through the *protection* of an identifiable person. In order to mobilize art. 4 ECHR in these cases, therefore, a credible trafficking-related-risk threatening an *identified individual* must be identified (*credible suspicion*). Such a risk, in turn, must be considered not only abstractly plausible (real) but also "immediate". The notion of "immediate risk" has been generally understood by the Court to entail an effective and continuative exposure of the victim to a given threat and/or the *imminence* of the manifestation of its consequences.[401] In the domain of THB, in particular, the finding of circumstantial elements signalling the actuality of a private threat to the person is often considered key to mobilize the operational obligation to protect.

This said, the Court clarifies also in this context the need not to impose an *excessive burden* on State authorities: it arguably cannot be affirmed a responsibility under human rights law every time a predictable risk towards an identified person is present, as this would unreasonably inquire on the State to be infallible towards a criminal threat which is incredibly hard to contrast and detect. On the same, when such individual threats exist, States are asked to inspect whether *appropriate measures* which fall *within the scope of their powers* can be adopted to *remove the individual from that situation of risk*.[402]

These "appropriate measures" have been progressively defined in their object and scope in the Court's jurisprudence: preventive operational measures accordingly *include measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage the*

[399] Rantsev v. Cyprus and Russia, §286.
[400] Rantsev v. Cyprus and Russia, §285.
[401] See in this sense V. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 404.
[402] L.E. v. Greece, §66; Chowdury and others v. Greece, §88.

demand for all forms of exploitation of persons; protection measures, on the other side, are understood to include *facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery*.[403]

This nonetheless, the standard of diligence required in State reaction to these real and immediate risks of an individual nature is far from clear. The existence of a relatively developed international legal framework of protective guarantees for trafficking victims and potential victims allows, to a certain extent, to overcome this ambiguity on the side of the operational measures to *protect.* In this sense, ineffective *in casu* application of the key victim-centred safeguards such as prompt identification,[404] access to a recovery and reflection period, protection from prosecution,[405] has been variously found to constitute a violation of the operational obligation to protect, and a form of disregarding the effectivity of the legal and regulatory framework against THB.[406]

Whatever the threshold of diligence, it is clear from the nature of the said operational obligation that the *content* of this duty is characterized by a peculiarly "victimological" perspective on human rights violations. The risks and the adverse consequences of THB, in other terms, are here inspected under the lens of the individual experience of the trafficking victim or potential victim. No adequate responses to the protection needs of (P)VoTs are suitable to be found absent an *ad hoc* inquiry of State authrorities on the personal situation of the individuals concerned.[407]

In this sense, the case of *J. and others v. Austria* has been crucial in clarifying that *administrative recognition of the status of a potential victim of human trafficking cannot be taken as recognition that the elements of the offence of human trafficking have been made out.* The operational obligation under art. 4 ECHR, in this sense, is triggered by risk findings which do not share the same logic of the criminal justice-based response to THB. Operational protection is thus suitable to be activated also in situations where the available amount of criminal evidence is scarce, but where nonetheless a serious trafficking-related protection need of an identified individual clearly emerges.[408]

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[403] V.C.L. and A.N. v. U.K., §159.
[404] *Ibidem.*
[405] Chowdury and others v. Greece, §110. See also GRETA Opinion on Rantsev: *Accordingly, it is not open to the State to plead ignorance of an individual's situation where it should have made itself aware of the risk faced. In the opinion of the Group of Experts, such practical measures include: the securing of the immediate physical safety of the trafficked person, or person at risk of being trafficked; their physical, psychological and social recovery, with the immediate provision of information about their rights and options in a language that they understand; referral to assistance and support with the aim of long-term social inclusion. [...] ensuring that the person has legal assistance and access to justice; evaluating the need for short or longer-term international protection, whether through refugee status or subsidiary/complementary protection; safe and dignified repatriation involving cooperation with the source State and relevant NGOs and following an individual risk assessment*
[406] Chowdury and others v. Greece, §121.
[407] See more in detail *infra,* 4.3.2.
[408] See also S.M. v. Croatia (Grand Chamber), §322.

This duty to address the immediate and individual risk of THB is therefore *operationalized,* i.e. it is addressed through the recourse to a number of necessary actions. In this sense, the proactive identification of trafficking victims and potential victims can be envisaged as the first essential operational measure to prevent trafficking and protect those who are exposed to the crime.[409]

The recent ECtHR jurisprudence has particularly clarified that the due compliance with the abovementioned operational obligation requires the prompt conduction of an individual need assessment. More specifically, the Court has specified that such assessment can be deemed adequate only where it is made by *ad hoc* authorities which are specifically tasked with victim protection competences.

Individual assessment, therefore, is envisaged as a key aspect of VoTs' individual right *to be treated as victims* independently of their legal or administrative situation or of the state of the criminal investigations concerning the trafficking facts they were subjected to.[410] Such a duty constitutes a key State priority of trafficking response also when VoTs are themselves the accused in a criminal investigation: the recent decision of V.C.L. and A.N. v. U.K. in this regard has clarified the *paramount importance* of identifying both the reasonable traces of a trafficking experience and the peculiar victimological needs connected to it *before* the start of a criminal trial against a presumed trafficking survivor.[411]

This preliminary protection duty is deemed essential insofar, as specified by the Court, the prosecution of victims can be at odds with the aims of the said operational duty under art. 4 ECHR: *It is axiomatic,* in the Court' terms, *that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in the future.*[412]

As already pointed out, legal-regulatory and operational responses to trafficking-related-risk are inextricably linked: in this sense, the finding of elements pointing towards the existence of a

[409] See e.g. the just mentioned L.E. v. Greece in the interpretation of V. Stoyanova, L.E. v Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR, 3 *European Human Rights Law Review* (2016), 323.

[410] J. And others v. Austria, §110; see also V. Stoyanova, Human Trafficking and Slavery Reconsidered: *A valuable aspect of the Court's reasoning in J and Others v Austria concerns the clear formulation of the positive obligation of identifying and supporting individuals as potential victims of human trafficking. It was easily found by the Court that Austria had not failed to fulfil this obligation for the following reasons: From the point when the applicants turned to the police, they were immediately treated as (potential) victims of human trafficking. They were interviewed by specially trained police officers, were granted residence and work permits in order to regularize their stay in Austria, and a personal data disclosure ban was imposed on the Central Register so their whereabouts were untraceable by the general public. During the domestic proceedings, the applicants were supported by the NGO LEFÖ, which is funded by the Government especially to provide assistance to victims of human trafficking [...] Just as significantly, the Court made it clear that the identification and the assistance of victims is independent of any criminal proceedings.*

[411] See e.g. V.C.L. and A.N. v. U.K., §160.

[412] *Ivi*, §159.

trafficking risk at the broad societal level has in many cases come to play an important role in the Court's findings of a violation of art. 4 ECHR under its operational "leg". The assessment of an individualized situation of risk, in this sense, must arguably be carried out through a careful observation of the surrounding contextual conditions which are suitable to shape a person's relationship with a given threat as a *real and immediate* one.[413]

In *Rantsev v. Cyprus and Russia*, for instance, the Court has clarified the authorities' duty to keep trace of the general trends of THB in the country in order to break down relevant *indicators* that they can subsequently use to detect individual situations of trafficking-related-risk. In that specific judgment, in fact, the judges had found that *there were sufficient indicators available to the police authorities, against the general background of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking or exploitation.*[414]

In the case of *Chowdury and others v. Greece*, the Court found that Greece had failed to comply with its operational obligations because the authorities knew through official reports and the media about the situation of extreme vulnerability to exploitation in which irregular migrant workers found themselves in the fields of the Manolada region and, this nonetheless, they abstained to take measures to protect the applicants.[415]

In the case of *V.C.L. and A.N. v. U.K.*, the absent provision of anti-trafficking protection guarantees to two Vietnamese minors who were found locked in illegal cannabis farms was judged to constitute a breach of the UK's operational duty to protect potential trafficking victims, as the applicants clearly matched the traits a "vulnerable group" which was already largely known to prosecutorial authorities.[416]

Finally, a crucial aspect in the determination of the expected operational response to be deployed by the State is represented by the Court's evaluation of the personal and situational conditions of the applicants in art. 4 cases. Such an evaluation in various instances was declined under the lens of an autonomous vulnerability assessment by the ECtHR.

In the case of *Rantsev v. Cyprus and Russia*, the Court found a violation of the operational duty to protect as arising from the behaviour of police authorities upon their first encounter with the victim.

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[413] See e.g. V. Stoyanova, *Human Trafficking*, 403.
[414] Rantsev v. Cyprus and Russia, §296.
[415] Chowdury and others v. Greece, §111-113.
[416] VCL and A.N. v. U.K., §171 "*At the time of the first applicant's arrest, Vietnamese minors had already been identified as a specific vulnerable group*".

The Court found "clear indicators" which were suitable to reveal a risk of sexual exploitation and the victim's strong dependence from her employer. Instead of questioning the person for what concerned her situation, the police spoke with her employer and let her leave with him.[417]

In the case of V.C.L. and A.N. v U.K., finally, the peculiar protection needs of the applicants in light of their minor age were specifically identified: trafficked children, the Court observes, *"could be reluctant to disclose the circumstances of their exploitation either for fear of reprisals, out of misplaced loyalty to their traffickers, or because they have been coached. They could also be subject to more psychological coercion or threats, such as threatening to report them to the authorities, threatening their families, or by keeping them socially isolated"*. The peculiar condition of the two children, thus, was *actualized* to find, the violation of the State's duty to afford them protection, in the form of prompt identification and assistance. The inadequate consideration of case-specific profiles of vulnerability was thus here once more reconnected to a failure to adopt effective operational measures to protect.[418]

2.2.4. States' "procedural" obligation to investigate and prosecute trafficking facts and to ensure the participation of trafficking victims to criminal proceedings.

In addition to the abovementioned general and operational obligations, the ECtHR has affirmed a further positive duty related to the effective protection of art. 4 ECHR, characterized by a *procedural* nature. This obligation has been so far conceived as covering mainly the criminal-prosecutorial sphere, and in particular the areas of investigation of alleged trafficking facts, of prosecution of traffickers and of the enabling of the victims' participation in the subsequent criminal trials.

Victims and potential victims of THB, therefore, can experience a violation of their right under art. 4 ECHR when their enjoyment of human rights has been compromised as a consequence of a inadequate investigation, prosecution and/or of the violation of their right of participation in criminal procedures. The content of this obligation can be thus summarized in a duty to effectively contrast crime from the stage of risk detection to the one of prosecution and sentencing.[419] This said, the Court has clarified that the considered duties entail an obligation of *means* and not of result: in this sense, no self-standing right of victims can be affirmed for what concerns the final outcome of investigations

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[417] Rantsev v. Cyprus and Russia, §297.

[418] See e,g. V.C.L. and A.N. v. U.K., §171: "*the fact that the first applicant had cash and a mobile phone, that the factory was not itself a prison, that he was provided with groceries and that his account was at times inconsistent could not, without more, negate the conclusion that he was trafficked*".

[419] See Judge Pinto de Albuquerque's Concurring opinion in the case of S.M. v. Croatia (Grand Chamber): "*Compliance with a State's procedural obligation under the Convention requires the domestic legal system to demonstrate its capacity and willingness to apply the criminal law against those who have unlawfully taken the life of another, violated his or her physical integrity* […] *or grossly violated another guaranteed right of a person, for instance by exposing the person to forced labour*".

and prosecution of suspected traffickers. The choice of such means, moreover, is generally understood to fall within the margin of appreciation of States.

The Court has clarified that the procedural obligation is triggered only when all elements of the trafficking definition (acts, means, purposes) are found to be reasonably present in the concrete circumstances of a given case. The meeting of such factual limits thus largely depends on the level of evidence available to State authorities at the moment of their contact with indicators of trafficking-related risk.[420] Specifically, it must be verified whether *credible allegations* were available to State agents concerning a *real and immediate risk of trafficking and/or of exploitation.* This risk, therefore, is expected to reside in a particular social, labour and/or relational *situation* of which the authorities had knowledge or which they could have acknowledged through the diligent exercise of their powers.[421] Moreover, the Court has clarified in various cases that a real and immediate trafficking risk can come to the attention of State authorities not only through direct allegations coming from the victims or other individuals, but also from the observation of circumsatantial elements (*prima facie evidence*).[422]

Crucial aspects of a States' effective procedural response have been found to reside, first, in the overall adequacy of the investigation and of the reconstruction of facts.[423] The Court's decision in *Rantsev* in this sense has clarified that:

For an investigation to be effective, it must be independent from those implicated in the events. It must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases.[424]

One essential aspect of such a character of effectivity of criminal investigations has been found to lie in State authorities' deployment of a high level of diligence in the gathering of evidence:[425] throughout its jurisprudence, the Court has highlighted the importance of accurately inspecting the circumstances and individuals involved in the alleged trafficking facts. All central witnesses in this sense must be

[420] S.M. v. Croatia (Grand Chamber), §302; §325.
[421] See e.g. V. Stoyanova, Human Trafficking and Slavery: "*The vulnerability of migrants might also require from the national authorities to take a much more proactive approach by not only acting when the matter has come to their attention, but also establishing 'useful detection and reporting mechanisms [which] are fundamental to the effective implementation of the relevant criminal laws'. This implies that labour inspectors have a crucial role since they can detect abusive labour practices*".
[422]C.N. and V. v. France., §72; J. and others v. Austria, §§112-113; S.M. v. Croatia (Grand Chamber), §324; Zoletic and others v. Azerbaijan §324.
[423] Rantsev v. Cyprus and Russia, §287; see also Chowdury and others v. Greece, §89.
[424] Rantsev v. Cyprus and Russia, §288.
[425] J. And others v. Austria, §107: "*authorities must take all reasonable steps available to them to secure evidence concerning the incident*".

heard;[426] all relevant places must be subjected to inspection;[427] the situation of suspects must be constantly monitored,[428] etc.

Moreover, the Court has clarified that police operations must be conducted *as a matter of urgency*[429] once there is a possibility of removing the victim from their situation of risk. The State's capacity of rescuing trafficking victims and the promptness of authorities' reaction to credible evidence of trafficking-related-risk thus constitute fundamental aspects of procedural protection under art. 4 ECHR, which interact closely with the obligation to adopt operational measures to protect trafficking victims.

Also under the procedural obligation to investigate and prosecute THB, the standard of diligence required on States is subjected to a "reasonable burden test": here, the scope of Stare responsibility is restricted to include only *significant flaws* of the criminal justice procedure. In this sense, the Court has clarified that it "is not concerned with allegations of errors or isolated omissions in the investigations".[430]

Furthermore, the conduct of not only investigating authorities, but also of prosecutors and of the judiciary, have been found to define the scope of procedural protection of art. 4 ECHR: criminal investigations and trials are in this sense expected to prove adequate to bring perpetrators to justice in a reasonable time. In the case of *L.E v. Greece,* for instance, the Strasbourg Court has found a violation of the procedural leg of art. 4 ECHR as descending from the long duration of the criminal trial against the applicant's suspected traffickers. The Court in this sense, while recognizing the evident procedural hardships raised by the investigation and prosecution of complex transnational trafficking cases, has nonetheless found the existence of a number of critical delays along the different stages of the procedure which had not been justified by the Greek Government in its submissions to the Court and which have been found, on the same, to have notably compromised the authorities' prospects of convicting the suspects.[431]

Regarding the scope of the procedural obligation, a particularly debated aspect concerns the extension of art. 4 ECHR guarantees to include the scope of victims' right of access to justice. In this sense, in the case of C.N. and V. v. France, the procedural obligation has been understood to entail a *"lex*

[426] S.M. v. Croatia (Grand Chamber), §227.
[427] L.E. v. Greece, §83.
[428] *Ivi.*
[429] Rantsev v. Cyprus and Russia, §288.
[430] M. and C. v. Romania, §§ 112-113; M.C. v. Bulgaria, § 168; C.A.S. and C.S. v. Romania, § 78; see also Söderman v. Sweden, [GC], § 90.
[431] L.E. v. Greece, §84-86.

specialis" of the positive State duties stemming from art. 13 ECHR.[432] The special character of such duty depends particularly on the existence of an *ad hoc* framework of binding procedural guarantees of procedural protection for trafficking victims in International and European Law. In this sense, the decision of S.M v. Croatia has affirmed that the entitlement of trafficking victims to receive a need assessment before taking part to criminal trials falls under the said procedural obligation.

These findings might arguably open the stage for an analysis under the procedural leg of art. 4 ECHR of several projections of victims' right of access to justice. Particular attention, in this sense, must be devoted to the crucial role attributed under International and European law to the objective of ensuring adequate compensation of the damages suffered from victims and restitution of property. At the national level, these interests are variously addressed in criminal and civil procedures. Moreover, the emergence of cases of violation of art. 4 ECHR often leads to the filing of labour law complaints by victims against their former exploiters, for what concerns specifically the payment of wages which were negated or deducted during their situation of exploitation. As it will pointed out, the inclusion of profiles of restitution and just satisfaction under the procedural obligation might be crucial for ensuring States' compliance with the principle of effective protection in cases of violations of absolute rights.[433]

Finally, some doubts remain concerning the connection between the procedural obligation under art. 4 ECHR and the guarantees of protection and participation recognized to trafficking victims in legal proceedings which are not related with the objective of prosecution of trafficking. For example, in the context of criminal proceedings *against* victims of human trafficking, the Court has notably found that the absent adoption of procedural measures suitable to ensure the due consideration of the needs of the accused determined a violation of the obligation to take *operational* measures to protect trafficking victims;[434] more generally, the absent recognition of adequate guarantees concerning the information of victims on their legal situation and their full defence in the criminal trial has been found to determine a violation of their fair trial rights under art. 6 ECHR.[435] Furthermore, in A.I. v. Italy, the inadequate consideration of the experience of trafficking of a mother in the civil proceedings which orderd her separation from her children has been found to constitute a violation of her right to

[432] C.N. and V. v. France, §113.
[433] An inclusion of such guarantees under the procedural protection of a Conventional right would not arguably represent a *unicum* in the ECHR system: see in this sense V. Stoyanova Separating Protection from the Exigencies of the Criminal Law. Achievements and Challenges under Article 4 ECHR in L. Lavrysen – N. Mavronicola, *Coercive Human Rights,* Hart, 2020, 204: "*Admittedly, the procedural aspect of the ECHR substantive provisions might not be limited to criminal proceedings and it might include civil and administrative proceedings that aim at the identification and punishment of those responsible*".
[434] V.C.L. and A.N. v. U.K., §174; §183.
[435] V.C.L. and A.N. v. U.K., §200.

family life under art. 8 ECHR.[436] It can be concluded, in this sense, that the procedural obligation under art. 4 ECHR sofar is understood to provide a special safeguard of victims' rights of procedural protection and access to justice insofar as the criminal investigation and prosecution of trafficking facts is at stake.

[436] A.I. v. Italy, §105.

PART 2. TRAFFICKING-RELATED-VULNERABILITY AND THE LAW OF STATE RESPONSIBILITY UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

1. Introduction

As clarified in the previous analysis, the references to the language of vulnerability in European law have often been deemed confusing, inconsistent and vague.

In EU law, THB is understood as a particularly disempowering experience which hinders the VoTs' effective enjoyment of their human rights in *targeted* legal procedures. Vulnerability, in this sense, represents a character of the victim, the assessment of which is tantamount to their fair involvement inside of otherwise standardised and insufficiently protective criminal, administrative and civil procedures.[437]

The CoE-ECHR legal framework, conversely, conceives the trafficking experience as a form of enduring abuse which can be adequately detected, prevented and contrasted through a diligent identification of patterns of vulnerability*,* suitable to reveal the exposure of certain individuals. to trafficking-related-offences.[438] The concept of vulnerability in this sense is used to address both the position of individuals at risk of trafficking, and the one of those who have already been trafficked and/or exploited and which might suffer from further human rights offences as a consequence of their victimization.

These conceptions of *vulnerability to trafficking* and *vulnerability of the trafficking victim* can be seen as defining that *continuum* of human rights endangerment that has been addressed under the name of *trafficking-related-vulnerability.*

The effects of this qualification of the overall trafficking experience as vulnerable arguably lie in the formal recognition of the existence of *special human rights threats,*[439] which the victim or potential victim is likely to face considerable hardships to cope with.

The development of *special protection regimes* of (P)VoTs, as already seen, have proliferated in the European legal order through the adoption, first, of the 2005 CoE Convention Against Trafficking, and some years later, of the 2011 EU Anti-Trafficking Directive. Both instruments display innovative methods of preventing and contrasting trafficking, protecting trafficking victims and favouring victims' access to justice and redress.[440] This nonetheless, the said instruments' references to the legal

[437] See *supra,* Part. 1, 1.4.
[438] See *supra,* Part 1, 2.
[439] For a general account of the vulnerability-special rights nexus, see S. Besson, La vulnérabilité dans la structure des droits de l'homme, *passim*.
[440] See *infra,* Chapter 3, Part 1.

notion of vulnerability are often episodic and unsystematic.[441] It can be held, in this sense, that a coherent conception of trafficking-related-vulnerability is needed to ensure the objective of a truly comprehensive regulatory system of human rights protection.

This operation of reordering, in particular, is crucial for favouring a coordination between EU/CoE positive law and the evolutive anti-trafficking jurisprudence of the ECtHR. Human rights law, in this sense, can be seen as the closure point of the complex regulatory system of special victim protection. While the adoption of a vulnerability *rationale* can be seen as only vaguely implied in European anti-trafficking instruments, its logical effects under human rights law arguably transcend their restricted sphere of normativity and mobilize State obligations in way broader and more systematic ways.

In the perspective of the present work, thus, the legal concept of trafficking-related-vulnerability can be understood as fully expressing its normative effects in the law of State responsibility, and such a "vulnerabilisation" of human rights law in the field of anti-trafficking arguably finds in the ECtHR's jurisprudence one of its most advanced expressions.

The following sections will try to clarify the role of TRV in the ECHR anti-trafficking system and in its developing law of State responsibility, highlighting the notion's influence on the determination of the scope of art. 4 ECHR; on the principle of human rights effectivity; on the Court's determination of relevant risks; and, finally, on the structure of positive human rights obligations. This general analysis will constitute the basis to later assess the role of special anti-trafficking regimes of EU and CoE law in this human-rights-based-system.

[441] See *supra,* Part 1, para. 1.

2. Vulnerability as an element of rights: reconstructing the scope of art. 4 ECHR under the lens of relational autonomy

In the previous review of the European human-rights-based approach to THB, some legal facts have been addressed as relatively uncontroversial: THB is a human rights offence; such an offence is based on an international legal definition; the societal effects of THB fall to a certain extent within the domain of State responsibility, which in European law is most accurately defined through the interpretation of States' duties under art. 4 ECHR.

In light of the above, an element of elaboration seems still to be missing for what concerns the *locus standi* of human trafficking within the ECHR legal framework, i.e., the justification of its inclusion within the normative *scope* of art. 4 ECHR; the influence of such inclusion in the determination of the *proprium* of wrongness that such a provision aims to address; and the definition of the *standard* of protection of individuals' fundamental interests descending from the norm.

The determination of the protective scope of art. 4 ECHR is particularly important in terms of legal certainty, in light of the *absolute* nature of the right to be free from slavery, servitude, forced and compulsory labour in the ECHR legal system.[442] Once the scope of an absolute human rights provision is defined, in other terms, the question of the *reasonableness* and proportionality of its application becomes relatively straightforward in light of the Conventional prohibition on States (art. 15 ECHR) to derogate from the protection of the right and to let them succumb against other fundamental interests.[443]

The "question of the scope" of art. 4 ECHR, nonetheless, presents itself as particularly complicated in the current judicial *aquis,* also in light of the Court's general self-restraint in addressing the matter of the *proprium* of the prohibition within its case law. Moreover, the character of "absoluteness" of art. 4 ECHR has been invested by evolutive interpretation: as of today, not only the prohibitions of slavery and servitude are considered as absolute norms in light of the express inclusion of art 4(1) ECHR in the text of art. 15 of the Convention; but also the prohibition of forced labour (art. 4(2) ECHR) enjoys such a "privileged status".[444] The reasons of this change of view concerning the "scope of absoluteness" of art. 4 ECHR inevitably invest the exploration of the reasons of the evolution of

[442] See L. Gerards - H. Senden, The structure of fundamental rights and the European Court of Human Rights*, I.CON*, 7 2009, 621: "*Some of the rights contained in the Convention, such as article 3 (the prohibition of torture) or article 7 (nulla poene sine lege priori), are nonderogable or can be limited only in the rarest of circumstances. The need for the definition of the scope of protection of such provisions is of great importance, since no justification or balancing operation is possible once an interference with these rights has been established*".
[443] cfr. *Ivi,* 622.
[444] Siliadin v. France, §82; Rantsev v. Cyprus and Russia, §283.

the "scope of the right" protected therein,[445] the features of trafficking and its grounding in vulnerability.

Vulnerability as a legal concept has been to a certain extent neglected and disqualified in its definitional potential in the Court's early case law on art. 4 ECHR: the most important trace of such an approach can be found in the Court's decision of *Siliadin v. France,* where a violation of the State's duty to enact a sufficiently deterrent legislation against domestic servitude was found. One of the reasons of such a censure, in the applicants' and judges' view, was the excessively *generic* character of the concept of "abuse of vulnerability" in French criminal legislation, which punished the recruitment through that means of individual subsequently subjected to conditions of work contrary to human dignity.

Interestingly enough, in its following decision of *Rantsev v. Cyprus and Russia*, the Court included THB - a practice which, as previously observed, largely relies in its definition on the concept of abuse of vulnerability – within the normative scope of art. 4 ECHR.

It shall thus be asked what interests is art. 4 ECHR meant to protect: this question requires an investigation of the underlying structure of the norm, which has been understood to entail the protection of the *substance* of an absolute right right (i.e., a certain declination of basic democratic liberties)[446] against a *standard threat* that the legal system commits itself to avoid through the affirmation of the right.[447] In this sense, it would be improper to affirm that THB falls within art. 4 ECHR because it represents a *serious risk* of subsequent severe exploitation. Quite differently, the current jurisprudence understands THB as a human rights violation and an offence to human dignity *in itself*, which is, in the Court's view, best addressed under art. 4 ECHR.

The condition of relational abuse identified by trafficking, in other terms, must be qualified in its *immediately harmful character* to the right enshrined in art. 4 ECHR. From such a conception of

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[445] Cfr. The cited concurring opinion of Judge Pinto de Albuquerque in the case of J. and Others v. Austria, §38: "*It should be noted that this ground-breaking pronouncement was not accompanied by an explanation of which paragraph of Article 4 was applicable to trafficking in human beings, which could be relevant for the purposes of Article 15, since this Article only refers to paragraph 1 of the Article 4. The Chamber's silence on this point can only be fully understood in the light of its other very bold statement that Article 4 "makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation"121. In a commendable, progressive interpretation of the Convention, the Chamber refused any internal normative hierarchy between paragraphs (1) and (2) of Article 4 and any difference of treatment of these paragraphs in a state of emergency or any other exceptional circumstance. By so doing, the Chamber not only extended the scope of the Article 4 proscription rule to trafficking in human beings, but submitted this new proscriptive rule to the regime of Article 15*".

[446] See e.g. Siliadin v. France, §82: "*The Court considers that, together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe*".

[447] See in this sense, the definition of basic rights provided in H. Shue, *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy,* Princeton University Press, 2013, 13. For a reading of the general ECtHR vulnerability jurisprudence informed by Shue's theory of basic rights, see again S. Besson, La vulnérabilité dans la structure des droits de l'homme, 59.

trafficking as a harm-in-itself, among other things, derives that not only the eventuality of *exploitation,* but also the eventuality of trafficking itself falls within the relevant *risks* that must be addressed by States in their commitment to secure the substance of art. 4 ECHR.

In the *Rantsev* judgment, the Court expressly addressed the issue of the wrongfulness of trafficking stating that:

"Trafficking in human beings, by its very nature and aim of exploitation, is *based on the exercise of powers attaching to the right of ownership*. […] It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as *the modern form of the old worldwide slave trade* […]."[448]

Interestingly enough, the Court drew its interpretation of the concept of *exercise of the powers attaching to the right of ownership* from the ICTY decision on the Kunarac case,[449] where the phenomenon of slavery in its contemporary manifestations, was understood to imply the presence of "relevant factors", including the dimensions of control of a person's movement or physical environment, psychological control, prevention or deterrence of escape, control of sexuality and forced labour.

As prominent voices in the legal doctrine[450] pointed out in the aftermath of *Rantsev*, the Strasbourg Court arguably failed to provide a credible justification of the sidelining of THB with the practices of severe exploitation listed in art. 4 ECHR (slavery, sevitude, forced and compulsory labour). The qualification of trafficking as the "modern slave trade" in this sense problematically misrepresents it as an offence relying on the annihilation of liberty, in substantial contrast with the content of the International definition of the Palermo Protocol. The relevant typological distinctions between THB and the other practices prohibited under art. 4 ECHR, consequently, remained problematically unaddressed. In evaluationg the trafficking allegations in *Rantsev*, the Court deemed *unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour*".[451] The scope of the protection afforded under art. 4 ECHR was thus understood to exorbitate the definitorial limis of the specific practices listed in its text, thus enabling the additional prohibition of the distinct "liberticide" offence of THB.

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[448] Rantsev v. Cyprus and Russian §281.
[449] Rantsev v. Cyprus and Russia, §§142, 143, 280.
[450] See most notably, V. Stoyanova, Dancing on the borders of art. 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case, *Netherlands Human Rights Quarterly,* 30/2, 2012, 170; J. Allain, Rantsev v. Cyprus and Russia and Trafficking as Slavery*,* in *Human Rights Law Review*, 10(3), 2010, 553.
[451] Rantsev v. Cyprus and Russia, §282.

On the same, the inclusion of THB in the normative scope of art. 4 ECHR has contributed to notably expand the provision's protection spectrum, especially for what concerns the domain of States' positive obligations. The ECtHR anti-trafficking jurisprudence from *Rantsev* onwards in this sense can be seen as characterized by strong forms of external integration of the content of art. 4 ECHR,[452] through the reception of those international legal standards (international cooperation, victim protection, crime prevention and prosecution) which define the scope of supranational anti-trafficking duties in Europe. Even more importantly, the abovementioned formalized standards of human rights protection have been understood to find application not only in trafficking cases but, more generally, whenever an offense or a risk of harm under art. 4 ECHR is found to subsist, thus expanding the protective scope of both the Convention *and* of the originary international instruments.[453]

Parallelly, the ECtHR case law after *Rantsev* has come to repeatedly address the issue of the *locus standi* of trafficking within art. 4 ECHR through a process of reflexive jurisprudence: it is in this process that the concept of vulnerability was arguably "rehabilitated" in the Court's reasoning and started to display its definitional potential. As previously observed, the early jurisprudence of the Strasbourg Court on art. 4 ECHR has been prevalently characterised by a framing of the scope of the prohibition inspired by the lexicon of slavery and coercion. The persistence of practices of *de facto* slavery and servitude in modern democratic societies was addressed as the express target of the prohibition of art. 4 ECHR in *Siliadin v. France*.[454]

Such a modern slavery rationale arguably saw a progressive decline in the ECtHR's Anti-Trafficking jurisprudence, where, after some initial reaffirmations[455], it was abandoned in the most recent cases under art. 4 ECHR,[456] which relied instead more and more on an conception of THB fitting the

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[452] See *Supra,* 3.2.

[453] Such a projection of the protective scope of art. 4 ECHR has arguably been clarified in the case of Chowdury and others v. Greece: see in this sense V. Stoyanova, *Sweet Taste,* 74: "*The more pioneering aspect of Chowdury is the suggestion that regardless of the legal qualification of the circumstances as human trafficking or forced labour, the positive obligations generated by Article 4 of the ECHR must in principle be interpreted in light of the CoE Anti-Trafficking Convention*".

[454] Siliadin v. France, §111. "*The Court also notes that, in addition to the Convention, numerous international conventions have as their objective the protection of human beings from slavery, servitude and forced or compulsory labour (see "Relevant law" above). As the Parliamentary Assembly of the Council of Europe has pointed out, although slavery was officially abolished more than 150 years ago, "domestic slavery" persists in Europe and concerns thousands of people, the majority of whom are women*".

[455] J. and others v. Austria, §104. "*The Court noted in Rantsev that trafficking in human beings was often described as a form of modern slavery, and it therefore took the view that it was in itself an affront to human dignity and incompatible with democratic and Convention values, and thus within the prohibition of Article 4, without needing to classify it as "slavery", "servitude" or "forced labour". The identified elements of trafficking – the treatment of human beings as commodities, close surveillance, the circumscription of movement, the use of violence and threats, poor living and working conditions, and little or no payment – cut across these three categories*".

[456] Such a turn was arguably first clearly affirmed in the case of S.M. v. Croatia (Grand Chamber): see in this sense K. Hughes, Human Trafficking, S.M. v. Croatia, and the Conceptual Evolution of art. 4 ECHR, *Modern Law Review*, 85(4) 2022, 1057.

elements of the international definition.[457] Such turn was arguably facilitated by the emergence of factual cases which concerned the condition of individuals who were provenly exploited after being abusively recruited or lured into a context of private domination through trafficking. These factual experiences displayed problematic legal questions concerning the overlapping between trafficking and the "final" offenses prohibited under art. 4 ECHR, most notably forced labour, which progressively led the Court to clarify the existence of a difference of "stage" between trafficking and the final practices of exploitation listed in art. 4 ECHR.[458]

Trafficking, in this sense, came importantly to be recognised as not entailing a "modern form of slavery" in itself: slavery, servitude and forced or compulsory labour, rather, in the Court's current terms, and in line with the international definition, represent the *purpose* of trafficking.[459] As already pointed out in Judge Pinto de Albuquerque's concurring opinion in the case of J. and Others v. Austria, the said conceptual nexus must arguably be understood to imply that *there can be trafficking in human beings without subsequent exploitation and there can be exploitation without previous trafficking.*[460]

Parallelly, the existence of strong typological differences between *de facto* slavery, servitude, forced or compulsory labour, and trafficking was increasingly recognized in the Court's case law.

More specifically, the idea of art. 4 ECHR implying forms of total coercion and command over a person, and a condition of victim vulnerability as an "absolute weakness preventing [the victim] from protecting himself"[461] has hardly ever been found to exist in the material reality inspected by the Court's judicial review. The applicants considered in art. 4 ECHR cases frequently displayed degrees of relevant freedom, agency, solidarity, alongside serious patterns of dependence and exploitation. Such evidences have repeatedly called the Court to express its official view of what reasonably should amount to a violation of art. 4 ECHR in contexts of incomplete unfreedom of the applicant. The Court

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[457] See, S.M. v. Croatia (Grand Chamber), §§ 289-90: "*it follows from Rantsev that impugned conduct may give rise to an issue of human trafficking under Article 4 of the Convention only if all the constituent elements (action, means, purpose) of the international definition of human trafficking are present [...]. In other words, in keeping with the principle of harmonious interpretation of the Convention and other instruments of international law [...], and in view of the fact that the Convention itself does not define the concept of human trafficking, it is not possible to characterise conduct or a situation as an issue of human trafficking unless it fulfils the criteria established for that phenomenon in international law*". See also *ivi,* §§296-97 and 303; Zoletic and others v. Azerbaijan, §155.

[458] Chowdury and others v. Greece, §93; S.M.; Zoletic and others v. Azerbaijan §168.

[459] Chowdury and others v. Greece, §93; Zoletic v. Azerbaijan, §167: *Forced labour and trafficking for that purpose are not to be confused with slavery, institutions or practices similar to slavery, or servitude*.

[460] Concurring Opinion of Judge Pinto de Albuquerque in the Case of S.M. v. Croatia (GC), "*Not "all forced labour is trafficking", just as not "all trafficking is slavery". These two manifestations of what has been termed the "exploitation creep" must be avoided130. The trafficking process itself is a preparatory stage of the ensuing exploitation and therefore is attached to each of the three proscribed conducts in Article 4*".

[461] See on this point the statement of the Patras Assize Court on the necessary characters of forced labour, quoted in the case of Chowdury and Others v. Greece, §27; See further §70 for the applicants' contestation of such a conception of vulnerability-as-absolute-weakness.

thus came to state, for instance, that migrant workers cannot be considered "free from forced labour" only in light of the absence of traces of coercion in the process of their recruitment;[462] and that sex workers cannot be considered free from forced labour only on the basis of the argument that that the victim perceived some financial benefit from her activity.[463]

While these important specifications can be welcomed as important developments of a European Human Rights jurisprudence which is sensible to the intricacies and subtle mechanisms of modern forms of private domination, one should not lose sight of the not to lose trace of the type of *wrongfulness* addressed by art. 4 ECHR. At this juncture, it is necessary to formulate a coherent reading of all the relevant turns in the Court's jurisprudence on art. 4 ECHR in a way that preserves the unity of scope of the right to be free from slavery, servitude, forced and/or compulsory labour *and trafficking*.

The Court in this sense has so far referred to an account of the wrongness of the THB which is based on a "characteristic approach".[464] In the 2020 Grand Chamber case of S.M. v. Croatia the Court reaffirmed that:

[T]*he identified elements of trafficking – the treatment of human beings as commodities, close surveillance, the circumscription of movement, the use of violence and threats, poor living and working conditions, and little or no payment – cut across the three categories set out in Article 4.*[465]

Parallelly, the Court acknowledged its latest findings on the intersections between trafficking - i.e., the phenomenon described in the international definition – and forced labour, recalling that "*exploitation through work is one of the forms of exploitation covered by the definition of human trafficking, and this highlights the intrinsic relationship between forced or compulsory labour and human trafficking*".[466]

It appears, thus, necessary to discuss how such statements can be coherently read together: in which sense, in other terms, the intrinsic, consequential relationship between trafficking and forms of severe exploitation qualifies its character of wrongness along the lines of the protection set out in art. 4 ECHR. The heart of the said questionli es in the determination of what, having regard to the ECtHR's latest case law, can be considered the key elements of *all* forms of severe exploitation falling under

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[462] Chowdury and others v. Greece, §96.
[463] See S.M. v. Croatia (First Section), §79.
[464] See in this sense K. Hughes, Human Trafficking, SM v Croatia and the Conceptual Evolution of Article 4 ECHR, 2022 85(4) *Modern Law Review,* 1048.
[465] Case of S.M. v. Croatia (GC), §291.
[466] *Ivi.*

art. 4 ECHR. Such requisite elements, in the perspective of the present work, can be identified in a character of motivational *constraint*; and an element of existential *burden.*

Focusing on the first element, it shall be recalled the practice of slavery is understood in International Law to entail the exercise on a person of any or all the powers attaching to the right of ownership.[467] An element of motivational constraint thus exists *in re ipsa* in slavery facts, in the sense that the individual is deprived of their legitimation to act autonomously *as a rule,* through their total subjection to the will of the abuser.

Differently, the abusive behaviours at the basis of the concepts of servitude and forced or compulsory labour arguably lack this element of objectification of the individual.[468] International law in this sense provides that such practices are enforced through the threat of a *penalty*.[469] This latter concept has undergone a notable evolutive reading in the ECtHR's case law: specifically, the Court has recently stated that "penalty" "may go as far as physical violence and restraint, but it can take also *subtler forms* of a psychological nature".[470] In this sense, for example, the fear of migrant workers of being sent back to their Country of origin can well constitute a relevant implied psychological threat in work relationships, the instrumentalization of which can enforce a relationship of servitude and forced labour.[471]

In the domain of THB, finally, the motivational constraining aspect of the offense is expressed through the list of trafficking "means", which, especially for what concerns the concept of "abuse of a position of vulnerability", arguably transcend the strict boundaries determined by the ideas of force, coercion, and consent.[472]

Coming to the element of "existential burden", the ECtHR case law has clarified that, even in the presence of overt coercion, not every act of forcing an individual to do/not do something amounts to a violation of art. 4 ECHR.[473] An essential element for the finding of a breach of art. 4 ECHR arguably

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[467] S.M. v. Croatia (Grand Chamber), §279.
[468] See e.g. Siliadin v. France, §122.
[469] See Forced Labour Convention, adopted on 28 June 1930 by the General Conference of the International Labour Organisation (ratified by France on 24 June 1937), art. 2.1.: "*For the purposes of this Convention the term 'forced or compulsory labour' shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*". As clarified by the Court in the case of *C.N. and V. v. France,* §91, the concept of servitude under the ECHR must be envisaged as a special, aggravated form of forced labour, which thus presupposes again the existence of the threat of a penalty.
[470] C.N. and V. v. France, §78.
[471] *Ivi;* Chowdury and others v. Greece, §95.
[472] See *supra,* Chapter 2.
[473] Van der Mussele v. Belgium, §39; C.N. and V. v. France, §74; Chowdury and Others v. Greece, §91.

lies in the subjection of individuals to forms of abuse which monopolise their time, energies, opportunities and life perspectives.[474]

The imposition of an extreme existential burden is arguably implied situations of slavery, where individuals are by definition deprived of their agency and self-ownership.[475]

Differently, in the case of servitude, the relevant material *burden* of the sanctioned conduct has been found to reside in the radical limitation of the victim's freedom of movement through the adoption of an intensive control of their body and activities.[476] Specifically, the Court found that, in order to have servitude, the conditions of life and work to which an individual is subjected must be considered suitable to convince the victim that their situation of exploitation is permanent and unchangeable. The totalizing character of the required services, the duration of the abusive relationships, as well as the victim's personal condition and existential perspectives[477] arguably come to define the relevant parameters adopted by the Court in the evaluation of the existence of servitude.

In the case of forced labour, where an element of control of movement is not considered necessary for a violation to arise,[478] the *amount* of work required on victims must be objectively envisaged as an excessive contribution[479] in light of the material circumstances of the case. Such a character of excessiveness is crucial in the Court's inquiry of whether a worker "has offered him/herself voluntarily", which in the forced labour jurisprudence is verified through a *disproportionate burden test* i.e., the requirement that the harmfulness and unfairness of the work activity considered are "so

[474] See e.g. the distinction made in C.N. and V. v. France, §75: "*In the present case the Court considers that the first applicant was forced to work so hard that without her aid Mr and Mrs M. would have had to employ and pay a professional housemaid. The second applicant, on the other hand, has not adduced sufficient proof that she contributed in any excessive measure to the upkeep of Mr and Mrs M.'s household. Furthermore, while it is not disputed that the second applicant was the victim of ill-treatment by her aunt, it has not been established that the said violence was directly linked to the alleged exploitation, that is, to the housework in question. The Court is therefore of the opinion that the illtreatment inflicted on the second applicant by her aunt does not fall within the scope of Article 4*".

[475] This element of objectification marks arguably the distinction between slavery and the other practices prohibited under art. 4 ECHR: Siliadin v. France, §122: "*The Court notes at the outset that, according to the 1927 Slavery Convention, "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". It notes that this definition corresponds to the "classic" meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"*".

[476] See e.g. S.M. v. Croatia §280.

[477] C.N. and V. v. France, §92: "*The Court accordingly considers that the first applicant had the feeling that her condition – that of having to do forced or compulsory labour at the home of Mr and Mrs M. – was permanent and could not change, especially as it lasted four years* […] *That state of affairs started when she was still a minor and continued after she came of age*".

[478] Chowdury and others v. Greece, §99.

[479] See C.N. and V. v. France, §75.

excessive or disproportionate [...] that the service could not be treated as having been voluntarily accepted beforehand".[480]

Finally, trafficking in human beings implies, in addition to the exertion of abusive means on the victim, the manifestation of an actual *risk* that the victim to the "purpose" offences, i.e. the cited, existentially burdensome practices of slavery, servitude, forced labour, as well as "sexual exploitation", "removal of organs" and, under EU law "forced begging" and "exploitation in criminal activities". The finding of an actual risk largely relies on the proven intention to exploit of a specific perpetrator,[481] the fulfilment of which already lies at the preparatory stage of the recruitment, transportation, harbouring of the victim.[482]

This "dispositional" character of exploitation in the definition of THB, in turn, requires to rediscuss how trafficking can be said to entail the *exercise* of forms of relational abuse attributed to it by the Court in its cited "characteristic approach" (commodification of people, control of movements, violence and threats, undignified labour). As the Court's own case law has clarified, in fact, the process of recruitment of an individual later found to be subjected to forms of severe exploitation can take place also in nonviolent ways, where an express consent by the victim is expressed, in the absence or of any *actual* control on their movement, body and/or activities. On the same, where a position of vulnerability is present, the existence of constraining contextual circumstances in the relationship between the victim and the exploiter impose that the subsequent imposition of an existentially budensome treatment cannot "be treated as having been voluntarily accepted beforehand".[483] As clarified by GRETA's submission in the case of *Chowdury and others v. Greece*, "while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. *For this reason,* [emphasis added] Article 4(b) [of the CoE Trafficking Convention] provides that there is trafficking in human beings whether or not the victim consents to be exploited".[484]

Commodification, control, violence, and undignified work, in this sense, cannot be said to constitute factual manifestations of trafficking; differently, trafficking can be conceptualized as the hallmark of

480 Van der Mussele v. Belgium, §38: "*The kind of work exacted, in other terms, must be envisaged as the manifestation of an unfairly constrained choice of the employee, under the point of view of the absence of relevant benefits descending from it and of the objectively predominant character of unpaid/unfairly paid work - as compared to ordinary paid work or other productive activities - useful to characterize the worker's overall treatment as exploitative*".
481 See e.g. Chowdury and others v. Greece, §99.
482 M. and others v. Italy and Bulgaria, §§160-163; S.M. v. Croatia, Grand Chamber, §330: "*the applicant's allegations that T.M. made the necessary arrangements for her to provide sexual services by securing accommodation and other facilities suggested the element of harbouring as one of the constituent "actions" of trafficking*"
483 See also Chowdury and others v. Greece, §98. Such a turn arguably constitutes' a validation by the ECtHR of indications coming from the International Labour Organisation: See e.g.Chowdury, §40.
484 Chowdury and others v. Greece, §43.

such forms of subsequent abuse, the crossing of a line of personal subjection which in the Court's view impedes to consider an individual's relational situation as free. Once the abuse of a situation of vulnerability takes place, in other terms, the individual arguably is likely to find themselves in a condition where they are unable to escape from subsequent exploitation.[485] Such a condition of "entrapment" is verified by the Court having regard to all the circumstances of a given case.[486] The individual therefore arguably "cannot be treated as free" not in the sense that at the moment where they expressed their consent they were not wilfully exercising their agency: in this sense, where a trafficking victim stipulates a fair labour contract and is subsequently exploited, such a previous contract must be considered as validly stipulated and the individual must be able to claim their damages (also) under labour law. On the other side, the peculiar relational setting where such an agreement takes place arguably reveals that the individual is not *free from private domination.* The underlying influence of conditions of disadvantage and/or existential precariousness,[487] in this sense, acquires an essential role in its combination with the existence of a private perpetrator's intention to exploit, in defining the wrongfulness of THB under human rights law.[488]

If a common wrongness is to be found at the basis of all practices prohibited under art. 4 ECHR, in other terms, this will have to be found not simply in the victim's relationship with the offender, but, rather, in the affected individual's *connection to the society he lives in, i.e.*, a formally democratic society grounded on human rights.

The Court's case law in this sense has clarified that violations of art. 4 ECHR are to be considered not only as private forms of injustice, the abusive character of which requires a proactive State intervention on behalf of victims to restore a condition of rule of law. Rather, such violations are understood to constitute a *social* threat, which is suitable to call into question the role of the State as a guardian of democratic liberties:[489] the Court in this sense has recently clarified that "[s]ince trafficking threatens the human dignity and fundamental freedoms of its victims […] *the same is also*

[485] Chowdury and Others v. Greece, §98: "*by promising them rudimentary shelter and a daily wage of EUR 22, which was the only solution for the victims to have any means of subsistence, the employer had been able to obtain their consent at the time of recruitment in order to exploit them later*".
[486] Chowdury and others v. Greece, §96.
[487] For a recent overview of the legal implications of structural injustice on the side of States' expected human-rights-based responses to exploitation, see V. Mantouvalou, Structural Injustice and the Human Rights of Workers, *Current Legal problems,* Vol. 0, (2020) 1-29.
[488] See for an early affirmation of such a principle, W. A. Schabas, *The European Convention on Human Rights. A Commentary,* Oxford University Press, 2016, 212.
[489] See e.g Concurring opinion of Judge Turkovic in the case of S.M. v. Croatia (Grand Chamber): "*The domestic courts must not allow the perpetrator to go unpunished. Compliance with a State's procedural obligation under the Convention requires the domestic legal system to demonstrate its capacity and willingness to apply the criminal law against those who have unlawfully taken the life of another, violated his or her physical integrity […] or grossly violated another guaranteed right of a person, for instance by exposing the person to forced labour*".

true of measures to protect against the scope of Article 4 of the Convention."[490] While the State is not always expected to be infallible in its repression of offences under art. 4 ECHR, it is always required to credibly contrast them the active pursuit of truth and justice. THB, together with slavery, servitude, forced and compulsory labour, in this sense, is a social harm the gravity of which can at least in part be found in its capability to threaten the democratic order.[491] The subjection of an individual to conditions of THB, in other terms, represents an enduring violation of human rights, the duration and gravity of which is *directly* influenced by Member States' capability to restore a situation of human rights effectiveness.

Relational autonomy, in this sense, and not liberty, is arguably the legal-social concept which, reading through the lines of the Court's current case law, lies in its essential characters at the core of art. 4 ECHR. This change of perspective, in turn, can be precious to explain the paradigm shift in the ECtHR jurisprudence from a previous exceptionalisation of art. 4 ECHR cases as singularities of "modern slavery" in a allegedly free European society,[492] to the recognition of the roots of severe exploitation in the same society which lives under secular conditions of freedom and democracy. While freedom and slavery arguably amount to an *aut-aut* in the experiences of contemporary, relational autonomy, as conceptualized in contemporary social and moral theory, is an *artificial* condition which is rooted in substantial relationships of interdependency which are constantly changing. Each human life, under this perspective, can be described as a variable succession of states of relative autonomy or lack of autonomy/dependency.[493] In this sense, the State represents a key actor in the safeguard of relational autonomy, through its policies and its capability to protect effective enjoyment of democratic liberties.[494]

Factual conditions of lack of autonomy arguably come to ground a real risk of *domination* when private agents pursue their egoistic interests *within* the societal frame of the State through the subjection of individuals to severe exploitation. Abuse of vulnerability, thus, on the one side, frustrates contemporary democracies' efforts of universal relational autonomisation through human rights. On the other, it inserts the victim in an alternative *existential* frame of relational dependency,

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490 V.C.L and A.N. v. U.K., §161.

491 See e.g. Chowdury and others v. Greece, §93 The Court reiterates that there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and *cannot be considered compatible with a democratic society* and the values expounded in the Convention (emphasis added).

492 Siliadin v. France, §111.

493 See e.g C. Mackenzie, The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability, in C. Mackenzie – W. Rogers – S. Dodds, *Vulnerability. New Essays in Ethics and Feminist Philosophy,* 42.

494 See e.g. M.A. Fineman, *The Vulnerable Subject and the Responsive State,* Yale Journal of Law and Feminism, 20:1, 4.

arbitrium, and uncertainty which secludes them from society and puts them in a blind spot where they are unreachable by democratic safeguards.

The standard threat addressed by art. 4 ECHR can be thus undestood under the lens of relational autonomy as entailing a dynamic of "cascade vulnerability".[495] In this sense, autonomy, broadly defined, does not constitue a self-standing individual interest protected under human rights law. On the same the "negative" character od autonomy as *freedom from domination*[496] acquires relevance when conditions of lack of autonomy are exacerbated through private action through the creation of a *pathogenic* vulnerability, which entraps an individual in a severely exploitative *relationship*. Such an increased vulnerability of trafficking victims, moreover, is suitable to acquire further "layers" where the individual is subsequently subjected to the "purpose offences" of THB. For instance, the perception of victims of servitude that their condition of exploitation is unlikely to change arguably constitutes one further form of harm to their relational autonomy which is absent in trafficking and only emerges through prolonged and intensive exploitation.[497]

This said, the international definition of THB does not necessarily imply that exploitation will take place or that the pathogenic condition of vulnerability of the victim will never change. Abuse of vulnerability does not entail a radical absence of agency on the side of the victim. Trafficking, in other terms, represents an offence to human rights in itself because it entails an experience of democratic unfreedom irrespectively of it being followed by the material imposition of an exploitative treatment. Such offence does not only amount to a private harm, the reparation of which can be invoked against the abuser/exploiter; but also a societal harm which must be publicly addressed through a process of

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[495] This expression can be originally attributed to Florencia Luna's highly influential biothical theory of vulnerability: see F. Luna, Identifying and evaluating layers of vulnerability - a way forward, *Developing World Bioethics,* 2018, 6.

[496] The understanding of art. 4 ECHR entailing a societal freedom *from* the said abusive practices can be arguably appreciated having regard to the norm's drafting history: see in this sense W. Schabas, *The European Convention of Human Rights. A Commentary,* 2016, 203: "*The initial draft European Convention on Human Rights, adopted by the International Council of the European Movement in 1949, contained the following: 'Every State a party to this Convention shall guarantee to all persons within its territory the following rights: . . . c) Freedom from slavery and servitude and from compulsory labour of a discriminatory kind*".

[497] The facts at the basis of the Court's decision in the case of C.N. and V. v. France are arguably illustrative of this progression of vulnerability: the applicants were first rectuited in Africa while living in conditions of notable existential precarity (ex ante vulnerability); they were subsequently entrapped in the house of a diplomat in France through the seizure of their identity documents (abuse of a position of vulnerability, trafficking); finally, their condition of entrapment was taken advantage of to subject the first applicant to forced labour, which, in light of the prolonged and severely controlled character of the activities provided, came to display the characters of servitude at the moment considered under the Court's assessment. In light of this overall reconstruction, it appears very censurable the Court's finding that no violation of art. 4 ECHR could be envisaged for what concerns the position of the second applicant, who, while finding in a situation of enforced immobility similar to the one imposed on the first applicant, was not found to have been materially subjected to conditions of work determinining a *disproportionate burden* on her. In our understanding, a more careful explorations of the clear evidences of trafficking concerning the situation of this applicant, and a subsequent discussion of a possible violation of art. 4 ECHR under this instance, would have been required in the considered case.

justice. Thus element of societal injustice requires that victims of trafficking are always afforded compensation from the State.

Trafficking-related-offences, on the other side, amount to human rights *violations* under the Convention when their causes, process or consequences can be said to have been influenced by States' action and/or inaction: the State in this sense can be seen as a relevant actor in the exacerbation of an individual vulnerability when it doesn't adequately take into account the relevant position of victims.[498] The State as a governing entity, in this sense, is not generalized as an absolute sovereign of democracy whose capacity to secure conditions for rights is taken for granted. On the contrary, under human rights law the State is conceived as fallible and sometimes even *inculpably fallible* in its undertaking of human rights protection. Only in cases of culpable failure to protect, in other terms, State responsibility can be affirmed. This limited scope of State responsibility in cases of private violation of key democratic freedoms arguably constitutes a societal projection of the individual situation of pathogenic vulnerability entailed by trafficking, the response to which, when falling outside of the realm of material State capabilities, arguably unveils a community-wide condition of *vulnerability to democratic unfreedom*.

To conclude, if one is to accurately place vulnerability within the structure of core rights of democratic societies such as the right to life, freedom from torture, freedom from severe exploitation, it is necessary to consider its role not only as a critical component of *disempowerment* which defines the condition of rights bearers within the relationships that give rise to them. In addition, the explicative role of vulnerability as *the hollow side of a democratic system's capability to protect* must be taken into account, together with the connected condition of radical insecurity experienced by those who fall under it. The Human Rights Legal system, though its absolute safeguard of key democratic liberties, arguably has this individual-societal vulnerability as its target in the project of creation of the most invulnerable democracies possible. Vulnerability to democratic unfreedom/domination amounts to the *standard threat* considered under art. 4 ECHR not in the sense that the State can reasonably affirm to be able to respond to such vulnerability every time it manifests. On the same, considered the absolute rights' character of "closure clauses of the ECHR system" and the fact that the abovementioned vulnerability to democratic unfreedom threatens the autonomy and survival of

[498] In this sense, the recent ECtHR jurisprudence on the prohibition of prosecution of trafficking victims who have foresseably been compelled to commit crimes arguably clarifies this relevant nexus between a privately and publicly exacerbated vulnerability. See V.C.L. and A.N. v. U.K., §159: "*It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction couldcreate an obstacle to their subsequent integration into society. In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention*".

societies of rights themselves, it represents the necessary target that any democratic State cannot but address to be able to set rules and require compliance. This difficult task, in turn, arguably calls State authorities to proactively protect rights holders in order to preserve the social infrastructure which governs interdependence.

From such a conception of vulnerability as the radical possibility of failure of democracy arguably derives, the particular strong requirement of *effectivity* in States' protection of art. 4 under the ECHR.

3. Vulnerability as an element of the ECHR's *telos*: THB as a problem for human rights effectiveness

Once defined THB in its character of *wrongness* under art. 4 ECHR, it is now open to question *how* the protection from THB is expected to be secured by the State under the ECHR. How, in other terms, does the human-rights-based prohibition of THB reflect on the relationships intercurring between the bearers of rights and the bearers of responsibilities in the Conventional system?

The ECtHR jurisprudence on the issue presents a particular approach to such questions, which is captured in its frequent affirmation that the rights of the Convention must be "practical and effective".[499] Fundamental rights under the ECHR can be violated not only where they are directly breached by way of State action, but also when their enjoyment can be understood as factually *ineffective* under State jurisdiction. The scope of a Conventional right, in this sense, is determined through the interpretation of the legal principle it derives from (e.g.: noone shall be subjected to trafficking) in light of the conditions that are necessary to make it effective in a real-world society.[500]

This section addresses the question of what it means to effectively protect individuals against trafficking and what are, more specifically, the abovementioned necessary conditions for effectivity. A space of effective protection from trafficking can arguably be defined as an ideal societal reality where 1) the State contrasts the adverse effects of trafficking on fundamental rights 2) such contrast ensures a *level* of protection compliant with the scope of the norm.

In such an abstract societal space, THB is envisaged not as a formal legal offence, neither as an empirical fact occurring in a distinct moment in space and time; in the perspective of the effectivity principle, trafficking is rather seen as a social *phenomenon*,[501] the effects of which on the overall enjoyment of human rights in the Conventional system are made the object of legal generalisations. Trafficking, under this particular lens, thus comes to represent a *general problem* for human rights, the determinants of which can be arguably traced back to the absolute nature of the wrong prohibited under art. 4 ECHR; and to the peculiarities of trafficking as a human rights offense.

On the first point of view, the recognition of THB as a threat for democratic systems arguably determines to a certain extent *how* such a phenomenon is understood to be necessarily dealt with by States Parties. First of all, THB as a phenomenon amounts to a *private* offense to human rights. Its

[499] See e.g. Siliadin and others v. France, §148; Rantsev v. Cyprus and Russia, §275.
[500] As already mentioned, the Court deployed the effectivity principle in the first instance to include trafficking within the scope of the norm in the first place, a move which left largely unaddressed the question of the *proprium* of the norm itself "beyond" its useful protection.
[501] See e.g. *Rantsev,* §278: "*The Court notes that trafficking in human beings as a global phenomenon has increased significantly in recent years*".

connected threats to democratic freedom, in turn, qualify it as a form of private force of unfreedom exerted on individuals which must be subjected to *careful scrutiny*[502] by State authorities; in this sense, the coercive power of the State is called to be deployed as a necessary measure for the reaffirmation of democratic freedoms against *grave acts […] where fundamental values and essential aspects of private life are at stake.*[503] THB, in this sense, amounts to a failure of democratic rule of law which must be contrasted actively and steadily in order to effectively protect the core values of democracy. The absolute character of the right in this sense requires that the radical threat at the basis of trafficking is avoided with the highest possible level of deterrence – in this sense, the coercive apparatus of the State, and especially the criminal law, are required to be applied to the general problem at issue, and appropriately high penalties are expected to be imposed.[504] Moreover, in order to ensure effectivity, State authorities are expected to react to a trafficking-related-threat irrespectively of the circumstances where it arises and of the possible countervailing State interests, in light of the underogable nature of the trafficking prohibition under art. 15 ECHR. This, particularly, has brought the Court to affirm the duty of States to conduct transnational investigations and to actively cooperate where a trafficking fact has been committed in their territory[505] and to set a standard of particular diligence in States' criminal justice response in (potential) trafficking cases.

Secondly, trafficking facts amount to situations of enforced *injustice*, where critically abusive relationships materially come to inform the texture of a community. In this sense, it is the societal normalisation of objectification that denies victims the recognition as valuable beings that in turn grounds their dignity as subjects of rights. Democratic institutions, therefore, are expected to undo such forms of *misrecognition* of the social dignity of trafficked persons through the deployment of their authoritative and discursive powers to assert legal truths.[506] the State in this sense must ensure

[502] S.M. v. Croatia, first Section, §75.
[503] X and Y v. Netherlands, §27, cited in Siliadin v. France, §144.
[504] See e.g. Concurring opinion of Judge Turkovic in the case of S.M. v. Croatia (Grand Chamber), "*although the domestic courts have considerable discretion in choosing the appropriate sanction for serious human rights violations, the Court retains a certain measure of supervision and has the possibility to intervene in cases where there is a clear disproportion between the offence committed and the sanction imposed*".
[505] Rantsev v. Cyprus and Russia, §289; in subsequent cases, the Court came insofar as to suppose the reasonability of an extraterritorial application of art. 4 ECHR for what concerns States' duties to prevent a victim's retrafficking in their country of origin: see e.g. V.F. v. France, p.14: "*Sur l'obligation positive de l'Etat de prévenir le réenrôlement dans le réseau de prostitution au Nigeria La Cour note que la question de l'application extraterritoriale de l'article 4 de la Convention à cet aspect du grief pourrait se poser, notamment au regard du caractère intangible et absolu de cette disposition*". However, no concrete application of this enhanced duty to prevent has been found in the Court's jurisprudence sofar, and the delimitation of jurisdiction on trafficking facts has been at times problematically reconstructed as falling within the ambit of Member States autonomous prerogatives.
[506] See e.g. M.C. Bassiouni, *International Recognition of Victims' Rights,* 257-8: "*An important step in the recovery and reintegration of a victim into society is that his/her status as a 'victim' be acknowledged. Dismissing a victim or placing blame for what Huyse describes as 'a perceived passivity to their fate' are attempts to depreciate their pain and suffering. Individuals and groups categorised as victims benefit from States' obligation to treat victims with humanity and respect, as well as to ensure that appropriate measures are taken for their safety and privacy and that of their family*".

effectivity in the terms of a *capability of establishing the circumstances of the case or the person responsible.*[507] Such a requirement of effectiveness, on the other side, calls into place the role of the ECtHR as a democratic institution itself, which, while not normally competent to act as a first-instance Court, is competent to conduct a particularly ”thorough scrutiny” concerning the implementation of State duties of investigation of facts.[508] Trafficking victims, moreover, must be officially recognised as such, and individual responsibilities must be affirmed in due time.[509] The pursuit of such truths and public condemnation must be envisaged as an absolute priority: the State, in other terms, is expected to act as a constant opponent of traffickers in the framing of societal truths and values in order to credibly promote individual freedom.[510]

Thirdly, the peculiar position of victims of violations of absolute rights arguably informs the principle of effectivity as a requirement on States to *restore* those forms of social protection and that were materially denied through the offense. The position of exclusion from democratic liberties suffered by VoTs arguably amounts to an extreme form of disadvantage which must be addressed in institutional processes of protection, assistance and redress. The seriousness of trafficking under the ECHR, therefore, can be said to reveal a particular dependency of survivors on State intervention and/or support for them to effectively enjoy their human rights again. In this sense, the State can be said to find itself in a position of particular proximity to (P)VoTs,[511] which is arguably declined in a duty to consider the protection of their interests as an absolute priority and to assume direct responsibility for their wellbeing through the establishment of a relationship of *pris en charge*.

[507] see S.M. v. Croatia, First Section, §78. See also S.M. v. Croatia (Grand Chamber), §318.
[508] See S.M. v. Croatia (Grand Chamber), §317.
[509] See e.g. L.E. v. Greece, §84.
[510] In this sense, not only the consequences of State actions on the applicant’s current and/or future risk *of trafficking* are considered relevant under the “dynamic” content of art. 4 ECHR, but also the official systematization and addressal of *past* trafficking facts, deprived of any actual element of private offensiveness at the moment they are dealt with through the State’s official narrative. Art. 4 ECHR, in other terms, can be violated by way of *moral damage* connected to authorities’ prosecutional, judicial or broaderly considered recognitive inaction. See e.g. M.A. v. Italy and Bulgaria, §72.
[511] See e.g. V. Stoyanova, L.E. v. Greece and the scope of States’ positive obligations under the ECHR, 3 *European Human Rights Law Review,* 2016, 314. Differently from our perspective, nonetheless, the author expresses the view that only a situation or risk of trafficking *tout court* is sufficient to ground such a situation of proximity between the State conduct and a private inflicted harm. Such a view is in accordance with earlier accounts of the scope of trafficking-related-responsibility under human rights law: see e.g. also R. Piotrowicz, The legal nature of Trafficking in Human Beings, *Intercultural law review*, 4, 175. According to this view, only ”direct“ offences from private individuals mobilise the absolute prohibition of art. 4, while any further adverse consequences descending on victims from State negligence in their recognition, assistance and empowerment can be at most read under other rights of the Convention (protection from ill-treatment, fair trial, protection of private life, etc). In our perspective presented above, it is not the risk of trafficking alone, but the whole bundle of threats to the effective enjoyment of basic relational autonomy deriving from trafficking-related-facts, that mobilizes State duties under art. 4 ECHR. In this sense, even if trafficking has ceased and the traffickers have been convicted, the lack of an adequate victimological assistance of the survivor provided in the aftermath of the conviction is suitable to ground the proximity between State (in)action and the consequences of a private act of domination where the State was not directly involved.

The mentioned problems in terms of effectivity can be understood as projections in the relationship between the State and the individual of what has defined as "vulnerability to democratic unfreedom". In other terms, when the cited State capacities of contrast, recognition and restoration are absent, the individual materially finds themself vulnerable in terms of their enjoyment of democratic freedom before, during and after trafficking.

On the other side, the question of effectivity in matters of THB, is suitable to unveil another group of general problems connected to the enjoyment of fundamental rights which descend find their normative source not much in the structure of rights, but in common knowledge. In this sense, an effective protection of art. 4 ECHR must necessarily consider THB as a real-world-phenomenon and not only as an abstract threat exclusively defined in its connection with democratic liberties. THB, in this sense, and the societal effects it determines in terms of communities' *experience* of human rights enjoyment, are crucial references for the determination of the ideal form of protection warranted for rights to be effective.

This second set of general problems point to the relevant characteristics of THB which challenge the *standard level of protection* of human rights afforded under the ECHR and which raise the necessity of a *special protection infrastructure* being built in order to ensure effective protection of the subject matter of art. 4 ECHR. In this sense, the Court has often made reference to the problems to effectivity raised by trafficking-as-a-phenomenon in light of:

A) its statistically relevant element of transnationality,[512] which renders the prospects of prevention, protection and prosecution notably insecure in absence of an underlying effective interstate cooperation[513]. A failure to contrast THB in the transnational space amounts to a denial of protection of those who navigate that space, and the consequent creation of opportunities for exploitation.

B) The hidden and elusive character of trafficking in the host society,[514] which determines difficulties in terms of detection of *prima facie evidences* for investigation and victim identification which, it has

[512] See e.g. *Rantsev v. Cyprus and Russia,* §278: "*The Court notes that trafficking in human beings as a global phenomenon (emphasis added) has increased significantly in recent years* […]. *In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it*". *Ivi,* §289: "*the Court reiterates that trafficking is a problem which is often not confined to the domestic arena*".

[513] Zoletic and others v. Azerbaijan, §191; §206-207. See also CoE 2006 Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, Preamble: "*Aware of the need for co-operation between states particularly to assist victims of* […] *transnational crimes*".

[514] See e.g. Group of Experts on Action Against Trafficking in Human Beings (GRETA), General Report 2015, §97-98, cited in the case of Chowdury and Others v. Greece, §43.

been argued,[515] are higher than in cases of violation of other absolute rights. Such forms of invisibilization arguably undermine human rights effectivity through the emergence of forms of societal complicity to often profitable systems of exploitation and the consequent normalization of domination in certain communities.

C) The relevant effects of trafficking on passive subjects' well-being in terms of trauma and fear,[516] which are understood to ground victims' low self-reporting rate[517] and their general exposure to secondary victimization after trafficking.[518] These assumptions arguably impose, in line with the EU-CoE legal framework, that the needs of trafficked persons are taken into account as an absolute priority through the creation of dedicated victim-centred protection procedures, independent from criminal prosecution.

D) The projections of the trafficking experience on survivors' *access to justice*: in this sense, VoTs have been considered as particularly vulnerable to not being believed in their statements concerning their experience of victimization, due to linguistic barriers, the effects of victimization on their capability to undergo testimony, widespread prejudices and misconceptions concerning trafficking itself as a phenomenon. This kind of hardship in the enjoyment of human rights has been found to undermine trafficked persons' position in processes of justice where their status as victims has not been previously recognised or adequately assessed[519] and they are, consequently, deprived of key guarantees in terms of assistance and participation.[520] Moreover, in the case of migrant victims, their

[515] See e.g. the joint concurring opinion of Judges O'Leary and Ravarani in the case of S.M. v. Croatia (Grand Chamber): "*In an article 2 case, to put matters bluntly, there is generally physical evidence of a death, or concrete elements pointing to the risk thereof. Similarly, in Article 3 cases, the authorities are confronted with allegations of ill-treatment, more often than not including physical manifestations on the body of the alleged victim of the treatment of which they complain [...] However, in Article 4 cases, as we see from the facts of the applicant's case, the available evidence with which investigating authorities may be confronted can be of quite a different nature. The present case involved a first connection via Facebook, social drinks, the search for employment, an alleged attempt to coerce into prostitution, continued social contact, a physical relationship carried on over months which may or may not have been consensual or which may have ceased to be consensual with time, allegations of threats and domestic violence, the renting and payment of a flat by the complainant who had been able to leave the flat on certain occasions and who retained use of her identity documents, mobile phone and part of the money earned from the alleged forced prostitution. It also involved, crucially, evidence of a friend of the complainant, with whom she had lived, confirming the threats to which she had been subject but also testifying that her involvement in prostitution had been voluntary*".

[516] S.M. v. Croatia (Grand Chamber), §344.

[517] See e.g. V.F. v. France, p. 13: "*La Cour note que la requérante pointe la difficulté pour les victimes de la traite de dénoncer les réseaux dans leur demande d'asile quand elles sont toujours sous l'emprise de leurs membres; [...] La Cour, bien que consciente de l'importance du phénomène de la traite des femmes nigérianes en France et des difficultés pour ces personnes à se faire connaître des autorités en vue d'obtenir une protection*". See also S.M. v. Croatia (Grand Chamber), § 344.

[518] V.C.L. and A.N. v. U.K., §159.

[519] A.I. v. Italy, §102.

[520] The Court in this sense clarified in the case of V.C.L. that the negligent recognition of a VoT can ground a violation of the individual's fair trial rights under art. 6§1 ECHR: V.C.L. and A.N. v. U.K., §§195-196.

often precarious status on the territory is understood to problematically collide with the individual-systemic interest of safeguarding an effective access to justice.

E) Its prevalent gender-based character,[521] an element which imposes an accurate determination of national and supranational anti-trafficking strategies so to include all those systemic drivers which foster the demand for particularly gendered profiles of victims. This general objective of gender mainstreaming is arguably crucial in the evaluation of the adequacy of States' efforts of prevention of gender-based-violence in their anti-trafficking legal and regulatory frameworks;[522] as well as in the inclusion of a gendered lens in the evaluation of facts of relational abuse under art. 4 ECHR. The Court's elaboration of the implications of such a gender-mainstreaming objective on issues of State responsibility can nonetheless be considered as generally under-developed.[523]

All the abovementioned features of trafficking-as-a-phenomenon can be theoretically seen as accidental under a positive-legal standpoint: it is not impossible, in other terms, to conceive a fact of trafficking compliant with the international definition which is infra-national, easily recognizable by state authorities, non-traumatic and which concerns a male citizen who finds themselves in the conditions to effectively litigate their rights.

This nonetheless, such elements are *typical* of THB, in the sense that they are commonly known features of the offence as it is generally perpetrated in real-world scenarios. In this sense, the previously listed forms of human rights ineffectivity associated to THB constitute part of the lived condition of a relevant portion of trafficked persons: they can thus be qualified as *categorial*

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[521] Such a general awareness of the gender-based implications of trafficking is backed by the frequent Court's references to International and European legal sources: see in this sense the European Parliament's Resolution of 26 february 2014 on sexual exploitation and prostitution and its impact on gender equality. (2013/2103(INI)), cited in the case of S.M. v. Croatia (Grand Chamber), §209: "*1. Recognises that prostitution, forced prostitution and sexual exploitation are highly gendered issues and violations of human dignity, contrary to human rights principles, among which gender equality, and therefore contrary to the principles of the Charter of Fundamental Rights of the European Union, including the goal and the principle of gender equality*".

[522] As already recalled, the Palermo protocol is explicitly devoted to the contrast of trafficking in persons, *especially women and children.* Moreover, the title of Chapter 3 of the ECAT is notably titled: "*Measures to protect and promote the rights of victims, guaranteeing gender equality*"

[523] See e.g the comment of Prof. Valentina Milano on the Court's decision of L.E. v. Greece: V. Milano, The ECtHR Case Law on Human Trafficking in Light of L.E. v. Greece, *Human Rights Law Review*, 2017, 17, 721: "*the Court failed to assess to what extent gender sensitive policies have been established and implemented by public authorities, not only in relation to the adoption of protective operational measures but also in the broader context of their overall regulatory framework. This finding allows us to question the appropriateness of the Court's approach to gender discrimination and stereotyping in human trafficking cases. In L.E., for example, one may wonder why the Court failed to assess to what extent a lack of gender perspective in Greek anti-trafficking policies and a possible gender stereotyping by public officials contributed to the failure to identify Ms L.E. at an early stage*". Domestic Courts have been sometimes proactive in recognising the predominance of sex trafficking *in women* as a manifestation of structural patterns of gender-based violence. This, for example, has brought the Italian Supreme Court to recognise the refugee status to a woman victim of trafficking, in consideration of her belonging to a particular social group (women) at heightened risk of violence in her context of provenance (Corte Suprema di Cassazione, Sez. I Civile, 12 january 2022, n. 676; for a broader overview of the current judicial developments of the issue in Italy, see E. Rigo, *La straniera. Migrazioni, asilo e sfruttamento in una prospettiva di genere,* 68-72.

vulnerabilities of trafficking victims and potential victims. An undeniable role in the affirmation of such a common knowledge at the institutional level is played by the existing international *consensus* concerning the key characters of trafficking as a social harm and of the necessary guarantees to be recognized to survivors. In this sense, categorial *vulnerabilities* amount to officially validated presumptions of unfitness of a "aspecific response" to THB to secure the effective protection of the human rights under the Convention.[524]

[524] See in this sense F. Ippolito, Vulnerability as a Normative Argument for Accomodating "Justice" in the AFSJ, *European Law Journal,* 2019:25, 558.

4. Vulnerability as an element of human rights risks: human trafficking and the determinants of protection needs

In the ECtHR jurisprudence and in its emerging theory of obligations, the harms related to THB are often addressed in terms of *risk* when the Court engages in the assessment of human rights violations. Factual experiences of exposure to THB, under this perspective, represent breaches of human rights, which originate from underlying individual and/or collective situations of risk. Within such a *rationale*, the concept of vulnerability often recurs in the Court's evaluation of circumstances and its case-by-case determination of the characters of trafficking-related-risks. This section thus aims at clarifying the underlying relationships between risk, vulnerability and human rights emerging from the ECtHR anti-trafficking case law.

Risk, in commonly shared terms, is defined as the eventuality of a harm manifesting. The seriousness of a risk, in turn, depends on the level of *likelihood* that an event manifests and on the *impact* - in terms of harm - that such event is expected to determine on a targeted good. The determination of seriousness is thus linked, on the one side, to the likelihood of the harmful *event* presupposed by a given risk concept. On the other side, seriousness is crucially influenced by the position of the *bearer* of the threatened good. Once the likelihood of a harmful event is determined in the abstract, the probability that a protected good (human rights) will be actually harmed by the event - and the level of harm that the good will suffer – can only be determined by taking into account the interplay between the said event and the characteristics and capabilities of the individuals exposed to the risk factors concerned.

Vulnerability, in this sense, amounts to the set of conditions that define this second, individualised dimension of risk. Such conditions arguably follow what have been defined in risk studies as the three main determinants of vulnerability, I.e., *exposure, lack of resilience, and susceptibility.*

A) Exposure

In several expressions of its anti-trafficking jurisprudence, the ECtHR has qualified applicants as vulnerable in light of their disproportionate social *exposure* to a trafficking-related-harm.[525] In the case of *V.C.L. and A.N. v. U.K.*, for instance, Vietnamese minors have been recognised as a group particularly vulnerable[526] to THB in light of the common knowledge of their frequent involvement in exploitation in criminal activities. This conception of vulnerability arguably amounts to a factual condition of disadvantage in individuals' access to the protection from THB and serious exploitation

[525] See e.g. S.M. v. Croatia (Grand Chamber), §329: "*the applicant's personal situation undoubtedly suggested that she belonged to a vulnerable group*".
[526] V.C.L. and A.N. v. U.K., §117.

in a given community. Such a condition in turn is suitable to influence the seriousness of risk in relative terms: given the particular *likelihood* of the event involving a vulnerable individual in a certain societal setting, the risk of harm for them will be more serious than for others.

The condition of particular exposure of social groups, once they become institutionally well known, come at times to inform the institutional language concerning State duties of effective human rights protection from THB. It is the case, for instance, of the cited codification in international legal texts of the gendered character of THB and to of its frequent radication in irregular migration flows.[527]

B) Disempowerment

As previously observed, the concept of vulnerability in the perspective of human security studies is correlated with the ability of individuals and communities to "cope with" a certain destabilizing event.[528] Such a "capability to cope", or resilience, is a concept which has proven crucial in the interpretation of the legal notion of "abuse of position of vulnerability" in the previous analysis of the international definition of THB.[529] In human rights legal terms, moreover, an idea of "vulnerability-as-lack-of-resilience" lies at the basis of the the cited protection of the interest of relational autonomy in the ECtHR case law on art. 4 ECHR; and in the codification of a "presumptive" collective character of vulnerability of trafficking victims in international legal texts for what specifically concerns the hardship faced by trafficking survivors in escaping abusive relationships ,[530] and in participating in justice processes.[531]

Under a different perspective, the ECtHR has frequently adopted the lens of resilience in its recognition of the vulnerability of *individual* applicants in art. 4 cases, having regard of their specific personal and social conditions of *particular disempowerment*.[532] The connection between a harmful event and a human rights offence, in other terms, can be considered more *immediate* once the individual at risk can be deemed disempowered in their predictable response to the harmful event. Vulnerability-disempowerment influences the determination of risk for what concerns the likelihood of harm, but, differently from vulnerability-exposure, such increased likelihood descends from the

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[527] V. *supra,* para. 3.
[528] See *supra,* Chapter 1.
[529] See *Supra,* Chapter 2.
[530] See *Supra,* Part. 2, 2.
[531] See supra, Part. 2, 3.
[532] See e.g. Chowdury and others v. Greece, §97: "*the applicants began working at a time when they were in a situation of vulnerability as irregular migrants without resources and at risk of being arrested. The Court in this sense qualifies the applicants' position as a situation of lack of resilience towards exploitation*".

internal projections of harm and not from the *external* probability of them being confronted with an harmful event.[533]

The concept of vulnerability-as-disempowerment arguably represents a generalisation of the broad spectrum of individual characteristics that are suitable to be taken advantage of through APOV ("ex ante vulnerability"), as well as of those victim capabilities that are often damaged through their exposure to THB.[534] In this sense, the level of existential autonomy enjoyed by an individual is particularly relevant for human rights policing. As succinctly stated in GRETA's third party intervention in the case of S.M. v. Croatia, (Grand Chamber)[535] vulnerability represents an item of evidence useful for the prevention of offences through risk assessment and response; for the accurate investigation of trafficking facts; for the proof of trafficking means in criminal justice procedures; and for the determination of the protection needs of survivors.

C) Susceptibility

Finally, the third *individually mediated nexus* between a situation of trafficking-related risk and a breach of art. 4 ECHR can be identified in individuals' *susceptibility* to the offence, i.e., their suitability to experience a higher-than-average and/or qualitatively different harm from their subjection to THB.[536] In this sense, the ECtHR jurisprudence has in several cases addressed particular characters of the applicants in art. 4 ECHR cases in terms of vulnerability of a rights bearer to suffer a disproportionately serious impact on their human rights from the verification of a harmful event. Indicators of vulnerability-susceptibility have been specifically been found in cases concerning children[537] and repeated victims.[538] Moreover, vulnerability-susceptibility is already partially addressed in the international legal framework against THB as a general character of the *ineffective* access of survivors to human rights. The affirmation of VoTs' particular vulnerability to secondary victimization in this sense arguably amounts to a general legal presumption of susceptibility of the whole category to trauma when confronted with some instituinal forms reaction to crime and/or to victimisation.[539] On the side of human rights risk assessment, a finding of a particularly susceptibility

[533] See e.g. Chowdury and others v. Greece, §96-97; Zoletic v. Azerbaijan, §167.
[534] See e.g. *mutatis mutandis,* Siliadin, §92.
[535] S.M. v. Croatia (Grand Chamber), §265.
[536] See *mutatis mutandis,* F. Ippolito, *Understanding vulnerability,* 214, for an understanding of vulnerability as a component of a "horizontal" duty of protection against mistreatment in the ECtHR's case law on detainees: "*vulnerability contributes to defining the existence of a possible prejudice to their physical integrity that justifies full protection*".
[537] It is the case, for instance, of the Court's attribution of a particular character of vulnerability to children, which is connected an enhanced duty to protect their personal integrity and best interest see e.g. in the anti-trafficking jurisprudence, V.C.L. and A.N. v. U.K., §160 and the case law cited therein.
[538] See e.g. S.M., first Section, §80: "*The Court, given the vulnerability of the victims of sexually-related offences, also accepts that the encounter with T.M. in the courtroom could have had an adverse effect on the applicant, regardless of T.M. being subsequently removed from the courtroom*".
[539] See *supra,* Part. 2, 3.

to THB-related harm concerning a specific rights bearer determines an increase in the seriousness of the trafficking-related risk concerned.

5. Vulnerability as an element of a theory of responsibility: human trafficking, due diligence, and "reasonable responsiveness"

Lastly, the concept vulnerability can be explored in its effects on the process of determination of State responsibility under the ECHR. The extent to which a State can be said to have contributed to the human rights violation descending from a private offence constitutes a widely debated issue in human rights law.[540] The affirmation of positive State obligations under the ECHR implies that not only a direct action of the State, but also omissive conducts can be envisaged as sources of human rights violations. On the same, the Strasbourg Court has generally refrained from substantiating a structured theory of positive obligations under the Convention[541], leaving notably vague the connections between the content of such obligations and the *telos* of the Convention.

This nonetheless, the ECtHR's jurisprudence under artt. 2, 3, 4 of the Convention has clarified that the absolute nature of the rights considered determines the imposition of a higher standard of positive due diligence of State Parties in their proactive protection. Such higher standard of diligence limits to a certain extent States' margin of appreciation in their response to human rights risks through a more rigorous formalization of the object of protection duties, of which the previously analysed structure of general, procedural and operational obligations is the most obvious trace.[542] Furthermore, the Court has shaped the content of positive obligations through an extensive reference to the duties set out in the international legal framework against THB, especially the Palermo Protocol and the ECAT.[543]

On the other side, the critical need to prevent violations of absolute rights arguably determines a higher *burden* on States in terms of the effort, cost and accuracy required to effectively contrast the trafficking-related-risks. This higher burden arguably invests all the sectors (prevention, victim protection, prosecution) covered by the abovementioned obligations. For instance, under the obligation to investigate and prosecute THB, State authorities are required to display *exemplary diligence and promptness in investigation* and to *take whatever reasonable step to secure the*

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[540] For an extensive discussion of the conditions under which trafficking in human beings can be considered a human rights violation see e.g. R. Piotrowicz, The Legal Nature of Trafficking in Human Beings, *Intercultural Human Rights Law Review*, vol. 4, 2009, 175.

[541] See e.g. L. Lavrysen, The scope of Rights and the scope of obligations. Positive obligations, in S. Brems - J. Gerards, "*Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge, 2013, 163: *the Court itself has stated that it 'does not have to develop a general theory of the positive obligations which may flow from the Convention*".

[542] Rantsev v. Cyprus and Russia, §286.

[543] Rantsev v. Cyprus and Russia, §287: "*It is relevant to the consideration of the proportionality of any positive obligation arising in the present case that the Palermo Protocol, signed by both Cyprus and the Russian Federation in 2000, requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking* […]. *States are also required to provide relevant training for law enforcement and immigration officials*".

evidence.[544] For what concerns the obligation to prosecute and punish traffickers, States are required to ensure an *effective deterrence* within their jurisdiction through the penalization of trafficking by way of adequately dissuasive and comprehensive criminal norms and to *show a strong commitment to the repression of the crime* when credible trafficking allegations arise. Moreover, the primacy of States' commitment to safeguard victims has repeatedly brought the Court to oppose forms of State delegation of the response to trafficking-related-risks to private actors;[545] CoE Member States, in other terms, are always called into question when a trafficking risk arises, and they cannot discharge their special position of guarantee towards victims. Such manifestations of the higher burden of State due diligence under art. 4 ECHR can be connected to the key protection needs raised by trafficking as a threat to human rights effectivity: condemnation of threaths to the right to liberty; recognition of the evil through official discourse and procedures, reintegration of the in the community of rights.[546]

This said, it shall be asked how vulnerability reasoning integrates in this reinforced system of human rights due diligence. In the perspective of the present work, the recent affirmation of an institutional knowledge concerning the systemic effectivity problems connected to THB as a phenomenon ("categorial vulnerabilities"); and the role of individual-mediated factors ("empirical vulnerabilities") in incrementing trafficking-related-risks to individual human rights is suitable to influence the structure of positive human rights obligations under art. 4 ECHR. In particular, key *functions* of vulnerability policing can be seen to have infiltrated the scope of human rights protection in the field of anti-trafficking. While the implications of such an influence can be multiple, two main consequences of the integration of vulnerability reasoning in human rights due diligence can arguably be identified.

On the one side, the gathering of information on situations of risk through the monitoring of empirical vulnerabilities has come to constitutes a key aspect of States' expected response to THB. Trafficking, in other terms, is a phenomenon that challenges States' capacity to protect human rights through its transnational, hidden, traumatic and disempowering characters. In order to overcome such ineffectivity, the adoption of an "indirect" risk guessing perspective is crucial: vulnerability reasoning

[544] See e.g. M. and Others v. Italy and Bulgaria, §100.
[545] Cfr. Rantsev, §292, where the Court considered unreasonable the attribution of immigration control powers to the immigrants' private employers in a situation where a general risk of trafficking was evident. See, at the procedural level, the Court's reasoning in V.C.L. and A.N. v. U.K., §198, where it was held that the response to the situation of procedural disadvantage of an undetected trafficking victim could not be said to fall under the exclusively private responsibility of the individual's lawyer. The State, in this sense, was understood to hold a relevant duty of care towards the accused survivors.
[546] See *supra,* 3.2.

thus arguably determines an inclusion of preventative risk *detection technologies* within the content of State responsibility.[547]

On the other side, the awareness of the general unfitness of States' standard responses to crime and victimization to adequately safeguard trafficking victims' rights in terms of security, recovery and access to justice arguably imposes the adoption of a targeted, individualized approach focused on the *pris en charge* of victims' needs.[548] The adoption and effective implementation of comprehensive victim-centred-protocols, policies and procedures thus come to constitute another key requirement of States' "reasonably effective" response towards trafficking.

The intersection between the high burden of due diligence descending from the absoluteness of the trafficking prohibition and the special methods of protection descending from the vulnerability policing arguably leads to the description of the space of protection of art. 4 ECHR along the lines of various "standard functions". In this sense, for instance, the absoluteness-based requirement of promptness and exemplary diligence of States in the investigation and prosecution of THB; andwith the vulnerability-based requirement of taking into account victims' fear to denounce perpetrators, has been conjugated in the Court's jurisprudence through the affirmation of a duty of *early alert and victim-centred* response to of trafficking-related-risk.[549] Investigations, in this sense must be activated also on the basis partial evidence of risk and without relying on victim testimony.[550] The scope of such standard functions is still embryonally developed in the Court's case law and will constitute the focus of the next Chapters.

Under a different point of view, risk-based considerations are of great relevance in determining the *reasonableness* of the State response to THB. Building on a commonly adopted taxonomy of positive obligations, the concept of reasonable response (or "sanctioned conduct") comes to define a finding of State responsibility in its dynamic interaction with a requirement of *knowledge* and one of *effectiveness*.

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[547] This methodological evolution, as we will point out, can be observed in the Court's reference to the existence of formalized systems of indicators of trafficking risk: see e.g. V.C.L. and A.N. v. U.K., §99; S.M. v. Croatia (Grand Chamber), §146; and through the Court's assessment of the adequacy of States' implementation of the functions of risk/vulnerability assessment and referral (§V.C.L. and A.N. v. U.K., §172-173).

[548] A.I. v. Italy, §102-103.

[549] See e.g. M. and others v. Italy and Bulgaria, §101.

[550] See e.g. S.M. v. Croatia, Grand Chamber, §344: "*having regard to the prosecuting authorities' decisive reliance on the applicant's statement* [...] a*nd their failure to follow some of the obvious lines of inquiry, the Court notes that it has already been recognised in the work of GRETA and other expert bodies that there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account. There is thus a risk of overreliance on the victim's testimony alone, which leads to the necessity to clarify and – if appropriate – support the victim's statement with other evidence*". See also V.C.L. and A.N. v. U.K., §180.

"Knowledge" as a requisite element inquires whether the State "knew or ought to have known" about elements raising a reasonable suspicion that a relevant risk existed. "Effectiveness", on the other side, amounts to a judgment of whether the State had a reasonable prospect of avoiding or eliding the impact of a risk, and thus of whether the human rights offence suffered by an applicant can be attributed to State inaction. In this sense, "reasonableness" as a character of State responsibility comes to define the expected cognitive relationship between the State and a relevant risk ("reasonable grounds to believe"), the expected State action ("reasonable response"), and the expected effectiveness of State response ("reasonable prospects" of avoiding or reducing harm). The influx of considerations of vulnerability on the standard of reasonability of the Court, in this sense, arguably embraces all the distinctive elements of positive obligations.

5.1 Knowledge

The activation of a positive obligation descends from the encounter between State authorities and a relevant risk factor. Depending on the nature of the risk considered (general, individualized, real, immediate), different kinds of obligations can acquire relevance. The Court's reasoning in terms of knowledge, consequently, generally starts from a determination of whether a relevant risk existed, based on the *evidence* which was available to State authorities before a human rights offence took place. In such an evaluation, the Court considers the state of such evidence, and subjects it to a credibility test. If such evidence is considered sufficiently to raise a suspicion about the presence of a relevant risk to human rights, the Court proceeds to inquire whether the State knew or ought to have known about the evidence. In case of the affirmative, the element of knowledge is integrated.

The dimension of normative knowledge in this sense is variably declined in the Court's jurisprudence to embrace, at the empirical level, cases where a risk emerged from "sufficient indicators" observable in the factual reality;[551] at the general level, the State's knowledge of systemic threats is often presumed where a prior warning of the existence of risk was affirmed in reliable and available sources.[552] Moreover, the reasonableness of knowledge is arguably influenced by the determination of standard functions of the anti-trafficking response. In this sense, the Strasbourg Court has affirmed a duty on State authorities to adequately take into account "corroborating information"[553] concerning

[551] Rantsev v. Cyprus and Russia, §295: "*In the Court's opinion, there were sufficient indicators available to the police authorities, against the general backdrop of trafficking cases in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms. Rantseva was, or was at real and immediate risk of being, a victim of trafficking or of exploitation*".

[552] In many instances, the Court refers to public sources: see e.g. the normative knowledge assessment provided in Rantsev v. Cyprus and Russia §294, which concerned the evidence contained in reports of the Cypriot Ombudsman and of the CoE Commissioner for Human Rights.

[553] This element of *"motu propriu investigation"* on the side of prosecutorial and victimological State responses has seen a notable evolution across the Court's case law in the last years. The first affirmation of this duty of contextual awareness

potential trafficking risks, drawn, among others, from civil society actors,[554] so to compensate the evidential hardships deriving from the impossibility of relying on victims' statements in the reconstruction of trafficking facts.[555] The frequent character of transnationality of facts of THB, on the other side, has lately brought the Court to acknowledge the duty of a Member State to activate an internal anti-trafficking investigation, where the said State has previously received an inter-State legal assistance request with sufficiently detailed information concerning the presence of breaches of art. 4 ECHR taking place on its territory.[556]

The requisite elements of knowledge are notably influenced by the actualization of empirical and categorial vulnerabilities and their normative effects in the context of a specific case. On the one side the existence of *indicators* of empirical vulnerability (exposure, lack of resilience, susceptibility) plays a crucial role in the determination of the seriousness of the factual grounds of trafficking risk. In this sense, exposure, as already seen, influences the credibility of the threat in terms of likelihood.[557] Disempowerment influences the credibility of an offense deriving from a variably likely future event.[558] Susceptibility influences the expected impact of a given threat.[559]

Parallelly, the affirmation of a relevant cognitive nexus between the State and a trafficking risk (knew or *ought to have known*) arguably relies on the application of a standard of *preparedness* to the same State's ability to perceive and detect the abovementioned elements raising a reasonable suspicion. In this sense, the determination whether the State ought to have known of the specific trafficking-related-risk depends on the *reasonable response* in terms of institutional framework and capabilities that the

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of State authorities to hidden victim plights was issued in Rantsev; Later, a number of striking contrary statements were provided in V.F. v. France; Idemugia v. France; L.E. v. Greece, §75, where the claims of an unsufficient response of State authorities was quickly discharged in light of the absence of direct victim denounce. In the most recent cases (S.M. v. Croatia (Grand Chamber); Chowdury and others v. Greece; V.C.L. and A.N. v. U.K.; Zoletic and others v. Azerbaijan;), the Court has consolidated its reasoning on the non-reliance of victims' denounce or testimony for the activation of an effective response to trafficking.

[554] Zoletic and others v. Azerbaijan, §163-165.

[555] See also J. Trajer, *Hidden in Plain Sight: Failure to Investigate Allegations of Abuse on Public Construction Projects in Zoletic and Others v. Azerbaijan*, Strasbourg Observers, 18 november 2021.

[556] Zoletic and others v. Azerbaijan, §198.

[557] See e.g. S.M. v. Croatia, Grand Chamber, §329: "*the applicant's personal situation undoubtedly suggested that she belonged to a vulnerable group*".

[558] See e.g. Chowdury and others v. Greece, §97 S.M. v. Croatia, first Section, §79. S.M. v. Croatia, §328: "*T.M.'s position and background suggested that he was capable of assuming a dominant position over her and abusing her vulnerability for the purpose of exploitation of prostitution*".

[559] See e.g. with specific regard to the situation of potentially trafficked children, M. and others v. Italy and Bulgaria, §105: "*The Court further notes that even assuming that it was true that the events at issue amounted to a marriage in accordance with the Roma traditions, it was still alleged that in the month the first applicant stayed in Ghislarengo she had been beaten and forced to have sexual intercourse with Y. The Court notes that State authorities must take protective measures in the form of effective deterrence against serious breaches of an individual's personal integrity also by a husband [...] or partner. It follows that any such allegation should also have required an investigation. [...] It is of even greater concern that the first applicant was a minor at the time of the events at issue. Indeed, the Convention requires effective deterrence against grave acts such as rape, and children and other vulnerable individuals, in particular, are entitled to effective protection*"; see also V.C.L. and A.N. v. U.K., §161.

State is normatively required to oppose to the *known general risk* represented by THB as a broad societal phenomenon. Consequently, even if the State can be found in a concrete situation of inability to grasp relevant indicators of trafficking risks in certain situations,[560] the "reasonable knowledge" element will be considered nonetheless integrated, in light of the negligent prior implementation of standard anti-trafficking functions: a violation will thus be found under both the legal-regulatory and the operational obligations under art. 4 ECHR.

The aim of adequately taking into account the risk of trafficking therefore is normatively addressed through a complex chain of steps, of both a general-regulatory and procedural-operational nature. It is relevant to point out, in this sense, that where a State's failure to activate such a cognitive process is found to have manifested at the beginning of the chain, it is often materially impossible for the ECtHR itself to determine whether an arguable trafficking violation, suitable to ground a victim's claim under art. 4 ECHR, actually existed. The case of *M. and others v. Italy and Bulgaria* is quite eloquent in this sense: here, one of the applicants' complaints concerned Italian authorities' absent investigative response to her allegations of having been exploited in criminal activities after her immigration to Italy. The Strasbourg judges in this sense observed that, given the lack of any further information concerning the credibility of such allegations, it was impossible for the ECtHR to consider the applicant's complaint under art. art. 4 ECHR admissible.[561] It was allegedly impossible, in the Court's view, to recognize credible traces of the subject elements of trafficking and/or of severe exploitation in the domain of evidence available to the Court, the limitation of which was crucially determined by the absent activation of Italian authorities' investigative functions.[562] This nonetheless, the Court found that the victim's allegations were suitable to reveal a credible risk of ill-treatment and thus to ground a claim under art. 3 ECHR; the applicant was thus admitted to contest the violation of State authorities' procedural obligation to investigate her ill-treatment, a duty which would have been diligently complied with only though the investigation of possible grounds of trafficking.[563] The ECtHR, thus, found itself in a position of institutional incapability of guaranteeing effective protection of the victim's specific right enshrined in art. 4 ECHR i.e., to affirm that trafficking had presumably been perpetrated and to recognise the applicant as a potential trafficking victim under

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560 Think, for instance, about a possible negligence scenario where an evident risk of exploitation remains unaddressed because of the absence of trained State personnel capable to detect trafficking-related-risks manifesting in a certain area of a Country.

561 M. and others v. Italy and Bulgaria, §152.

562 M. and others v. Italy and Bulgaria, § 106: "*the Court cannot exclude that the circumstances* [...], *as reported by the first applicant to the Italian authorities* [...] *had they been proved*, *could have amounted to human trafficking as defined in international conventions* [...] *The Italian authorities had an obligation to look into the matter and to establish all the relevant facts by means of an appropriate investigation* [...]. *This was not so* [...]. *The Court cannot share the view that such a conclusion sufficed to remove any doubt that the circumstances of the case revealed an instance of human trafficking*".

563 M. and others v. Italy and Bulgaria, §107.

human rights law. This example clarifies the intricacies of trafficking as a hidden, hard-to-grasp phenomenon, and of the condition of categorial vulnerability to misrecognition of victims as essentially State-enabled through the absent implementation of standard functions of risk responsiveness.

5.2 Reasonable response

As already stated, the element of knowledge constitutes a precondition for the application of the proactive content of positive obligations under the ECHR, i.e., the duty of the State to react to a relevant risk through an *adequate response*. The form of such a response differs depending on the kind of risk taken into account (real, immediate, individualized, etc). In many instances, the same risk can give rise to a plurality of expected responses, too (legislative-regulatory, procedural, operational). In any given case the Court proceeds to reconstruct the material characters of the expected response to the risk, in light of the obligations which came into place and of the *burden* which in each circumstance it deems reasonable to be imposed on the State.

The scope of the reasonable burden exigible on the State is determined by the Court every time having regard to the material circumstances of a given case. In this sense, the different level of exposure of Member States to the phenomenon of THB and their variable availability of financial, human and technological resources arguably amounts to a relevant canon for the determination of the exigibility of a response.[564] This said, given the absolute nature of art. 4 ECHR, the Court a reasonable response to trafficking-related threats is understand as a situation where the State did everything it could do *within the scope of its powers* to avoid or limit the consequences of a relevant risk to human rights.[565]

In light of the extreme gravity of THB, States are expected to *seriously take into account*[566] *prima facie evidences and/or allegations,* of trafficking-related-risk, through the prompt application, on of domestic anti-trafficking legal guarantees[567]; and through the adoption of proactive arrangements, falling within the scope of their obligations under the ECHR, that emerge as immediately necessary

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[564] See e.g. J. and other v. Austria, §110. On the other hand, the existence of a functioning anti-trafficking framework in every State Party that meets the requirements descending from international obligations arguably constitutes the underogable core of such a reasonableness evaluation.

[565] It must be recalled in this sense that the ECtHR has generally considered those human rights offences descending from human conduct to generally fall within the said scope of the State's powers of risk contrast, wherever it is not clearly proven the atypicality or unpredictability of the event. The same, instead, cannot arguably be said of offences descending from *natural facts: s*ee in this sense L. Seminara, Risk Regulation and the European Convention of Human Rights, *European Journal of Risk Regulation,* 4, 2016, 740.

[566] J. And Others v. Austria, §111.

[567] See e.g. Chowdury and others v. Greece, §121: "*The Court further finds that, in rejecting the request of this group of applicants on the grounds, inter alia, that their complaint to the police was belated, the public prosecutor disregarded the regulatory framework governing human trafficking. Article 13 of the Council of Europe's Anti-Trafficking Convention provides for a "recovery and reflection period" of at least thirty days for the person concerned to be able to recover and escape from the influence of the traffickers and knowingly take a decision about cooperating with the authorities*".

to secure human rights protection at such a preliminary grounds stage.[568] In case a general risk manifests, a response at both the legal and administrative level will be required which is capable to provide a ”general solution” to an overall societal situation of trafficking proneness.[569] Where, conversely, an immediate and/or individualised risk of harm is foreseeable, an active reaction is arguably required on those State authorities operating on the ground, through the activation of investigative, prosecutorial[570] and protective responses.[571] On the same, it can be argued that the level of available evidence influences the reasonable burden of the expected State response: the more serious the traces of a given risk, the broader the scope of the expected State reaction. Such element was prominently clarified in the case of *J. and others v. Austria*, where the Court recognized that the presence of dubious allegations of transnational trafficking and domestic servitude were sufficient to activate Austrian authorities' obligations to take operational measures to protect the potential victims and to evaluate possible prosecutorial paths.[572] The same factual grounds were, on the same, considered insufficient by the Court to ground a duty on the State to prosecute the alleged traffickers, also in light of the relevant hardships connected to the activation of a transnational investigation.[573]

The existence of factual indicators of vulnerability has frequently influenced the Court's assessment of reasonability of the expected State response at the preliminary grounds stage: for instance, wherever the situation of potential *child* trafficking victims is discussed, the Court deems reasonable a the activation of a protective response even in presence of very limited evidence, on the one side, and which requires an extreme level of diligence from the authorities in their comprehensive preventive, protective and punitive responses.[574]

Similarly, the general duty of State authorities to *promptly* activate themselves to contrast trafficking risks through, among others, prosecution; and the common knowledge of victims' "categorial vulnerability" to social abandonment and denial of justice have in several instances brought the Court to interpret the procedural and operational obligations under art. 4 ECHR as imposing that procedures of prosecution and/or of victim identification are concluded in reasonable time.[575] A relevant element in the determination of such character of reasonableness, in other terms, is constituted by the existence

[568] Rantsev v. Cyprus and Russia, §297; M. and others v. Italy and Bulgaria, §102.
[569]Chowdury and others v. Greece, §113.
[570] Chowdury and others v. Greece, §120.
[571] See e.g. Chowdury and others v. Greece, §115.
[572] J. And Others v. Austria, §110.
[573] See for a relevant discussion of such a factual standard of reasonableness of investigative response the Concurring opinion of judge Pinto de Albuquerque in the case of J. and Others v. Austria, §54.
[574] See e.g. M. and others v. Italy and Bulgaria, §104.
[575] See e.g. L.E. v. Greece, §77.

of foreseeable adverse effects on the victim descending from the prolongation of their trafficking-related-condition of misrecognition, trauma and disempowerment.[576]

On the other side, the process of risk acknowledgment amounts to a sequence of phases that from preliminary, generally incomplete evidence of trafficking brings to a more accurate reconstruction of the facts, context, threats and victim profiles. When confronted with prima facie evidence, States are required to adopt a second kind of expected response, aimed at broadening their knowledge through a process of risk *assessment*.[577] Such duties include the gathering of evidence on a potential human rights risk and their examination through adequate methods.[578]

Vulnerabilities arguably play a great role in instituting this form of due diligence in front of partial evidence: on the one side, the character of elusiveness of THB as a social phenomenon, lies at the basis of the adoption of an early-alert standard in State responses against it. These responses are declined at the policy level through the requirement of having in place *ad hoc* procedures of victim identification, referral and special assistance which are activated at an early stage.[579] Considered in its operative consequences, such an approach requires that prima facie indications of trafficking are not overlooked and are instead monitored through the securing of evidence and the pris en charge of the situation of potential victims.[580]

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[576] See *ivi,* §77-78: "*Cela est d'autant plus vrai que l'omission des autorités compétentes a pu avoir des conséquences négatives sur la situation personnelle de la requérante. En effet, sa mise en liberté a pu être retardée, puisqu'elle est restée en détention jusqu'au 20 février 2007. [...] Il s'ensuit que le retard mis par les autorités internes pour reconnaître la requérante en tant que victime de traite a marqué un défaut substantiel quant aux mesures opérationnelles que les autorités pouvaient prendre pour la protéger*".

[577] Rantsev v. Cyprus and Russia, §297-298; See L. Seminara, Risk Regulation, 742.

[578] See e.g. M.A. v. Italy and Bulgaria, §§104-105, where the absent questioning of relevant third parties; the lacking conduction of medical examination of one of the applicants and the authorities' failure to verify the veridicity of photographs which were allegedly falsified brought the Court to find a violation of Italy's procedural obligation under art. 4 ECHR. See also V. Stoyanova, *Human Trafficking and Slavery Reconsidered,* 404.

[579] See *infra*, Chapters 3 and 4.

[580] In this sense, we can once more recall that trafficking victims are often not in the conditions to prove their relevant situation risk, even when they are aware of its existence and are intentioned to denounce and/or provide testimony. Only an ad hoc inquiry, in other terms, is suitable in many instances to unveil those evidentiary elements which clearly reveal the existence of trafficking and of related risks (secondary victimization; repeat victimization/ retrafficking). Preliminary ground responses, therefore, are crucial in order to both afford personal protection to individuals potentially at risk, and to create subsequent conditions for an effective litigation. Such elements have arisen as critical in the ECtHR jurisprudence, too: before the clear affirmation of the said formalized assessment duties, in fact, the Court has in several instances found claims of trafficking or of art. 4 violation to be missing in light of the applicant's inability to prove that, when they first encountered State authorities, they were actually trafficked or exposed to trafficking-related risks. In more than one instance, the Court problematically relied on the absence of a victim direct denounce/testimony to affirm the absence of a normative knowledge on the side of the State. See e.g. V.F. v. France; Idemugia v. France. The Court subsequently proceeded to re-evaluate its reasoning concerning the evidence expected to be provided from potential victims in their complaints, where a lacking institutional response was alleged (see e.g, M.A. v. Italy and Bulgaria §101): the mere issuing of a serious, yet unsubstantiated, trafficking-related allegation in this sense can be considered sufficient to attract the applicability of the Convention in such cases.

Moreover, the ECtHR has repeatedly affirmed, in the context of both procedural and operational obligations under art. 4 ECHR, that whenever a potentially trafficked person is identified, the screening of their *empirical* vulnerabilities necessarily falls within the scope of the urgent responses required on States. In this sense, the perspective of an adequate human rights protection of those seemingly exposed to trafficking cannot be reasonably determined absent an individualised and expert focus on their vulnerabilities.[581]

The diligent determination of the *proprium* of a given risk, as well as the establishment of a relationship of control/safeguard on the sources/targets of the same risk, arguably creates new conditions of risk knowledge which in turn serve as the basis for the affirmation of broader, "second stage" reasonable responses, i,e., the determination of the "adequate measure, falling within the scope of [States'] powers, which, judged reasonably, might be expected to avoid the risk".[582]

States' management of trafficking-related risks under the ECHR, in other terms, relies on the prior prompt assessment of hidden indicators of vulnerability, which are also critical to unveil the protection needs which must be addressed through the expected State response.

5.3 Effectiveness

Lastly, an affirmation of State responsibility for breach of a positive human rights obligation is possible only when a) a reasonable response to a relevant risk was possible and exigible and it has not been adopted; b) this negligence has *contributed* to the materialization of an actual harm to fundamental rights. Under this second requirement, the expected State response must be inspected in its counter-factual *effectiveness* to contrast the relevant risk concerned.

Such an evaluation reasonable effectiveness is arguably not constructed in causal terms but is rather informed by a "soft" probabilistic test:[583] in anti-trafficking cases, the Court generally refers to the formula of the "reasonable prospects to avoid or mitigate the harm".[584] Also in this case, the evaluation of States' capability to contrast trafficking-related risks in the ECtHR jurisprudence under art. 4 ECHR has been influenced by the existence of a body of binding international legal duties on the matter which have been ratified by all CoE Member States. In this sense, the test of "reasonable prospects" of a State avoiding a trafficking-related-offence in a material case relies not only on the

[581] See e.g. S.M. v. Croatia, §80: "*The Court further notes that the national courts dismissed the applicant's testimony as unreliable because they deemed her statement as being incoherent, that she had been unsure and that she had paused and hesitated when speaking [...]. The national authorities did not make any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and clearly relate the circumstances of her exploitation*".
[582] See V. Stoyanova, *Human Trafficking and Slavery Reconsidered,* 404.
[583] See L. Lavrysen, Causation and Positive Obligations under the European Convention on Human Rights: a Reply to Vladislava Stoyanova, *Human Rights Law Review*, 2018, 12.
[584] See e.g. J. and Ohters v. Austria, §117.

presumed utility of a protective and/or prosecutorial response to trafficking threats in order to safeguard or restore human rights; but also on the antecedent legal duty of States to have in place a functioning nation-wide legal and regulatory infrastructure in charge of the effectivity of anti-trafficking responses. The impossibility of concretely identified State authorities to credibly respond to a trafficking-threat-threat, therefore, can serve as evidence for the affirmation of State responsibility under the different perspective of States' duties of legal-regulatory *preparedness*.[585]

Finally, the determination of the *reasonability* of the prospects of trafficking risk contrast relies once more on the seriousness of the concrete risk of human rights violation, and thus on empirical vulnerabilities and other factual grounds influencing the evaluation of severity of any given risk. Moreover, such "reasonable prospects" standard must be necessarily sidelined with the cited requirements of particular diligence deriving from the absolute character of art. 4 ECHR, in the form of States' duties to ensure effective deterrence against THB and to show a particularly strong commitment to prosecute trafficking and to protect its victims. This latter aspect came to acquire particular prominence with regard to State duties to transnationally cooperate and to investigate facts which have taken place in more than one jurisdiction, where the necessity of showing a credible transnational response to trafficking more than often clashes with a material reality of inadequate interstate cooperation, which renders the prospects of concluding a transnational investigation materially unreasonable.[586]

[585] See *Infra,* Chapter 4, para. 1.

[586] For instance, in the case of J. and others v. Austria, the Strasbourg judges stated that Austrian authorities were not in the conditions to start an effective investigation on an arguable trafficking case which had intersected Austria's jurisdiction as a transit country, in light of the absence of any cooperation agreement with the State of origin of the suspects (EAU) and the impossibility to start a criminal trial *in absentiam* under Austrian law. See J. and others v. Austria, §117.

Chapter 3. The special protection of trafficking victims and potential victims under European law

In the previous chapter, it has been argued that a theory of vulnerability and a method of its normative assessment can be derived from the system of human rights protection against trafficking in human beings which has been progressively affirmed in Europe during the last two decades. Moreover, the influence of such a working theory on the law of State responsibility, showing how vulnerability informs the content of State obligations vis-à-vis trafficking risks.

In what follows, the previous findings will be extended to analyse the legal discipline concerning the protection of trafficking victims in European law. In the first part of this chapter, the disciplines of EU and CoE legal instruments will be taken into account in their definition of the legal status of trafficking victims and potential victims and in their introduction of a body of special protection guarantees for them.

In the second part, the current approach of European States concerning the protection of trafficking victims through will be critically addressed through the adoption of a human rights-based approach: the role of vulnerability as a iusgenerative and euristic legal concept will be further developed there to provide a first account of a coherently comprehensive system of guarantees for trafficking survivors.

PART 1. SPECIAL PROTECTION NEEDS UNDER EUROPEAN ANTI-TRAFFICKING LAW

1. Prevention, cooperation and organization

The European legal framework against THB identifies a first central sector of State response in the duty to *prevent* trafficking. The sphere of prevention, it has been held, is delimited in its core content by the State duties affirmed in art. 5-6 of the ECAT, on the one side, and in art. 18 of the EUATD, on the other. These provisions describe a non-exhaustive bundle of "effective policies and programmes",[587] or "appropriate measures"[588] / "appropriate actions"[589] which are deemed essential to prevent trafficking.

The outline of such measures coincides to a large extent with the set of guarantees envisaged under art. 9 of the Palermo Protocol, but their framing as binding legal norms, instead of mere recommendations to signatory parties, has been generally read as a notable progress accomplished by European law in the effective a promotion of the international legal aim of trafficking prevention.[590]

The ECAT and the EUATD include a number of norms which distinguish the various "legs" of such the general duty of trafficking prevention: these include, first of all, the development of measures aimed at directly contrasting the actions of traffickers across borders and within State territory. Such measures are understood to include the strengthening of border control[591]; the adoption of legislative arrangements aimed at preventing means of transport operated by commercial carriers from being used in the commission of offences; and the regulation of travel and identity documents.[592]

Both instruments then specify the necessity of a due implementation and assessment of the said policies and programmes, in order to ensure the effectiveness of trafficking prevention;[593] The EUATD in this sense refers to a duty of States to "carry out assessments of trends in trafficking in human beings, gather statistics, measure the results of anti-trafficking actions, and regularly report".[594]

A further ingredient of prevention is represented by the development of a functioning societal response against THB, through the adoption of measures such as the strengthening of national

[587] ECAT, art. 5.2.
[588] EUATD, art. 18.1.
[589] EUATD, art. 18.2.
[590] See e.g. H. Sax, Article 5, in Planitzer, Sax, *Commentary*, 5.23.
[591] ECAT, art. 7.
[592] ECAT, art. 8-9.
[593] ECAT, 5.3.
[594] EUATD, Preamble, 27.

coordination between the various bodies responsible for preventing and combating THB;[595] the cooperation of States with civil society organizations;[596] the training of professionals concerned with THB.[597] The EUATD in this sense specifies the importance of regular training of front-line officials for ensuring the effective performance of key functions of the anti-trafficking system, i.e. the identification of victims and potential victims of THB;[598] and the prompt investigation of allegations of THB by law enforcement officials and prosecutors.[599]

Both instruments then refer to the duty of States to address the root causes of THB:[600] on one side, States shall adopt prevention measures which take into account the "factors that increase vulnerability to trafficking".[601] These measures include the creation of pathways of legal migration in countries of destination;[602] the development of social and economic initiatives and training programmes especially for vulnerable populations;[603] the creation of a protective environment for children to reduce their vulnerability to trafficking.[604]

On the other side, European law highlights the importance of discouraging the demand that fosters all forms of exploitation of persons, especially women and children,[605] through the adoption of measures such as research on best practices, methods and strategies; awareness raising on the role of civil society and media in contrasting the demand that fosters trafficking; targeted information campaigns; educational programmes for boys and girls during their schooling on matters of discrimination based on sex, gender equality, etc.[606] Both the ECAT[607] and the EUATD,[608] moreover, recommend that States shall consider the possibility of establishing a criminal offence of "use of services which are the product of exploitation", when the user of such services is found to be aware that the service-provider is a victim of THB.

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595 ECAT, art. 5.1.
596 ECAT, art. 5.6 and art. 35.
597 ECAT, art. 5.2.
598 EUATD, art. 18.3.
599 EUATD, Preamble, para. 17: Law enforcement officials and prosecutors should be adequately trained, in particular with a view to enhancing international law enforcement and judicial cooperation. Those responsible for investigating and prosecuting such offences should also have access to the investigative tools used in organised crime or other serious crime cases. Such tools could include the interception of communications, covert surveillance including electronic surveillance, the monitoring of bank accounts and other financial investigations
600 EUATD, art. 18.1
601 See also, in this sense, the 2002 UN OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, Guideline 7.
602 ECAT, art. 5.4.
603 ECAT, art. 5.2.
604 ECAT, art. 5.5.
605 ECAT, art. 6.1., EUATD, art. 18.1.
606 ECAT, art. 6.1, a) b), c), d).; EUATD, artt. 18.1-2.
607 ECAT, art. 19.
608 EUATD, art. 18.4.

The said duties of prevention of root causes of human trafficking are understood to include different obligations depending on the nature of the transnational threat faced from country to country: the ECAT Exlanatory Report in this sense clarifies that, generally speaking, "the improvement of economic and social conditions in *countries of origin* (emphasis added) and measures to deal with extreme poverty would be the most effective way of preventing trafficking".[609] Conversely, discouraging the demand that fosters THB is understood as a measure which mostly concerns the prevention duties of countries of destination of trafficked persons.

Moreover, preventive measures have different temporalities for what concerns their expected effects: in this sense, information, awareness – raising and education campaigns are understood as short-term prevention measures; social and economic initatives, being aimed at undoing forms of systemic disadvantage, represent instead forms of long-term contrast of THB. Research and data gathering, differently, are *preliminary* measures, which are essential for the subsequent development of an adequate preventive response.[610]

For what concerns the principles of implementation of the said prevention measures, both the ECAT and the EUATD[611] clarify that States' efforts must be aimed primarily at safeguarding human rights. Both instruments, then, identify relevant corollaries of this human rights-based approach, namely the adoption of gender-mainstreaming and of a child-sensitive approach.[612] The first approach is understood by the ECAT Explanatory Report to entail the adoption of an active stance by policy makers in contrasting the systemic patterns which make gender-based discrimination widespread and which render women more exposed to trafficking than men.[613]

For what concerns the condition of child victims, art. 5.5 of the ECAT provides for the creation of a 'protective environment for children', a general objective which is understood constitute the primary target of the abovementioned child-sensitive approach. The ECAT ER in this sense refers to eight key components of a protective environment promoted by the UNICEF, which address specific aspects of children's peculiar situation as rights bearers such as the absence of complete autonomy; their interest

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[609] Explanatory Report, 103.

[610] *Ibidem.*

[611] EUATD, Preamble (7) "*This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings*".

[612] While such principles are included in the binding part of the ECAT (art. 5.3), the EUATD expresses them in the Preamble, at (25): "*Member States should establish and/or strengthen policies to prevent trafficking in human beings* […] *In such initiatives, Member States should adopt a gender perspective and a child-rights approach*". Art. 18.2 of the Directive the specifies the duty of raising awareness and reducing the risk of people, *especially children,* becoming victims of trafficking in human beings.

[613] See ECAT Explanatory Report, 104: *The Council of Europe group of specialists on the subject defined* [gender mainstreaming] *as "the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and all stages, by the actors normally involved in policy making".*

to be taken into account in decisions concerning them; the existence of adverse social attitudes concerning child labour exploitation; etc.[614] Trafficked children, moreover, are considered "particularly vulnerable to trafficking" in the EUATD. [615] The respect of the said guidelines of human rights-based protection shall inform not only the implementation of MS' strategies of trafficking prevention, but also the impact assessment of State responses to trafficking. Central are in this sense the duties of States to develop suitable monitoring mechanisms at the domestic level to evaluate each Country's progress towards an effective nation-wide risk response against THB.[616]

While "prevention" is the explicit object of two provisions in the ECAT and the EUATD (art. 5 ECAT, art. 18 EUATD), the overall scope of this anti-trafficking function is generally understood to embrace a broader policy area than the one described in the said norms.[617] On one hand, the principles set out in art. 5 ECAT are commonly understood to apply to all the measures provided for under Chapter II of the ECAT. On the other hand, the administrative and organizational dimensions of national anti-trafficking efforts are central in the effective implementation of the function of prevention. Art. 5.1 ECAT, in this sesne, has been interpreted in the ECAT ER as to include a duty of States to "*co-ordinate all the sectors whose action is essential in preventing and combating trafficking, such as the agencies with social, police, migration, customs, judicial or administrative responsibilities, non-governmental organisations, other organisations with relevant responsibilities and other elements of civil society*."[618] Preventive organisational measures thus include a State duty of overview and coordination of the anti-trafficking regulatory system through the institution of functioning national and international authorities and transnational forms of cooperation. These measures are included in Chapter 5 of the ECAT and at art. 19, 20 and 28 of the EUATD.

States, thus, have a general duty of appointing specialised persons or entities with the institutional mandate of combating trafficking. The ECAT identifies some key elements of an adequate organisational structure in this sense, requiring that the appointed persons or entities have the necessary independence to carry out their tasks; and that they have the adequate training and financial resources to be effective.[619] In this regard, the ECAT ER clarifies that it is not necessary for States to create *ad hoc* anti-trafficking units at all levels of national, subnational and local response.[620] On the same, specialisation is understood to crucially require that "where is necessary to counter trafficking

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[614] *Ivi,* 106
[615] EUATD, Preamble, 8: "*Children are more vulnerable than adults and therefore at greater risk of becoming victims* of *trafficking in human beings*".
[616] See Sax, *Article 5,* 5.13.
[617] Ivi, 5.01.
[618] ECAT Explanatory Report, 102.
[619] Art 29 c. 1 ECAT;
[620] See ECAT, Explanatory Report, §292.

effectively and protect victims, there must be units with *responsibility* for implementing the measures, and staff with adequate training".

The admnistrative form of domestic anti-trafficking organisational responses, thus, largely falls in the discretion of Member States. The ECAT ER in this sense specifies that "countries can opt to have a number of specialist police officers, judges, prosecutors and administrative officers or to have agencies or units with special responsibility for various aspects of combating trafficking".[621] On the same, the Explanatory Memorandum clarifies that, in any case, an adequate preventive response to trafficking risk entails the detection of those sectors where a targeted anti-trafficking response might be necessary, and the subsequent identification of a body which is at one time *expert in* and *responsible for* the activation of such a response. These requirements of institutional experience and responsibility, in turn, imply that appointed anti-trafficking authorities shall have the "*capability and legal and material resources to at least receive and centralise all the information necessary for preventing trafficking and unmasking it*"; as well as *"the necessary independence to be able to perform effectively*".

Furthermore, art. 29.2 of the ECAT envisages the *possibility* for States to institute ad hoc national bodies "to ensure the co-ordination of policies and actions of […] governments' deparments and other agencies against trafficking in human beings".[622]

Art. 29.3 of the ECAT refers to the role of "relevant officials in the prevention of and fight against trafficking in human beings", specifying States' duty of ensuring the training, including human rights training, of such authorities. While, in other terms, the specialised persons and entities cited in art. 29.1 have anti-trafficking as their main task and are thus expected from the outset to display a high experience in human rights-based prevention; the cited provision extends States' duties of training to all 'relevant officials', an expression commonly understood to include all those authorities which might be expected to routinely enter into contact with (potential) victims of trafficking.[623] The ECAT ER in this sense specifies that an adequate national response to THB requires "tak[ing] in the people likeliest to be faced with victims of trafficking in human beings": prevention, in other terms, entails the prior determination of the target population of the subsequent anti-trafficking response. The development of a national capacity of recognition of signs of trafficking, through the collection and

[621] *Ivi,* §293.
[622] Art. 29.2 ECAT; see also ECAT Explanatory Report, §295.
[623] ECAT, Explanatory Report, §297: *""Relevant officials" covers persons and services liable to have contact with trafficking victims, such as law-enforcement officials, immigration and social services, embassy or consulate staff, staff of border checkpoints and soldiers or police on international peacekeeping missions; similar considerations are made at para. 129-130, with regard to those "Competent Authorities" involved in the processes of detection and identification of trafficking victims*".

circulation of relevant information; and the increase of the overall societal awareness of the importance of favouring the identification of - and assistance to - victims, constitute the express objectives of the abovementioned preventive arrangements.[624]

Article 29.3 ECAT further recommends the adoption of a agency-specific approach in providing the said training, which shall include "methods used in preventing […] trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers".[625]

Both the ECAT[626] and the EUATD,[627] moreover, provide for the appointment of National Rapporteurs (or equivalent mechanisms) as a key measure to favour multiagent cooperation,[628] as well as interstate coordination.[629] While the ECAT includes such an organisational measure as a mere recommendation, the EUATD differently requires at least that States "take the necessary measures to establish" such authorities. The primary task of National Rapporteurs is understood to consist in the monitoring of national trafficking trends and State responses to the phenomenon, through the gathering of statistics and reporting, "in close cooperation with civil society organizations active in the field".[630]

Anti-trafficking rapporteurs, finally, are envisaged as crucial authorities to be instituted at the supra-national level: the ECAT in this sense recognizes the role of GRETA as a supranational anti-trafficking overviewing body and the mandate of the Committee of the Parties to the Convention as a political body in charge of issuing recommendations concerning the proper implementation of the Convention.[631]

The EUATD, on the other side, introduced the duty of EU MS to "facilitate the tasks of an anti-trafficking coordinator" (ATC): such tasks include "improving coordination and coherence, avoiding duplication of effort, between [the] Union [,] Member States and international actors", "contributing to the development of […] Union policies and strategies relevant to the fight against trafficking in

[624] ECAT, Explanatory Report, §297.
[625] ECAT, art. 29.3.
[626] ECAT, art. 29.4.
[627] EUATD, art. 19.
[628] Art. 29 c. 2 ECAT; Para. 6 Preamble e art. 20 EUATD.
[629] Art 32 c. 1 ECAT; Preamble, para. 28 EUATD.
[630] See also art. 29.4 ECAT, which defines the essential functions of National Rapporteurs as entailing "*monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements*". The recent European Parliament proposal of 23 April 2024 for a legislative amendment of directive 2011/36/EU substitutes the prerogatives of the current national rapporteur with the one of a "national coordinator": see art. 19 of the proposal.
[631] Artt. 36-38 ECAT.

human beings", "reporting to the Union institutions".[632] Specifically, each Member State is required to transmit to the ATC the information gathered by national rapporteurs under art. 19 EUATD.[633]

[632] EUATD, Preamble, Para. 29.
[633] EUATD, art. 20.

2. The identification of trafficking victims

The ECAT dedicates its Chapter III to the "[m]easures to protect and promote the rights of victims, guaranteeing gender equality". The first provision of this Chapter (art. 10 ECAT) regulates the "identification of the victims": the Explanatory Report to the Convention in this sense clarifies that "*to protect and assist trafficking victims is of paramount importance to identify them correctly* […] *failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights"*. Moreover, the ER makes clear the tricky nature of the identification process, which is understood to "*necessitate detailed enquiries*".[634]

The essentiality of the identification procedure as well as its relevant connaturated hardships are further taken into account in art. 10.1 of the ECAT:

"*Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention*".[635]

The Convention thus, on one hand, requires States to provide for a *formal procedure* of identification in their domestic legal frameworks, which must specifically take into account the situation of women and child victims. On the other hand, the process of identification is understood to require the deployment of crucial aspects of institutional "preparedness" which lies at the basis also of the parallel function of trafficking prevention, i.e. the training of State authorities specifically tasked with victim identification; and the adequate collaboration between all the different actors suitable to enter into contact with trafficking victims.

The said procedural and organisational duties are addressed in the ECAT ER as a necessary response to the "*insufficient aware*[ness]" of national authorities about the problem of trafficking in human beings. This element is seen as a risk under the perspective of victim identification: VoTs are known to be frequently "treated [by State authorities] as illegal migrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help".[636]

[634] ECAT, Explanatory Report, §127.
[635] Ecat, art. 10.1.
[636] ECAT, Explanatory Report, §128.

The national bodies in charge of the identification of trafficking victims are referred to as "competent authorities" under the EUATD and the ECAT. The ECAT ER maintains a certain level of ambiguity for what concerns the administrative structure of such authorities, which are understood to include "the public authorities which may have contact with trafficking victims".[637] Moreover, it is specified that the presence of anti-trafficking *specialists* within competent authorities is not strictly required under the ECAT.[638] This nonetheless, the ER considers "essential" that such authorities have the capacity of a) identifying victims; b) channelling them towards the organisations and services who can assist them;[639] c) collaborating with one another and with support organisations.[640]

A further element of this duty of specialisation regards the autonomy of the mandate of comperent authorities. In this sense, States' duty of victim identification under the ECAT is expressly qualified as independent from States' exercise of their criminal justice powers:[641] identification, in this sense, shall take place also where no criminal investigation has been activated on a specific trafficking fact or where no potential perpetrators have been detected by law enforcement authorities.[642]

In this respect, the wording of the Convention is clear in requiring that identification must be put in place whenever a victim finds themselves within the jurisdiction of a State Party, irrespective of whether the crime falls under that State's criminal jurisdiction as well.[643]

On the same, the process of identification entails an access to the personal data of victims which raises penetrant issues concerning the protection of private life.[644] Art. 11 of the ECAT affirms the duty of States Parties to protect the private life and identity of victims. The ECAT ER in this sense

[637] *Ivi,* 129: such authorities expressly include "*the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates*".
[638] *Ivi,* 130.
[639] *Ivi,* 129.
[640] *Ivi,* 130. Support organisations are intended as those (governmental and non-governmental) organisations tasjed with providing aid and support to victims. See also *infra,* 3.2.
[641] Stoyanova, Article 10, 10.23: "*Normally, the formal status of a victim of a crime is granted when the person formally participates in the criminal proceedings, for example, by acting as a witness. In contrast, victim identification as envisioned by Article 10 of the Convention is a procedure separate and independent from criminal proceedings, including any participation of the person in such proceedings*".
[642] Explanatory Report, 134. The identification process provided for in Article 10 is independent of any criminal proceedings against those responsible for the trafficking. A criminal conviction is therefore unnecessary for either starting or completing the identification process.
[643] Stoyanova, Article 10, 10.17: "*irrespective of where the presumed victim or the victim was an object of trafficking (i.e., in another CoE Member State or a state beyond the geographical limits of CoE), once the victim is 'within the jurisdiction' of a State Party, this state has to identify and ensure assistance*".
[644] The EUATD does not contain any special discipline concerning the protection of (P)VoTs' private life, but in the Preamble, at recital 33, " *the protection of personal data*" is expressly included among those human rights which must be "notably" taken into account when it comes to its application.

specifies that this kind of protection is "essential for victims' physical safety, given the danger from their traffickers, but also [...] to preserve their chance of social reintegration".[645]

This duty includes, on one hand, the due storage of victims' data, "in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)".[646] On the other hand, the duty of protection of victims' privacy and identity is considered to require the adoption of "measures aimed at encouraging the media to protect the private life and the identity of victims",[647] a provision which must be arguably read in continuity with the abovementioned State preventive duties of awareness raising on the risks connected to THB. Finally, the ECAT disciplines the particular situation of child victims of trafficking, requiring that "the[ir] identity, or details allowing the[ir] identification [...] are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child".[648]

Firm these general requirements, the Convention apparently leaves notable leeway[649] to Member States in building their identification procedure. Art. 10.1 ECAT in this respect states that the abovementioned procedure can be provided by "*legislative or other measures* as may be *necessary to identify victims",*[650] thus enabling the regulation of the function of victim identification through non-binding legal sources such as soft law indicators, standard operating procedures and administrative guidelines.[31]

Under EU law, the identification of trafficking victims is substantially overlooked in the discipline of States' duties of protection: in the EURPD, specifically, no explicit provision can be found requiring States to identify (potential) VoTs.[651] The EUATD, on the other side, merely specifies that Member States have to take measures to establish '*appropriate mechanisms aimed at the early identification of victims*':[652] this expression arguably envisages *all* victims, regardless of their status, as targets of States' early identification duties.[653] No guidance, on the other side, can be found concerning the necessary characters of the said *appropriate mechanisms*, thus leaving the scope of the provision

[645] Explanatory Report, §138.
[646] ECAT, art. 11.1. See on this Explanatory Report, para. 141. See *Infra,* Chapter 5, 2.3.
[647] ECAT, art. 11.3.
[648] ECAT, art. 11.2.
[649] See e.g. Stoyanova, Article 10, 10.33.
[650] It can be argued, nonetheless, that a *specific procedure* aimed at identifying VoTs must be present in all CoE MS: in this regard, it must be noticed that 4 EU MS still had not introduced any such legal/administrative procedure as of 2022: see European Migration Network (EMN), *Third-country national victims of trafficking in human beings: detection, identification and protection,* March 2022, 26.
[651] Stoyanova, *Human Trafficking,* 89.
[652] EUATD, art. 11(4).
[653] See e.g. UN Joint Commentary, 47

problematically vague.[654] On the same, the article's reference to "mechanisms" shall arguably be read as entailing a duty of sufficient institutionalisation and operationalisation of the early identification function, which is expressly understood as requiring multiagent cooperation;[655] The Directive's Preamble moreover links the process of identification with the relevant measures of *prevention* examined above, mentioning the "development of general common indicators of the Union for the identification of victims of trafficking, through the exchange of best practices between all the relevant actors" as a necessary preventive measure to be adopted at the Union level.[656]

Art. 10.2 of the ECAT includes only some vague indications concerning the key characteristics of the identification procedure: on one hand, identification is understood to constitute a *process*, which starts with the detection of signs of presumed trafficking victimhood by Competent Authorities and ends with the formal recognition of the individual as a "victim of an offence provided for in Article 18 of [the] Convention". The range of guarantees included in art. 10 thus cover this whole process of identification, which is understood to possibly end, "where appropriate", with the issuing of a residence permit to the victim "under the conditions provided for in Article 14 of the […] Convention".[657]

A crucial aspect of European Law's approach to VoTs identification resides in the anticipation of victim protection *before* the official recognition of individuals as victims of a trafficking offense. Both the EUATD and the ECAT in this sense require that victim assistance measures are activated at the earliest possible stage whenever credible signs of trafficking victimisation are detected. The ECAT ER in this sense clarifies that the identification process can often take a long time, in light of the complexity of the ascertainment of victimhood, which often requires the gathering of a plurality of elements of proof from different authorities both within the same Member State and across countries. While such a process is pending, detected individuals generally face a number of risks to their human rights which shall be addressed at the earliest possible stage.[658]

A first essential protective measure is identified in the Convention in the recognition of a right to stay on the territory to all presumed trafficking victims: in this respect, art. 10 the Convention provides that: "if the competent authorities have reasonable grounds to believe that a person has been victim

[654] On the problematic vagueness of art. 11(4), see Stoyanova, *Human Trafficking and Slavery Reconsidered,* 89-90.
[655] EUATD, art. 11(4). The EU Strategy 2012-16 in this sense identified the establishment of National Referral Mechanisms as a key corollary of Member States' duty under art. 11(4) EUATD, which was connected with their joint action against serious and organised crime as well: see European Commission, *EU Strategy 2012,* 6.
[656] EUATD, Preamble, (4).
[657] ECAT, art. 10.2
[658] See ECAT Explanatory Report, §§131 and 135.

of trafficking in human beings, that person shall not be removed from its territory until the identification process […] has been completed by the competent authorities”.[659]

European law does not indicate a clear timeframe for the exhaustion of the identification procedure: it must be noticed, nonetheless, that, once reasonable grounds of trafficking victimhood have been found to exist by competent authorities, the presumed victim is entitled under art. 13(1) ECAT to a “recovery and reflection period of at least 30 days”.[660] As already argued in the literature,[661] the expiry of such term shall be considered as an implicit minimum limit for the taking of a conclusive decision on victimhood. On one hand, the access to a period of recovery and reflection is considered essential to favour victims’ active participation in post-trafficking legal procedures and to avoid the risk of their secondary victimization.[662] On the other side, the observation of the conditions of potential victims during the recovery and reflection period constitutes an essential element to be taken into account for a sufficiently informed conclusive grounds decision by competent authorities.[663]

For what concerns the process of preliminary identification, it has been already highlighted that the ECAT and the EUATD refer to “reasonable grounds to believe” as a relevant evidentiary basis for first-stage identification.[664] While positive law hardly gives any further insight on what is needed to consider available grounds of trafficking “reasonable”, such an expression has been often understood to refer to a low standard of proof.[665] The first stage of identification, in this sense, often takes place at a moment in time where little is known concretely about the potential victim’s condition, and where further evidence gathering is generally needed to pervene to a conclusively grounded decision.[666] Blunt signs and suspicions, more than fully formed evidences and convictions, generally come to constitute the concrete evidentiary basis of Competent Authorities at this early stage.

The conclusive determination of trafficking victim status is commonly understood to be made through a formal judicial or administrative decision. For what concerns the evidentiary requirements of the said conclusive stage of identification, in absence of specific provisions in supranational law,[667] the legal doctrine generally agrees to consider such a phase as necessarily based on a “deeper

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[659] ECAT, art. 10.2.
[660] ECAT, art. 13.1.
[661] Stoyanova, *Human Trafficking,* 103.
[662] See infra, para. 3.1.
[663] The cited OSCE report “National Referral Mechanisms” poses 90 days as the timespan for the issuing of the conclusive grounds decision. See OSCE, *National Referral Mechanisms,* 126.
[664] Art. 10.2 ECAT, art. 11.2 EUATD
[665] See ECAT COMMENTARY, 10.08, for an outline of the relevant debates among the signatory parties during the process of drafting of the Convention.
[666] Stoyanova, *Human Trafficking,* 100.
[667] See e.g. Stoyanova, Human Trafficking and Slavery Reconsidered, 99.

assessment", which shall produce all the relevant "facts militating for as well as against the migrant being a victim of trafficking".

The legal consequences of trafficking victim status determination are only partially clarified under European Law: for instance, as it will be further discussed, formally identified VoTs have access to a broader level of assistance and support under the ECAT than the one guaranteed under art. 12.1-2 to potential victims.

Art. 10(3) ECAT includes in this sense some relevant provisions concerning the status of trafficked children, stating that "when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age". The norm thus clarifies that minor age, exactly as victim status, represent an attribute of individuals which might well remain uncertain at the moment of their previous contact with competent authorities. The existence of "reasons to believe" that the victim is a child, therefore, shall suffice for them to be presumed to be so.

3. The special assistance of trafficking victims: common principles, rights and duties

State duties of "victim assistance and support" under European anti-trafficking law identify the mandatory provision of a plurality of guarantees, which include material assistance; legal support and information; procedural forms of protection in Court proceedings; special rights of compensation and safe return. Moreover, both the ECAT and the EUATD suggest the adoption of several *facultative* measures of victim protection, including the issuing of residence permits to trafficking victims and the non-punishment and/or prosecution of VoTs who commit crimes which are directly connected to their situation of exploitation.

The material scope of the victim assistance and support available to trafficking survivors is nonetheless very variable depending on the legal situation of the victim concerned. Some general guarantees in this sense are recognised to all VoTs automatically upon the identification of reasonable grounds of trafficking by competent authorities; other assistance of support measures, instead, are specifically attributed to victims who hold a particular legal status or who take part to particular proceedings.

The first, "universal" set of special protection guarantees will be examined in the next subsections, while the additional forms of protection dedicated to particular categories of trafficking victims will be introduced in the following paragraph 4.

3.1. Unconditional assistance of trafficking victims and potential victims under European law

The CoE and EU anti-trafficking legal frameworks present a series of special provisions concerning the scope and degree of the assistance granted to victims of THB. A first essential measure in this sense is identified in art. 10(2) ECAT:

If the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process […] has been completed by the competent authorities".[668]

The legal discipline of victim assistance and support is thus relevantly connected with the phases and guarantees of the identification procedure: art. 10(2) in this sense further stipulates that upon detection of *reasonable grounds* of trafficking victimhood, individuals must be provided with "the assistance provided for in Article 12, paragraphs 1 and 2".[669]

[668] ECAT, art. 10.2.
[669] ECAT, art. 10.2.

Similarly, art. 11.2 EUATD states that "Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3".

These guarantees are closely connected: The ECAT ER clarifies in this regard that non-removal represents an essential precondition for securing the rights recognised to VoTs in Chapter III of the Convention. "Removal" under the ECAT is understood to refer both to the process of returning a victim to their country of origin and to their resettlement to a third country.

The entitlement to assistance and support measures, thus, is attributed under the Convention not only to identified *victims,* but also to those individuals ("potential victims") who are awaiting a formal identification and in relation to whom a relevant risk can be found that they might suffer relevant harm in absence of the activation of special measures of protection.

Paragraphs 1 and 2 of art. 12 ECAT in turn specify the level of assistance and support which is due to all victims and potential victims of trafficking in human beings from the emergence of reasonable grounds of THB to the conclusion of the identification procedure[670]. These guarantees are required under art. 13(2) of the Convention to be available along the whole duration of the recovery and reflection period.[671]

Concerning the aims of the said assistance measures, art. 12(1) ECAT states: "[e]ach Party shall adopt such legislative or other measures as may be *necessary* [emphasis added] to assist victims in their physical, psychological and social recovery". Art. 12(2) ECAT moreover requires States to take due account of victims' safety and protection needs while exercising their duties of assistance and support.[672] While, thus, victim assistance under the ECAT entails the provision of a series of general guarantees for all the subjects of art. 12 ECAT, the implementation of such safeguards in individual cases shall be centred on the particular needs and vulnerabilities of each survivor. Art. 12(7) ECAT further specifies that "each Party shall […] tak[e] into account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.[673] Finally, European States' duty to provide assistance is explicitly addressed in art. 12(6) ECAT as independent from the victim's decision to cooperate with competent authorities in investigations and criminal proceedings.[109]

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[670] See Stoyanova, art. 10, Relationship between Article 10 and Article 12.
[671] See *infra,* 3.2.
[672] ECAT, art. 12.2.
[673] ECAT, art. 12.7.

Turning to the EU legal discipline, a relevant degree of symmetry can be observed between the provisions of the ECAT and of the EUATD in the sector of victim assistance and support. On the same, some differences between the two legal frameworks arguably emerge for what concerns the specific content and scope of special protection guarantees. The EAUTD, in this sense, has extended the level of assistance previously granted to trafficking victims under the EURPD. This latter instrument, on one hand, only concerned victims who are non-citizens;[674] moreover, under the EURPD, the activation, maintainment and termination of victim support is largely dependent on State discretion,[675] and conditioned upon the survivors' availability to cooperate with law enforcement authorities.[676]

Conversely, art. 11(2) of the EUATD stipulates that *Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3*.[677]

While this provision does not expressly refer to the existence of formal process of victim status determination, it nonetheless makes clear that the guarantees of assistance and support are expected to be activated promptly (*as soon as*) in the presence of a "*reasonable grounds indication*" of trafficking victimhood. The required evidentiary standard for the activation of assistance measures under art. 11(2) EUATD and under art. 10(2) ECAT thus literally coincide.

Art. 11(1) of the 2011/36 Directive in turn stipulates that "*Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to*

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[674] EURPD, art. 2: (a) "*'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty*".

[675] See e.g. RPD, art. 7: Article 7 "*Treatment granted before the issue of the residence permit*

1. Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance.

2. Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive, in accordance with national law.

3. Member States shall provide the third-country nationals concerned, where appropriate, with translation and interpreting services.

4. Member States may provide the third-country nationals concerned with free legal aid, if established and under the conditions set by national law".

[676] The reference made under art. 7 RPD, cited above, to "*the third-country nationals concerned*" evidently circumscribes the scope of the assistance granted to individuals before the issue of a residence permit only to those individuals concerned under the purpose and scope of the said directive: EURPD, art. 1: "*The purpose of this Directive is to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration*."

[677] EUATD, art. 11(1).

exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive". Independently from the specific reference to criminal proceedings, it seems clear that such a provision, similarly to the abovementioned art 12(2) ECAT, embodies a "sufficiency clause" in stating that assistance and support should allow (P)VoTs to effectively enjoy their rights to recovery, reintegration and access to justice. Recital 18 of the EUATD Preamble in this sense provides some clarification on the scope of the abovementioned standard of "appropriatedness" of protection: on one hand, the Directive clarifies that "the assistance and support provided should include at least a minimum set of measures that are *necessary* to enable the victim to *recover and escape from their traffickers* [emphasis added]".[678]

The approaches of CoE and EU law concerning (potential) victim support and assistance, in turn, tend to overlap when it comes to other key aspects of the special support of trafficking victims. In this sense, both the ECAT[679] and the EUATD[680] envisage the access of trafficking survivors to assistance as necessarily conditioned upon the express manifestation of their informed consent. These provisions are of particular relevance, considering that the content of victim protection from secondary and repeat victimization as embodied in the two legal frameworks more than often coincides with a limitation of (P)VoTs' liberties (in terms of freedom of movement, means of communication, right to privacy, etc).[681] On the same, the Directive is also clear in stating that a victim's refusal of a certain form of assistance "does not entail obligations for the competent authorities of the Member State concerned to provide the victim with alternative measures".[682]

Secondly, both EU and CoE law expressly refer to the assistance and support function as intrinsically driven by a particular attention to trafficking survivors' special situations of need and vulnerability. In this sense, while the ECAT merely provides that "[e]ach Party shall take due account of the victim's safety and protection needs", and that the provision of assistance shall be implemented "taking due account of the special needs of persons in a vulnerable position and the rights of children"; the EU Trafficking directive arguably provides a more detailed list of situations of special need which "Member States should attend to", including "pregnan[cy], […] health, […] disability, mental or

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678 EUATD, Preamble, (18).

679 ECAT, art. 12(7): "*For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis*".

680 EUATD, Preamble, (21): "[v]*ictims should* […] *be informed of the important aspects of those measures and they should not be imposed on the victims*".

681 See e.g. A.T. Gallagher, E. Pearson, *Detention of trafficked persons in shelters. A legal and policy analysis*, AusAID, August 2008, 20.

682 EUATD, Preamble, (21).

psychological disorder […] serious form[s] of psychological, physical or sexual violence […] suffered".[113]

Finally, the provision of assistance is understood under European law to constitute the object of a multiagent form of cooperation, with the active involvement of civil society organisations.[683] This nonetheless, the Convention's ER specifies that it is States Parties that ultimately remain responsible for meeting the obligations in the Convention, especially for what concerns the adequate and timely funding of "reception, protection and assistance services".[684]

3.2 The material scope of special assistance guarantees available upon detection of reasonable grounds of trafficking victimhood

As previously anticipated, all European legal instruments provide for the access of (potential) victims to a basic range of anti-trafficking guarantees from the moment of detection of reasonable grounds of THB. The different CoE and EU legal instruments indicate each a specific list of essential assistance measures, which, generally speaking, cover the same broad areas of protection. In this sense, a first range of measures is aimed at safeguarding the subsistence of potential victims pending identification and/or the recovery and reflection period; other provisions, then, address the issue of survivors' physical and psychological health; furthermore, key guarantees are dedicated to the protection of victims' access to rights.

For what concerns the first set of measures, art. 12(1) ECAT requires Member States to guarantee *standards of living capable of ensuring [victims'] subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance.*[685] The safeguard of victims' subsistence can be considered under the abovementioned special protection objectives: the Explanatory Report to the Convention in this respect reveals that the drafters chose to explicitly refer to the needs of safe accomodation and psychological assistance as they were considered "particularly relevant to assisting victims of trafficking".[686]

On the side of accommodation measures, the Convention notably requires the housing situation of the victim to be *appropriate* and *secure.* These conditions are further specified in the Explanatory

683 ECAT, art. 12(5).
684 ECAT ER, 149.
685 ECAT, art. 12(1)(a). See also under EU law the similar formulation of art. 7(1) EURPD: "*Member States shall ensure that the third-country nationals concerned who do not have sufficient resources are granted standards of living capable of ensuring their subsistence* […]. *They shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance*". Similarly, art. 11(5) EUATD stipulates: "*The assistance and support measures referred to in paragraphs 1 and 2* […] *shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance*".
686 ECAT ER, 152.

Report as imposing the institution of protected shelters for (P)VoTs, “staffed with people qualified to deal with questions of assistance […], provide round-the-clock victim reception services and […] able to respond to emergencies”. The provision of these guarantees is considered tantamount to the abovementioned primary objectives of security, recovery and reflection which arise from the moment of early identification: a safe shelter should allegedly provide victims with “surroundings where they feel secure and […] provide them with help and stability”.[687]

The requirement on States to provide *material* assistance to preliminarily identified victims shall be considered tantamount to their security, recovery and reflection needs, too. The ECAT ER in this sense specifies that such support shall be provided either financially or in kind, and that it is aimed to allow victims, and especially the destitute and/or illegally residing ones, to fulfil their basic material needs and to gain independence from traffickers.[688]

Under the different aspect of the right to health, both the ECAT[689] and the EURPD[690] stipulate that potential victims pending identification and/or recovery and reflection period shall have *access to emergency medical treatment.* The legal doctrine has critically addressed this norm as void of any special protective content, considering that an emergency level of medical assistance is generally recognized as a universal human right of any individual regardless their legal status.[691] It is questionable, moreover, whether a mere emergency treatment would constitute a sufficient assistance to meet victims’ recovery needs in a phase where clear traces of a crime are present which might hide severe health damages.[692] These medical needs are likely to emerge only through a thorough examination of the clinical situation of victims, a guarantee which under the ECAT is reserved only to those survivors who are nationals of the assisting State or who have been granted a residence permit. In this specific sector, the EUATD provides for a consistently broader level of “default” medical assistance, stipulating that both presumed victims and victims, irrespective of their migration

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[687] *Ivi,* 154. See for a recent reaffirmation of this material standard of protection at the EU level, para. 16 of Preamble of the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: “*In order to improve the assistance and support to victims of trafficking in human beings, Member States should ensure that victims have access to shelters and safe accommodation equipped to accommodate the specific needs of victims of trafficking in human beings. In order to reinforce the safety of presumed or identified victims, Member States are encouraged to require that personnel coming into contact in shelters with victims of trafficking do not have a criminal record of offences concerning trafficking in human beings, or of other crimes or offences that lead to serious doubts about their ability to assume a role of responsibility with regard to victims*”. Further, at art. 11(5a): “*The shelters and other appropriate interim accommodations shall assist them in their recovery, by providing adequate and appropriate living conditions with a view to a return to independent living. They shall also be equipped to accommodate the specific needs of children, including of child victims*”.
[688] ECAT ER, para. 156.
[689] ECAT art. 12, par. 1 b)
[690] RTD, art. 7(1).
[691] See e.g. Planitzer, Article 12, in Planitzer-Sax, *Commentary,* 12.27.
[692] See e.g. OSCE, National Referral Mechanisms, 102.

status, shall be provided with *'necessary* [emphasis added] medical treatment including psychological assistance'.

This nonetheless, it has been suggested that the wording "emergency medical treatment" provided in the ECAT shall not be read too narrowly, in line with the relevant provisions of the European Social Charter, which is expressly recalled in its assistance standards under art. 12 ECAT. In this sense, it is commonly held that emergency assistance under the Convention shall be necessarily understood as entailing an individualisation of the treatment based on the assessment of each victim's state of health.[693] These considerations arguably find a confirmation in the provision of art. 12(1) ECAT fro what specifically concerns psychological assistance. In this matter, the overviewing work of GRETA has repeatedly stressed the duty of States to tailor the level and nature of the support provided to the type of trafficking the individual has been or is believed to have been subjected to and to the special needs which emerge from the contact of State authorities with each specific victim. The Explanatory Note to the Convention clarifies the relevance of these measures "to help the victim overcome the trauma they have been through and get back to reintegration into society".[694]

A number of safeguards are then deployed in European instruments to protect trafficking survivors' right of access to rights, which, under the Explanatory Report of the ECAT, is expressly addressed as a key precondition to their further access to justice.[695] In this sense, art. 12(1)(c), (d) and (e) ECAT stipulate that special victim assistance under the Convention shall include "translation and interpretation services, *when appropriate* [emphasis added]";[696] "counselling and information, in particular as regards [victims'] legal rights and the services available to them, in a language that they can understand;[697] "assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders".[698]

These provisions arguably leave notable leeway to States Parties in the definition of specific aspects of legal and linguistic assistance which can prove crucial in the victims' correct understanding of their situation and of their legal avenues for redress and rehabilitation. On one hand, the inclusion of the formula "when appropriate" in the general provision on translation and interpretation services introduces a problematic margin of State discretion in the availability of an essential service for victims' participation in both support programs and legal proceedings.[699] The ECAT ER stipulates in

[693] J. Planitzer, Article 12, in Planitzer, Sax, *Commentary*, 12.25. See also ECAT ER, §157.
[694] ECAT ER, §156
[695] ECAT ER, §§158, 160.
[696] ECAT, art. 12(1)(c).
[697] ECAT, art. 12(1)(d).
[698] ECAT, art. 12(1)(e).
[699] The same formula in EU law is adopted in art. 7(3) of the RTD; and in art. 11(5) of the EUATD.

this sense that for those victims who do not speak the language of the host country, language aid constitutes an "essential measure for guaranteeing access to rights". Moreover, it is clarified that the mere provision for victims' right to an interpreter in judicial proceeding shall not be regarded as a sufficient guarantee in this sector.[700]

On the other hand, the provisions on information and counselling are vaguely formulated, without any clear list of mandatory information to be provided to victims. In this respect, the Explanatory Note to the Convention crucially stipulates that such measures are conceived to target "two common features of victims' situation, i.e. "helplessness" and "submissiveness to the traffickers due to fear and lack of information about how to escape their situation".[701] In light of this, the relevant information to be provided to victims is understood to include matters such as:

"*the availability of protection and assistance arrangements, the various options open to the victim, the risks they run, the requirements for legalising their presence in the Party's territory, the various possible forms of legal redress, how the criminal-law system operates (including the consequences of an investigation or trial, the length of a trial, witnesses' duties, the possibilities of obtaining compensation from persons found guilty of offences or from other persons or entities, and the chances of a judgment being properly enforced)*".[702]

The EU legal framework is arguably clearer under this specific aspect: article 11(6) EUATD in fact states that potential victims must be informed about their entitlement to a recovery period and about the possibility of being granted international protection in the form of refugee status or subsidiary protection.[703]

This same objective lies at the basis of the entitlement of trafficking survivors to legal counselling and to specialised assistance to ensure that their rights are taken into account in criminal proceedings.[704] These provisions arguably determine an entitlement of preliminarily identified victims to forms of assistance of only extra-legal nature: the access to a proper legal aid from a qualified lawyer is only granted to formally identified victims under art. 15 of the Convention.[705] Differently, the EURPD expressly introduces the possibility of the provision of free legal aid to potential victims during the recovery and reflection period, but frames it as a merely facultative

[700] ECAT ER, §158.
[701] ECAT ER, §159.
[702] ECAT ER, §160.
[703] EUATD, art. 11(6). See also EURPD, art. 5(1): "*When the competent authorities of the Member States take the view that a third-country national may fall into the scope of this Directive, they shall inform the person concerned of the possibilities offered under this Directive*".
[704] ECAT, art. 12(1)(e).
[705] See e.g ECAT ER, §161.

measure ("Member States *may provide* […] *if established under the conditions set under national law* [emphasis added]").[706]

For what concerns the specific situation of child victims, finally, art. 12(1)(f) ECAT stipulates that the assistance provided to them pending identification shall include their access to education. Differently than with adult victims, who are provided with a right to education only insofar they have been recognised as victims and they are lawfully resident within a State Party's territory;[707] the Convention expressly frontlines children's best interest to education in including such a safeguard among those which must be activated upon "reasonable grounds" under the first alinea of art. 12 ECAT.[708]

The EUATD contains a set of dedicated provision to the special protection of child victims of trafficking: art. 13(1) in this sense stipulates: "Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the child's best interests shall be a primary consideration". Art. 14 EUATD further specifies the scope of this duty of best-interest protection, requiring that "specific actions to assist and support child victims […] in the short and long term, in their physical and psycho social recovery" are determined "following an *individual assessment of the[ir] specifical circumstances, taking into account the child's views, needs and concerns with a view to finding a durable solution for the child.* [emphasis added]" Specifically, the access of the child to education must be arranged by the State in "*reasonable time*".

For what concerns the situation of unaccompanied child victims, art. 14 EUATD expressly requires that the assistance and support of this category of survivors is delivered taking into account their personal and special circumstances. This duty of special care is understood to require Member States to take "necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child".[709]

Art. 33(2) ECAT, finally, introduces a facultative provision for what concerns the "reinforcing" of interstate action in the "search for missing people, in particular children", where reasonable grounds are present to believe that such persons are victims of THB. States are thus encouraged to conclude bilateral or multilateral agreements for this purpose.[710]

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[706] RTD, art. 7(4).
[707] ECAT, art. 12(4); see *infra,* para. 4.4.
[708] See e.g. J. Planitzer, Article 12, in Planitzer-Sax, *Commentary*, 166: "*Education for children has been placed, as opposed to education and vocational training for adults, in the first paragraph of Article 12, meaning that all children must have access to education, irrespective of benefiting from a recovery and reflection period or of being formally identified as victim*".
[709] EUATD, art. 14.
[710] ECAT, 33(2).

3.3. The recovery and reflection period

Art. 13 of the ECAT states that, "when there are reasonable grounds to believe that [an individual] is a victim" a "recovery and reflection period of at least 30 days" shall be activated.[711] Similarly to victim identification, the recovery and reflection period (R&R) is form of victim protection entitlement, peculiar of the European anti-trafficking legal framework. The ECAT in this sense has represented the first international instrument to affirm this duty as a binding and unconditional legal measure.[712] Differently from the rules regulating the victim identification procedure, art. 13 ECAT expressly requires that the recovery and reflection period is regulated in each Party's internal *law*.[713]

The ECAT, moreover, specifies that such a period shall be "sufficient[101] for the person concerned to recover and escape the influence of traffickers".[102] The ECAT ER in this sense clarifies: "victims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability".[714] This period is also supposed to allow the person to adopt an informed decision concerning the implications of their legal status as a victim or potential victim of human trafficking: the ER stipulates that the phrasing "informed decision" under art. 13 ECAT shall mean that the victim must be in a reasonably calm state of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. In order to be informed, thus, such a decision shall be taken once the survivor is longer under the traffickers' influence.[715] Moreover, a crucial component of the said conditions for an informed decision is the prior access of the victim to counselling and information, safeguarded under art. 12(1) ECAT. [716]

The object of trafficking survivors' informed decision expressly entails the opportunity to collaborate with State authorities in the investigations and subsequent criminal trials against the traffickers.[717] This nonetheless, art. 12(6) ECAT is explicit in stipulating that States shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness".[718] the Explanatory Report to the Convention clarifies that

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[711] ECAT, art. 13(1).
[712] See UN Joint Commentary, 44: "*The concept of a reflection and recovery period is relatively recent and post-dates, for example, the OHCHR Recommended Principles and Guidelines*".
[713] See e.g. V. Stoyanova, *Human Trafficking and Slavery Reconsidered,* 92.
[714] ECAT ER, §173.
[715] ECAT ER, §174.
[716] See in this sense Sax, Article 13, in Planitzer, Sax, *Commentary*, 13.18.
[717] *Ibidem*: "*victims must decide whether they will cooperate with the law-enforcement authorities in a prosecution of the traffickers. From that standpoint, the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal*".
[718] ECAT, art. 12(6).

such cooperation shall not condition individuals' access to the R&R, either.[719] Moreover, while this period was originally conceived as a particular form of protection of victims who have no title of stay in the country concerned, its scope of application under the Convention clearly includes all victims, including nationals of the protecting State and EU/EEA citizens.[720] It must thus be distinguished from a residence permit. On the same, art. 13.1 ECAT specifies that the activation of the R&R shall be "without prejudice to the activities carried out by competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned".[721] In this sense, where victims of trafficking are legally attributed a mandatory duty to testify within a domestic criminal justice system, their access to the R&R cannot be used as a justification for abstaining from such duty.[722] For what concerns the limits of States' duty to activate the R&R, art. 13.3 ECAT stipulates: "[t]he Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly". These conditions, at the same time, must be arguably considered as exceptional, with the consequent prohibition of Member States to insert further limitations in their national laws to the access to and maintenance of the R&R.[723]

If, thus, the CoE legal discipline regulates the recovery and reflection period as an integral part of States' duties of *protection* of the human rights of VoTs, the picture emerging from the analysis of the relevant EU law on the issue is rather confused. First of all, it must be acknowledged that the R&R has not been specifically regulated in the EUATD, which refers to the pre-standing discipline of the said period provided for in the RPD.[724] This latter instrument stipulates in this regard: "Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offence *so that they can take an informed decision as to whether to cooperate with the competent authorities* (emphasis added)".[725] the ultimate aim of the reflection period under the RPD thus resides in incentivizing victims' to

[719] ECAT ER, §175.
[720] See e.g. Sax, Article 13, 13.27. See also GRETA, *Report on Greece*, I GRETA(2017)27, paras 169 and 171; GRETA, *Report on Ireland*, II GRETA(2017)28, para 160; GRETA, *Report on Poland*, II GRETA(2017)29, para 140; GRETA, *Report on Portugal*, II GRETA(2017)4, para 135; GRETA, *Report on the Slovak Republic*, II GRETA(2015) 21, para 125; GRETA, *Report on Slovenia*, II GRETA(2017)38, para 125.
[721] ECAT, art. 13(1).
[722] ECAT ER, §176.
[723] A particularly debated case in this regard concerns several Member States' policy of interruption of the r&r wherever a victim has renewed contacts with the suspected traffickers, a behaviour which expressly constitutes a cause of termination of the r&r provided for under the RPD at art. 6(4). GRETA has in this sense frequently clarified the unsuitability of such a limitation to meet the standard of protection required under the ECAT, thus declaring the subsequent legislation incopatible with art. 13.3 of the Convention. See e.g. See, for instance, GRETA, Report on Malta, II GRETA(2017)3, para 110; GRETA, Report on North Macedonia, I GRETA(2014)12, para 163.
[724] EUATD, art. 11(6) "*The information referred to in paragraph 5 shall cover, where relevant, information on a reflection and recovery period pursuant to Directive 2004/81/EC*".
[725] EURPD, art. 6(1).

cooperate with competent authorities: this is arguaby in line with the general purpose of the 2004/81 Directive, which consists in defining the conditions for granting residence permits to 'third-country nationals *who cooperate in the fight against trafficking in human beings* [emphasis added]'.[726]

Moreover, the Residence Permit Directive expresses a very strong deferential attitude towards Member States' autonomous exercise of their protection prerogatives, stating that "*the duration and starting point of the period referred to in the first subparagraph shall be determined according to national law*"[727] and that "Member States may at any time terminate the reflection period if the competent authorities have established that the person concerned has actively, voluntarily and on his/her own initiative renewed contact with the perpetrators of the offences referred to in Article 2(b) and (c) or for reasons relating to *public policy* and to the *protection of national security* [emphasis added]".[728]

In addition to the abovementioned limitations concerning the safeguard of public order, the regulation of the R&R under the EU law thus delineates a notably narrower space of protection as compared with the ECAT. The R&R in this sense is a safeguard which is available only for non EU-EEA victims who have severed their contacts with their perpetrators and who are willing to cooperate with criminal justice authorities.[729]

Coming to the material assistance guarantees connected to the R&R, the ECAT stipulates that Member States "shall authorise the persons concerned to stay in the territory"[730] for the whole duration of the period. Such a requirement arguably differs from the abovementioned prohibition of removal from State territory of those individuals in relation to whom reasonable grounds to believe have been found that they are victims,[731] and is generally interpreted as imposing the duty of issuing a provisional title of stay to trafficking victims or potential victims at least for the duration of the recovery and reflection period.[732] Moreover, the Convention states that "[d]uring this period, the

[726] EURPD, art. 2(a). See on this the recent remarks of the European Parliament in its 2021 Report on the Implementation of the EUATD, para 39: "[The European Parliament] [i]*s concerned that the recovery and reflection period is linked to cooperation by the victim during the investigation and is granted by law enforcement agencies; deplores the fact that in some Member States the period is provided neither to victims of trafficking who are EU and/or EEA nationals nor to asylum seekers*".
[727] EURPD, art. 6(1).
[728] EURPD, art. 6(4).
[729] See for similar considerations V. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 112: "*the reflection period is granted to migrants who may be victims of the offence and who are anticipated to cooperate. Moreover, in contrast to the CoE Trafficking Convention, Article 6(1) of the EU Residence Permit Directive clearly states that the purpose of the reflection period is making 'an informed decision as to whether to cooperate*'".
[730] ECAT, art. 13(1).
[731] See *supra,* 3.1.
[732] ECAT ER, §178: *Although free to choose what method to employ, Parties are required to create a legal framework allowing the victim to remain on their territory for the duration of the period. To meet this end, in accordance with national*

persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2".[733]

This said, the relationships between the r&r and the overall assistance guarantees of potential victim assistance (art. 10.2, art. 12 para 1 and 2, and art. 13.2), identification (art. 10.1) an non-removal (art. 10.2 and art. 13.1) remain to a certain extent unclear under the ECAT: specifically, it must be noted that, while all the said protective measures are understood to be activated upon detection of *reasonable grounds*, different rules arguably regualate their *duration*. In this sense, the guarantees provided for under art. 10 ECAT are to be maintained for the whole duration of the identification procedure, irrespective of its length. On the other hand, the recovery and reflection period, and its related measures of assistance and authorization of stay, shall be "of at least thirty days".[734]

A question thus emerges concerning what the State is expected to do when after 30 days of R&R a victim has not yet recovered from their trafficking experience and/or taken a decision about collaborating with criminal justice authorities and/or if their identification procedure has not been completed. As it will be observed, the Convention provides for the possibility of granting renewable residence permits to victims under art. 14 ECAT, owing alternatively to their *collaboration* with Competent Authorities (in this case, thus, an informed decision on the issue must have been made possible) or to their *personal situation.*[735] States, nonetheless, are not under any binding obligation to grant such protection, and it is thus common to witness the issuance of expulsion orders while their identification procedure is still pending.

Under EU law, the EURPD states that "[d]uring the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have access to the treatment referred to in Article 7 and it shall not be possible to enforce any expulsion order against them".[736] Moreover, art. 11.6 EUATD includes among the necessary measures of assistance for (P)VoTs the provision of "information on a reflection and recovery period pursuant to Directive 2004/81/EC".[737] This juncture between the activation of the R&R and survivors' entitlement to assistance under EU law finds a particularly puzzling regulation under the EUATD, which stipulates: "Member States shall take the necessary measures to ensure that assistance and support for a victim *are not made*

legislation, each Party shall provide victims, without delay, with the relevant documents authorising them to remain on its territory during the recovery and reflection period.
[733] ECAT, art. 13(2).
[734] See e.g. Stoyanova, art. 10, 10.26-28.
[735] See e.g. Gallagher, Recent Legal Developments, 180. See *infra,* 4.3.
[736] As it will be discussed in the following, the notion of "expulsion order" under the EURPD has been recently understood by the European Court of Justice to include also the case of inter-EU transfers of asylum seekers operated under the Dublin Regulation: see *infra,* Chapter 5, 7.2.
[737] EUATD, art. 11.6.

conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial". On the other hand, the Directive does not directly regulate the R&R, referring instead to the rules of the EURPD, which, as already stated, provide a subjectively limited and heavily conditional discipline of the said guarantee. Furthermore, the EUATD's affirmation of States' duty to ensure VoTs' unconditional access to assistance concludes with the phrasing "*without prejudice to Directive 2004/81/EC or similar national rules*". Conditionality and unconditionality are thus present side by side in the EU Directive, an element which determines a critical difficulty in determining the actual scope of the protection warranted to potential trafficking victims under EU law.[738]

The greatest difficulties in this sense arguably concern the determination of the duration of unconditional assistance under the EUATD, with Recital 18 expressly stating that: "[i]n cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period". Differently than under the ECAT, where unconditional assistance and support are expressly qualified as necessary measures to be provided to all victims for the whole duration of identification procedures; EU law addresses such guarantees as mere corollaries of the recovery and reflection period regulated under art. 6 EURPD. In this sense, recital 18 of the EUATD further states: "If, after completion of the identification process or [emphasis added] expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive". The evidenced "or" clause seems to reiterate that the mandatory timeframe of victim assistance under the EUATD shall be limited to the duration of the recovery and reflection period. This interpretation is arguably in line with the cited discipline of the EURPD, which addresses victims' preliminary assistance as intrinsically limited to that period (art. 7), and which conditions any further access to assistance to the discretionary issuing of a residence permit to victims conditioned on their usefulness for and cooperation in criminal proceedings (art. 8).

It is thus hard to understand which measures of assistance can be legally considered "necessary before, during and after criminal proceedings" under EU law in the case of victims who do not have a valid title of stay and whose recovery and reflection period has expired or has not been activated at all. In this sense, it is relevant to reiterate that the R&R is applied *by definition* before the victim

[738] See e.g. Stoyanova, *Human Trafficking and Slavery,* 113: "*the directive does not impose an obligation upon the Member States not to deport the person when there is reasonable-grounds indication for believing that he/she is a victim of trafficking. It does not address the territorial presence of the presumed victim. It rather refers to the EU Residence Permit Directive, which, as demonstrated above, ensures non-removal only if the person is officially granted a reflection period*".

eventually takes part to criminal justice proceedings as a witness and/or as an injured party. Moreover, given the very short duration of the period provided for in most EU Countries, the expiry of the R&R will generally take place before a conclusive identification decision has been made: absent any provision requiring that assistance measures are maintained during the whole identification process, an individual might thus find themselves unassisted and, in hypothesis, subjected to expulsion procedures while their identification is still pending. Neither the EUATD, nor the EURPD apparently tackle such void of protection, with Recital 18 of the EUATD merely stating that:

"Where necessary, assistance and support should continue for an appropriate period after the criminal proceedings have ended, for example if medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim' s statements in those criminal proceedings".

The assistance after the expiry of the recovery and reflection period is thus regulated under a non-binding norm; which merely considers the recovery needs of those specific victims who have taken part to criminal proceedings.

4 Special rights and guarantees for particular categories of trafficking victims

While the rights and guarantees of assistance and support examined sofar extend to all victims and/or potential victims of trafficking in human beings unconditionally, the EU-CoE anti-trafficking legal framework presents a number of special safeguards for particular subcategories of survivors. In the following, the relevant victim sub-statuses will be distinctly analysed (formally identified VoTs; victims who take part to criminal proceedings; and VoTs lawfully residing on a European State's territory), highlighting the relevant intersections of protective provisions that are attached to them.

4.1 Special rights and guarantees for formally identified victims under the ECAT

4.1.1 Access to State compensation

Art. 15 of the ECAT introduced specific State duties for what concerns the access of trafficking victims to legal avenues for seeking compensation. Such access, we argue, is variably related to the individual's status: art. 15(4) ECAT in this sense states: "Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23".

Differently from the kind of compensation provided for under art. 15(3), which finds its origin in adversarial legal proceedings,[739] the compensation through State funds shall arguably be understood as directly descending from the State's official finding of human rights victimization which follows a positive conclusive grounds identification decision.

4.1.2. Victims' access to residence permits "owing to their personal situation" under art. 14 ECAT

In the previous analysis of artt. 10 and 12 ECAT, it has been highlighted that the level of assistance afforded to trafficking survivors under CoE law is very limited as concerns both the material scope and the duration of victim protection measures. A key aspect of trafficking victims' possibility to recover and reintegrate after trafficking is thus represented by their access to avenues of regularization of their stay on the territory. On one hand, in fact, the issuing of a residence permit evidently halts – or at least delays – the return of the victim to their home country, a process which knowingly entails the frequent subjection of trafficking survivors to a number of relevant risks for what concerns both

[739] See *infra,* 4.2.1.

their personal security and their recovery perspectives. On the other hand, the ECAT affords a number of relevant guarantees of long term assistance to those victims who have a lawful title of stay in host States' territory, which can be considered crucial in adequately tackling (P)VoTs' needs of reintegration.

These considerations arguably explain why the access to residence permits represents a clear interest of many victims from the early stages of their detection and assistance. Specifically, after the expiry of the recovery and reflection period, (P)VoTs who are awaiting a conclusive identification decision are not expressly entitled to a regularization of their stay on host state territory: art. 10 ECAT in this sense merely clarifies that expulsion orders cannot be enforced with respect to them. On the same, such orders can well be pending, and States in many cases happen to adopt preliminary measures to arrange the return of potential victims while they are still under identification.

In order to avoid expulsion, thus, foreign victims of trafficking must qualify for a residence permit in their host country. This can take place through the ordinary procedures of international protection and domestic immigration law, or through their application to residence permits specifically based on their status as victims of trafficking.

Art. 14 of the Convention specifically regulates this latter issue, stating: "Each Party shall issue a renewable residence permit to victims, [where] the competent authority considers that their stay is necessary owing to their personal situation". "The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party".[740]

The said provisions clarify the strong level of discretion left by the ECAT to State Parties for what concerns the conditions of issuance, renewal and withdrawal of residence permits to VoTs, as well as their duration.

Central in this consideration is the expression "owing to their personal situation", which, its relevant vagueness nonetheless, seemingly clarifies a duty of competent authorities to adequately consider in each individual case where the adequate protection of a victim or potential victim might require the regularisation of their stay and their access to the said complementary forms of assistance to recovery and reintegration. The ECAT ER in this sense specifies that such expression includes "a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account".[741]

[740] ECAT, art. 14.
[741] ECAT ER, §184.

The examined provision in this sense is evidently connected in its objectives with the rules of victim assistance provided under art. 12 ECAT: "owing to their personal situation", in this sense, shall be arguably read in accordance with the the previously examined requirement under art. 12(1) ECAT "as may be necessary to assist victims in their physical, psychological and social recovery".[742]

Moreover, it can be held that other aspects of a survivor's personal situation which shall be taken into account in the decision concerning the issuing of residence permits regard the individual's right to pursue remedies. In this sense, art. 16(2) of the ECAT provides an express limitation to host States' right to return victims of trafficking, stating that such return shall be with due regard to the "status of any legal proceedings related to the fact that the person is a victim".[743]

As it will be later observed, the article further provides the possibility of issuing a residence permit for victims who cooperate with criminal justice authorities.

The provision further regulates the situation of child victims, stating that the residence permit "shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions".

Finally, art. 14(5) ECAT makes clear that "the granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum". This provision arguably addresses the situation of those victims who file requests for international protection while their residence permit is pending of while their situation is still under examination by competent authorities. In this sense, it shall be held that the trafficking-specific assistance provided under the Convention shall never be considered as rival to the guarantees descending from refugee law.[744]

4.1.3. Safe return and access to reintegration

Art. 16 ECAT disciplines the matter of the return of trafficking victims to their countries of nationality or where they had the right of permanent residence at the time of entry in the country where they were subsequently identified as VoTs. Such return thus necessarily takes place after the identification procedure is completed, as art. 10 ECAT clearly states a duty of non removal of potential victims pending identification.

The regularization of stay of an identified VoT in the identifying State territory is envisaged as exceptional under the Convention: victim status in itself, in other terms, does not ensure a right to residence, and, therefore, the return of identified VoTs is considered a standard ending of the

[742] See *supra,* 3.1.
[743] See in the same sense, V. Stoyanova, Human Trafficking and slavery reconsidered, footnote 185.
[744] See on this specific aspect *infra*, Chapter 4, 7.2.

identification and preliminary assistance processes. The only partial exception in this sense is provided under art. 16(7) of the Convention, where the return of a *child* victims is expressly prohibited wherever the returning State considers that such return would be contrary to the child's best interest.

Art. 16(1) ECAT notably introduces a duty on behalf of VoTs' home States to "facilitate and accept [the victim's] return without undue or unreasonable delay".[745]

Return, nonetheless, is generally understood to constitute a form of interference in the life of victims which might at times compromise their essential interests of protection. Art. 16 ECAT in this sense stipulates a number of essential guarantees to be provided by the various actors involved in return proceedings: first of all, art. 16(1) states that the home State's acceptance of the return of a national or permanent resident shall be "with due regard for his or her rights, safety and dignity".[746]

The returning Party, on the other hand, is required under art. 16(2) to implement the provisions concerning return with "due regard for the rights, safety and dignity" of the victim and "*for the status of any legal proceedings related to the fact that the person is a victim*". Return, finally, "*shall preferably be voluntary*".[747]

Key in the respect of such duties is the adoption of targeted legislative or other measures, "as may be *necessary* to establish *repatriation programmes*, involving relevant national or international institutions and non governmental organisations". Such programmes are expressly aimed at "avoiding revictimisation" and at "favour[ing] the reintegration of victims into the society of the State of return".[748] For what concerns the substance of the concept of "reintegration", art. 16(5) ECAT specifies the duty of favouring the access to education and to the labour market "in particular through the acquisition and improvement of professional skills".[749] For what concerns the particular situation of trafficking children, moreover, reintegration shall necessarily include "measures to secure adequate care or receipt by thw family or appropriate care structures".[750] Finally, the Convention takes into account the necessary continuity of the assistance of victims in their reintegration across borders, recommending the adoption of legislative and other measures aimed at providing returned victims with "contact information of structures that can assist them in the Country where they are

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[745] Such measures are further specified at art. 16(3) and (4) ECAT, as including the duty of a requested Party to "*verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party*" and, where the concerned victim is without proper documentation, the duty of a requested Party to "*issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to trabel to an re-enter State territory*".
[746] ECAT, art. 16(1).
[747] ECAT, art. 16(2).
[748] ECAT, art. 16(5).
[749] *Ibidem.*
[750] *Ibidem*.

repatriated".[751] Such contact information shall arguably cover all the relevant of victims' longterm assistance, including security ("law enforcement offices"), victimological support ("non governmental organisations"), counselling ("legal professions"), material assistance ("social welfare agencies").

4.1.4. States' duty to provide for the possibility of non punishing or prosecuting victims who have been compelled to commit an offence while subjected to trafficking

The general array of protection guarantees warranted to trafficking survivors under European law features the inclusion, under both the CoE and the EU legal frameworks of provisions which regulate the exercise of States' prosecutorial powers against trafficking victims.

Art. 26 of the ECAT in this sense stipulates: "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so".[752]

Similarly, art. 8 EUATD requires Member States, "in accordance with the basic principles of their legal systems", to "take the necessary measures to ensure that competent national authorities are entitled not to *prosecute or impose penalties* [emphasis added] on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit *as a direct consequence* [emphasis added] of being subjected to any of the acts referred to in Article 2".[753]

The said provisions arguably take into account those situation where an individual is suspected of having committed a crime, while relevant evidence is present nonetheless concerning the connection between the said crime and the accused's status as a trafficking victim.

In these cases, European law does not indicate what an adequate treatment of the survivor under the domestic criminal justice system shall amount to: on the same, the cited provisions require Member States to legally provide for the possibility of not punishing the victim for the facts committed, where they can be understood to have been "compelled" to commit them. Specifically, the EUATD refers to a compulsion which is a "direct consequence" of the individual's subjection to trafficking.

Furthermore, the EU legal framework provides for a broader level of protection against law enforcement of the said victims, requiring that not only the non-imposition of penalties on them is

[751] ECAT, art. 16(6).
[752] ECAT, art. 26.
[753] EUATD, art. 8.

included within the margin of appreciation of competent national authorities, but also the decision "not to prosecute" *tout court*.

These provisions have opened up a relevant debate concerning the discipline of criminal blameworthiness at national level in cases where human trafficking and severe forms of exploitation are at stake. For what is of immediate interest in the present thesis, the introduction of non-punishment clauses is on the same arguably of relevance in the definition of the spectrum of State duties of protection, assistance and support concerning trafficking victims under European law.[754] On the other hand, it has been generally held that the Convention leaves the relevant between States' interests of prosecution and victims' interest of protection ultimately on national authorities, which shall merely be put into the condition to decide not to impose penalties, without any binding obligations not to do so.[755]

Both EU and CoE law, in this regard, notably refer to the need that such guarantees are "in accordance with the basic principles of [Member States'] legal principles", a clause that has been understood to make clear the absence of any vinculated duties of States to introduce specific modifications to their national criminal law systems. The non-imposition of penalties in this sense has been often understood to be adequately safeguarded through the application of pre-standing domestic legal disciplines of criminal defenses; the non-prosecution of victims, on the other hand, has been frequently understood to clash with the basic principles of those criminal legal systems where prosecution is understood as mandatory, with the consequent prevalence of domestic legal provisions on art. 8 EUATD.

4.1.5. Special guarantees for child victims and unaccompanied child victims

Several special guarantees are then envisaged for what concerns the special victimological situation of trafficked children: such a category of victims is paired with particular vulnerable persons in art. 12.7 CAT as requiring a due taking into accounts of their special needs, as specifically concerns education, accommodation and appropriate health care.[756] These in particular are understood to include the differentiation of accommodation services for children from the ones who are provided to adults.

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[754] See *infra,* Chapter 4, 7.2.
[755] Moreover, the legal construction of the said "compulsion" or of the "consequentiality" between exploitation and the criminal conduct constitutes, in the view of the European Court of Human Rights, a matter which falls under States' wide margin of appreciation: see in this sense ECtHR, G.S. v. U.K.
[756] ECAT, art. 12(7).

Art. 10.4 ECAT takes into account the particular assistance needs of unaccompanied child victims, which require most notably the appointment of a legal guardian or other authority competent for representation and which "shall act in the best interest of [the] child". Furthermore, following the identification of unaccompanied child victims, Member States shall necessarily "take the necessary steps to establish [their] identity and nationality" and "make every effort to locate [their] family when this is in the best interests of the child.[757]

As already discussed, the special assistance tributed to "child victims" under the ECAT shall be extended to those individuals who are reasonably presumed to be a child but whose age has not been conclusively ascertained at the moment of their identification as victims of trafficking.[758]

Finally, the EUATD provides for the possibility of favouring locating the family of child victims[759]; providing assistance to such family, when they find in the territory of the Member States; and favouring family reunification, where appropriate.[760]

4.2. The special protection of victims of trafficking in human beings who take part to criminal proceedings and other Court proceedings

Both the ECAT and the EU legal framework contain a number of special provisions which address the special protection issues arising from victims' participation in Court proceedings. A particularly penetrant discipline is dedicated to the substantial and procedural assistance of survivors within criminal justice procedures.

Art. 27 ECAT in this sense stipulates that "[e]ach Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory".[761] The Convention thus expressly aims at avoiding the risk that proceedings against traffickers create a burden on victims for what concerns both the activation of investigations and the further prosecution of authors. Moreover, the article introduces special State duties to ensure the victims' possibility of filing a complaint from outside the concerned Party's territory: the State of residence of the victim in this sense is legally required to accept the victim's complaint and, where necessary, transmit it to the competent authorities of the State which holds the competence for incrimination;[762] finally, art. 27(3) ECAT takes into account victims' interest of effective participation

[757] ECAT, art. 10(4).
[758] ECAT, art. 10(3). See *supra,* Part 1, 2. A substantially identical discipline is provided under art. 14(2) EUATD.
[759] ECAT, art. 10(4) c
[760] EUATD, art. 14(3)
[761] ECAT, art. 27(1).
[762] ECAT, art. 27(2).

in the proceedings, requiring that each Party allows by means of legal or other measures the possibility that victims are assisted in criminal justice proceedings by "any group, foundation, association or nongovernmental organisations which aims at fighting trafficking in human beings or protection of human rights".[763]

Art. 28 of the ECAT, in turn, comprises a set of measures especially aimed at the protection of trafficked persons who take part to criminal proceedings, their families, witnesses, as well as people who report trafficking offences "or otherwise cooperate with the investigating and prosecuting authorities". The article in this sense requires that "[e]ach Party shall adopt such legislative or other measures as may be necessary to provide *effective and appropriate protection from potential retaliation or intimidation* (emphasis added) in particular during and after investigation and prosecution of perpetrators".[764]

As already pointed out, the Convention is generally understood to refer to the notion of "victim" to indicate those individuals who are legally recognised as passive subjects of a trafficking offense at the end of a process of identification.[765]

This nonetheless, as the previous paragraphs have arguably shown, the participation of an individual as a witness or as an injured party within criminal proceedings against alleged traffickers can well take place before a conclusive determination of their status as victims has been made. At the same time, the special protection measures considered under art. 28 ECAT arguably respond to possible hardships in the safeguard of trafficking survivors' protection interests, which are suitable to manifest both for what concerns the situation of formally identified trafficking victims and potential victims.

In this sense, the expression "victims" in this context shall refer not, as generally happens under the Convention,[766] to the special status inaugurated under the ECAT itself and validated through an ad hoc identification procedure; but to a notion of "victim of crime" as "the injured party in a criminal justice proceeding".[767]

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[763] ECAT, art. 27(3).
[764] ECAT, art. 28.
[765] See also ECAT, art. 4 e): "*"Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article*".
[766] See *Supra,* Chapter 3.
[767] In this sense, as already observed, the EU Victims' Rights Directive takes into account the injured parties in criminal proceedings as the relevant subjects of a number of special assistance measures of individualized assessment trauma-informed protection.

The necessary measures to afford security to this particular category of victims is specifically taken into account in the second paragraph, where arrangements such as *physical protection, relocation, identity change, assistance in obtaining jobs* are mentioned.

The Trafficking Directive also separately regulates at its art. 12 the aspects of special protection provided in the framework of criminal investigations and proceedings: such provision shall be read in continuity with the relevant standards of assistance for victims of trafficking provided for under Chapter 4 of the EU Victims' Rights Directive (EUVRD), where, as clarified in the previous chapter of this thesis, VoTs are expressly addressed as presumed "victims with specific protection needs", whose victimological situation shall be "duly considered".[768] While the EUATD provides for a targeted framework of criminal assistance for this particular category of victims, the reference to the general discipline of the EUVRD is suitable to put the same special guarantees in perspective[769] against the said advanced standards of protection and recognition.[770]

In this sense, it shall be generally noted that, while the EUVRD requires that particular attention is tributed to the situation of VoTs, the activation of special protection guarantees for this category of victims is always subordinated to the detection of special protection needs in the case of each individual victim[771] through an individual assessment.[772] The EUATD, differently, introduces a number of special assistance guarantees as *automatically* connected with the participation of trafficking survivors in criminal justice proceedings. Specifically, the latter directive provides for VoTs' access "without delay" to legal counselling and legal representation, also for the purpose of claiming compensation. Such services are required to be offered "free of charge where the victim does not have sufficient financial resources". [773]

Furthermore, art. 12(3) specifies the necessity to adopt witness protection schemes or other protection programmes where they are necessary to protect specific individuals from the risk of repeat victimization or retaliation. Similary to the EUVRD, the EUATD understands the provision of special assistance in criminal proceedings as necessarily need centred and individualised: art. 12(3) in this sense clarifies that victims' access to "appropriate protection" shall take place "*on the basis of an*

[768] EUVRD, art. 22(3).
[769] Art. 12(1) EUATD in this sense stipulates: "*The protection measures referred to in this Article shall apply in addition to the rights set out in Framework Decision 2001/220/JHA*". The said Framework Decision has in turn been integrally replaced by the EUVRD, which the latter instrument aimed at significantly expanding (EUVRD, Preamble, (65)). Art. 30 EUVRD in this sense stipulates: "*In relation to Member States participating in the adoption of this Directive, references to th[e 2001/220/JHA] Framework Decision shall be construed as references to this Directive*".
[770] See *Supra,* Chapter 3, 1.2.
[771] EUVRD, art. 22(1).
[772] EUVRD, art. 22(2).
[773] EUATD, art. 12(2).

individual risk assessment (emphasis added)".[774] The need for an "individual assessment of the personal circumstances of the victim" is then reiterated for what concerns the adoption of a specific treatment in Court proceedings aimed at preventing victims' secondary victimization.[775] Such treatment is understood to possibly include the avoidance of a number of potentially traumatizing acts and facts, on the side of testimony (unnecessary repetition of interviews, unnecessary questioning on the victim's private life; giving of evidence in open court), as well as on the side of the avoidance of any victim contact with the presumed perpetrator(s).[776]

Special forms of protection are, furthermore, provided for what concerns the situation of child victims: the ECAT in this sense specifies: "a child victim shall be afforded special protection measures taking into account the best interests of the child".[777] Specifically, the provision of effective protection to this particular category of victims is expressòy indicated under the Convention to possibly require the adoption of ad hoc multinational agreements or arrangements.[778]

Art. 15 EUATD elaborates more in depth the scope of assistance necessary to safeguard child victims' best interest under criminal justice procedures: such measures particulary require, in addition to the above analysed guarantees of art. 12 EUATD, the ad hoc appointment of a representive for children where parental responsibility holders are precluded to represent them; the avoidance of unnecessary delays in interviewing child victims after the facts have been reported to the competent authorities; the conduction of the said interviews in *ad hoc* designated or adapted premises, in a number as limited as possible and always through the same professionals, who must be trained for that purpose, and with the presence, where not expressly excluded, of an adult of the child's choice; the possible recourse to video recorded interviews with child victims and child witnesses in criminal investigations; and the possibility of disposing that court hearings take place without the presence of public and/or with the child's at distance participation.[779]

As already mentioned, for what concerns the specific situation of victims, the special protection guarantees provided for in art. 12 and 15 EUATD shall be coordinated with the relevant provisions of Chapter 4 EUVRD: VoTs as victims of crime shall thus be guaranteed the whole set of special rights listed at artt. 18-21 of the latter directive, insofar as they might exceed the protective scope of the specific provisions of the said art. 12 EUATD.

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[774] EUATD, art. 12(3).
[775] EUATD, art. 12(4).
[776] EUATD, art. 12(4)(a),(b),(c) and (d).
[777] ECAT, art. 28(3).
[778] ECAT, art. 28(4).
[779] EUATD, art. 15.

Moreover, while artt. 12 and 15 EUATD introduce a baseline of guarantees to be recognised to all trafficking victims taking part to criminal proceedings, the conduction of an individual assessment of specific individuals' victimological needs might well bring to a further extension of the protection available under general EU law, respectively, to adults (art. 23 EUVRD) and to children (art. 24 EUVRD), where particular necessities in this sense are revealed by the said individual enquiry.

The provisions of art. 12(3) and 12(4) EUATD shall thus arguably be read as special versions of the general norm of art. 22(2) EUVRD, which integrally regulates the aims, methods and due diligence standards of the function of assessment. In this sense, it can be argued that, in order to have an adequate consideration of a VoT's situation under art. 12 EUATD, the assessment of their individual needs shall be *timely*;[780] and it shall take into account their *particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation*,[781] through the adequate consideration of the "personal characteristics of the victim"; "the type or nature of the crime"; and "the circumstances of the crime";[782] with particular attention being tributed to the victims of particularly severe offences; of crimes committed with bias or discriminatory motive; victims who are relationally vulnerable with regard to their offenders; victims with disabilities; as well as victims who have been jointly offended with other forms of particularly offensive crime.[783] The assessment itself, finally, shall arguably be adapted in its extent to the severity of the crime and the degree of apparent harm suffered by the victim;[784] and shall be carried out with the close involvement of the victim and taking into account their wishes;[785] and shall be updated wherever the elements that formed its basis in the first place have changed significantly.[786]

Art. 33(1) ECAT, finally, introduces a special duty of transnational cooperation with regard to the situation of those endangered persons involved in court cases against THB mentioned in art. 28(1) of the Convention.[787] In this sense, where a Party to the Convention has reasonable grounds to believe that the life, freedom or physical integrity of a victim, witness, or of a family member thereof is in danger in the territory of another State, such Party is required to "transmit [the relevant information] without delay to the [State where the individual finds themselves] so as to take the appropriate protection measures". This provision thus extends State duties of protection against repeat victimisation, intimidation and retaliation beyond the specific jurisdiction where a victim is taking

[780] EUVRD, art. 22(1).
[781] *Ibidem*.
[782] EUVRD, art. 22(2).
[783] EUVRD, art. 22(3).
[784] EUVDR, 22(5).
[785] EUVDR, art. 22(6).
[786] EUVDR, art. 22(7).
[787] Art. 33(1) ECAT refers to the list of subjects of protection provided under art. 28(1) ECAT.

part to criminal proceedings, addressing the transnational projections of the protection needs that descend from survivors' cooperation with criminal justice authorities.[788]

4.2.1. Special assistance in other Court proceedings and the right to compensation

For what concerns the level of procedural safeguards recognized to trafficking victims under European law, art. 15 of the ECAT can be read as a specification of States' duties of prompt information to victims upon reasonable grounds[789] where it requires that "*victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand*".[790]

Such a guarantee is arguably linked to the provision of art. 30 ECAT, which sets the standard of assistance for those trafficking survivors who take part to "Court proceedings". Given the existence of a detailed discipline of victims' participation to *criminal* proceedings, the expression "Court proceedings shall be understood to include all other possible forms of participation of victims and potential victims in judicial procedures in the aftermath of their victimisation.

Art. 30 ECAT in this sense establishes a State duty to "adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings […] the protection of victims' private life and, where appropriate, identity [and] victims' safety and protection from intimidation".[791]

The provision thus arguably generalises to all Court proceedings some essential characters of victim procedural protection which have been analysed in the precedent paragraphs, including most notably the protection of private life, a victim-centred assistance aimed at avoiding secondary and repeat victimisation, and the protection of child victims' best interest.[792]

A number of special guarantees, moreover, are provided under European law as corollaries of trafficking victims' right to *compensation*. States, in this sense, are required to establish *ad hoc* legal avenues that shall allow victims to seek compensation for the offense they were subjected to.[793] Such avenues notably include the possibility of acting against their perpetrators in civil, labour and other proceedings concerning damages and the restitution of unpaid wages. This measure shall be arguably read in connection with the provisions of art. 6 of the Convention concerning the prevention of

[788] See e.g. Sax, Article 33*,* in Planitzer, Sax, *Commentary,* 33.01: "*examples would include situations of threats and reprisals by traffickers against family members of victims or witnesses involved in court cases, who live in a country different from the one where the proceedings take place*".
[789] ECAT, Art. 12(1)(d). See *supra,* para. 3.2.
[790] ECAT, art. 15(1).
[791] ECAT, art. 30.
[792] See *supra,* 4.1.
[793] ECAT, art. 15(3).

trafficking as a human rights based duty under the ECAT: favouring the victims' effective access to redress through a legally enshrined right to compensation, in this sense, arguably constitute a crucial aspect of States Parties' safeguard of their rights at the policy level, and a suitable mesure to end impunity and to tackle trafficking through private litigation

In this regard, we shall observe that the ECAT expressly attributes this right to *victims*.[794] On the same, it has been frequently observed that the filing of a lawsuit against a trafficker might well take place before the end of the identification procedure: in this sense, it can be argued that the provision of a recovery and reflection period of at least 30 days responds to a presumed victim need of determination of their further avenues of litigation that can well include the activation of civil and labour lawsuits. Compensation, in this sense, arguably follows an autonomous determination of the fact and of the amount of damages warranted by civil, labour and other judges. The said reference to "victims", thus, shall arguably be read as "injured parties in legal proceedings", similarly to what has been observed with regard to criminal proceedings.[795]

These considerations are arguably of relevance for what concerns the extension of key guarantees of procedural protection: art. 15(2) ECAT in this sense states with regard to victim assistance in compensation proceedings: "Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law".[796]

Such guarantees arguably introduce a victim's right to professional aid by a lawyer in their plight for compensation, thus representing a way broader form of assistance in (P)VoTs' access to justice compared to the ones extended to *all* potential victims pending identification under art. 10(1)(d) and (e) ECAT.[797] Contrarily to what is commonly held, it shall thus be argued that such a standard of assistance is to be recognised not only to formally recognised victims, but also to potential victims once they decide to act against their perpetrators in legal proceedings.

4.2.2. Residence permit based on collaboration with criminal justice authorities

In addition to the issuing of a residence permit to trafficking victims "owing to their personal situation", art. 14(1)(b) ECAT stipulates that Parties "shall issue" such a permit to victims also where "the competent authority considers that their stay is necessary for the purpose of their cooperation

[794] See, similarly, art. 17 EUATD: "*Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent*".
[795] Different considerations must be made with regard to victims' access to State compensation funds, as we will observe in the following: see *infra,* 4.2.3.
[796] ECAT, art. 15(2).
[797] See *supra,* 3.2.

with the competent authorities in investigation or criminal proceedings". The conditions of renewal and withdrawal of such permit, as well as its duration, are totally left to the discretion of State Parties.

Within the EU legal space, the RPD constitutes the relevant framework which regulates the granting of residence permits for victims of trafficking who cooperate with criminal justice authorities. Such permit is regulated under art. 8 and 13 of the said Directive and might be issued after the expiry of the reflection period, or earlier, where the concerned individual "has shown a clear intention to cooperate" already at an early stage of assistance. The said clear intention to cooperate in turn constitutes *in any case* the condition for the issuing of a residence permit, which shall be considered together with "the opportunity presented by prolonging [the third country national's] stay on [the] territory [of the concerned State Party] for the investigations or the judicial proceedings"[798] and the fact that the person "has severed all relations with those suspected of acts" of facilitation of illegal immigration and/or of trafficking in human beings as defined under art. 2 (1) (b) and (c) of the same instrument. This permit is understood to be valid for "at least six months", renewable,[799] save the possibility of withdrawing it under a number of grounds.[800] These notably include, on one hand, "reasons relating to public policy and to the protection of national security"; on the other, the abovementioned originary conditions for the issuance of the residence permit must be found to be present for the whole duration of the stay of the concerned individual in the territory of the Member State.[801] In this sense, art. 14 RPD identifies a number of specific grounds of withdrawal of the residence permit, including, as particularly relevant i) "if the competent authority believes that the victim's cooperation is fraudulent or that his/her complaint is fraudulent or wrongful"; and ii) "when the competent authorities decide to discontinue the proceedings".[802]

The said conditions thus subordinate the individual's access to protection on criminal justice authorities evaluation of *credibility* of their claim in investigations court proceedings; and on the evaluation of opportunity and/or possibility of carrying out the said investigations and proceedings for the purposes of domestic criminal justice.

4.3 Special rights and guarantees for lawfully resident victims

Within the ECAT legal framework, an enhanced standard of assistance and support is furthermore provided to those victims who are lawfully resident on State territory. These individuals under art. 12

798 EURPD, art. 8(1)(a).
799 EURPD, art. 8(3).
800 See e.g Stoyanova, *Human Trafficking and Slavery Reconsidered*, 138: "*The 'without prejudice' clause* [in art. 8(3) RPD] *deprives the six month minimum period of any significance since it has the effect of preserving the supremacy of the conditions under which the permit can be withdrawn*".
801 EURPD, art. 8(2).
802 EURPD, art. 14.

par. 3 ECAT have access to a more comprehensive form of medical assistance ("necessary" instead of "emergential"), provided that they do not have adequate resources, as well as to "other" forms of assistance that might be required by their particular condition.[803]

In addition, States are required under art. 12 co. 4 ECAT to "adopt the rules under which victisms lawfully resident within [their] territory shall be authorised to have access to the labour market, to vocational training and to education".[804] The Convention's Explanatory Report clairifies that the conditions of access of lawfully resident victims to such services are the object of a broad margin of State discretion: specifically, the norm shall not be read as necessarily requiring the issuing of administrative documents that allow lawfully residing VoTs to work; and, more generally, it shall not be read as attributing a *right of access* to labour market, vocational training and education.[805] Differently, the *conditions* of access to such guarantees of societal (re)integration shall arguably be regulated under domestic law.

Under EU law, the EURPD provides a more penetrant regulation of the legal guarantees associated with the issuing of a residence permit to collaborating VoTs: art. 9 of the directive in this sense clarifies that the holders of such a permit *who do not have sufficient resources* shall be "granted at least the same treatment provided for in Article 7" (i.e., during the recovery and reflection period).[806] This notably includes, as already mentioned, the guarantee of *standards of living capable of ensuring* [victims'] *subsistence*; and targeted treatments aimed at addressing the *special needs of the most vulnerable",* a provision that is understood to *possibly* include, "if provided by national law", the victims' access to psychological assistance.[807] The provision of free medical care to legally residing VoTs is once more addressed as a guarantee exclusively attributed to those survivors "who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence and, where states have so opted, children.[808] Art. 9(2) EURPD indicates that such categories of victims shall be provided with "necessary and other treatment", an expression which arguably entails the duty of EU MS of esuring that the special clinical needs of legally residing trafficking victims are accurately met by national services.[809]

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[803] ECAT, art. 12.3.
[804] ECAT, art. 12(4).
[805] ECAT ER, 166.
[806] EURPD, art. 9.
[807] See *supra,* 3.3.
[808] It shall be recalled in this sense, that the scope the RPD under art. 3(3) expressly includes only "*third country nationals [who have] reached the age of majority set out by the law of the Member State concerned*". This nonetheless, the same provision specifies that EU MS might opt to apply the RPD also to minors "*under the conditions laid down in their national law*".
[809] EURPD, art. 9.2.

Furthermore, art. 11 RPD arguably provides a discipline of VoTs' access to work, vocational training and education which is substantially similar to the one previously examined under art. 12(4) ECAT. In this sense, EU Member States, are expected to *define the rules*, the "conditions" and "procedures" for authorising the access of victims to the abovementioned guarantees.[810]

Finally, art. 12 of the RPD introduces a targeted provision directly taking into account legally residing victims' interest of reintegration, with the requirement that survivors are granted access to "to existing programmes or schemes, provided by the Member States or by non-governmental organisations or associations which have specific agreements with the Member States, aimed at their recovery of a normal social life, including, where appropriate, courses designed to improve their professional skills, or preparation of their assisted return to their country of origin".[811] It shall be specified that the activation of such programmes is not considered mandatory under the latter directive, as expressly:[812] in this sense, art. 12 arguably provides a regulation of the guarantees of victim reintegration which is entirely coherent to the RPD's key characters as a *conditional* instrument of victim support which largely relies on State discretion in the regulation of the matter of victim protection. Art. 12(1) further specifies that the said programmes and schemes *may* be exclusively dedicated to trafficking victims, thus leaving the possibility open that such forms of medium and longterm assistance are provided in the frame of generic social services; moreover, art. 12(2) stipulates that, where such guarantees have been activated in the Member State concerned, the victim's participation to the said programmes or schemes can be included among the conditions for the renewal of VoTs' residence permit in the Country.

This notably constrained margin of protection emerging from the EURPD legal framework shall arguably be put in connection with the relevant discipline of victim assistance provided under the 2011 EUATD. As already mentioned, the issue of the granting of residence permits to VoTs expressly falls outside the scope of the latter directive.[813] This nonetheless, the necessary conditions and forms of victim assistance consitute the object of express regulation under the EUATD: most notably, the previous paragraphs have arguably clarified that the scope of such assistance is not expressly limited in its timeframe. Victims of trafficking shall be adequately assisted "before, during, and from an

[810] See on this the critical observations of V. Stoyanova, *Human Trafficking and Slavery Reconsidered*, 121: "*Accordingly, the added value of the human trafficking framework in terms of access to the labour market might not be of tangible significance since states in principle adopt rules indicating the conditions under which lawfully resident migrants are authorized to work, and a conclusive decision that the migrant is a victim of trafficking does not necessarily make the receipt of a work permit easier*".
[811] EURPD, art. 12.1.
[812] EURPD, art. 12.2.
[813] See *supra,* 4.1.2.

appropriate period of time after criminal proceedings".[814] In this sense, while the conditions for the issuing of a residence permit to VoTs under EU law constitute the exclusive object of regulation of the RPD,[815] the special protection guarantees attributed to trafficking victims shall be arguably determined *also* in accordance with the relevant provisions of the EUATD. In this sense, legally residing VoTs shall arguably at least have access to the same standards of protection which shall be recognised to *all* (P)VoTs under the 2011 Directive.[816] All this considered, a coherent reading of art. 12(1) EUATD arguably requires that, as long as criminal proceedings are undergoing, legally residing victims shall have access to the whole bundle of assistance guarantees provided under art. 11 EUATD.

Furthermore, an *ad hoc* determination of the "appropriatedness" of the continuation of assistance after the end of criminal proceedings shall be provided in each individual case, so to identify the necessary guarantees which shall be recognised to VoTs for the time of their residence in the Country which can "enable them to exercise their rights" set out in European Law.[817]

[814] EUATD, art. 11.1.
[815] See e.g. EUATD, Preamble, (17): "*this Directive does not deal with the conditions of the residence of the victims of trafficking in human beings in the territory of the Member States*".
[816] See *supra,* paras. 3.1 and 3.2.
[817] EUATD, art. 11.2; see also *infra,* Chapter 4, 6.1.3.

PART 2: TOWARDS A VULNERABILITY-INFORMED PROTECTION FUNCTION IN EUROPEAN ANTI-TRAFFICKING LAW

1. Defining "protection" in the European Anti-Trafficking legal system.

In the preceding paragraphs, the general bundle of special guarantees connected to the status of trafficking victims and potential victims under EU and CoE law have been examined.

The progressive affirmation of such guarantees as binding norms in international legal texts constitutesan implementation of one of the central pillars of Anti-Trafficking policy, i.e. the duty of States to *protect* trafficking victims' human rights.[818]

It is worth recalling, in this sense, that the CoE Anti-Trafficking Convention has been developed with a view improving the standards of human rights protection inaugurated with the Palermo Protocol;[819] the same objective has been implemented through the EU 2011/36 Directive as a further legislative step from the 2002 Framework Decision and the 2004 Residence Permit directive.[820]

A central tenet of such improvements was represented by the affirmation of the primacy of the human rights of *all* subjects of anti-trafficking policies and by the introduction of the special set of guarantees of victim identification, assistance and support examined above.[821] These arguably represent the core

[818] "*Protection of human rights of victims*", together with "*prevention*", "*prosecution of traffickers*" and "*partnership*" represent the main objectives of international Anti-Trafficking policy, commonly known also as the "*4Ps*", inaugurated by the Palermo Protocol. The ECAT expressly refers to this policy rationale at its art. 1: "*The purposes of this Convention are: a to prevent and combat trafficking in human beings, while guaranteeing gender equality; b to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; c to promote international cooperation on action against trafficking in human beings*". See also ECAT Explanatory Report, §4: "*To be effective, a strategy for combating trafficking in human beings must adopt a multidisciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively*".

[819] ECAT, Preamble, 12: "*Taking due account of the United Nations Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children with a view to improving the protection which they afford and developing the standards established by them*".

[820] See e.g. EUATD, Preamble, para. 7: "*This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings and when implementing it, 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 and Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals should be taken into consideration. More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. This Directive also adopts contextual understandings of the different forms of trafficking and aims at ensuring that each form is tackled by means of the most efficient measures*".

[821] See e.g. UN Commentary, 26: "*A human rights-based approach puts the human rights of trafficked persons at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims*".

principles of what is commonly understood as the *human rights-based* approach to human trafficking.[822]

In light of this, human rights protection nowadays can hardly be considered as merely one pillar of the anti-trafficking strategy as regards the specific status of trafficking *victims*. On the contrary, it constitutes the necessary condition for the correct implementation of the other objectives of a comprehensive anti-trafficking policy, too (trafficking prevention, prosecution of traffickers, and international cooperation).[823]

The implications of such a human rights-based, integrated and comprehensive approach remain arguably hard to grasp if one focuses on positive European Law alone. In this sense, the binding affirmation of the primacy of human rights hardly constitutes a special feature of Anti-Trafficking law, given its character of overarching principle of both European and International law. A serious enquiry on what a human rights-based approach to victim protection concretely entails shall arguably focus on two main corollaries of such principle, i.e. States' duty to ensure that their anti-trafficking policies are not in contrast with the human rights of victims;[824] and that the positive safeguards afforded through Anti-trafficking law are *sufficient* to ensure an effective protection of the human rights of victims.[825]

Under the first point of view, both the ECAT and the EUATD address some important tensions that might possibly arise between the aim of protection of human rights and other pillars of the Anti-Trafficking strategy, most importantly criminal prosecution and border control. If, thus, the binding prohibition of deportation of trafficking victims pending identification is the product of a human rights-based understanding of Anti-trafficking border policy; and the granting of a recovery and reflection period to potential trafficking victims represents a crucial safeguard of a human rights based

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[822] ECAT, art. 5.3 "*Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2*". ECAT, Preamble, 5: "*Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives*".
[823] UN Recommended Principles and Guidelines, Guideline 1: "*Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked*"; ECAT Preamble, para. 6. EUATD, Preamble, 7: "*This Directive adopts an integrated, holistic, and human rights approach to the fight against trafficking in human beings* […], *More rigorous prevention, prosecution and protection of victims' rights, are major objectives of this Directive. par. 13: Taking into account the need to prepare a comprehensive international legal instrument focusing on the human rights of victims of trafficking*". See also European Commission, Report of the Experts Group, 62-63.
[824] See e.g. the ECAT Explanatory Report, §377: "*the exercise of fundamental rights should not be prevented on the pretext of taking action against trafficking in human beings*".
[825] ECAT, art. 12.1: "*Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery*".

anti-trafficking criminal policy; several knots of such possible interferences still remain unaddressed in positive law.

The EU legal order provides some evident examples of such an ambiguity: it might suffice to recall that, while victims' recovery is explicitly recognised as a necessary baseline of an adequate assistance of all victims in the EUATD;[826] the same instrument does not directly regulate the conditions for such recovery, referring instead to the duty of States to inform victims about the possibility of accessing a "recovery and reflection period pursuant to Directive 2004/81/EC", a legal instrument which addresses victim assistance as a form of legal guarantee *expressly conditioned* to the cooperation of victims with law enforcement.[827] It might thus be asked how is this provision to be read in conjunction with the abovecited general principle of primacy of human rights, which notably envisages the protection of victims of THB as a underogable and unconditional State duty.

Under the second point of view, European law at times displays relevant *lacunae* for what concerns its safeguard of a standard of sufficient protection of needs of trafficking victims. It might suffice to recall that, while the ECAT is explicitly committed to safeguarding trafficking survivors' victimological needs; art. 12 of the Convention provides that preliminary identified trafficking survivors have acceess to a mere *emergency medical assistance*, i.e., a patently *insufficient* form of protection of the right to health of victims in the aftermath of THB.[828]

Such shortcomings are the evident product of political compromises which have been negotiated throughout the drafting processes of European Anti-Trafficking legal instruments, which had to a certain extent came to problematically undermine the comprehensiveness and coherence of the human rights-based approach.[829]

The hardships faced by European States in developing a sufficient legislative standard of human rights protection were then arguably heightened by the absence of a consolidated elaboration concerning *which* human rights are arguably at stake in anti-trafficking policy.[830] In the first decade of the 21st

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[826] EUATD, Preamble, 18.
[827] See *Supra,* Part 1, 4.1.
[828] See *Supra,* Part 1, 3.2.
[829] See e.g. A. T. Gallagher, Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, *European Journal of Migration and Law*, 8, 2006, 163-189.
[830] The available legal instruments affirmed, in some instances, that THB is a violation of human rights in itself: see e.g. ECAT, Preamble "*Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being*"; sometimes deemed a "gross violation", as in the EUATD, Preamble (1): "*Trafficking in human beings is a serious crime* […] *a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union*". In others, trafficking is understood to comprise human rights violations, such as domestic, gender-based, physical and/or sexual violence: see e.g. the Preamble of the 2002 Framework Directive, "[trafficking] *comprises serious human rights violations*". See also the 2005 Miami Declaration of Principles on Human Trafficking, para. 2: "*Trafficking in persons also typically violates other basic human rights, especially the right of the victim to be free from slavery or servitude, the right of the victim to life, liberty and security of person, the*

century, such aspects have been the object of deep elaborations both in the legal doctrine[831] and in the work of IOs and expert bodies.[832]

The inauguration of an anti-trafficking case law of the European Court of Human Rights under art. 4 ECHR, in this sense, represented a crucial complementary legal elaboration on the guarantees of victim protection afforded under European positive law. The basic coordinates of a human rights-based approach, in this sense, have been first elucidated by the Strasbourg Court in the case of *Rantsev v. Cyprus and Russia*: trafficking in human beings is *by its own nature* an offense to the right to be free from slavery, servitude and forced and compulsory labour; the protection of the said right must be understood to include the adoption of a set of positive measures aimed at making its protection *practical and effective*.[833] The principle of primacy of human rights was thus adjudicated[834] within a working theory of State responsibility which equated the concept of *sufficient protection* with the one of human rights *effectiveness.* A crucial ingredient of an effective human rights protection, in the Court's view, resides in States' adoption of a comprehensive approach against THB as required under the Palermo Protocol and the Anti-Trafficking Convention. Any credible response to the serious threat posed by trafficking to the democratic freedoms of individuals, in other words, must arguably entail a holistic combination of measures to be effective in human rights terms.[835]

The structure of positive obligations presented in *Rantsev,* moreover, is suitable to clarify the forms of delivery of victim protection: human rights effectiveness, in this sense, shall be safeguarded through the development of adequate institutions and rules, capable of taking into account general trafficking-related-risks; through the expression of a particular due diligence of State authorities in responding to credible allegations of trafficking through the activation of investigations and criminal justice procedures; and through States' diligent reaction to individual, real and immediate trafficking-related-risks through the adoption of adequately preventive and/or protective "operational measures".

As previously observed, a central role in the Court's findings of State responsibility for the violation of art. 4 ECHR is played by findings of institutional *failures* to protect the human rights of VoTs,

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right of the victim to be free from torture or cruel, inhuman or degrading treatment or punishment, the right of the victim to health, the right of the victim to freedom of movement and residence, and the right of the victim to free choice of employment. It also includes the commission of serious crimes against persons, in many cases rape, assault, and torture, as well as crimes against states, often including money laundering, tax evasion, and violations of immigration rules".

831 See e.g. A. T. Gallagher, *Recent Legal Developments*; C. Rijken, E. de Volder, The European Union's Struggle to Realize a Human Rights-Based Approach to Trafficking in Human Beings*, Connecticut Journal of International Law*, 2009, 49-79.

832 See e.g. European Commission, *Report of the Experts Group,* 10, 18, 138.

833 See *supra,* Chapter 2.

834 See also European Court of Human Rights, Krachunova v. Bulgaria, §190.

835 *Rantsev v. Cyprus and Russia,* §285; *L.E. v. Greece,* §65; *Chowdury and Others,* §87; *T.I. v. Greece,* §135; *Krachunova v. Bulgaria,* §168.

which in several instances consist in an inadequate State response to individual and collective vulnerabilities.[836] These include, as already seen, factual conditions of unacceptable exposure of certain categories of individuals to the risk of trafficking and severe exploitation; and particular hardships in human rights enjoyment faced by individuals at risk and/or survivors of the offenses prohibited under art. 4 ECHR. Such individual and superindividual risks of harm, in other words, come to constitute vulnerabilities under human rights law when they are sidelined with the *actual* level of State diligence, preparedness and promptness in responding to the said risks. Vulnerability, in this sense, is a always-evolving and context-dependent measure of the possibility that individuals at risk under art. 4 ECHR remain unprotected. A State failure to protect under art. 4 ECHR amounts to a human rights violation whenever authorities are found not to have done whatever is in their power to address the said relational *situation* of vulnerability.[837]

The exposure to a private offence, thus, does not amount only to violation of an individual's rights or dignity; it is also a critical form of harm to the conditions of human rights enjoyment, which ought to be rebalanced in order to restore human rights effectivity.[838]

Human rights effectiveness, in other terms, can be understood as the consequence of the adequate determination of survivors' *protection needs*. In this sense, it can be argued that the shape of an anti-trafficking adequate response shall follow a previous understanding of the process of trafficking victimization; its relationships with human rights enjoyment; and its effects on the determination of a vulnerability-informed standard of protection.[839]

[836] See *supra,* Chapter 2, Part 1, 2.2.2, 2.2.3

[837] See, similarly, Stoyanova, *Human Trafficking and Slavery,* 337.

[838] The elaboration of the normative implications of victimisation in domestic law are notably variable when one compares different legal systems in Europe. While, in fact, several States envisage the status of victim as the condition of a claimant of a rights violation; some legal systems, most notably the UK common law and the criminal law framework in the Netherlands, describe the process of victimisation as the infliction of a *harm* and the consequent condition as one of the restoration of a victim's wellbeing as added to the reaffirmation of a situation of *justice* concerning the facts they were subjected to. See for a recent comparative overview on the issue, EU Fundamental Rights Agency, *Victims' Rights as Standards of Criminal Justice,* 2019 in https://fra.europa.eu.

[839] See on these relevant juntures C. Rijken, L. Khadraoui, M. Tankink (Preventing) Secondary Victimisation of Trafficking Victims through Law Enforcement Interventions, *in Journal of Human Trafficking , Enslavement and Conflict-Related Sexual Violence* 2(1), 8.

2. Protection needs: subjects and object

2.1: The bearers of protection under art. 4 ECHR: victims, presumed victims, potential victims

Turning to the subjects of protection under art. 4 ECHR, the ECtHR jurisprudence takes into account a concept of rights bearer which goes well beyond the cohort of individuals who are formally identified as victims of THB within domestic criminal proceedings. On one hand, the Court's recognition of an individual as a victim of trafficking is independent from the any alternative legal qualification made by a Member State. The ECtHR, in other terms, operates an autonomous assessment of victimhood, which is based, first of all, on an *in facto* evaluation concerning the credible integration of the different elements (acts, means, purposes) of the international definition of THB in a specific case.[840]

On the other hand, throughout its anti-trafficking jurisprudence, the Strasbourg Court has repeatedly held that a violation of art. 4 ECHR can be found even where no definitive evidence concerning an identified individual being a victim is concretely available, where such an evidentiary lacuna derives from a State's negligent fulfilment of positive obligations.[841] Human rights responsibility, in other terms, can be affirmed where a credible violation of an applicant's protection interests under art. 4 ECHR has been produced as an arguable consequence of State action and inaction.[842]

For what concerns the scope of *protection* as a human rights-based State function under art. 4 ECHR, the referent subjects of such a function shall not necessarily be found in the victims of human rights *violations* under art. 4 ECHR;[843] but, more broadly in all individuals subjected to a *relevant risk*, capable of mobilizing human rights obligations of protection under the Convention. In this sense, a coherent reading of European anti-trafficking law in accordance with art. 4 ECHR arguably requires that the positive legal guarantees of victim identification, non-deportation, special assistance, etc., are implemented *not only* with a view of avoiding the violation of victims' interests. On the contrary, such duties express a proactive content of protection which emerges from States' encounter with a particular threat associated to the right to be free from severe exploitation (the "positive content" of

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[840] See, lastly the Case of Krachunova v. Bulgaria, §145-146.

[841] See e.g. Rantsev v. Cyprus and Russia, §295; V.C.L. and. A.N. v. U.K., 178-179; V. Stoyanova, *Positive Obligations under the European Convention on Human Rights,* Oxford University Press, 2023, 202.

[842] These applicants can qualify thus both as the passive subjects of a crime ascertained by criminal justice authorities; constituted injured parties within criminal, civil or other proceedings against alleged traffickers and/or exploiters; recognised victims of a art. 4-related human rights violation (e.g., formally identified VoT under art. 10 ECHR); and self-proclaimed victims of a private offence under art. 4 ECHR who can be found to have (or have had) an arguable claim of protection vis-à-vis one or more State-Parties and to have been subsequently injured in their protection interest by a State's negligent fulfilment of their positive obligations under art. 4 ECHR.

[843] See *supra,* Chapter 2, Part 2, para. 1.

protection).[844] In this sense, when confronted with *general* trafficking-related risks, ECHR signatory Parties are expected to react through a review and eventual amendment of their legal and/or regulatory frameworks. Where, instead, State authorities detect *specific individuals* as reasonably exposed to an *immediate* trafficking-related risk, the ECtHR identifies the adoption of adequate "operational measures" as the mandatory content of States' vis-à-vis the said risk. The referent element of the function of protection, thus, is not trafficking *victimhood* – be it a criminal-justice or a human rights-based notion of the term; rather, as already mentioned, reasonable grounds of a relevant *risk,* capable of undermining the protective scope of art. 4 ECHR, represent the objective reference of States' duties to protect under the ECHR.

Such a perspective on protection is variously reproduced in European anti-trafficking law: it may suffice, in this sense, to recall the relevant phrasing of art. 10 ECAT: "if the Competent Authorities have *reasonable grounds to believe that a person has been victim* [emphasis added] of trafficking in human beings, that person shall not be removed from its territory until the identification process […] has been completed". Similarly, art. 11 of the EUATD states: "Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a *reasonable-grounds indication for believing that the person might have been subjected to any of the offences* [emphasis added] referred to in Articles 2 and 3". Not only victims, in other terms, but also *presumed victims* represent the subjects of protection under both the ECAT and the EUATD. Protection, in other terms, is a function the activation of which predates the formal identification of individuals as victims.

This nonetheless, relevant differences can arguably be identified between the subjective scope of the protection afforded under the European Anti-Trafficking Law and the one afforded under the ECHR. In this regard, all thr positive obligations which have been affirmed in the jurisprudence of the Strasbourg Court under art. 4 ECHR take into account a *spectrum* of risks to human rights which range from the threat of private offences being enacted to the *derivative* human rights threats which can arise from the aftermath of the said private offences.[845]

In this sense, the law of State responsibility under art. 4 ECHR promotes a concept of protection which has as its referent subjects both victims and individuals/groups *at risk* of trafficking. This latter category of individuals is arguably taken into account under the ECAT and the EUATD as the target group of general measures of trafficking *prevention*,[846] being instead largely overlooked in the

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[844] See *supra,* Chapter 2, Part 2, 5.2.
[845] See *supra.* Chapter 2, Part 2, 1.
[846] See *supra,* Part 1, 1.

sections dedicated to protection. On the other hand, the ECtHR jurisprudence has variously repeated that States' duty to adopt operational measures to protect VoTs is suitable to arise wherever "reasonable grounds that an identified individual is or *was at real and immediate risk of being* trafficked or exploited" are present.[847] In this sense, the "reasonable grounds", presumptive approach to protection characterizes States' duties towards both (presumed) victims and individuals at risk of trafficking and/or exploitation.

This considered, it might be asked how the different subjective scopes of protection provided under European Anti-Trafficking Law and under art. 4 ECHR can be conciliated. Such a question shall be answered by taking into account the relevant connections between the duties of protection affirmed in the two legal systems. On the one hand, all EUATD and/or ECAT signatory Parties are also Parties to the ECHR, which thus represents a source of international obligations which is suitable acquire relevance in the evaluation of human-rights-compliance of States' implementation of their duties under European anti-trafficking law. International Human rights obligations in this sense are are central in the anti-trafficking approach of both the EUATD and the ECAT. This latter instrument, expressly cites the ECHR as a source of international obligations to be taken into account in the interpretation of the Convention's provisions, a teleological perspective which has been promoted consistently by the advisory work of GRETA during the last two decades. This said, it must be noted that the phrasing of the provisions of both the ECAT and of the EUATD on matters of anti-trafficking protection suggests that *victims,* both formally identified and presumed, represent the clear destinataries of the guarantees of identification, assistance, recovery and reflection, etc., examined above. In this sense,the ECAT and the EUATD address such specific legal guarantees as a bundle of entitlements exclusively dedicated to those individuals who have been materially *harmed* by THB.

The ECtHR jurisprudence on art. 4 ECHR, on the other hand, promotes a conception of the scope of State duties of victim protection which is notably broader. In this sense, in recent cases, the Strasvourg Court has specified that the bundle of positive human rights obligations descending from art. 4 ECHR must be interpreted in light of the ECAT and of the relevant supervisory work of GRETA. The necessary content of protection under art. 4 ECHR, in this sense, shall be read as notably specified within the text of the ECAT as a central legal source of guidance for all the signatory Parties to the ECHR.[848] These considerations have brought the Court, in different occasions, to hold that trafficking victims' access to identification, to a recovery and reflection period, to special victimological

[847] See *supra,* Chapter 2, Part 1, 2.2.3.
[848] See e.g. Chowdury and others v. Greece, §104. See also Stoyanova, *Human Trafficking and Slavery*, 322.

assistance, to the protection from undue punishment, among others, shall be understood to constitute essential legislative *and* operational measures to protect trafficking victims under art. 4 ECHR.[849]

This "external integration" of the standards of victim protection safeguarded in the ECtHR jurisprudence is suitable favour an extension of key guarantees of the ECAT to other categories of human rights applicants. In this sense, the access to identification, recovery and assistance has been considered as key protection interests *not only* of (P)VoTs, but also of (potential) victims of slavery, servitude, forced and compulsory labour. As clarified in the case of *Chowdury and others v. Greece*, the condition of individuals subjected to forced labor is characterised by forms of intimidation and difficulty to escape a situation of abuse which are comparable if not higher than the one suffered from trafficking victims. Such a condition has been taken into account by the Court in deploring the absent adoption of operational protection measures by police authorities, which should have included the prompt provision of special forms of assistance and the granting of a recovery and reflection period.[850]

The extension of the ECAT special protection guarantees beyond the category of human trafficking victims and presumed victims shall thus be understood as required under human rights law whenever the said measures can be considered as essential in responding to the *human rights needs* of other categories of protection bearers under art. 4 ECHR. In this sense, to conclude, the position of "individuals *at risk*" of trafficking *and of severe exploitation* shall be adequately inspected in its displayment of similar needs to those of (presumed) *victims* of the same offences. The visible exposure of an individual to a *real and immediate risk* of trafficking or of exploitation, for instance, can be understood to display the necessity of a prompt identification of the person; of the activation of emergency measures of protection from the crime; and of the activation of a number of assistance and support guarantees which can sustain the individual in the overcoming of the said experience of critical threat to their human rights.

While the ECtHR has sofar refrained from recognising the entitlement of "individuals at risk" to the said special victim protection guarantees, the next Chapter will frequently refer to this group of individuals as arguable bearers of protection interests under the different functions of an effective system of human rights protection under art. 4 ECHR. The following paragraphs will address the key principles of such protection as dedicated to the whole cohort of subjects of art. 4 ECHR as (potential) victims of trafficking and/or of severe exploitation – (P)VoTEs.

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[849] See *infra,* Chapter 4..

[850] Chowdury and others v. Greece, §121.

2.2. The aims of human rights protection under art. 4 ECHR: security, recovery, redress and reintegration

As the previous legal analysis has highlighted, the protection afforded to trafficking victims under European law is articulated through the attribution to different categories of survivors of different levels assistance and support. While the material scope of the protection enjoyed by all (P)VoTs is the product of the intersection of regional and domestic rules concerning their entitlement to assistance and support, a human-rights-based analysis of this function must be primarily aimed at discussing the conditions of an effective safeguard of the fundamental rights of the survivors. These conditions can be identified in the *capacity* of the protection system to take in charge and satisfy a number of special protection needs attributed to trafficking victims. These special protection needs of VoTs have been generally identified in Anti-trafficking law in the guarantees of personal safety, recovery, social inclusion[851] (or reintegration), and access to justice.[852]

The most urgent need of a trafficking survivor arguably consists in their access to immediate *safety*.[853] The personal safety of trafficking survivors, in other terms, arguably constitutes the primary aim at the basis of Member States' "procedural" and operational[854] obligations, which must be characterized by an element of necessary promptness, so to ensure an effective detachment of those individuals exposed to a real and immediate risk under art. 4 ECHR from the sources of those risks.

From the immediate restoration of the situation of *safety*, States are required to create and maintain such a situatiom along the whole process of victim assistance and support, so to create the basic conditions for a possible response to survivors' further protection needs.[855] This assumption arguably lies at the basis of specific European legal provisions concerning the necessary adoption of an individual risk assessment of (P)VoTs upon detection, and of the subsequent personalization of care

[851] See United Nations General Assembly, Human Rights Council, 23 April 2019, *Report of the Special Rapporteur on trafficking in persons, especially women and children,* A/HRC/41/46, in www.un.org.
[852] See e.g. A. T. Gallagher, *The Right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy,* Paper submitted for the expert consultation convened by the UN Special Rapporteur on Trafficking in Persons, especially women and children, Ms. Joy Ngozi Ezeilo on: "The right to an effective remedy trafficked persons" Bratislava, Slovakia 22 – 23 November, 2010.
[853] UN Recommended principles, Guideline n. 5: "*Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programmes may include some or all of the following elements: identification of a safe place in the country of destination; access to independent 1egal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation*".
[854] ECtHR, *Chowdury and others v. Greece,* §89: "*there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk*".
[855] C. Rijken, Trafficking in persons. A victim's perspective, in Piotrowicz *et al. Routledge Handbook,* 244.

for what concerns their access to services such as secure accommodation, criminal-procedural safeguards, witness protection programmes.

The process of assistance and support to victims, moreover, is intrinsically linked to a general aim of favouring *recovery.* This objective is clearly stated within different European Anti-Trafficking legal instruments: of relevance in this sense is art.12.1 ECAT, which stipulates that *Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery.* The effectiveness of such measures under human rights law will thus be conditioned upon the verification of their fitness to assist trafficking survivors in the overcoming of the adverse physical and psychological effects arising from THB. Moreover, recovery is commonly envisaged as a process-need of victims, the effective fulfilment of which can be autonomously assessed. The abovementioned expression “as may be necessary to assist victims in their […] recovery” should arguably be interpreted as implying the adequacy of victim assistance under under European law presupposes effective satisfaction of individual survivors’ recovery needs.[856]

As mentioned above, the theoretical scope of the protection function clearly points towards the necessary safeguard of further protection needs, including namely the reintegration of victims and their access to justice. Victim reintegration is understood to constitute the final aim of process of post-trafficking protection: such a process, as has been highlighted by the UN Special Rapporteur against THB, envisages survivors’ recovery as its first step, but shall be conceived as based on a long-term approach, aimed at ensuring the restoration of the autonomy of formerly trafficked persons and their social inclusion.[857] Crucial in this process is the “full and permanent restoration of all rights that have been violated before and during the trafficking cycle”, a crucial interest which is suitable to be satisfied only through trafficking survivors’ effective access to justice.[858] Access to justice is understood to include under IHRL at least the guarantee of an effective investigation of the trafficking facts, the victim’s right to participate to proceedings and their entitlement to compensation.[859]

Both reintegration and access to justice constitute objectives of the protection of trafficking victims which are only partially safeguarded under States’ positive obligations under art. 4 ECHR. On one side, guaranteeing the individual’s possibility to access justice in a non-disempowering way arguably

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[856] See in the same sense EUATD: Preamble, “[t]*he assistance and support provided should include at least a minimum set of measures that are necessary to enable the victim to recover and escape from their traffickers*”.
[857] United Nations General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, 17 July 2020, A/75/169, para. 21.
[858] *Ibidem*.
[859] Planitzer, *Art. 12*, 216; T. Obokata, A Human Rights Framework to Address Trafficking of Human Beings*, Netherlands Quarterly of Human Rights*, 24/3, 2006, 394.

lies at the basis of the institution of the reflection period, which is included within the scope of States' positive obligations of protection at both the regulatory and operational level.[860] On the other side, the verification of the victim's possibility of "reintegration" explicitly falls under the preliminary duties of States in the matter of return (art. 16 ECAT) and of long-term assistance upon issuance of a residence permit to victims.

On the same, such guarantees are suitable to safeguard victims' interests to a limited scope, and the latter are likely to find themselves in conflict with State interests which find express safeguard in Anti-Trafficking law itself. So, while States have the duty to create the conditions for an informed decision of VoTs concerning their legal situation, no posirive duty has been affirmed sofar that safeguards victims' interest in remaining in State territory in order to effectively pursue justice. On the contrary, the issuance of a residence permit to victims is often tied to the decision of trafficking survivors to collaborate with State authorities. Moreover, the European Anti-Trafficking law envisages the return of foreign victims to their home Countries as the "standard solution" in international trafficking cases. This implies that, while conditions for a "safe return" are required to be provided by returning States, the victims' interest to "reintegration" is seen as primarily falling within the tasks of the State of return, which more than usually does not fall under the jurisdiction of European human rights law.[861]

In the perspective of the current thesis, therefore, while the concept of trafficking-related-vulnerability is arguably of great relevance in shaping trafficking survivors' opportunities of social inclusion and access to justice, the legal operationalization of such a vulnerability is hindered within the currently valid both European positive law and Human Rights Law.[862] Differently from recovery and security, in other terms, the defence of the interests of reintegration and access to justice is suitable to be limited through host States' prioritization of their national interests over the interest of victim protection.

The effective protection of the rights of (P)VoTs, in this sense, arguably requires a deeper analysis of the key methods and material guarantees which shall be associated with the fulfilment of trafficking-related protection needs; and with the evaluation of the harmfulness of potential cases of State interference with such needs.

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[860] EctHR, *Chowdury and Others v. Greece*, §121.
[861] Planitzer, Article 12, 211.
[862] C. Rijken, Trafficking for Sexual Purposes as a Globalized Shadow Economy: Human Security as the Tool to Facilitate a Human Rights Based Approach, in R. Letschert, J. van Dijk, *The New Faces of Victimhood. Globalization, Transnational Crimes and Victim Rights,* Springer 2011, 94.

The next sections will discuss the relevance of need-centred policies in the determination of the material scope of human rights obligations of protection of (P)VoTs in Europe.

3. Need-centred human rights protection: prevention through addressing vulnerability and victim-centred assistance

3.1. Prevention through addressing vulnerability

As previously anticipated in the first part of this Chapter, "trafficking prevention" constitutes a human rights-based duty of European States, characterised by the intersection of three main aims:

a) the active contrast of general trends of THB and severe exploitation across and within States, by means of policymaking, monitoring, research, and the training of professionals;[863]

b) the intervention on the root causes of trafficking,[864] through the activation of awareness raising and education campaigns, social and economic activities;

c) the coordination of preventative efforts within and across States, through an effective exchange of information concerning the abovementioned threats and the development of an integrated expert response.

The possibility of adjudicating such duties under art. 4 ECHR has often been deemed hardly plausible,[865] as a consequence of both the vague language in which prevention duties are formulated in positive law; and of the difficulty for claimants to prove alleged harms to their human rights which were causally determined by the violation of the said duties. It shall be considered, in this sense, that prevention duties find application before any trafficking victim has been detected by State authorities, and their impact on specific individual situations is hard to assess given their prevalent focus on favouring medium- and long-term processes of social change .[866]

While these limitations are evident, it can be argued that the current state of development of European law has to a certain extent embraced key aspects of a *method* of trafficking prevention which is suitable to inform the broader understanding of the function of human rights protection overall. Trafficking prevention as a subfunction of victim protection under art. 4 ECHR arguably describes the key characters of a State's due diligence vis-à-vis both future and uncertain *and* present-and-uncertain *general* trafficking-related risks. The measures of prevention described in European law expressly address what has been described as the risk of primary victimization, i.e. the risk of a

[863] See e.g. European Commission, *Study on high-risk groups for trafficking in human beings,* 2016, in https://ec.europa.eu.
[864] See, for instance, para. 2 of the Preamble of the EU Parliament legislative resolution of 23 April 2024 on the proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU: "*Trafficking in human beings has various root causes. Poverty, conflict, inequality, gender-based violence, the absence of viable employment opportunities or social support, humanitarian crises, statelessness and discrimination are among the main factors that make persons, especially women, children and members of marginalised groups, vulnerable to trafficking*".
[865] See e.g. V. Stoyanova, *Human Trafficking and Slavery Reconsidered,* 75.
[866] See *supra,* Chapter 2, Part 2, 5.3.

trafficking being perpetrated in Member States' jurisdictions. These duties, as previously stated, derive from the common knowledge that THB constitutes a serious societal offence which concretely threatens the human rights of individuals within States' territories.

Under a different point of view, European Law formally addresses two key *shortages* in the institutional knowledge of the phenomenon of THB which generally manifest at the level of national prevention policies. On one hand, THB as an offence remains a notably obscure societal threat in its criminological/victimological characters, as well in its effects on communities, markets and public institutions. The objective of developing an effective and informed State response against THB is thus critically endangered by the said *lacunae*. These informational limits are addressed in supranational texts through the affirmation of State duties of research and progressive update of their theoretical knowledge of THB: it is the case for instance of the cited State obligation to investigate the root causes of THB.

On the other hand, Anti-Trafficking law takes into account the frequent absence of a sufficient knowledge of State authorities concerning the specific characters of their domestic trafficking problem, in terms of offenders' typical strategies; economic revenues; number of victims; affected areas; involvement of organised crime; nature and level of the domestic demand for exploitative labour and services etc. "Awareness raising" as a key anti-trafficking objective, in this sense, must be interpreted to entail first of all an effort in each Member State to address the veil of ambiguity that characterizes the institutional, before of the societal, understanding of trafficking as an existing national threat. These relevant epistemic *lacunae* arguably define State prevention efforts not only as policies of contrast, but also of knowledge production. Prevention, in other terms, does not only react to general, super-individual human rights risks, but it also primarily concerns the issue of the positionality of States towards risk acknowledgment.

These two dimensions of knowledge production and general risk response are arguably merged in the key techniques of trafficking prevention promoted under European law, which include an *evidence-based* approach; an *early-alert* response; and *reflexive policing*. These techniques, seen under a human rights-based lens, constitute key assets of an adequate protection function and of an effective *pris en charge* of the protection needs of survivors. Such effectiveness, thus, encompasses all the spheres of State response (legal-regulatory, procedural, operational) contemplated under human rights law.

First of all, preventing THB as a general and abstract human rights risk at the national and regional level entails the necessary adoption of an effective evidence-based approach to this risk. As already observed, the understanding of the phenomenon of trafficking and of its root causes is reconnected in supranational law to States' active duty of *researching* THB as an object of policy, of sharing the results of such research and of progressively updating their knowledge on the phenomenon.[867] The institution of Expert Groups at both the national and supranational level represents the organisational consequence of such a epistemological need; while the duty of conveying the most advanced knowledge on the characteristics of trafficking in the training of practitioners; and the duty of "*us*[ing] *gender mainstreaming in the development, implementation and assessment of* [victim protection] *measures*"[868] represent essential policy implications of an adequate preventative response enshrined in the currently valid law.

Furthermore, an evidence-based response against THB necessarily invests States' acknowledgment of the actual traits of their domestic trafficking risk, a necessity which lies at the basis of an obligation of effective of monitoring of the *actual* trends in THB observable in a certain context.[869] Such a duty arguably must be understood as multi-level: on one hand, a State-wide strategy of trafficking prevention must be made the object of a National Action Plan, which in turn implies a prior centralisation of the function of trafficking prevention through the institution of *ad hoc* authorities (National rapporteur; national coordinator; expert group, etc.)[870] At the supranational level of the Council of Europe, GRETA exercises continuous monitoring functions in all Member States; at the EU level, the EU Rapporteur receives constant updates from National rapporteurs concerning the results of their monitoring activities.

On the other hand, the evidence-based approach to prevention requires that the monitoring monitoring of THB is intended as a *situated* function: trafficking and exploitation, in other terms, constitute context-specific phenomena, the assessment of which in terms of risk requires a targeted response at the subnational level. The most concrete effects of this approach on the safeguard of individuals' human rights can be observed in the institutional mapping of patterns of collective risk and vulnerability.[871] The known existence of vulnerable population groups and/or market sectors, territories, statuses, social conditions, in this sense, imposes the adoption of a special duties of

[867] ECAT, art. 5(2), 5(3); EUATD, art. 18(2) and art. 19.
[868] ECAT, art. 17.
[869] EUATD, art. 19.
[870] See *supra,* Part 1, para. 1.
[871] V. Milano, The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v. Greece: A Disturbing Setback?, in *Human Rights Law Review*, 2017, 712-713. The author openly criticizes the ECtHR decision on L.E. v. Greece for failing to address what in Prof. Milano constituted evident signs of the inadequacy of the Greek anti-trafficking legal and regulatory system for what concerns its delivery of effective victim support and protection from punishment, as emerging from both the facts of the case and from the available evidence presented in popular reports, namely from the US Department of State concerning the systematic character of the said inefficiencies in the period where the applicant had been under the control of Greek authorities.

diligence on State authorities in their response to trafficking-related risk.[872] At the general level of policing, national plans and training programmes are expected to address those general vulnerabilities that emerge from the intersection of integrated research and multi-level monitoring. This duty of "prevention through addressing vulnerability"[873] arguably represents a progressive and continuous obligation of states: the vulnerability-based provisions of the EUATD and of the ECAT, in this sense, have been frequently criticised in their indication of "women" and "children" as the generic and exclusive bearers of special protection needs. It can be argued that European law fails to consider other relevant forms of disadvantage besides age and gender, which can similarly influence individuals' situation of trafficking-related risk and can well *compound* with them, unveiling new and different protection needs.[874] In this sense, the use of a labelling approach within legal texts arguably does not represent an adequate response to the said contextualised patterns of trafficking-related vulnerability: vulnerability, as trafficking risk, in other terms, must be made the object of ongoing research and monitoring.[875]

A second crucial aspect of prevention concerns States' duties of due diligence in their *reaction* to *general* trafficking-related-risks. In this sense, both European law and the anti-trafficking case law of the ECtHR require that the criminal justice response to credible allegations of trafficking is exercised with particular promptness. The presence of reasonable grounds of trafficking-related risk, thus, ignites the adoption of a *early alert response*, which shall necessarily be conducted in conditions of uncertainty and/or unconclusive or partial knowledge. Prevention, thus, must be understood as a precautionary duty, primarily aimed at minimizing the possibilities of a future and uncertain offense. The aim of an adequate knowledge production in trafficking matters in this sense requires the development of *ad hoc* risk and vulnerability indicators, as well as of investigative and operational procedures. Moreover, in order to effectively address patterns of trafficking-related-risk, States shall

[872] See in this sense, e.g. the best practice of Belgian labour inspectorates recalled in European Union Agency for Fundamental Rights (FRA), *Protecting migrant workers from exploitation in the EU: boosting workplace inspections,* 2018, annex 2: "*They proactively conduct monthly inspections of high-risk sectors, which are led by the auditor or public prosecutor and with which other organisations (such as labour and social inspectorates, and victim support organisations) cooperate*".

[873] UN Recommended Principles, Principle 5: "*States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination*".

[874] The intersectional character of the situation of disadvantage experienced by (P)VoTs is expressly taken into account, for what specifically concerns the influence of racial and gender-based discrimination on trafficking-related vulnerability at para. 4 of the Preamble of Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: "*Trafficking in human beings can be exacerbated where it intersects with discrimination based on a combination of sex and other grounds of discrimination prohibited by Union law. Member States should therefore pay due regard to victims affected by such intersectional discrimination and to the resulting increased vulnerability, through providing specific measures where intersecting forms of discrimination are present. Particular attention should be paid to discrimination based on racial and ethnic origin*".

[875] See e.g. GRETA 4th General Report.

deploy adequately trained anti-trafficking personnel within their territories, with a specific attention at particularly vulnerable areas and population groups.[876] This need is at the heart of the cited State duty of ensuring a multiagent, public-private cooperation against THB, with the involvement of civil society organizations. A prompt operational response to trafficking is thus necessarily an expert, whole-of-society response. This aspect is particularly enphasized for what concerns the nexus between trafficking prevention and victim identification. European law in this sense explicitly recognises the essential role of a diligent preventative response for ensuring the possibility of an effective identification, which, in turn, is understood as the hallmark of survivors' access to an effective human rights-based assistance. Addressing existing vulnerabilities and deciphering the main vulnerabilizing social patterns within Member States' territories in this sense paves the way for an effective detection and identification of (P)VoTEs.

Finally, prevention as a State function of *societal* risk management critically requires the adoption of *reflexive* forms of policing. On one hand, the lack of a complete understanding of the phenomenon of THB and of its manifestations in terms of risk factors within State jurisdictions qualify domestic anti-trafficking policy as an ongoing "experiment" of effective safeguard of human rights. Human Rights law in this sense notably includes an obligation of impact-assessment of State responses.[877] These legal duties of self-evaluation, and the corresponding communication of the results of anti-trafficking policy at the supranational level, shall be fulfilled on a regular basis, and their results shall be integrated in the evidence-based response through a continuous adjustment of anti-trafficking policy and practice. Moreover, a human rights-based understanding of trafficking-related-vulnerability necessarily considers the State as an active part in the creation and/or toleration of THB and of forms of severe exploitation. European law in this sense recognises that State policies can often play a role in sustaining and reproducing patterns of interpersonal domination.[878] A crucial aspect of a public

[876] Directive (EU) 2024/1712 of 13 June 2024, amending Directive 2011/36/EU, contains a particularly advanced reaffirmation of the said duty of training, through the introduction of a dedicated provision in the proposed text: art. 18b: "*Member States shall promote or offer regular and specialised training for professionals likely to come into contact with victims or potential victims of trafficking in human beings, including front-line police officers, court staff, assistance and support services, labour inspectors, social services and healthcare workers, aimed at enabling them to prevent and combat trafficking in human beings and to avoid secondary victimisation, and to detect, identify, assist, support and protect the victims. Such training shall be human-rights based, victim-centred, and gender-, disability- and childsensitive. 2. Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall encourage both general and specialised training for judges and prosecutors involved in criminal proceedings aimed at enabling them to prevent and combat trafficking in human beings and avoid secondary victimisation, and to detect, identify, assist, support and protect the victims. Such training shall be human-rights based, victim-centred, and gender-, disability- and child sensitive*".

[877] UN Recommended Principles, Guideline 1.7: "*Establishing mechanisms to monitor the human rights impact of antitrafficking laws, policies, programmes and interventions*".

[878] See e.g. European Commission, *Report of the Experts Group*, 171.

response to the trafficking-related risk thus concerns the *minimization* of the possibilities of an institutional interference with the effective enjoyment human rights.

The ECtHR's decision in Rantsev v. Cyprus and Russia in this sense has provided a similar interpretation of CoE MS' duties of prevention under art. 5 ECAT, read under the frame of art. 4 ECHR. A visa policy which favours the creation of dangerous situations of interpersonal dependence and abuse, in the Court's view, cannot be considered as a suitable measure to favour legal migration through a human rights based a gender sensitive approach (artt. 5.1 and 5.4 ECAT).[879]

3.2. Victim-centred protection

The previous section has tried to outline the key principles of an effective response to general trafficking-related risks European human rights law. Under a different perspective, the previous overview of States' duties of protection under art. 4 ECHR has shown that a crucial aspect of a diligent response to trafficking-related vulnerabilities resides in the due taking into account of *individual* victim protection needs.

the 2002 UN Recommended Principles and Guidelines on Human Rights and Human Trafficking in this sense state: "The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked".[880] The following 2006 CoE Declaration on the rights of victims of crime, in turn, crucially clarifies that such an attention to the victimological condition of crime survivors necessarily revolves around the adequate assessment of - and reaction to - the threats of secondary[881] and repeat victimisation.[882]

Such general objectives of victimological assistance have been upheld by the European Court of Human Rights in the recent case of V.C.L. and A.N. v. U.K. When confronted with the question of what it takes to ensure an adequate *operational* protection to individually identified (P)VoTs, the Court has notably stated that victim protection shall have two main objectives: a) the protection of victims from further harm and b) the facilitation of their recovery. The Court thus arguably addressed the interests of protection from secondary and repeat victimisation as the core of States' duties of victim protection.

[879] See in the same sense Zoletic and others v. Azerbaijan, §101.
[880] UN Recommended Principles, Guideline 6.
[881] See e.g. Council of Europe, Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, 14 June 2006, art. 1.3: "*Secondary victimisation means the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim*".
[882] *Ivi,* preamble: "*Aware of the need to prevent repeat victimisation, in particular for victims belonging to vulnerable groups*"; art. 1.2. "*Repeat victimisation means a situation when the same person suffers from more than one criminal incident over a specific period of time*".

The abovementioned duties of victimological risk management are thus expressly considered the object of an autonomous and self-standing State function of victim protection, which shall be distinguished in its aims and founding principles from other pillars of anti-trafficking policy such as criminal prosecution and border control.[883] A human rights-based approach to protection under art. 4 ECHR, thus, shall have trafficking survivors' interests *qua victims* as their exclusive focus. The development of such approach can be retraced on both the level of legal guarantees and on that of the methods, techniques and working principles of delivery of such assistance guarantees.

As previously clarified, a systematization of (P)VoTs' protection needs has been progressively codified in International Human Rights Law through the affirmation of a developing "checklists of rights"[884] recognized to victims of crime, on one side; and in the affirmation of the series of trafficking-specific protection guarantees which have been examined in the first part of this Chapter, on the other. Supranational human rights law, in this sense, can be to a certain extent understood as status-differentiated on the basis of special protection needs, thus acquiring an active role in the determination of the form of an adequate protection of "particularly vulnerable victims" such as VoTs.

This nonetheless, the victimological literature has repeatedly made clear that the experience of victimization and its effects on human rights needs shall be understood as largely mediated through each survivor's specific experience: any determination of the concrete content of an adequate protection shall necessarily be built on the previous *individualisation* of such a protection.[885] In this sense, the presumed vulnerability of victims of crime and of particular categories thereof shall be understood to substantiate a duty of *preparedness* on States in their response to the risk of victimization. On one hand, the formal introduction of special rights and guarantees in legal texts cannot be understood to provide alone a sufficient protection to individual victims; nor it can be assumed that the needs of each (P)VoT concretely overlap with the bundle of special needs defined in general legal instruments. On the other hand, the existence of generally defined protection guarantees and *ad hoc procedures* arguably constitute crucial preconditions for the actual determination of individual protection needs and of the correlative operational requirements for an adequate assistance of concretely identified (P)VoTs.

As recent contributions have shown, the creation of credible safeguards against secondary and/or repeat victimisation, through - among others - the provision of free and safe shelter, psychological assistance, guarantees of non-interference in the immediate aftermath of crime, can be seen not only

[883] *Ivi*, Preamble: "*Convinced that it is as much the responsibility of the state to ensure that victims are assisted as it is to deal with offenders*".
[884] J. Goodey, *Victims and Victimology. Research, Policy and Practice,* Pearson Longman, 2005, 130.
[885] *Ivi*, 122.

as crucial requirements for (P)VoTEs' access to *recovery*, but also as essential conditions for the survivors' *discovery* of their particular protection needs.[886] On the other hand, the accurate delivery of services of legal counselling, information and longterm social support shall be understood as tantamount to the emergence of medium and long-term needs of reintegration of trafficking survivors, the adequate consideration of which, in turn, defines the effectiveness of their access to the full package of protection provided under human rights law. [887]

The prevention of secondary victimisation through the individualisation of assistance, specifically, has been for long intended to represent a guarantee to be recognised to victims of *crime* and provided within the particular context of criminal justice proceedings.[888] European Anti-trafficking law in this sense has favoured a notable extension of the scope of victim-centred assistance: while, as already seen, the assessment of trafficking survivors' protection needs and correlative duties of adaptation of their treatment are arguably particularly penetrant in the EUATD and ECAT' regulation of the rights of (P)VoTs in criminal proceedings; the general discipline of unconditional victim assistance in both instruments can arguably be considered as centred on survivors' individual needs. The frequent references in supranational texts to standards of assistance as "*adequate* housing"; "*necessary* medical treatment"; issuing of residence permits "*owing to* [each victim's] personal situation", among others, clarify the existence of a relevant duty of individualization of treatment in the implementation of the cited bundle of special rights of victims of trafficking under European Law.

In this sense, Recital 18 of the EUATD Preamble specifies that the "practical implementation of [assistance] measures should, on the basis of an individual assessment carried out in accordance with national procedures, take into account the circumstances, cultural context and needs of the person concerned". The victim-centred character of human rights protection shall thus be understood as merging the above-mentioned attribution of special rights to individuals who have been subjected to serious human rights violations; and the development of an *approach* based on a "systematic focus on the needs and concerns of a victim to ensure compassionate and sensitive delivery of services in a non-judgmental matter".[889] This latter definition of a victim-centred approach is now currently recognised as a baseline of due diligence in recent international documents at both the CoE and EU

886 UN General Assembly 2020, para 21: "*Early support is intended to ensure the empowerment and independence of trafficked persons in the long term*".
887 Probst, *Victims' protection*, p. 4: "*victims' protection needs a sensitive assessment of the needs of each trafficked person to assist them in accessing their rights. In general, victims' protection in this article is understood as long-term assistance*".
888 See in this sense F. Ippolito, *Understanding Vulnerability*, 105.
889 Office for Victims of Crime, Training and Technical Assistance Centre, *Human Trafficking Task Force e-Guide, Strengthening Collaborative Responses*, available at: https://www.ovcttac.gov/TaskForceGuide/eguide/.

levels.[890] While the relevance of such a *rationale* of individual protection in the field of THB will be clarified in depth in the following chapter, it might be useful to introduce here the key principles of the victim-centred approach. It shall be observed, in this regard, that no comprehensive discipline exists concerning the key principles of a victim-centred approach to the trafficking. On the same, several soft-legal sources and best practices are currently available which present a variety of definitions of such a method of protection which revolve around the following main principles:[891]

A) Holistic and multiagent need determination.

The experience of trafficking victimisation is currently understood in clinical studies to "affect a wide range of life dimensions".[892] Just as trafficking represents a composite and complex societal phenomenon, suitable to be credibly contrasted only through a sufficiently comprehensive approach; the impact of trafficking on individual livelihoods and rights represents a form of harm to be necessarily addressed *holistically.*[893] Crucially, the deployment of different professionalities is central in accurately understanding and taking into account protection needs. Trafficking survivor's feelings of fear for their personal safety; the relevant uncertainties that many VoTEs maintain concerning their future existential perspectives; as well as the relevant *impact* of exploitation on the physical and psychological stability of victims arguably represent important examples of the intersecting necessities and hardships that characterise the condition of trafficked and/or severely exploited persons and which require a simultaneous and coordinatied form of response. In light of this, adequate interagency cooperation arrangements can be considered as a central component of the due implementation of Member States' duty to adopt effective operational measures to protect trafficking victims and potential victims. The central technology of such victim-centred coordination is arguably the *referral function.*

B) Consensual and transparent access to services.

[890] See Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Preamble, para. 3: "*The directive* […] *includes common provisions to strengthen the prevention of trafficking, the assistance provided to victims, as well as their protection, taking into account gender, disability and children's perspectives, and using a victim-centred approach*"; *ivi,* art. 11(1): *Member States shall take the necessary measures to ensure that specialised assistance and support are provided to victims in a victim-centred, gender-, disability- and child-sensitive approach*".

[891] M. Carmo, C. David, L. Meindre-Chautrand, M. Valerio, *Manual of Effective and Secure Referrals of Victims,* February 2020, available at https://www.victimsupport.eu, 18: "*A victim-centered referral system would therefore include three main elements: - Victims are involved in a transparent manner - The process minimises secondary victimisation - Referral is carried out in a timely manner*".

[892] L. Meindre-Chautrand, *How to Identify Victims' Support Needs? Guidelines to develop an individual needs assessment,* November 2019, available at www.victimsupport.eu.

[893] S. Doherty, R. Morly, Promoting Psychological Recovery in Victims of Human Trafficking, in Malloch M., Rigby P. (Eds.), *Human Trafficking: the Complexities of Exploitation,* Edinburgh University Press, Edinburgh, 2016, 122.

The previous legal analysis has underlined the requirement that the access of victims to special protection guarantees takes place through an informed and consensual process.[894] In a victim-centred perspective, these elements of voluntariness and sufficient information shall be read to encompass not only a "negative" safeguard of the victims' freedom of choice and self-determination. Crucially, preserving the possibility of survivors' wilful and informed participation to treatment represents a crucial precondition[895] of the individualization of such treatment on the basis of the victim's preferences, an element which is understood to constitute a credible predictor of a successful process of recovery and reintegration.

C) Trauma-informed treatment and the minimization of the risk of secondary victimisation.

The function of protection of trafficking victims under human rights law, as repeatedly observed, is associated to the prioritary aim of avoiding their secondary victimisation. At the operational level, such duty entails the adoption of *ad hoc* protocols of communication with (P)VoTs and of special procedural guarantees, capable of frontlining the relevant risk that the individual might have suffered a relevant trauma from their victimisation experience. Trauma-informed treatment, in this sense, shall be understood as a precautionary principle of assistance of trafficking survivors which responds to a rationale of *minimization* of the risk of secondary victimisation.[896] A crucial aspect of operational due diligence associated with the said principle resides in the duty of service providers to actively anticipate possible risks to survivors' process of recovery and reintegration through the prompt conduction of ad hoc assessments when the victim is expected to undergo potentially harmful forms of treatment or to participate to potentially retraumatizing procedures. The integrated provision of services, moreover, is expected to be capable to avoid the risk of failures in anti-trafficking systems' delivery of assistance, through the accurate planning and facilitation of survivors' access to assistance guarantees.[897]

D) Empowering and partecipative service delivery.

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[894] Art. 11 EUATD: *The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis*; art. 12(7) ECAT: "*each Party shall ensure that services are provided on a consensual and informed basis"*.

[895] Carmo *et al, Manual of Effective and Secure Referrals,* 19.

[896] UN 2002, Guideline 1: Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers. See also Carmo, *Manual for Effective Referrals*, 20. See also CoE Recommendation on Assistance of Victims of Crime, 3.3. "*Victims should be protected as far as possible from secondary victimisation*".

[897] OSCE, National Referral Mechanisms, Note 281: "*The do no harm principle in the context of anti-trafficking work means that the anti-trafficking stakeholders have an obligation not to endanger, under any circumstances and at any time, the life, physical and psychological safety, freedom and well-being of victims, witnesses and all persons who come into contact with them in the course of their work. Anti-trafficking stakeholders must make every effort to do no harm in their work"*. See also OHCHR, *Manual on Human Rights Monitoring*, 2011, 4.

While the abovementioned principles of transparency and informed consent represent essential preconditions for the determination of any adequate victim-centred assistance, the "dynamic phase" of such an assistance is presented in victimological practice as necessarily based on the active involvement of the survivor, too. Given the highly disempowering characters of THB as a form of human rights victimisation, such forms of inclusion of the victim in the determination of their treatment shall be considered as a crucial component of protection as a form of *undoing* of the social reality of exploitation, through the express recognition of victims' agency as the driving force of recovery and reintegration.[898] In this sense, the relevant supranational guidance on the issue clarifies that the provision of victim-centred services shall necessarily take into account the fact that the perspective on protection of the victim might change over time, as a consequence of the progressive satisfaction of their protection needs and of the survivor's consequent regaining of key aspects of their safety and control on their life through targeted support. The need-centred assistance of trafficking victims in this sense shall be considered as a necessarily *interactive* and continuously redetermined process, which must by definition be based on periodic feedbacks from the survivors and the subsequent timely activation of referrals whenever new needs emerge.[899]

[898] See in this sense Ladd S.K., Neufeld Weaver L. Moving forward: Collaborative accompaniment of human trafficking survivors by using trauma-informed practices, *Journal of Human Trafficking*, 2017 (online) DOI: 10.1080/23322705.2017.1346445, 16: "*Empowerment allows survivors to regain control of their lives; cultivating the sense of choice or agency counteracts the trauma bonds and minimizes vulnerability to revictimization*".
[899] Carmo *et al, Manual for Effecitive,* 21-22.

Chapter 4. Substantiating the vulnerability – based protection of trafficking victims and potential victims

The analysis provided in this last chapter moves from the outline of the essential principles of the vulnerability-informed protection of (P)VoTEs elaborated in the second part of Chapter 3, and aims to explore the organisational, procedural and operational implications of such priciples on the material scope of States' human rights-based response to THB. Specifically, this chapter will reconsider the different guarantees of victim protection provided for in European law (prevention of trafficking, identification of trafficking victims, victim assistance and support) to highlight the aspects of their implementation which are mostly influenced from an underlying understanding and method of addressing trafficking-related-vulnerability.

Each of the following sections will focus on targeted expressions of the victim-centred *rationale* in trafficking matters, which constitute ongoing evolutions of the European States' positive obligations of protection under Human Rights Law. The analysis will sideline the relevant normative inputs descending from the ECtHR jurisprudence with the most recent developments of the European legal and policy framework against trafficking in human beings. Crucial insights concerning the role of vulnerability policing in the response to trafficking survivors' protection needs will be drawn from the work of supranational organisations and monitoring bodies (OSCE, GRETA, UNODC, IOM) as well as by from developing clinical-victimological scholarship.

1. Protection by design: National Referral Mechanisms

In the first part of this thesis, it has been highlighted how the development of the anti-trafficking global strategy has taken place within an international security frame. Transnational threats, it was held, represented new challenges for the International Community brought by globalisation, which were understood to require new institutional responses to be adequately addressed. When it comes to transnational crime, single States alone with their traditional law enforcement structures were deemed largely unapt to contrast global threats, which were associated to the action of large and deeply organized transnational networks.[900] The objective of effectively safeguarding transnational security was understood to require the adoption of legal and policy measures which extend beyond the core area of criminal prosecution of THB, to include broader efforts of crime prevention and, for what is of interest here, the protection of victims. The mechanisms and actors of victim protection which have

[900] See e.g. C. Friesendorf, Introduction: The Security Sector and Counter-Trafficking, in C. Friesendorf (Ed.), *Strategies Against Human Trafficking: The Role of the Security Sector,* Reprocenter Vienna, 2009, 17-32.

progressively emerged in the field of anti-trafficking were, at least initially, inspired by a security governance *rationale*.[901]

The main instrument of this governance model of victim protection is the National Referral Mechanism (henceforth NRM),[1] defined as "a comprehensive institutional framework in which a network of various entities cooperate to ensure access to protection and support for victims of crimes. Referral mechanisms are based on efficient communication and defined methods to achieve the purpose of connecting victims to support services".[902] At the beginning of the 21st Century, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) was provided with the mandate to assist States in establishing NRMs, as well as to give technical assistance in their development, testing and progressive update. Most notably, in 2004, OSCE/ODIHR published an influential report where the conceptual and organisational bases of a model NRM, to be adopted in all OSCE Member States, were detailed.[903]

The basic aim of NRMs is to regulate referral, i.e., the process of rapid, secure and coordinated discovery of potential trafficking cases and of subsequent streamlining of the access of (P)VoTEs to targeted support services.[904] The function of referral is necessarily fulfilled through an enhanced cooperation between State and non-State actors:[905] serious crime and its harmful effects on individuals and communities are, in other terms, understood to be best addressed through forms of community policing.[906] NRMs, on the same, represent governance structures which are not expected to substitute already existing public or private strategies of anti-trafficking in place in Member States, but the

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[901] See e.g. International Organisation for Migrations (IOM), *IOM Guidance on Referral Mechanisms for the Protection and Assistance of Migrants Vulnerable to Violence, Exploitation and Abuse and Victims of Trafficking,* available at https://publications.iom.int/books/iom-guidance-referral-mechanisms, 4: "*An appropriate, comprehensive and sustainable programmatic response is one that addresses the risk factors that contribute to vulnerability and mobilizes protective factors that enhance resilience, at all levels and with the engagement of all relevant stakeholders*".

[902] Carmo *et al., Manual for Effective Referrals,* 7. See also OSCE, *National Referral Mechanisms,* 14: "*The National Referral Mechanism (NRM) is "a co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, coordinating their efforts in a strategic partnership with civil society". The basic aims of an NRM are to ensure that the human rights of trafficked persons are respected and provide an effective way to refer victims of trafficking to services. In addition, NRMs can work to help to improve national policy and procedures on a broad range of victim-related issues such as residence and return regulations, victim compensation, and witness protection*"

[903] OSCE Office for Democratic Institutions and Human Rights, *National Referral Mechanisms. Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook*, Warsaw, 2004, available at www.osce.org/odihr.

[904] OSCE, National Referral Mechanisms, 26.

[905] See e.g. M. T. De Gasperis, *Mirror Project. Developing agreed methodology of identification and referral for trafficking for labour exploitation: guaranteeing the victims the access to protection*, available at: https://ccme.eu/wp-content/uploads/2018/12/2013-05-15-MIRROR_English.pdf, 30.

[906] See e.g. Organization for Security and Co-operation in Europe (OSCE), *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach*, available at https://www.osce.org, 32, 36-43.

existence of which is nonetheless deemed essential for ensuring an integrated approach to victim protection.[907]

Most notably, the OSCE NRM Model aims at covering the whole process of victim protection as described in supranational anti-trafficking law. In this sense, the 2022 update of the OSCE NRM Handbook describes the scope of application of NRMs distinguishing 4 main pillars: "Identification plus Protection"; "Individual Support and Access to Services", "Social Inclusion" and "Criminal Justice and Redress".[908] NRMs, thus are not conceived to cover all policy aspects of the fight against Trafficking in Human Beings.[909] On the contrary, they represent governance structures dedicated to the fulfilment of national and transnational duties of victim protection. NRMs are presented as necessarily flexible regulatory measures, which must be adapted to the specificities of each existing national system trafficking governance.

The OSCE Handbook in this sense underlines the strict connection existing between the development of a Country-specific NRM and the preventive function of trafficking risk assessment. National Rapporteurs and their connected bodies are understood to hold a crucial role in in the building of the governance structure of protection, through the "*identifi*[cation of] *the most effective NRM structure,* [of the] *agencies and civil society organisations that should be the key stakeholders;* [the inclusion of] *pre-established anti-trafficking national bodies* [in the NRM]; [the arrangement of] *follow-up assessments*".

Furthermore, the Handbook recommends that NRMs are included within National Action Plans against THB, which represent "living documents" which outline the state of the art of a Country's Anti-Trafficking strategy, its objectives, the results of the latest assessments conducted as well as the ongoing changes in the legal and policy framework.[910]

Since the publication of the first NRM Handbook, almost all CoE/EU Member States now have[911] or are implementing[912] a formalized NRM or a similar governance structure which regulates the phases and forms of the *pris en charge* of trafficking victims. On the same, the differences between national systems are often remarkable: the coordination of NRMs, in this sense, is not always attributed to a specific national body or multiagent network of authorities and organisations; on the contrary, the referral in many countries represent a mere "component or *function* which sits within, and alongside

907 Planitzer, *Article 12*, 12.15.
908 OSCE, *National Referral Mechanisms*, 106.
909 See GRETA, Report on Greece, I GRETA(2017)27, para. 72.
910 See *supra,* Chapter 3, Part 1, 1.
911 European Commission, *Study on Reviewing,* 19.
912 *Ivi,* 13.

a wider range of systems, procedures and services".[913] While this organisational outline of victim protection is expressly envisaged as a viable option in the OSCE Handbook, a sufficient level of harmonisation among State practices is on the same considered necessary to provide a credible regional response against THB. In this sense, the 2022 version of the OSCE Handbook highlights that sufficient funding shall be provided to NRMs or analogous mechanisms in place in each Member State and that domestic legal frameworks shall cover all the sectors of victim protection identified in the cited four pillars.[914]

Moreover, Member States are required to develop *transnational referral mechanisms,* so to ensure an adequate circulation of the knowledge about trafficking victimisation cases across different States and to favour multinational cooperation in guaranteeing an effective protective response.[915] Such objective, in turn, has been addressed under the EU Strategy immediately after the adoption of the 2011/36 directive,[916] and is expressly mentioned in the recent Council Proposal of Amended Recast of the said Directive.[917] As highlighted by Friesendorf, the necessary *comprehensiveness* of States' security policy against THB clearly entails the adoption of suitable measures of interstate coordination aimed at addressing the transnational effects of trafficking on the perspective of an adequate protection of victims.[918]

Finally, NRMs as internationally harmonized governance frameworks against THB are considered by International Organisations as a best practice of victim protection. The standards and rules of the OSCE/ODIHR NRM model, in this regard, are justified on the basis of the latest standards of clinical research; the OSCE Handbook itself is the product of the work of experts, with the inclusion of critical perspectives from anti-trafficking survivor leaders.[919] The need-centred approach to trafficking

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913 OSCE, National Referral Mechanisms, 14.
914 *Ivi,* 15.
915 See e.g. I. Orfano, *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe,* 2010, available at www.icmpd.org, 23. "*A Transnational Referral Mechanism (TRM) is a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons. A TRM links all stages of the referral process from the initial screening, through formal identification and assistance, to the voluntary assisted return, the social inclusion, and the civil and criminal proceedings. It is based on the co- operation between governmental institutions, intergovernmental agencies and non- governmental organisations of countries of origin, transit and destination of the assisted trafficked persons. Through the TRM, state actors of different countries fulfil their obligations to promote and protect the human rights of trafficked persons*".
916 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016,* COM(2012) 286 final, 19.
917 European Commission, *Proposal for a Directive of the European Parliament and the Council Amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims,* 2022/0426 (COD), Explanatory Memorandum, 14.
918 See, C. Friesendorf, Conclusions: Improving Counter-Trafficking Efforts Through Better Implementation, Networking & Evaluation, in Id., *Strategies*, cit., 460: "*A TRM is thus a response to complex transnational security risks, linking governmental and non-governmental actors across borders in a joint effort to protect victims and prosecute traffickers. It must be noted that a TRM aims to be a comprehensive tool, addressing all forms of trafficking*".
919 OSCE, *National Referral Mechanisms*, 15.

victims protection lies at the heart of the NRM model, as highlighted in the section of the 2022 OSCE Handbook dedicated to the guiding principles of NRMs. Here, national and transnational responses to THB are addressed as necessarily "victim-centred, gender-sensitive[920] and trauma-informed"[921]. A central role is attributed to several aspects of victim-centred protection analysed in the previous chapter, such as the safeguard of the best interest of children; non-conditionality; prompt access to recovery and reflection; and social inclusion.

The role of such principles in the OSCE model is integrated within a systemic understanding of the function of trafficking victim protection. In this sense, the "*overriding objective of all NRMs*" is addressed as the creation of effective conditions for *prevention*: NRMs are considered an essential technology for ensuring States' capacity to address trafficking risk broadly, professionally, and in a coordinated and harmonized manner.[922] The substance of this central principle of prevention is substantiated in the NRM Structure through the affirmation of a number of "*Recommended Standards*", i.e. guidelines including targeted measures at both the institutional, legal, procedural and/or operational levels, aimed at creating a sufficient State *capacity* to protect trafficking victims. These recommended standards will be made the object of detailed analysis across the present chapter, as a precious source of clarification of the substance of States' duties of effective protection of (P)VoTs under Human Rights Law. Before engaging in the analysis of the key ingredients of the protection function, NRMs themselves as comprehensive systems of protection will be addressed in their relevant relationships with the ECHR framework of positive State obligations against THB and in their deployment of a vulnerability-based approach to protection.

1.1 NRMs and the adequacy of European States' legal and regulatory frameworks under art. 4 ECHR

As previously pointed out, NRMs as governance structures of protection of (P)VoTEs have been developed along the last 20 years through the preminent action of International organisations. Their institution has been recommended in different soft-law documents along the last 20 years, especially at the EU policy level.[923] The 2011 EUATD, moreover, specified the duty of States "*to establish*

[920] OSCE, *National Referral Mechanisms*, 70: "*NRM procedures and services should be gender-sensitive, as well as being based on a developed national policy and strategy to address the gender dynamics of human trafficking. This should be tailored for victims of trafficking throughout the 4 NRM Pillars*". See also Organisation for the Security and Co-Operation in Europe, Office of the Special Representative andd Co-ordinator for Combatting Trafficking in Human Beings, *Applying Gender-Sensitive Approaches in Combating Trafficking in Human Beings,* Vienna 2021, available at https://www.osce.org, 16.
[921] See e.g. Organisation for the Security and Co-Operation in Europe, Office for Democratic Institutions and Human Righs (ODIHR), *Guidance on Trauma-Informed National Referral Mechanisms and Responses to Human Trafficking,* Warsaw 2023, available at https://osce.org.
[922] C. Friesendorf, Conclusions, 467.
[923] J. Kanics, National Referral Mechanisms, in Piotrowicz et al, *Routledge Handbook*, 306.

appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations".[924] Victims' rights of assistance and support, moreover, constitute the object of State positive obligations of protection against THB: specifically, assistance and support measures must form part of an "adequate legal and regulatory framework" under art. 4 ECHR.[925]

The essentiality of an adequate regulatory and organisational structure to favour trafficking victim's effective enjoyment of their rights has recently arisen as an object of concern at the level of EU law. In this sense, the European Commission Proposal of Amendment of the EU Anti-Trafficking directive provides for the formal establishment of NRMs "*by laws, regulations or administrative provisions*".[926] This legal-regulatory duty is addressed in the Explanatory Report of the cited Proposal of Amendment as "*a minimum measure to enhance the referral of identified victims, as it builds upon the pre-existing obligation under Article 11(4) of the Anti-trafficking Directive"*.[927] This amendment signals a remarkable consensus among European States concerning the essentiality of targeted and specialised multiagent structures of victim protection to the adequate fulfilment of the objectives of the anti-trafficking strategy. The subsequently adopted Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU further specifies: "*A referral mechanism should be a transparent, accessible and harmonised framework facilitating the early detection and identification of, assistance to, and support for the victims of trafficking, and facilitating their referral to the responsible national organisations and bodies*";[928] the key tasks of such mechanisms shall include *"(a) establishing minimum standards for the detection and early identification of victims, and adapting the procedures for such detection and identification to the various forms of exploitation covered by this Directive; (b) referring the victim to the most appropriate support and assistance; (c) establishing cooperation arrangements or protocols with the asylum authorities to ensure that assistance, support and protection is provided to victims of trafficking who are also in need of international protection or who wish to apply for such protection, taking into account the victim's individual circumstances*".[929] At the CoE level, the reporting work

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[924] Art. 11(4) EUATD.
[925] See *supra,* Chapter 2, Part 1, 2.2.
[926] European Commission, European Commission, *Proposal for a Directive of the European Parliament and the Council Amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims,* 2022/0426 (COD), art. 11(4) "*Member States shall take the necessary measures to establish by laws, regulations or administrative provisions, national referral mechanisms aimed at the early identification of, assistance to, and support for victims, in cooperation with relevant support organisations, and to appoint a national focal point for the referral of victims*".
[927] See *ivi,* Explanatory Report, 6.
[928] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Preamble, para. 15.
[929] *Ivi,* art. 11(4).

of GRETA has played a major role in encouraging a growing number of State Parties to introduce NRMs within their anti-trafficking regulatory frameworks. At the International level, the integrated, multiagent and victim-centred approach of NRMs is presented as a key best practice of victimological risk management in the advisory documents of IOM, UNHCR and UNODC.

All the said elements suggest that the role of a formalised NRM within national jurisdictions might be investigated in its essentiality to ensure human rights effectivity under art. 4 ECHR, too. In this sense, NRMs have never been addressed in the Strasbourg Court's jurisprudence concerning States' legal-regulatory anti-trafficking duties. Differently, existing NRMs framework have been analysed as the existing institutional structure regulating the concrete activation of regulatory and/or operational response to trafficking-related risk in certain jurisdictions.[930] In order to discuss the relevance of NRMs for what concerns European States' obligation of developing an adequate legal and regulatory framework against trafficking in human beings, the key elements of such a general duty shall be briefly recalled.

In the case of *Rantsev v. Cyprus and Russia*, the Strasbourg Court specified the substance of the legal-regulatory obligation stating that "*the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking*".[931] As already mentioned, the ECtHR jurisprudence refers to the notion of *systemic failure* as the relevant standard of ineffective protection of victims' rights suitable to trigger State responsibility under the legal/regulatory limb of art. 4 ECHR.[932] In this sense, the previous analysis has clarified how preventive institutional arrangements of trafficking risk prevention, including the institution of NRMs and *ad hoc* anti-trafficking authorities, are suitable to influence the delivery of an adequate *protective* response against THB at national and transnational level.[933] It can be thus argued that the actual implementation of an institutional infrastructure against THB within a State interested by general trafficking-related threats shall represent a necessary parameter to be taken into account in the evauation of the existence of systemic failures to protect (P)VoTEs under art. 4 ECHR. Cases of serious harm to individuals' interests of institutional protection against trafficking and severe exploitation can manifest, for instance, as a consequence of a deficient monitoring of general trafficking patterns by National Rapporteurs.[934] An absent and/or late identification of a potential

[930] See most notably the relevant ECtHR art. 4 decisions concerning the UK anti-trafficking legal system: F.A. v. U.K.; V.C.L. and A.N. v. U.K. G.S. v. U.K.
[931] Rantsev V. Cyprus and Russia, §284.
[932] See *supra,* Chapter 2, Part 1, 2.2. See also Stoyanova, *Human Trafficking and Slavery Reconsidered*, 327.
[933] See *supra,* Chapter 3, Part 2, 3.1.
[934] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU in this sense stipulates, with regard to the prerogatives of the newly proposed National Coordinator, at art. 19(1): "*The national anti-trafficking coordinator or the equivalent mechanism shall work with relevant national,*

victim, moreover, is suitable to take place in consequence of organisational deficiencies in the multiagent coordination of the processes of victim detection and referral.[935] The general level of effectivity of an anti-trafficking legal system, in this sense, is suitable to be redescribed in terms of legal-regulatory due diligence.

The empirical, participatory and coordinative *lacunae* which have been variously highlighted in the anti-trafficking strategies of many European Member States in the latest years represent arguably the main target of the NRM approach. A systemic failure in terms of detection, identification and assistance of trafficking victims can in this sense be considered to be still present at the regional level, as testified by Europe-wide evidence-based analyses of the state of the art of trafficking victim protection. The extremely scarce number of formally identified and assisted victims, the ineffective level of transnational cooperation in victim protection, and the serious hardships faced by survivors in accessing critical services for their recovery and reintegration, are crucial indicators of the inadequacy of the standard of protection currently afforded to (P)VoTEs in the European region.

Indeed, the active contrast of an elusive and still largely unknown criminal phenomenon as THB represents a hard task for EU/CoE Member States. The ECtHR has in many occasions clarified that it would be unreasonable and unrealistic to expect from the State an absolute capacity of protecting individuals against any possible trafficking-related-risk. On the same, the inability of anti-trafficking practitioners to *detect* victims in presence of relevant indicators; or to afford survivors a sufficient level of protection once they have already been detected, are arguably matters which call into place the adequacy of legal-regulatory *environments* of protection, i.e. the existence of previously determined social and legal conditions which can be reasonably expected to ensure that individuals can enjoy their rights.[936] In the case of (P)VoTEs, such conditions notably entail the *capacity* of States to detect risks, to identify victims, to prevent retraumatization and to foster recovery, reintegration and redress. Such capacity, as already observed, is arguably the product of expertise, adequate procedures and guarantees, and adequate coordination between all the nodes of the protection function.

regional and local bodies and agencies, particularly law-enforcement authorities, with national referral mechanisms, and with relevant civil society organisations active in this field".

[935] See e.g. the Preamble of Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, para. 15: "*In order to enhance the national capability to detect and identify victims at an early stage, and to refer them to the appropriate protection, assistance and support services, it is necessary to establish, by laws, regulations or administrative provisions, one or several referral mechanisms in the Member States*".

[936] Stoyanova, *Positive obligations,* 173.

In this regard, it shall be noticed that all the key pillars of NRMs (identification, assistance, redress, reintegration) have already been addressed[937] as essential aims of States's obligations of victim protection under European anti-trafficking Law. The laws are, thus, arguably in place, but they do not deliver the protection they are constructed to offer. National referral mechanisms, in this sense, represent best practices in the implementation of what has been addressed as the key preventive function of multiagent *coordination* in the delivery of special anti-trafficking protection, on the one side. On the other side, such mechanisms constitute self-standing systems of rules which outline a comprehensive set of principles and guidelines which shall apply both to multiagent coordination and to the output of the said coordination, i.e. the four pillars of protection.[938] They constitute a legal-regulatory *environment* in the sense that they address protection as an attribute not only of individuals or of rules, but of *systems* themselves and of their aptness of presenting working responses to known, generalised risks to human rights.

In this sense, NRMs constitute a necessary institutional response to the abovementioned systemic failure of European Member States in substantiating their duties of protection at the policy and operational level, and thus fall within the scope of the legal-regulatory limb of art. 4 ECHR. Moreover, the recent introduction of a binding duty of States of adopting NRMs under EU law might provide relevant elements for further innovative developments of the ECtHR case law, too. As already observed, in fact, the Strasbourg Court has often faced considerable hardships in finding a State's systemic failure to protect trafficking victims in its art. 4 jurisprudence.[939] This difficulty depended, in some instances, by the specificity of the complaints of claimants, which often do not include general legal-regulatory considerations of human rights effectiveness. It shall be recalled, nonetheless, that the Court holds an autonomous power of evaluation of legal facts which can well bring it to highlight the existence of other human rights violations than the ones alleged by individual applicants. In this sense, a crucial role in the inactivity of the Court in the identification of systemic failures arguably derives from the absence of an underlying legal guidance concerning the form and method of an expected State institutional response to general risks to art. 4 ECHR.

In many occasions, the ECtHR considered that no failure at the legal-regulatory level was present, because the States concerned had laws in place which criminalised trafficking and which attributed special protection entitlements to VoTs. The overall functioning of State infrastructures of trafficking victim protection was hardly addressed throughout the Court's jurisprudence on art. 4 ECHR. Where

[937] See *supra,* Chapter 3, Part 2.
[938] Kanics, *National Referral Mechanisms,* 304: "*An NRM is a structure comprised of an institutional anti- trafficking framework, as well as an on- going process, where the situation is assessed and capacity built*".
[939] See in this sense, Stoyanova, Separating Protection, 218-19.

this has been done, the Court has only focused on the *direct* harm which victims might suffer from State policies which are not directly connected to the fight against THB, such as the legal discipline of labour migration and the regulation of businesses which operate in sectors knowingly affected by THB. No general account has been provided yet concerning the necessary content of the legal and regulatory arrangements which are directly concerned with delivering protection to (P)VoTEs. It might be hoped that the current consensus concerning the cogency of National Referral Mechanisms as necessary governance structures of protection will provide the Court with a clearer model to refer to in its adjudication of States' efforts of capacity building in human trafficking matters.[940] Such a baseline of standards of protection at the institutional level can be understood to embrace other relevant provisions of the recently adopted amendment of the EUATD, namely the requirement on States – enshrined in the new art. 19a of the directive- to set in place an adequate "*system* […] *for the recording, production and provision of anonymised statistical data to monitor the effectiveness of their systems to combat* [trafficking] *offences*", with the specific determination of the kinds of data to be mandatorily gathered[941] and of a duty of timely transmission of such data to the EU Commission.[942] The same can be said for the new duty of States to adopt National Action Plans (NAPs) against THB (art. 19b of the amended directive)[943]. While most EU MS have currently some sort of national anti-trafficking plan in place currently, this provision is particularly clear in addressing the *minimum content* of any adequate NAP,[944] a specification which might prove particularly useful in European Courts' assessment of Member States' fulfilment of their legal-regulatory human rights obligations.

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[940] This evaluation of States' capacity-building efforts will be strongly favoured by the prospective introduction of a duty of States to identify all relevant authorities involved in the fulfilment of the referral function. See on this the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Preamble, para. 15: "[NRMs] *should identify the participating competent authorities, civil society organisations and other stakeholders and set out their respective responsibilities, including the procedures and the lines of communication*".

[941] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims Art. 19a(2).

[942] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Art. 19a(3).

[943] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Art. 19b(1*):* "*Member States shall adopt by 19 July 2028 their National Anti-Trafficking Action Plans, developed and implemented in consultation with the national anti-trafficking coordinators or equivalent mechanisms referred to in Article 19, with the independent bodies and with relevant stakeholders active in the field of preventing and combating trafficking in human beings. Member States shall ensure that the National Anti-Trafficking Action Plans are reviewed and updated at regular intervals of no more than five years*".

[944] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims Art. 19b(2): *National Anti-Trafficking Action Plans may include the following elements:*
(a) objectives, priorities and measures to address trafficking in human beings for all forms of exploitation, including specific measures for child victims;
(b) preventive measures, such as education, awareness-raising campaigns and training, and preventive measures as part of the emergency response to the risks of trafficking in human beings caused by humanitarian crises, where relevant;

Finally, a crucial component of the NRM model's protection system is represented by its elaboration of States' duties of understanding and addressing trafficking-related-vulnerability. The OSCE Handbook in this sense contains a specific section[945] dedicated to the issue, where the existence of pre-trafficking vulnerabilities, their abuse and further exacerbation through exploitation are addressed as known features of trafficking as a human rights offence. The Handbook in this sense recommends that the said common knowledge is integrated in the development of national strategies against THB and in the training of respondents and Competent Authorities.[946] Such vulnerability is understood to descend not only from personal, relational or societal circumstances, but also from State policies, as has been already highlighted in many ECtHR decisions.[947] The following sections will examine the relevant traces of such a duty of vulnerability-based policing in key sectors of the NRM framework: proactive screening, victim detection, status attribution, referral, service provision, and need assessment.[948]

(c) measures to strengthen the fight against trafficking in human beings, including to improve the investigation and prosecution of cases of trafficking in human beings, and to improve cross-border cooperation;
(d) measures to strengthen the early identification and assistance to, support for, and protection of the victims of trafficking in human beings;
(e) procedures for regular monitoring and evaluation of the implementation of the National Anti-Trafficking Action Plans.

945 OSCE, National Referral Mechanisms, 39.

946 S.M. v. Croatia, first Section, §46.

947 See e.g. Rantsev v. Cyprus and Russia; Chowdury and others v. Greece; Zoletic and others v. Azerbaijan.

948 See again para. 15 of the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: "*A referral mechanism should apply to all victims and to all forms of trafficking offences taking into account the individual vulnerability of the victims*".

2 The capacity to detect victims: proactive screening

As previously mentioned, the OSCE Handbook describes the process of victim protection as a sequence of different phases: the first activation of the NRM is expected to take place after the *detection* of a particular individual as the subject of a trafficking-related-risk. Such a preliminary phase predates the activation of the measures of victim identification and of special assistance and support. This phase regulates the first encounter between (P)VoTEs and *ad hoc* anti-trafficking authorities identified under the NRM. Victim detection, in this sense, can be triggered by a variety of different actors,[949] ("first responders"), which include police and border guards, personnel of hotspots and migrant reception centres, medical practitioners, lawyers, as well as civil society actors, which shall be provided with specialist training for the detection of potential victims.[20]

The process of detection in many cases takes place through first responders' autonomous discovery of signs of THB upon their contact with individuals at risk; the NRM Handbook, on the same, takes into account the possibility that such situation of risk is communicated by (P)VoTEs themselves, who might "self-refer" to anti-trafficking authorities.[21] The detection phase, given the broad and unpredictable variety of cases of its activation,[22] is poorly regulated and proceduralised: its effective implementation largely depends on first responders' diligent evaluation of the possible signs of human rights risk.

In this regard, it shall be recalled that under art. 4 ECHR, the obligation to adopt operational measures to protect (P)VoTEs and the procedural duty to investigate and prosecute THB require national authorities to acknowledge ("ought to have known") those factual elements ("reasonable grounds to believe", "prima facie evidence") that reveal a real and immediate risk under art. 4 ECHR.[950] The said obligations, in other terms, are activated where an *immediate* (individual and/or contextual) trafficking-related-risk exists which is reasonably recognizable by a well-trained professional.[951] As already pointed out, nonetheless, the "encounters" between anti-trafficking authorities and situations of trafficking-related risk cannot be regarded as entirely unpredictable: on one hand, trafficking and severe exploitation generally take place outside of authorities' spotlight, in socially and/or territorially isolated contexts. Trafficked and/or exploited persons, moreover, are unlikely to encounter first responders while they are subjected to abuse, in light of the scarce level of autonomy that they

[949] In this sense, Timoshkina envisages Referral and Assistance Protocols (i.e. the multi-agent operational frameworks from which NRMs are derived) as ideal infrastructures of convergence of all possible "points of entry" of trafficked persons. N. Timoshkina, Health and Social Service-Based Human Trafficking Response Models, in Jones, *The Palgrave,* 685.
[950] See *supra,* Chapter 2, Part. 1, para. 2.2.3.
[951] See *supra* Chapter 2, Part 2, para. 5.

generally enjoy; of their fear of retaliation; and/or of their mistrust in State authorities, which they often associate with a personal risk of criminalization and/or deportation.[952]

In other terms, the due implementation of States' duties of detection shall be understood not only as a matter of technical preparedness, but also crucially as a question of *positionality*, which shall be informed by considerations of vulnerability. The 2022 OSCE Handbook, in this regard, provides an up-to-date guidance of the general, region-wide patterns of societal vulnerability correlated with the emergence of THB: a non-exhaustive list of "populations at higher risk of trafficking" is provided in the document.[953] A similar codification of social and community-based vulnerabilities to trafficking has been recently proposed by the EU Commission[954] and, in the specific context of trafficking for labour exploitation, by the EU Agency for Fundamental Rights (FRA). [955]

Once a general vulnerability to THB has been identified, in other terms, a particularly prompt and diligent response is expected from the State at both the policy and operational level. While, in fact, victim detection is generally understood as a "passive" kind of duty of States in their encounter with *immediate and individualised* trafficking risk, the development of a knowledge concerning the existence of generalised and superindividual vulnerabilities is suitable to influence the determination of States' expected response to the said risk under art. 4 ECHR. In order to build a nation-wide capacity to tackle systemic trafficking-related vulnerabilities, in other terms, States' operational response shall create itself the conditions for individual risk to emerge. "Addressing vulnerability", thus, represents a *rationale* that translates from the field of general prevention policies to operational protocols of risk management at the local level.[956] In this sense, the NRM Recommended Guideline 22 clarifies that States shall fulfil a duty of *proactiveness* in addressing vulnerable populations through both identification of victims and investigation of crime.[957] This form of anticipation of the detection function is commonly known as "proactive screening", i.e., the planned interaction of first responders with target populations with the specific aim of detecting possible signs of trafficking risk and/or victimhood.

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[952] OSCE, *National Referral Mechanisms*,. 109.
[953] OSCE, *National Referral Mechanisms*, 40-41.
[954] See e.g. European Commission, *Study on High-Risk Groups*, *passim.*
[955] See e.g. FRA, *Severe labour exploitation,* 42-45; 46-50.
[956] Stoyanova, *Human Trafficking*: 100: "*The vulnerability of migrants might also require from the national authorities to take a much more proactive approach by not only acting when the matter has come to their attention, but also establishing 'useful detection and reporting mechanisms [which] are fundamental to the effective implementation of the relevant criminal laws'*".
[957] OSCE, *National Referral Mechanisms*, 260: "*Proactive identification and investigations. States should ensure that their approach to identifying victims of trafficking and investigating human trafficking crime is proactive and adequately resourced*".

Proactive screening thus constitutes a specific aspect of the training of local teams and units, which conjugates the general knowledge of ongoing trafficking trends in the concerned areas and para-investigative abilities to be deployed in the course of visits, inspections and interviews. Such competences are highly specific, and are thus unlikely to fall under the tasks of all first responders in a given place.[958] On the other hand, the appointment of specialised anti-trafficking units in local areas, especially where vulnerable socio-economic circumstances and/or populations are known to exist ,represents a crucial aspect of the fulfilment of the obligation to adopt an adequate regulatory framework under art. 4 ECHR.[959] National Action Plans, in this sense, are commonly understood as the policy instrument in charge of constantly reviewing the state of trafficking risk management in a country; and National Rapporteurs and related overviewing bodies are specifically tasked with the duty of continuous evaluation of *systemic* trafficking-related risks to human rights, a central component of which is represented by the evaluation of the actual level of State response in areas particularly exposed to THB. The "investigative" character of proactive screening makes it a function potentially falling under the competences of national police authorities and labour inspectorates: in this sense, it is frequent that specialised anti-trafficking units are developed within such authorities; or that a general training is provided to all police officers and/or labour inspectors who are acting on the field in areas where a general trafficking risk is known to exist.

Given the importance of proactive screening for the creation of an effective State capacity to detect trafficking-related-risks, it is necessary to investigate whether and how such duty is likely to fit in the scope of State human rights duties of (P)VoTEs protection. First of all, under the *procedural* obligation to investigate and prosecute THB under art. 4 ECHR, the States are required to *proactively investigate* instances of potential trafficking wherever an *arguable claim* of a real and immediate risk under art. 4 ECHR is present. The concept of "arguable claim", in turn, does not necessarily that victims expressly communicate the existence of such risk to State authorities.[960] On the contrary, "arguable claims" are understood to include also the existence of *visible indicators* of an immediate trafficking-related risk on the ground, which can be observed and autonomously evaluated by State authorities.[961] On the same, the procedural obligation has sofar been interpreted to apply only to

[958] Rantsev v. Cyprus and Russia, §287.
[959] See in the particular context of labour exploitation FRA, *Protecting Migrant Workers,* 9: "*Member States should train staff engaged in monitoring workplaces to understand and assess risk factors for criminal forms of labour exploitation in practice – including how to question workers and inform them about their rights where they suspect such exploitation. Monitoring bodies should organise their work in line with these factors, allocating resources according to the level of risk identified in their risk assessment/analysis*".
[960] Rantsev v. Cyprus and Russia, §288.
[961] See e.g. V. Stoyanova, Separating Protection from the Exigencies of the Criminal Law. Achievements and Challenges under Article 4 ECHR*,* in L. Lavrysen, N. Mavronicola, *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law Under the ECHR,* Hart 2020, 209.

criminal justice investigations and procedures. In this sense, as previously highlighted, the duty proactive screening is often inserted within the prerogatives of police authorities, and it's conducted, for instance, during police raids aimed at arresting potential trafficking suspects.[962] This overlap between the risk screening and prosecutorial anti-trafficking functions is arguably necessary, especially in situations where only the deployment of the public force can contrast situations of widespread violence, and ensure a prompt rescue of victims from serious situations of abuse.[963]

This nonetheless, investigation and proactive screening constitute two significantly different functions for what concerns their *aims* under human rights law: the reconstruction of *criminal facts* and correlative affirmation of a criminal responsibility, on one side; the early alert detection of individuals at risk, on the other. In this sense, the function of proactive screening, irrespective of the authority which is materially tasked with its exercise, shall be read as part of States' positive obligation to adopt *operational measures to protect* trafficking victims and/or potential victims.[964] This qualification can well prove problematic when it comes to the cogency of proactive screening under the ECHR, given that the field of application of the "operational obligation" has been traditionally limited to the cases where a real and immediate risk *of an identified individual* is present. Conversely, proactive screening represents a function which has been developed precisely in response to the significant unlikelihood that authorities tasked with protection get casually into contact with "identified individuals" which carry visible trafficking-related-risks without any prior investigation of the source, context and societal effects of the underlying threat.[965] In this sense, it seems unreasonable that, where credible allegations are present concerning a superindividual *real and immediate* trafficking-related risk which gives rise to a State duty to investigate, correlative operational duties of protection of (yet undetected) trafficking victims are not parallelly affirmed. [966]

The Strasbourg Court's decision of *Chowdury and others v. Greece* in this sense has provided a reelaboration of the requisite elements of States' operational duty to protect under art. 4 ECHR. The Court in this case has attributed relevance to the "common knowledge" of the vulnerability of irregular migrant workers to blackmail and severe exploitation, and to the general evidence concerning the existence of a particularly widespread threat of labour exploitation of irregular migrants in the Greek region of Manolada.[967] The absence of any reaction from local police authorities for what concerns the delivery of emergency assistance to the said vulnerable population

[962] OSCE, *National Referral Mechanisms*, 59.
[963] ECtHR, S.M. v. Croatia (Grand Chamber), §134.
[964] See in similar terms V. Stoyanova, *Human Trafficking and Slavery*, 366.
[965] See e.g. Greta, 1st Report Italy, para. 97.
[966] See UNGA, *Report Special Rapporteur* (2020), point 7.
[967] Chowdury and others v. Greece, §114.

was evaluated to constitute a violation of Greek authority's obligation to adopt adequate operational measures to protect trafficking victims and potential victims.[968]

While such decision does not expressly affirm the duty of first responders to proactively screen and detect individuals at risk of THB, *Chowdury and others v. Greece* has provided a particularly innovative *dictum* where it stated that the operational duty to protect under art. 4 ECHR can be triggered *also* in presence of a ultra-individual risk of exploitation;[969] and that State responsibility under art. 4 ECHR in this regard is closely connected to presence of an actual power to act of local authorities in the face of signs of vulnerability. The subsequent decision of *V.C.L. and A.N. v. U.K.* has further confirmed the existence of relevant operational duties which pre-date the encounter between a State and an "identified individual" at risk under art. 4 ECHR. The Strasbourg Court in this sense has specified that the operational limb of art. 4 ECHR includes not only *protection,* but also *prevention* measures. Operational "*prevention measures*" is specifically defined as including States' duties of strengthening the coordination between various anti-trafficking bodies and of discouraging the demand for all forms of exploitation of persons. Operational "*protection measures*", on the other side, "*include, among others, facilitating the identification of victims by qualified persons*".[970] In this regard, proactive screening can be considered as a form of transversal duty of early alert response to trafficking-related risk which can prove essential both for the prevention of trafficking-related offences and to facilitate the identification of victims under art. 4 ECHR.[971]

On the same, the operational duty of proactive screening shall be understood as necessarily limited for what concerns the burden it can impose on State authorities: chasing any possible risk of trafficking or exploitation along and across State territory evidently amounts to a extremely demanding task which cannot reasonably be expected from State authorities. As already mentioned, such duty shall be made the object of strategically identified and situated units among anti-trafficking personnel, specifically tasked with the reaction to severe super-individual manifestations of trafficking risk. Where a general risk manifests in an area where no authority is reasonably in the condition to acknowledge and/or react to it, a violation of human rights is clearly present, but it shall

[968] Chowdury and Others v. Greece, §115.
[969] See in this sense, *mutatis mutandis,* the Dissenting Opinion of Judge Pinto de Albuquerque in the case of Valiuvene v. Lithuania: "*If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities*". For an earlier affirmation of the existence of an operational duty to protect art. 2 ECHR in presence of superindividual risks, see ECtHR, Mastromatteo v. Italy, §74. For a general analysis of the evolution of the Court's elaboration of the said operational duty under the point of view of the relevant risk, see Stoyanova, *Positive Obligations,* 206-207
[970] ECtHR, V.C.L. and A.N. v. U.K., §153.
[971] OSCE, *Identification of Potential*, 22.

be addressed under the different State obligation of adopting of an adequate regulatory framework to tackle THB.[972] The emergence of an operational duty under art. 4 ECHR, in other terms, presupposes the existence of a relevant *proximity* between victims and first responders, which shall be reconstructed on a case by case basis.[973] Such proximity shall be understood as descending from the *evident* character of the risk concerned; its *seriousness*; and the *reasonable capability of response* held by the considered authority.[974] National Referral Mechanisms as commonly shared guideliness of State preparedness vis-à-vis trafficking related risks, in this sense, constitute suitable sources for distinguishing cases of State failures at the legal-regulatory and/or at the operational level in the field of detection of trafficking victims and/or potential victims.

Some specific considerations for what concers the issue of proximity, finally, shall be made for what concerns the detection of trafficking victims in contexts where a *direct control* of State authorities is exerted on a certain group of individuals. The ECtHR jurisprudence, in this sense, has frequently provided examples of individuals who, before being identified or self-detecting as trafficking survivors, had spent long periods of times in close contact with State authorities in contexts such as asylum procedures, administrative detention, criminal justice procedures, migrant reception centres, often remaining undetected. In these cases, the element of a sufficient proximity between State authorities and trafficking-related-risks can be presumed, wherever visible sign of such risk are found to be objectively present in a specific case.

Moreover, where, as in the cited forms of direct State control on discrete population groups, a common knowledge exists concerning the frequent presence of (P)VoTEs within the concerned population, State authorities shall necessarily address such a knowledge as entailing both a general trafficking-related risk *and* a superindividual vulnerability of the rights-bearers concerned to ineffective access to identification and protection. A clear mandate of proactive risk prevention through the detection and subsequent assistance of VoTs and individuals at immediate risk of trafficking thus clearly emerges in these contexts. The adequate pris en charge of superindividual trafficking-related risk and vulnerability, in this sense, does not only constitute a crucial corollary of Sates' *positive* duties of victim protection under art. 4 ECHR; but it also constitutes a crucial precondition for ensuring that that legal and administrative procedures where individuals are subjected to States' direct control don't come to produce harmful consequences on (P)VoTEs.

[972] See in this sense V. Stoyanova, *Positive obligations*, 216.
[973] V. Stoyanova, *Human Trafficking and Slavery*, 327.
[974] See e.g. ECtHR, *Ribcheva and others v. Bulgaria,* §186.

3 Trafficking victims detection: the role of indicators and risk factors

The duty to detect traces of trafficking-related risk is not explicitly regulated in European law, nor are the methods or techniques of such an operation.[975] Nevertheless, the developing practice of frontline actors along the years has clarified that, in order to adequately fulfil their human rights based duties of victim protection, Stare shall develop a sufficient understanding of what constitutes a potential trafficking situation, what amounts to a sign of trafficking, and how are such signs to be grasped operationally.[976]

Supranational organisations, in this sense, have frequently signalled[977] the existence of a "preparedness deficit" in European States' detection of (P)VoTEs, a deficit which descends not mainly from the lack of working operational protocols and trained personnel on the ground.[978] The technical character of protection, and especially the existence of *ad hoc* Standard Operating Procedures for the detection of trafficking victims, arguably represent crucial components of States' obligation to adopt an adequate legal and regulatory framework to contrast trafficking. This necessity has been clearly highlighted in recent amendment of the EUATD, with the introduction of an express duty of States Parties to adopt NRMs within their domestic anti-trafficking frameworks.[979] The development of a national capacity to detect (P)VoTEs, in other terms, represents a crucial response to the "vulnerability to misrecognition" of trafficking survivors, a condition of systemic disadvantage wich has been observed to characterize this category of individuals for what concerns the *effectiveness* of their enjoyment of human rights under the ECHR.[980]

The most common instruments deployed to foster effective human rights protection in this phase are lists of indicators, screening models, interview forms and factsheets which are used by first

[975] The function of early detection of trafficking victims has been, nonetheless, directly addressed in the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. Paragraph 5 of the recalls the European Commission Communication of 14 April 2021 on the EU Strategy on Combatting Trafficking in Human Beings 2021-2025, which had highlighted a number of shortcomings of the *criminal law response* of EU Member States to THB, which are understood to relate to, among others, "*the national systems aimed at the early detection and identification of, specialised assistance to, and support for victims of trafficking*".
[976] European Commission, *Study on reviewing the functioning of Member States' National and Transnational Referral Mechanisms*, HOME/2018/ISFP/PR/THB/0000, 2018, 38.
[977] EMN, *Third Country Nationals,* 26: "*Several EU Member States and Georgia cited an overall lack of capacity at national and local level in detecting possible situations of trafficking in human beings*".
[978] Rijken, *Secondary Victimisation*: "*Typically, three types of problematic circumstances can be distinguished with regard to victim identification*. […] *The first circumstance addresses the inability to identify victims of human trafficking due to the failure of professionals to recognize the signals*".
[979] See *supra,* 1.
[980] See *supra,* Chapter 3, Part 2, 3.

responders as methods of detection of arguable trafficking cases.[981] Anti-trafficking indicators are *tools* which are developed through a plurality of sources. They generally feature a list of factual grounds which singularly or jointly are suitable to reveal situations of *risk to trafficking* (so-called risk factors)[66] or past experiences of trafficking victimhood (human trafficking indicators *strictu sensu*).[982] Lists of possible indicators and risk factors are frequently distributed among first responders, who shall be specifically trained to observe these signs in their daily activities.[983] While the diligent use of the said methodologies of victim detection represents a key component of States' operational duty to prevent trafficking and protect trafficking victims, all available documents of guidance concerning the use of such tools, on the same, point out that lists of indicators and risk factors constitute mere sketches of the factual grounds of trafficking risk that might be present in real life cases.[984] Indicators and screening models, in other terms, do not constitute rigid rules for the determination of trafficking victim status. On the contrary, they are generally presented as a form of technical aid which must be always adapted to the peculiarities of the specific situation where they are used.[985] Such tools must not to be conceived as proofs of the existence of a trafficking-related-risk or of a credible experience of victimization, but rather as *indicia,* elements to be taken into account within the said evaluation of risk and/or of past victimhood.[986] They shall be sidelined with an in depth examination of each individual case, possibly through the conduction of an interview with the detected person.[987] Moreover, the OSCE Handbook specifies at its Recommended Standard 23 that trafficking indicators "should be regularly reviewed and updated to ensure that they are current as trafficking crime is constantly evolving into new patterns, methods, of operation and targeting of victims".[988]

What are the connections between these forms of trafficking risk assessment and vulnerability? This question is arguably poignant, considering that the lexicon of vulnerability is variously deployed in several systems of indicators which are currently adopted in a number of European countries.[68] Specifically, early models such as the IOM Counter-Trafficking Module on Victim Identification[989]

[981] Timoshkina, Health and Social Service, 11. See also European Commission, *4th Report*, 13 for recent updates concerning EU Member States' recent arrangements in bolstering their early detection and identification capacity through the local and/or nation-wide adoption of the cited technical tools.
[982] EMN, *Third-country nationals*, 23.
[983] European Commission, *Study on Reviewing*, 38.
[984] OSCE, *National Referral Mechanisms*, 124. See *mutatis mutandis,* ECtHR, Kurt v. Austria, §159.
[985] See OSCE, *Identification Potential Presumed Victims*, 55.
[986] See e.g. United Nations Office on Drugs and Crime, *Anti-human trafficking manual for criminal justice practitioners,* Module 2, New York, 2009, 2.
[987] Rantsev v. Cyprus and Russia, §296.
[988] OSCE, National Referral Mechanisms, 260.
[989] OSCE, *Identification Potential Presumed Victims*, 84.

and the ILO-European Commission delphi indicators[990] present a structure which is built starting from the supranational (criminal) definition of trafficking in human beings: indicators are thus divided into categories of signs which are understood as suitable to help *law enforcement agencies* to detect the acts, means or purposes of trafficking, and to use such signs to bring perpetrators to justice. In such law enforcement – oriented models, vulnerability is exclusively taken into account as an element of the specific means of APOV,[991] and it is thus expected to be revealed through factual signs of relational dependency and/or disadvantage, absence of alternatives. These detection tools have been frequently deemed ineffective in ensuring an adequate safeguard of the protection interests of (P)VoTEs, in light of their exclusive criminal-prosecutorial focus.[992]

The UN Special Rapporteur Against THB in this sense has recently urged[993] States to adopt models of identification which are centred on detecting individual vulnerabilities to trafficking and to exploitation. This model of vulnerability policing associates the detection of trafficking-related-risks with the response of systemic risks of explloitation, such as precarious work conditions, social isolation, irregular migrant status, etc..[994] Trafficking-related-vulnerability is thus here understood as a *situational* marker of human rights risk, suitble to connect an *ex ante* situation of exposure to private offences with an actual condition of abuse. Indicators of *vulnerability to trafficking* are thus sidelined with more specific indicators of *trafficking victimhood*, such as signs of beatings, relational intimidation, evidence of restriction of freedom of movement, etc.[995] In several risk screening models of this kind, indicators are ubderstood as crucial instruments of victim-centred protection. A central aspect of this understanding lies in the shift from a group based, formal conception of vulnerability to a source focused, operational approach to human rights *needs.*[996]

[990] International Labour Office, *Operational indicators of trafficking in human beings. Results from a Delphi survey implemented by the ILO and the European Commission,* September 2009, available at https://www.ilo.org.
[991] See *supra,* Chapter 2.
[992] Such a methodology, moreover, has been considered to have the unreasonable effect of 'singling out' ideal trafficking victims from composite and ambiguous pools of individuals who in real life happen to live in exploitative of exploitation-prone situations, thus rendering the actual perspective of detection concretely unrealistic. See UNGA, *Report Special Rapporteur* (2020), point 6, where the then UN Special Rapporteur cites the contribution of a number of experts cited on this specific aspect.
[993] UNGA, *Report Special Rapporteur* (2020), point 14: "*A new model is needed, organized around the detection of vulnerabilities to trafficking and exploitation, which is founded on the recognition that exploitation has structural features that should be detected at an early stage and on the understanding of vulnerability as shaped by discrimination and by the inability of a person to gain access to social protection and effective remedies*".
[994] See for a recent endorsement of such a detection methodology by the ECtHR, V.C.L. and A.N. v. U.K., §99 and §117.
[995] The OSCE in this sense operates a distinction, drawn from the earlier operational experience of La Strada, between "direct" and "indirect" trafficking indicators: see OSCE, *Identification of Potential and Presumed Victims*, 54: "*Direct indicators correspond to some part of the definition of human trafficking. Indirect indicators are based on current trends, data derived from real cases, research, etc.*"
[996] International Organisation of Migration, *Understanding migrant vulnerabilities and capacities: a framework for analysis and programming,* 6 June 2017, S/20 /8,point 16: "*IOM proposes a more comprehensive understanding of vulnerability, one that does not focus solely on protected categories of migrants or on the migrant's membership in* a *particular group, but instead complements that approach with a more complete understanding of the factors that*

The most widespread articulation of such a rationale is found in the recently developed IOM "Determinants of Vulnerability" model, which has been largely deployed in the targeting of trafficking risk both inside and outside of Europe's borders. This model conceptualizes vulnerability as: "*the diminished capacity of an individual or group to resist, cope with or recover from violence, exploitation, abuse and/or rights violations. This vulnerability is determined by the presence, absence and interaction of factors or circumstances that increase the risk of and exposure to, or protect against, violence, exploitation, abuse and rights violations*".[997]

Other detection models, finally, combine group-based and needs-based considerations their methodologies. It is the case of the collaboration between the Teramo Court in Italy and the Ontheroad Onlus ("Teramo Protocol"), which operates through the frontlining of particular "vulnerable categories" (irregular migrants, women, elderly people, unaccompanied minors, irregular workers). First responders are expected to be particularly alert when it comes to these vulnerable categories: specifically, they shall be aware that the situation irregular migrants, irregular workers, sex workers and unaccompanied minors, among others, is particularly likely to hide a potential trafficking risks and/or experiences of trafficking victimisation. In this sense, the belonging to a vulnerable category in the process of assessment is equated in its suitability to reveal a relevant risk to human rights to the situation of individuals who are found to present two or more "risk indicators" after a personal assessment.

These examples can be of use in the evaluation of the role of vulnerability policing within the process of detection of (P)VoTEs under at least two aspects. Indicators, as potential *indicia* of an invisible vulnerability, risk or offense, represent an official taxonomy – even if partial and not normatively cogent – of what the Strasbourg Court defines as "*reasonable grounds to believe that an individual is or was at real and immediate risk of being a victim of trafficking or of exploitation*".[998] Thus, the adoption of guidelines and technologies of risk screening represents an essential component of the duties of *professionalisation* of first responders and Competent Authorities under human rights law.[999] Moreover, the detection of individuals at risk must not only be favoured through the deployment of an expertise, but it shall also follow sufficiently uniform standards which allow

contributed to the vulnerability of the individual migrant or group of migrants, and the resources and capacities they can mobilize to resist or recover from their vulnerability. That understanding would apply at any stage of the migration process and in any context".

[997] *Ibidem,* 18.

[998] See *supra* Chapter 2, Part 2, 5.

[999] United Nations Office on Drugs and Crime, *Model Legislative Provisions Against Trafficking in Persons*, Vienna 2020, 57: "*The development of legally mandated guidelines on victim identification for State entities, including law enforcement, border guards, immigration officials, labour inspectors, social welfare officers, child protection officers, educators, medical practitioners, diplomatic and consular staff is critical to the effective implementation of anti-trafficking responses, including the identification of victims*".

different personal screenings not to be incoherent with another. The adoption of a common baseline of rules at the national level for the detection of victims and people at risk of trafficking clearly falls within States' positive obligation to adopt an effective *regulatory framework* under art. 4 ECHR.[1000]

The form of the said national guidance must arguably be adapted to the peculiarities of the function it regulates: considered the multi-agent and context-specific scenarios where detection is usually conducted, it might be argued that a top-down imposition of rigid methodologies of trafficking-related risk assessment might hamper the effectivity of the work of first responders.[1001] The NRM model in this sense provides for an adequate differentiation of the detection and screening models adopted by different authorities so to capture the peculiarities of the specific forms of abuse, victim profiles and types of demand which are of relevance in each context of anti-trafficking cooperation. This nonetheless, a fundamental component of the comprehensive human rights based european framework against trafficking is the effective protection of the situation of people exposed to trafficking-related risk. In this sense, National Referral Mechanisms shall identify at least the basic coordinates of the detection function, expliciting its aims, methodological standards, and the relevant associated guarantees recognised to those undergoing screening and risk assessment.[1002]

Moreover, the OSCE NRM Handbook contains various standard operating procedures, (SOPs) which clarify the essential methodological bases of indicators operationalization, as well as the importance to be attributed to such indicators in the further identification phase. Given the transnational character of THB and of the obligations to contrast it, it has been frequently advanced that an adequate insterstate cooperation in the field of trafficking prevention and victim protection must necessarily rely on a shared multinational set of operational indicators and on an agreed upon methodology for their operationalization.[1003] Similar conditions of Europewide harmonization might be reached through the effective development of the abovecited project of a Transnational Referral Mechanism.

This said, asecond profile of relevance concerning victim detection under human rights law must be considered. The previous analysis has shown that even the most commonly adopted guidelines for the detection of trafficking risk notably differ for what concerns the target (crime / protection needs),

[1000] See e.g. European Commission, *EU Strategy Against Trafficking in Human Beings,* 2012, 19.
[1001] This issue emerges as even more salient if we consider that the development of effective technologies of detection is a continuous process which is increasingly developing in anti-trafficking projects europewide. The role of publicly funded pilot projects is arguably key in the advancement of such a whole-of-society enterprise: these projects by definition adopt innovative methods which are not mandated through national legislation or regulation. See European Commission, *Study on Comprehensive policy review of Anti-Trafficking Projects funded by the European Commission. Final Report*, HOME/2014/ISFP/PR/THBX/0052.
[1002] Several NRMs indicate a general list of common trafficking indicators, suitable to be integrated and evaluated in their salience through the deployment of more context-specific professionality at the local/project level.
[1003] See in this sense ILO, *Operational indicators,* 2.

the modalities of screening (with or without the use of personal interviews) and the methods of risk-guessing (indicators operationalization / vulnerability-oriented screening). While the determination of the "how" of detection function constitutes the object of wide State discretion, European law explicitly provides that Member States' approach to the identification of VoTs shall be human-rights-based and victim-centred.[1004] From this arguably descends that the *indicia* used for the detection of VoTs shall not focus solely on emerging elements of *crime* in the inspected material reality; the victim-centred character of the duty of victim identification requires, on the contrary, that detection models give proper relevance to indicators of relational-situational risk of exploitation and/or secondary victimization as well. Both indicators of victimhood and risk factors, in other terms, must be included in national anti-trafficking rules, so to fulfil Member States' regulatory obligation under art. 4 ECHR. The detection function, in this sense must be understood as encompassing a multitude of categories of beneficiaries. While the ECtHR jurisprudence provides for the adequate detection of any individual who is at real and immediate risk of a violation of art. 4 ECHR (people at risk of trafficking and/or of severe exploitation, victims of trafficking and/or of exploitation);[1005] it has been furthermore argued that the detection and referral functions shall be extended to cognate categories of interpersonal domination such as gender-based and domestic violence, in light of the strong overlappings between such criminal offenses, THB and severe exploitation; and of the similarity of the protection needs of the survivors of this group of offenses.

A third and last aspect to be considered under a human rights based analysis of the detection function is the nexus intercurring, within the NRM model, between indicators operationalization and the discovery of the *empirical* vulnerabilities of the detected individuals. As previously observed, the terminology of trafficking risk screening models has embraced a notion of vulnerability, intended as those (situational or personal) characters of a person which render them more easily subjected to THB. Differently, victim protection under art. 4 ECHR relies on a notion of vulnerability which covers a different and broader spectrum of individually mediated risks, which include forms of particular exposure, susceptibility and/or of disempowerment towards threats of repeat *and/or secondary* victimization. The relationships between indicators, risk factors and vulnerabilities must therefore be explored in such a perspective. As previously mentioned, risk factors and indicators constitute officially predetermined *reasonable grounds* of trafficking victimhood and/or risk. Trafficking victimhood, in turn, is reconnected by law to the emergence of several protection needs which are required to be met through the activation of special anti-trafficking protection and assistance guarantees. Indicators and risk factors are thus plausible empirical manifestations of a

[1004] See *supra,* Chapter 3, part. 2.
[1005] See *Supra,* Chapter 3, Part 2, 2.1.

victimological risk and the encounter between a first responder and a potential victim constitutes a relevant moment for the affirmation of a State's *knowledge* of reasonable grounds of trafficking-related-risk.

In this sense, VoTs detection through indicators operationalisation entails an affirmation of the "reasonable existence" of special protection needs, needs which usually at the moment of detection are still largely unknown in their specific content and which will be determined only through the further implementation of the risk/vulnerability *assessment* function.[1006] Indicators and risk factors thus can be seen as factual signs of an arguable protection need which awaits to be further inspected and which finds its basis in the survivor's empirical vulnerability. Such vulnerability is inevitably individualized and emerges after a process of assessment. This nonetheless, the first encounter between a trafficking victim and a responder can often display at least some of the relevant sources of empirical vulnerability of the individual, in terms of fear, intimidation, trauma, emotional and/or material dependency on perpetrators, precarious legal status, socio-economic disadvantage, etc.[1007] In some cases, moreover, the manifestation of an empirical vulnerability during the screening process can be recognised as a reasonable grounds of victimhood by first responders.[1008] Such early signs of empirical vulnerability will constitute crucial elements to be transmitted as soon as they emerge within the process of referral.

[1006] See *infra.*
[1007] See e.g. Rantsev v. Cyprus and Russia, §295-296.
[1008] ICMPD, *The Strength to Carry On. Resilience and Vulnerability to Trafficking and Other Abuses among People Travelling along Migration Routes to Europe,* 2019, online, available at www.icmpd.org, 70: "*The relationship between contexts of general vulnerability, specific vulnerability to trafficking, and indications of actual trafficking cases is understood as overlapping in the context of the study, where large numbers of people are experiencing general vulnerabilities. This is not to suggest that all of those affected by these factors of general and specific vulnerability are being or will be trafficked. Rather, in certain specific cases, situations of vulnerability to trafficking can present indications of actual trafficking cases, which, in turn, on further investigation by officials, may be determined to constitute the crime of human trafficking*".

4 The referral function

The NRM model relies in its key functioning on the process of *referral*, i.e. a form of inter-agency communication which **"***links the first entity in contact with a victim to a relevant victim support provider. Its main objective is to ensure that all all those who need and will benefit from support are offered assistance from support services*".[1009]

The emergence of referral as a technique of victim-centred awareness raising can be observed in most European countries and with regard to various forms of crime: as previously discussed, the EU 2012 Victims Rights directive provides at its art. 8(2) that "*Member States shall facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services*".[1010] While referral function is thus expected to be activated for *all* victims of crime, special forms of referral are currently present in several EU MS for (P)VoTs, victims of domestic violence and child victims.[1011]

The subjects of referral can be thus identified in i) a referring entity; ii) a receiving entity and iii) a referred person. Concerning the referring entity, while the current analysis is specifically considering the situation of referrals made by *first responders*, it must be clarified that NRMs foresee the activation of a series of subsequent referrals also at further stages of VoTs assistance and support. Referral, in other terms, represents the core method of multiagent *pris en charge* of (P)VoTEs during the whole period of protection.

Considering the receiving entity of referral, a distinction can be drawn between a referral to victim assistance *services*, on the one side; and a referral to trafficking-related *procedures*, on the other. Thus, while at the stage of detection the victim will be firstly asked about their willingness to receive medical, material or psychological assistance through specialised services; the first referral represents, on the same, the stage where a consent is asked to the victim for what concerns the communication of their case to a Competent Authority, and the subsequent activation of the identification procedure.[1012] While victims' access to the legal procedures in the aftermath of THB (international protection; criminal justice; civil procedures) is addressed under the NRM model as a medium-term need of the individual, which is best responded to after the granting of a recovery and reflection period; it can well happen that individuals express the will to be referred to such procedures immediately upon referral, maybe simultaneously refusing to be assisted through the NRM. Referral in this sense must be seen as an adaptable bridging service that is activated through the creation of a

[1009] Carmo *et al., Manual for Effective Referrals*, 6.
[1010] *Ibidem.*
[1011] *Ibidem.*
[1012] This form of referral does regularly not apply, for example, to those individuals who are detected as *at risk of trafficking*: see supra.

proximity between (P)VoTEs and first responders. Moreover, as previously observed the first contact between assistance-bearers and service providers can take place through the self-referral of the (potential) victim themselves.[1013]
For what concerns the subjects of referral, the previous considerations concerning the scope of the protection function suggest that presumed victims of trafficking in human beings, presumed victims of severe exploitation and people at real and immediate risk of trafficking or severe exploitation shall be included in the referral function, as carriers of largely overlapping protection needs.[1014]

The previous sections have shown that the formal regulation at national level of the key functions of (P)VoT protection is an essential component of the adequacy of European States' legal and regulatory framework under art. 4 ECHR.[1015] On the same, the determination of a standard of legal-regulatory adequacy for what concerns domestic rules on referral constitutes a challenging task. In this sense, while the referral function has been largely analysed and progressively refined in clinical literature and soft law instruments, the EU/CoE legislation and case law[1016] have sofar remained tellingly silent on this particular duty. This is all the more worrying, considered that serious shortcomings and *lacunae* are currently present in the current implementation of referral duties in several EU-CoE Member States.[1017]

Yet, the CoE Convention requires States Parties to "*ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure*" and to "*adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations*".[1018] The said objectives arguably lie at the core of the referral function as a community-wide, early-alert awareness-raising method. Moreover, as already seen, the recent recast of the EU Anti-Trafficking Directive envisages the introduction of NRMs in all national jurisdictions as a key component of States' duty to institutionally foster victim identification, thus apparently validating the thesis of the necessity of a referral-based infrastructure to adequately tackle THB nation- and Union-wide. This paragraph will thus outline the key objectives, modalities and limits of the referral function, drawing on the current

[1013] Such spontaneous forms of need signalling can be encouraged through the adoption of already discussed forms of trafficking prevention: see e.g. Carmo *et al. Manual for Effective Referrals*, 9.
[1014] This is for instance the approach to referral adopted under Italian law: see for a recent contribution, M. Flamini, E. Masetti Zannini 2023, *La protezione dei cittadini stranieri vittime di sfruttamento lavorativo,* L'Altro Diritto Rivista 6, 2023, 125.
[1015] I. Orfano, *Guidelines,* 37.
[1016] Even the qualification of absent referral as a human rights violation represents a very recent addition to the ECtHR art. 4 jurisprudence: see Stoyanova Commentary G.J. v. Spain; see V.C.L. and A.N. v. U.K.
[1017] Carmo et al., *Manual for Effective Referrals,* 3.
[1018] ECAT, art. 10.

best practices and with a particular attention to the role of vulnerability a as a necessary referent of an effective system of referral human rights law.

The first and foremost objective of referral consists in the activation of the broadest and most effective protective response possible once a situation of trafficking-related-risk comes to arise in a given regulatory system. Victim protection, as repeatedly stated, necessarily entails the response to individuals' *special needs,* which are still largely unknown at the moment of the first referral.[1019] Referral, in other terms, represents a State duty meant to alleviate the hardships faced by (P)VoTEs in their access to recovery and reintegration, thus constituting a necessary response to the categorial vulnerability of trafficking victims. The salience of institutional abandonment of VoTs in the absence of referral protocols is thus officially associated to the existence of administrative and beaurocratical barriers to an effective victim-centred service provision and of the absent delivery of crucial information to victims about their entitlement to special assistance and support.

This said, while referral represents the dedicated procedure for channelling (P)VoTEs to identification and special protection and support, this procedure is on the same understood as necessarily adaptable to the preferences of victims.[1020] In this sense, the forms and limits of a State's *pris en charge* of a presumed or potential victim must be seen as a fully negotial process, where the individual is offered a number of services and procedural avenues and freely chooses whether to enter an NRM and to be identified; to access only targeted forms of assistance; to proceed against their trafficker; to file a request for international protection, assisted voluntary return, etc.[1021] The victim-centred character of the procedure in this sense entails a relevant duty of *transparency* of first responders – and of subsequent referring authorities – in their interactions with survivors: such a duty entails specifically the creation of a relationship of trust with the victim,[1022] through the adoption of trauma-informed operational protocols.[1023] A central aspect of this approach consists in the binding affirmation of a duty of *confidentiality* for all first responders, which shall be communicated to victims immediately upon detection.[1024]

[1019] See *supra,* para. 3.
[1020] Carmo *et al., Manual for Effective Referrals*, 19.
[1021] In the current practice, a distinction is often drawn between an "opt-in" and a "opt-out" model of referral: Carmo *et al., Manual of Effective Referrals,* 9-10 .
[1022] OSCE, 27.
[1023] In recent years, several models of trauma-informed codes of conduct for anti-trafficking practitioners have been developed: see e.g. R. Witkin, K. Robjant, *The Trauma-Informed Code of Conduct. For all Professionals Working with Survivors of Human Trafficking and Slavery*, available at www.helenbamber.org.
[1024] OSCE*, National Referral Mechanisms*, 84.

Concerning the timing of referral, the victim-centred character of the function necessarily entails a requirement of *promptness*: [1025] referral thus is necessarily activated immediately after the detection of a (P)VoT by a first responder and before a subsequent identification takes place. Such immediate entitlement to referral of all individuals at risk under art. 4 ECHR to a prompt referral represents a central tenet of the *unconditional* and *need-centred* characters of (P)VoTs protection.[1026]

A distinguishing aspect of referral as a widespread awareness-raising function resides in its reliance on multiagent partnerships: the 2022 NRM Handbook in this sense requires that inter-agency cooperation agreements clearly define the roles and the tasks of each actor involved in referral and that they create clear channels and protocols of communication and information sharing. This objective is addressed as the specific target of so-called "*Operational Partnership Protocols*" (OPPs).[1027] Under a different point of view, the existence of multiple entry points in the referral system (first responders; competent authorities; self-referral); and the variability of the amounts of detected people by the same authoritiy at different time stages arguably require a due organisation of the entries among the different actors and the introduction of adequate guarantees to prevent case overload. In some jurisdictions, ad hoc "focal points" are identified as competent to administrate the function of referral as their principal task. The relevant literature tends to recommend the adoption of a unique computerized system of referral, in order to favour a quick and uniform performance of the function.[1028] For what concerns the procedure to be followed for the determination of a victim's pris en charge by victimological services upon detection, recent reports encourage the initial referral of the individual to generic victim support services which later conduct an individual need and vulnerability assessment; on the basis of such an assessment, a further referral will be made to more specialist services. The interplay between the phases of referral and need/vulnerability assessment thus constitutes an essential juncture in the process of determination of an adequate victim-centred assistance.[1029] It is essential that a scheme of such a sequence of phases is included in NRMs standard operation procedures or similar nation wide protocols.[1030]

[1025] Carmo *et al, Manual for Effective Referrals*, 18.

[1026] The risk of a recourse to conditionality in the enablement of (P)VoTs' access to victim support services has been observed in P. Roth, B. H. Uhl, M. Wijers, W. Zikkenheiner, 2015, *Data Protection Challenges in Anti-Trafficking Policies. A Practical Guide,* available at www.kok-gegen-menschenhandel.de, 71.

[1027] *OSCE, National Referral Mechanisms*, 20 "*Operational Partnership Protocols (OPPs) should be used to clearly define the purpose and co-ordination of a joint working relationship while ensuring the maintenance of each party's independence within the mandate and remit of their role. OPPs can create and maintain integral and direct links within NRMs, between law enforcement authorities, statutory services, national child protection systems and healthcare services*".

[1028] Ivi, 21.

[1029] See infra, 7.

[1030] It must be noted that several national and supranational models of referral lack a similar detailed proceduralisation through SOPs.

While, then, several methodological and/or logistical aspects of referral currently remain open to interpretation, a preliminary sketch of the function following human rights effectivity is likely to highlight a certain number of necessary *limits* of referral as an instrument of protection. First of all, it must be reiterated that referral represents a form of awareness raising concerning a potential situation of victimological risk which is exclusively aimed at safeguarding the referred individual's human rights. The obvious consequence of such a principle is that any circulation of the information gathered through referral for purposes different than victim-centred protection and assistance must be avoided. It must be noticed how, in institutional narrative, the emergence of trafficking victims and a general awareness raising on their situation is often deemed as a dually advantageous outcome for the individual victim and for the State. Referral, in this sense, can be envisaged as an effective instruments of generalisation of a relevant *knowledge* concerning reasonable grounds of a trafficking-related-risk,[1031] thus constituting, among other things, a strong basis for affirming a broader State accountability concerning the adequate *pris en charge* of a detected survivors.[1032]

(P)VoTEs, on the same, notably come to seek or receive protection while exposed to a number of interpersonal, social and legal-systemic threats. In this sense, revealing one's condition of trafficking-related risk might constitute the origin of a ferocious retaliation against the victim by subjects involved in their exploitation. Moreover, the unrestricted spread of sensible data concerning an irregularized migrant VoTs can expose them to the further risk of forced return to their Country of origin by law enforcement authorities. These risks exert a strong motivational influence on (P)VoTEs for what concerns their availability to seek and/or accept assistance, and are likely to explain the extremely low number of victims who currently receive protection in European Member States.[1033] Referral as a public function thus must be assisted by strong data protection obligations. [1034] Such duties have been explicated in European Anti-Trafficking law, with art. 11.1 ECAT stating: [e]*ach Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*.[1035]

[1031] Carmo *et al., Manual for Effective Referrals*, 17: "*To meet the needs of victims, access to support must be ensured as a right. However, regardless of the role appropriate support plays in meeting needs, many victims never reach the services who can help them. Research shows that victims do not always reach the support professionals1. Whilst support services can enhance their visibility, the direct referral of victims is the most precise means of getting victims in contact with the assistance they need and is based on ensuring that victim support organisations are given the victims' contact details*".

[1032] See supra, Chapter 3, Part 2, 5.

[1033] See e.g. A. Brunovskis and M L Skilbrei, 'Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers', *Anti-Trafficking Review*, issue 6, 2016, www.antitraffickingreview.org, 18.

[1034] OSCE, National Referral Mechanisms, 86.

[1035] Similarly, Recital 33 of the Eu Anti-trafficking Directive its respect for fundamental rights and its observance of the principles: '[R]*ecognised in particular by the Charter of Fundamental Rights of the European Union and notably […]*

The three aspects of relevance of data in the field of protection – the essentiality of the gathering of (P)VoTs' data for an adequate delivery of protection; the high risk of an adverse use of such data; absence of known and actionable remedies against data misuse for referred individuals – are suitable to be read under the lens of vulnerability. (P)VoTEs, in other terms, are considered as *vulnerable data subjects*[1036] inside of the referral system. Such vulnerability is a byproduct, on one side, of the strong imbalance of power that generally is present in the interaction between (P)VoTEs and first responders, which manifests most notably in strong informational asymmetries between the two classes of subjects concerning the functioning of the system, the potential implications of the circulation of data, the rights and duties connected to the referral function, and ultimately their reciprocal status in the legal system. On the other side, (P)VoTEs are vulnerable data subjects in light of the extreme risks connected to a misuse of their data; such risks are also frequently intensified in light of the particular *susceptibility* of individual survivors, which are often particularly prone to retraumatization in the aftermath of THB.

Referral systems so far have frequently refrained from addressing such crucial "process risks" embedded in the system of referral, with the consequence that many trafficking survivors wilfully refuse to be identified. (P)VoTEs in this sense frequently decide to avoid contacts with data gathering authorities (police, first responders), or to reveal their status as exploited individuals, because they know that such a discovery might not turn to their best interest. Duly limiting the function of referral so to avoid such adverse consequences thus amounts to a responsive State attitude towards a vulnerability which is both socially and legally enabled. In other terms, referral shall be understood as a process which "puts floors" under situations of vulnerability.[1037] Such an operation must be arguably informed by the cited aim of minimizing secondary victimization.[1038] This victim-centred duty arguably entsils the *ad hoc* creation and activation of strong guarantees against data misuse: sufficient safeguards against security breaches must thus be introduced.[1039] Any use of a victim's personal data for purposes different than the one for what it was gathered and/or transmitted should be duly sanctioned and rendered legally ineffective.

the protection of personal data […]." In particular, the Directive "*seeks to ensure full respect for those rights and principles and must be implemented accordingly*".

1036 See e.g. Gallagher, *The International Law,* 305: "*There are strong indications that the right to privacy is vulnerable to violation in situations of trafficking, in particular when victims are in contact with State apparatus including support services and criminal justice agencies*". See also G. Malgieri, J. Niklas, Vulnerable data subjects, *Computer Law and Security Review,* 2020, online, DOI: 10.1016/j.clsr.2020.105415, for a definition of the category and related duties of special protection.

1037 See for an original account of this form of policy response to vulnerability, Chambers, *Editorial Introduction*, 5.

1038 See *supra,* Chapter 3, Part 2, 3.2.

1039 Carmo, *Manual for Effective Referrals*, 26.

Ensuring the safety of victims' data in this sense should necessarily pass through the prior delimitation of the list of authorities which might be contacted through referral; the avoidance of gathering and/or sharing data which are strictly necessary for the determination of a protective response; the adoption of the highest security guarantees in the stocking and transferring of such data,[1040] which on the same should be always deletable at victim's request.

Another crucial limitation of the referral function descends from the necessity that any entry in the system is validated though the (potential) victim's informed *consent.* In this sense, the negotial character of referral discussed above does not regard only the "how" of assistance (i.e. asking which needs the victim holds, which kind of specialised assistance they are wanting to receive, which kind of procedures they want to pursue); but also the "if" of protection. Referral, in this sense, must be seen as a process of controlled emergence of an individual who is likely to lie in a subjective and objective situation of vulnerability and who is primarily in charge of the decisions concerning assistance. Such an apparently plain principle of consent is actually largely foreign to many past and current national practices of assistance, where a general presumption of knowledge of the victim's best interest has led several States to introduce referral mechanisms which are activated irrespective of victims' consent and which rely on standardised paths to protection, such as forcing trafficking survivors to enter closed shelters and being thus subjected to critical limitations of their freedom of movement.

Recent supranational documents[1041] have clarified a number of key features of an adequately consensual referral function: first of all, an element of clarity in the communications with the detected person must be ensured. This entails most notably the availability of an interpreter and of a mediator upon request; the use of a plain language in communications; the gradual delivery of the relevant information to victims, each time for a specific purpose,[1042] avoiding information overload and confusion; on the same, the amount of information provided must always be sufficient to enable an informed consent of the victim to the specific action required.[1043] Moreover, information shall not only cover the relevant options open to the victim, which should be as broad as reasonably possible considering the aims and the capacity of the protection system considered;[1044] importantly, a thorough information concerning the relevant *risks* associated with each possible option must be delivered,

[1040] Roth *et al., Data Protection,* 69.
[1041] ECAT Explanatory Report, 140, 14; OSCE, *National Referral Mechanisms,* 84.
[1042] Roth *et al., Data Protection*, 74.
[1043] Ivi, 21.
[1044] I. Orfano, *Guidelines*: "*Each individual has the right to determine whether, preferably to which extent and when, s/he wishes to receive assistance and should be consulted before providing any support measure. […] An initial rejection of assistance shall not lead to the irreversible exclusion of access to assistance, should the victim change her/his mind later*".

too.[1045] While all these guarantees are suitable to put the victim in an informed position to take a decision about the "if" and "how" of protection, it has been held that the implications of entering the NRM are so complex that only the availability of an *ad hoc* individualised legal assistance might ensure a truly informed decision.[1046]Also in light of the above, each referral model should make clear that victims can always refuse the assistance offered to them at a later point in time.[1047]

Most supranational guidelines nonetheless specify that there might be instances where a victim's relevant data are gathered and shared without their consent: these situations generally arise as a consequence of legal reporting obligations imposed to first responders and/or anti-trafficking authorities.[1048] The most common cases involve, for instance, the duty to report crime imposed on civil servants in several European States; the duty of medical and other frontline staff to report the existence of actual interpersonal risks for the personal security of patients to law enforcement authorities; the gathering of survivors' personal data in Countries where the victims of crime are under a legal obligation to testify in criminal trials against their offenders. [1049] In all these cases, the victim-centred approach to protection is generally understood to require that the authority's duty of reporting is revealed to the victim at first notice, before the relevant information is gathered.[1050] While the methods and mechanisms of such a multiagent information sharing function can be analogous to those which refer trafficking survivors to a victim-centred protection path, the said "forced" forms of referral are not part of the human rights-based protection of (P)VoTEs and rely on a significantly different logic. In this sense, the law enforcement approach to THB is expressed through authoritative decisions concerning the prosecutorial interest of the State, which leave only a very limited space to victim preferences. Victimological considerations are often countervailed in the fields of criminal justice and immigration enforcement by evidentiary necessities in criminal trials and considerations of national security.[1051] In this sense victim-centred and "forced" referral

[1045] OSCE, *National Referral Mechanisms*, 85-86.
[1046] OSCE, *National Referral Mechanisms*, 112: "*Free access to legal advice should be offered with regard to entering NRM procedures in all cases where it is required*".
[1047] Carmo *et al., Manual for Effective Referrals*, 10.
[1048] See e.g. Anti-Trafficking Monitoring Group (ATMG), *Class Acts? Examining modern slavery legislation across the UK,* October 2016, available at https://www.antislavery.org, 34.
[1049] See e.g. OSCE, Office for the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Uniform Guidelines for the Identification and Referral of Victims of Human Trafficking within the Migrant and Refugee Reception Framework in the OSCE Region*, Vienna 2019, 16: "*If an initially identified presumed victim of trafficking is not willing to be referred to the respective agency CTHB Focal Point, information about the case should be shared with the local CTHB Co ordinator. If a presumed victim of trafficking is initially identified by coastguards or/and law enforcement CTHB focal point(s) themselves, consent for further collaboration should be obtained from the presumed victim. If no consent is given, information about the case should be shared with the local CTHB Co-ordinator*".
[1050] OSCE, *National Referral Mechanisms*, 84.
[1051] See for an example from the UK legal system ATMG, *Class Acts*, 37.

often constitute “rival” forms of awareness raising in trafficking cases. It is crucial in this sense to reaffirm that the Palermo Protocol and all further supranational anti-trafficking legal instruments addresses the safety and well being of victims as the paramount objective of the action of States against THB.
The primacy of victim protection does not only impose the introduction of protected modalities for the participation of trafficking survivors in legal procedures. Under a different point of view, it must be ensured that the tools, data and technologies of victim-centred referral are not used for purposes different than protection.[1052] It is frequent, moreover, that the story of a trafficking victim is spread through media campaigns against THB, a practice that, even where personal data are not shared, is suitable to expose a trafficked person to a relevant pressure and risk of secondary victimisation.[1053]
It can be thus concluded that the function of referral – and the specific ways in which it is regulated – presents both vulnerability-tackling and vulnerability-defining effects. Under the first point of view, referral, as detection, represents a function aimed at dissipating the systemic *invisibility* of trafficking victims in host state societies. Referral represents a form of generalisation of knowledge through awareness raising, a technique which is in turn understood as a *best practice* for the further streamlining of a (P)VoTEs’ access to adequate and individualised assistance. Being such assistance the result of the assessment of an empirical vulnerability, referral can thus be defined as a form of *mediated* tackling of vulnerability. Additionally, the international guidelines concerning referral are largely informed by a vulnerability-responsive approach. Such approach conjugates the key features of a victim-centred approach (privacy, transparency, minimization) with the legally presumed vulnerabilities of trafficking victims under HRL (intimidation, lack of trust in authorities, precariousness of social and territorial ties, external conditioning, societal stigma and special risk of retaliation). This is likely to determine the development of a agency affirming, highly secure, trauma informed technique of victim *pris en charge* that directly tackles the systemic vulnerability of (P)VoTEs.

Under the second point of view, the actual regulation of the referral function in domestic anti-trafficking frameworks plays a role in *defining* some missing features of the transnational legal concept of vulnerability which are still largely unaddressed in the current elaboration of human rights bodies. Referral, in this sense, represents an operational measure suitable to favour the affirmation of a *normative* idea of victim best interest. What the State should know about arguable cases of trafficking victimhood is, as Claudia Aradau clearly stated, an issue which falls at the intersection between the two rival legal principles of privacy and security. In this sense, the increasing adoption

[1052] See e.g. Roth *et al., Data Protection*, 16.
[1053] See in this sense ECAT, art. 11.2-3: See also ICMPD, *Guidelines*, 32.

in international documents of a model of referral which is built upon victim consent is likely to bring important clarifications about the relationship between individual need, vulnerability, and agency. In this sense, the assumption of the best interest of trafficking victims within State policies of referral can constitutes a real threat to the human rights based aim of adequately responding to survivors' systemic vulnerability. This vulnerability in the process of referral notably manifests thruough victims' exclusion from the determination of the substance of their protection and consequent exposure to adverse consequences concerning both their recovery and their security. Seen in this perspective, thus, the only viable model of referral under human rights law must be envisaged in a form of *consensual* visibilisation of victimological risk, and the protection of such individuals must be informed by a consideration of the risks associated to the "undue visibilisation" of the situation of the concerned survivors.

Finally, under a different perspective, the *breadth* of the referral function as it will be concretely enacted in regional law will is suitable to tell something else about the substance of vulnerability in the European legal order. In this sense, it has been previously urgued that referral, as a best practice of protection-streamlining against the risks of THB and severe exploitation, shall concern not only presumed trafficking victims. Significantly, all other categories that are qualified as esposed to a real and immediate risk under art. 4 ECHR are likely to benefit from the inclusion in early alert protocols of referral under the point of view of their effective enjoyment of their rights under the Convention. This consideration is arguably in line with the recent extension, in the Strasbourg Court's case law, of the subjective scope of application of States positive obligation to adopt adequate operational measures to protect *beyond* the cohort of trafficking vicitms, to include all the victims of – and individuals at risk of being subjected to – the other forms of severe exploitation listed in art. 4 ECHR.

In this sense, a number of supranational models clarify a crucial distinction between the pool of individuals which are entitled to access referral (and victim-centred protection); that of individuals who are concretely registered in the NRM system; and that of individuals who take part to the identification procedure ex art. 10 ECAT. In this sense, referral and victim assistance as constitute crucial human rights based guarantees which are *needs based* and universal: every individual exposed to a relevant risk under art. 4 ECHR should have access to those services. Differently, the access to the NRM is the consequence of such individuals' acceptance of a series of limitations of their right to privacy, safety, freedom of movement etc which passes through the previous manifestation of a consent and the agreeing to a series of duties.

5. Reasonable grounds in the identification procedure: vulnerability, recognition and procedural justice

As observed in the previous Chapter, one essential element of the special protection afforded to VoTs under European Law is the duty of States to take "necessary measures" so that victims can be *identified in a procedure*.[1054] This norm clarifies the essentiality of a credible State effort to identify trafficking victims for the effective development of a human rights-based protective response to their needs; moreover, the ECAT highlights the need of *ad hoc* procedural rules capable of regimenting the function of identification. Regrettably, no further indications are provided in European Law concerning the form of the identification procedure, an aspect which has brought to the development of very differentiated practices of VoTs identification in CoE Member States.[1055] Moreover, the EU legal framework against trafficking does not regulate identification at all in its provisions concerning victim protection.

The jurisprudence of the European Court of Human Rights has in various occasions taken into account the prompt, professional and human rights-based identification of victims as an essential component of States' duty of adopting operational measures to protect trafficking victims and/or potential victims.[1056] Moreover, the formal introduction of rules which discipline the functions of Competent Authorities for what concerns identification constitutes part and parcel of European States' duty to develop an adequate legal and/or regulatory framework against THB.[1057] Victim identification, in this regard shall be considered as a "paramount objective" of States in the implementation of their duties of human rights protection under art. 4 ECHR.[1058]

This said relevant questions remain oper concerning the necessary characters of the identification procedure as a an essential guarantee of victim protection under human rights law. The ECtHR jurisprudence has clarified in several instances that the existence of effective human rights-based procedures shall be understood not only as a crucial component of individuals' interests of due process and access to rights under the Convention. Differently, in several cases, formalized procedures and their internal rules have been found to constitute necessary forms of *substantive* protection of human rights. In the case of art. 4 ECHR, in this sense, the adequacy of the legal-regulatory framework against THB and of the operational response to immediate trafficking-related-

[1054] See *supra,* chapter 3, Part 1, 2.
[1055] See in this sense European Commission, *Study on Reviewing*, 43-48.
[1056] L.E. v. Greece, §77. J. and Others v. Austria, §90. V.C.L. and A.N. v. U.K., §160.
[1057] L.E. v. Greece, §77.
[1058] V.C.L. and A.N. v. U.K., §160.

risks largely depend on the formalization and diligent implementation of a procedure of identification which can be understood as adequate to safeguard victims' interests of protection.

The Strasbourg Court has clarified in this sense that a procedure can be considered *adequate* to protect the human rights of the individuals who are subjected to it when it is capable of bringing to a sufficiently thorough assessment of facts; and when it can be seen as effectively taking into account the *special needs and interests* of the interested subjects.[1059]. A human rights-based scrutiny of the identification procedure shall thus take into account the key conditions for its delivery of accurate decisions concerning victim status; and its capability to adequately involve trafficking survivors.

5.1 Accuracy of identification

An essential determinant of the identification procedure's adequacy to safeguard the human rights of (P)VoTEs is represented by its *accuracy*, i.e. its capability of providing a sufficiently substantiated and comprehensive assessment of the legal fact which constitutes its object, i.e. trafficking victimhood. A vulnerability-informed approach to identification shall be seen as particularly influent in this regard: THB represents a very elusive and hard-to detect kind of offence. Where indicators of trafficking victimhood are detected, the possibility of Competent authorities to reach a relevant level of certainty concerning the person's victimization is generally very low absent an explicit statement of the survivor themselves. On the other hand, as already observed, European law stipulates that victim statements shall not in principle be relied upon in the process of identification of trafficking victims.

These epistemic limitations are particularly relevant at the *preliminary* stage of victim identification, which, following the OSCE Handbook, shall take place within five days from the referral of the individual to Competent Authorities, a timeframe which does not leave any credible margin for investigating the subjective and circumstantial signs of victimisation.[1060] This nonetheless, the early-alert character of the "preliminary grounds" identification decision represents a crucial element of the *adequacy* of the identification procedure overall. *Accuracy,* in this sense, shall be understood as a duty of due diligence which necessarily inserts itself in an underlying frame of necessary promptness in delivering first-stage identification. Consequently, a preliminary grounds decision shall be considered *accurate* when it manages to grasp the existence of - often non-conclusive - elements which point to the existence of an offense to art. 4 ECHR. In this sense, the first stage of identification largely amounts to "pinpointing" all those reasonable grounds that are seen to deserve a further investigation in view of pervening to a credible reconstruction of potential experiences of

[1059] Rantsev v. Cyprus and Russia, §288.
[1060] OSCE, *National Referral Mechanisms*, Recommended Standard 42.

victimisation.[1061] On the other hand, the preliminary stage of identification entails an expert "double check" of the "red flags" raised by first responders the processes of victims *detection* and *referral*, so to eschew those cases where the *reasonability* of the available grounds of trafficking victimhood can be invalidated through *prima facie* evidence.

This said, the presence of relevant evidentiary limits and lacunae in the identification procedure constitutes a relevant problem of the "conclusive grounds" identification decision, too. A wealth of factors come into play in determining the evidence basis considered by Competent Authorities at the Conclusive stage of identification. These factors include the evidence-gathering prerogatives of the CA itself; the eventual provision of victim statements, which often happen to lack clarity and/or coherence; the presence of assessments of the victim's personal situation of risk and/or vulnerability etc. Moreover, as already highlighted, (P)VoTs are understood to frequently suffer from severe trauma and/or fear descending from their experience of abuse, an element which oftentimes determines the emergence of a serious risk of secondary victimisation descending from their interrogation on the events of their (presumed) victimization. These projections of VoTEs systemic vulnerability to misrecongituion shall thus necessarily be taken into account in the rules regimenting identification *as a procedure primarily aimed at delivering protection* under art. 4 ECHR.[1062]

In this regard, the requirement of an autonomy of Competent Authorities in the process of identification implies a particularly high standard of diligence on their side in securing and evaluating the relevant evidence basis.[1063] The OSCE Handbook notably recommends the adoption of a proactive approach in this sense: Competent Authorities shall consider all possible sources of evidence before getting to a decision. Consequently, they shall be provided with sufficient investigative powers and they shall be granted access to all relevant pieces of evidence from other authorities. As previously noticed, an effective response to (P)VoTEs' vulnerability requires that the burden of proof concerning trafficking victimisation is not placed on survivors.[1064]

A particular aspect CAs' prerogatives of evidence gathering concerns the evaluation of victim statements: identification decisions in this regard are expected to conjugate both subjective-behavioural grounds emerging from the observation of potential victims; and circumstantial,

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1061 The UN 2011 Commentary to the EUATD refers in this sense to a "low threshold approach" to identification as an essential component of an adequate response to PVoTEs' protection needs. See also OSCE, *National Referral Mechanisms*, 280.

1062 See in similar terms Stoyanova, Human Trafficking and Slavery Reconsidered, 39.

1063 ECtHR, L.E. v. Greece §77. The UK Home Office Statutory guidance on victim identification in this sense clarifies that "[t]*he relevant competent authority must make every effort to request all available information that could prove useful in establishing if there are Conclusive Grounds*".

1064 Stoyanova, *Human Trafficking and Slavery Reconsidered*, 100.

"objective" grounds which are suitable to clarify the social, relational and material context where the presumed abuse might have taken place. In this regard, an adequate identification procedure must be informed by the imperative of avoiding an *overreliance* on victims' statements.[1065]

This principle has two main relevant consequences when it comes to the *accuracy* of decision making: on one hand, supranational documents of guidance recommend that the evaluation of victimhood under art. 4 ECHR shall first focus on the *objective* circumstances available. This guideline shall be considered as key in favouring the development of a particular sensibility among Competent Authorities to *contextual* signs of trafficking and the adoption of methods of victim recognition which minimize the risk of secondary victimization.[1066] Victim statements and their credibility, thus, must be considered as an eventual and secondary source of evidence in a vulnerability-informed identification procedure.

On the other hand, the evaluation of victim statements must arguably be made the object of a particularly thorough victim-centred evaluation of credibility:[1067] in this regard, several screening models clarify that victims of trafficking often provide false, incoherent and/or incomplete statements, as a consequence of their mistrust in State authorities, fear of reprisals, trauma, intimidation, etc.[1068] The objective of an accurate victim identification thus implies that Competent Authorities shall not focus exclusively on the plain meaning and abstract reasonability of victim statements in their evaluations of credibility. On the contrary, identification decisions shall be vulnerability-based in the sense that they must be capable of bringing to a credible, comprehensive victimological evaluation of the presumed victim's *behaviour* in front of State authorities throughout the processes of detection, referral and identification.[1069]

Under a different point of view, identification are notably addressed as a procedural guarantee crucial to allow the redirection of VoTEs to an *effective protection* of their human rights through the access to specialised services of assistance and support. Each negative decision concerning trafficking victimhood in situations of uncertainty thus carries with it the unavoidable risk of leaving an individual in need deprived of crucial victimological assistance and support. Conclusive findings of trafficking victimhood, in this sense, shall arguably rely on a standard of proof based on the balance

1065 S.M. v. Croatia, GC, §344.
1066 ECtHR, V.C.L. and A.N. v. U.K., §180.
1067 ECtHR, S.M. v. Croatia, first Section, §80.
1068 The Italian Corte di Cassazione in its ordonnance n. 41863 of 2021 has upheld this common victimological knowledge to a general requirement of interpretation of trafficking victims' statements in the context of international protection: "*fragmentation and contradiction*", in this sense, represent "*precipuous characters of the the narration of who is subjected to trafficking*".
1069 See in this sense the UK case of S.F. v. SSHD, where it was stated that the identification of VoTs shall be based on a full account of their victimological experience made by experts and victim support organisations.

of probabilities and not on an assessment of certainty beyond any reasonable doubt.[1070] Such is also the current consensus emerging from supranational expert bodies (GRETA, ODIHR), and from national practice: the UK National Guidance on NRMs in this sense states that victim status shall be conclusively recognised on the basis of a "more likely than not" test. The conclusive grounds decision concerning trafficking victimhood, in this sense, does not produce any further effect than to connect the protection needs of an individual to the guarantees of protection provided under the anti-trafficking legal framework. As notably clarified in the case of *J. and others v. Austria*, victim identification decisions might not be considered sufficient for activating other trafficking-related-obligations, such as prosecution of perpetrators or compensation of victims: they merely require that the identified individual is treatment as a victim by State authorities.[1071]

Conclusive grounds decisions on identification are ultimately informed by both a proactive and diligent approach of Competent Authorities in making the most out of often inconclusive evidence, and a relevant weighing of the risk which a negative decision concerning victimhood might subject a potential victim to in terms of their access to protection.[1072] In this sense, many different scenarios can arguaby open when competent authorities are faced with weak evidence of victimhood and relevant signs of victimological protection needs. On one hand, it shall be highlighted that European Law does not impose any strict time limit for issuing a conclusive grounds decision:[1073] in this sense, where several aspects of an individual experience remain unclear, CAs can well suspend their verdict and prolonguing the individual's access to preliminary assistance.[1074]

On the other hand, in some cases, the relevant evidence might clearly point against a finding of trafficking victimhood, but the individual might still be considered at serious risk of trafficking and/or severe exploitation. The 2022 OSCE Handbook in this sense clarifies[1075] that Competent Authorities shall further refer to special assistance services those denegated individuals who are found to be vulnerable to a violation of their rights due to their personal situation. This substantive-procedural duty is arguably in line with the general perspective on protection enshrined in the ECtHR jurisprudence. As previously observed the operational obligation of States under art. 4 ECHR entails

[1070] Stoyanova, *Human Trafficking*, 99.
[1071] See in this sense Art. 18 of the UNODC Model Law against Trafficking in Human Beings: "[a person] *should be considered and treated as a victim of trafficking in persons, irrespective of whether or not there is already a strong suspicion against an alleged trafficker or an official granting/recognition of the status of victim*".
[1072] See in this sense Stoyanova, *Human Trafficking and Slavery Reconsidered*, 395.
[1073] Differently, the OSCE Handbook indicates 90 days as the recommended timespan which shall intercur between the preliminary and the conclusive grounds decisions: OSCE, *National Referral Mechanisms*, Recommended standard 45.
[1074] As already mentioned, the ECAT clearly affirms potential VoTs' entitlement to assistance under art. 12 as long as the conclusive grounds phase is ongoing and prohibits the removal of the potential victim from the territory during that time span.
[1075] OSCE, *National Referral Mechanisms*, 137.

a duty to ensure, wherever it is reasonably possible, an effective protection both to victims *and* to individuals who are at real and immediate risk of being harmed under art. 4 ECHR.[1076]

5.2 Victims' rights of interaction within the identification procedure: justification and correctability of CA decisions

The issue of the procedural rights of PVoTEs within the identification procedure has been tellingly left unregulated under European law. A careful reading of the Travaux Préparatoires of the ECAT clarifies that such a vagueness was expressly agreed upon by the Convention's signatory Parties, with the aim of not creating an excessive burden on national authorities in the implementation of their duties under art. 10 ECAT. [1077] In a victim-centred perspective, the matter of procedural guarantees, and especially of victims' rights of participation and interaction within the identification procedure, represents a crucial aspect of the adequacy of the said procedure under human rights law.[1078]

In this regard, the access of (P)VoTs to the identification procedure and to the NRM is necessarily facultative: the participation of survivors must necessarily be consensual and no obligation to take part to interviews, assessments or hearings must be present in domestic law.[1079] A forced participation to the process of identification would, in this sense, fall at odds with the key principles of victim-centred treatment which were enucleated in the previous Chapter.[1080] This said, where victim consent is adequately safeguarded, the issue of survivors' *interest* to participate in the identification procedures shall arguably be raised. In this sense, the case of Rantsev v. Cyprus and Russia has declined States' procedural obligation to investigate and prosecute THB so to require that vicims and their nexts of kin shall necessarily be involved in legal procedures to the degree necessary to allow them to adequately safeguard their interests.[1081] While the identification procedure does not fall under the procedural limb of art. 4 ECHR, similar considerations of an interest to be involved in the procedure can be raised in the field of identification, too.

It shall be repeated, in this sense, that identification represents a procedure that has the victim and their subjective experience of abuse at the centre of its assessment. The effects of such procedure, moreover, are likely to produce incredibly relevant consequences on the individual's enjoyment of their human rights. Finally, the attribution of victim status represents one crucial component of States' duty of *recognition* of the harm suffered by trafficking survivors, which, as already stated, represents

[1076] See Supra, Chapter 3, Part 2, 2.1.
[1077] Stoyanova, Article 10, 10.07
[1078] *Ivi*: "*In light of the case law of the ECtHR under Article 4 ECHR, a powerful argument could be developed that the victim identification procedure needs to incorporate certain procedural safeguards*".
[1079] See *supra,* para. 4.
[1080] See *supra,* Chapter 3, Part 2, 3.2.
[1081] See, mutatis mutandis, European Court of Human Rights, Paul and Audrey Edwards, §§ 70 to 73.

a special right of victims of serious crime under International Human Rights Law. [1082] All these elements clarify the penetrant and justified reasons which ground a potential trafficking victim's interest of involvement and active participation in the identification procedure. In this sense, while the rules of identification take into account trafficking victims as "presumably vulnerable individuals", a victim-centred approach to protection shall on the same ensure avenues for participation which ensure the possibility for victims to contest such presumptioms of vulnerability, and to aquire an active role within the procedure of their identification.

Victim participation, moreover, shall be understood as dependent on the prior delivery forms of assistance to survivors upon detection and during the recovery and reflection period. On one side, a thorough information concerning the identification procedure, its underlying principles and aims and the rights of victims enshrined therein, shall be provided to all detected individuals, together with the possibility of accessing personalized legal assistance.[1083] On the other side, the effective and safe participation of trafficking survivors to legal procedures requires the adoption of targeted measures of procedural protection which shall be based on an individual risk and vulnerability assessment. The OSCE Handbook in this sense provides for the default adoption of such assessments before any decision concerning identification – at the preliminary or at the conclusive stages – is taken.

For what concerns the prerogatives of victims within the identification procedure, it shall be recalled that the ECtHR jurisprudence has clarified that a "sufficient involvement" of victims within legal procedures requires that individuals are informed about the progression of the proceedings. Where hearings are arranged,[1084] victims shall be allowed to take part to them; and they shall have access to all the relevant documentation contained in their file, where it is not contrary to the overarching interest of the procedure or exceptional security reasons. A particularly important aspect in this sense concerns victims' right to be heard: the OSCE model on this point specifies that personal interviews might be arranged at the *preliminary* stage level of the procedure, but that they shall not be considered as an essential procedural requirement, given the emergency character of such a decision. It shall be noticed that the possibility of the victim to be heard where they so require before a conclusive identification decision is taken represents a necessary corollary of the abovementioned rights of participation in the procedure. Moreover, given the crucial role played by, considerations of fragility, vulnerability, trauma, capacity and fear in susbtantiating a conclusive identification decision, the

[1082] Stoyanova, *Human Trafficking*, 394-395.
[1083] See *infra,* 7.
[1084] The UK legal system generally excludes the recourse to interviews unless strictly necessary and possible having regard to the condition of the PVoT: See Home Office, *Statutory Guidance,* 155.

arrangement of personal interviews arguably represents an essential component of the of accuracy of CAs' approach to evidence.

Finally, given the suitability of a negative identification decision to adversely affect trafficking survivors' interests of victim-centred protection, a possibility shall be provided to them to ensure that inaccurate decisions is "corrected", through the filing of an appeal. The right to appeal identification decisions is frequently absent in the domestic disciplines of European States.[1085] On the same, it has since long been recognised as binding by GRETA and the UNODC.[1086] The OSCE Handbook provides for the introduction of a right to appeal negative identification decisions at its Recommended Guideline n. 31.[1087] The right of appeal in this regard arguably represents a critical possibility for (P)VoTs of clearly enucleating the arguments which in their opinion shall ground positive decision concerning their status. In this sense, in order to have an effective right of appeal against negative identification decisions, such decisions shall be adequately motivated in their grounds of rejection. Regrettably, no references can be found in European law for what concerns the form and the content of identification decisions; on the same, following the ECtHR jurisprudence on procedural justice, it might be argued that an adequate identification decision shall necessarily take into account *all the relevant elements militating for as well as against a finding of victimhood*.

The article 4 jurisprudence of the Strasbourg Court in this sense provides some interesting hints concerning the necessary elements which ought to be discussed in the identification decision and that, consequently, shall be open to contestation through an appeal process. Specifically, in the recent case of V.C.L. and A.N. v. U.K.,[1088] the Court has clarified that an adequate human rights-based decision concerning trafficking victimhood shall take into account the existence of grounds suitable to reveal the past integration of all the requisite elements of the trafficking definition (acts, means, purposes) in a specific case. In this sense, an adverse decision concerning victim status shall be considered as *not* duly justified when it overlooks critical indicators of abuse and/or vulnerability in the personal story of a survivor, and/or where its argumentative structure relies on commonly shared misconceptions concerning the personal situation of trafficking victims.[1089]

[1085] See e.g. European Migration Network (EMN), *Identification of victims of trafficking in human beings in international protection and forced return procedures*. European Migration Network Study March 2014, available at htttps://ec.europa.eu, 26.
[1086] UNODC, *Model Legislative Provisions,* 57: "*Formal victim identification mechanisms should include mechanisms for reviewing decisions relating to the conferring of victim status on individuals*".
[1087] All NRMs should have in-built rights of access to an effective, accessible judicial remedy, to challenge the merits of any negative decisions at both the preliminary and conclusive stage of the identification process.
[1088] V.C.L. and A.N. v. U.K., §160. See also Stoyanova, *Positive Obligations*, 202.
[1089] V.C.L. and A.N. v. U.K., §178-179.

While the such *dicta* of the ECtHR represents a precious indication for substantiating the rules of an adequate justification of identification decisions, it shall be recalled that the cognitive perspective of the identification procedure is expressly focused on the reconstruction of signs of *victimization* through *victim-centred methodologies*. This perspective critically differs from a prosecutorial approach to the reconstruction of criminal facts. The reference of the Court to the requisite elements of the international trafficking definition shall thus not mislead the interpreter when it comes to the possible arguments that might justify the finding of arguable victimhood under the identification procedure, which has been expressly addressed in the ECtHR jurisprudence as intrinsically independent from criminal prosecution.[1090] In this sense, a positive finding of trafficking victimhood within the identification procedure might be reached also when some requisite elements of a trafficking facts have not (yet) been established. The cited case of J. and others v. Austria is clear in stating that identification shall descend from the recognition of arguable signs of abuse *on* a victim and on their known circumstances of life, often before a suspect has been located and/or without express statements being made. In such situations, thus, the recurrence of the requisite elements of the trafficking definition is notably hard to establish with reasonable certainty.[1091] Vulnerability, in this sense, intended as an individual condition of hardship in accessing autonomy and security, represents a critical evidentiary bridge which transcends the criminological-victimological divide in this ambit.[1092] The development of a sufficient diligence in interpreting the relevant connection between *ex ante* vulnerability, APOV and post-trafficking vulnerability in individual cases represents an essential component of the professionalisation of Competent Authorities. [1093] The development of legally-mandated guidelines for Competent Authorities, in this sense, has been addressed by the UNODC as a critical measure to the effective implementation of the identification function.[1094]

[1090] J. and Others v. Austria, §115.
[1091] S.M. v. Croatia (Grand Chamber), §322.
[1092] S.M. v. Croatia (Grand Chamber), §329.
[1093] S.M. v. Croatia (Grand Chamber), §265.
[1094] See UNODC, *Model Legislative Provisions*, 57.

6. Trafficking victims' vulnerability and the recovery and reflection period

As previously observed, European Member States are required to do adopt special victim assistance and support measures as may be "*necessary* […] *to enable* [victims] *exercise their rights*".[1095] In this regard, the Strasbourg Court has clarified that the main aim of States' efforts of operational protection of (P)VoTEs resides in the facilitation of their recovery.[1096] The conditions for human rights protection, in turn, shall be secured by States through the prompt removal of victims from the situation of risk where they find themselves, a duty which entails notably the early-alert delivery of assistance and support guarantees. Relevant nexuses thus intercur between systemic trafficking-related vulnerability and the adequacy of State duties of assistance and support for trafficking survivors. The special duty of operational protection against traffickng-related-risks, in this sense, descends from the creation of a close relationship of care between the individual and the relevant support services. A relevant proximity between survivors and State authorities emerges when trafficked persons access assistance measures: a relationship of trust is built in this context between support services and a group of victims who are *by definition* likely to be convinced about the impossibility of changing their condition of oppression and disadvantage. The genetic moment of this special relationship of care is legally addressed in the discipline of the recovery and reflection period.

The central aim of the R&R is to frontline victims' interests of rest and reelaboration of their harmful experience as primary aspects of their immediate support. Sufficient recovery, on one hand, represents the necessary condition for a survivor's overcoming of their trafficking experience without running the serious risk of secondary victimization. Reflection, on the other hand, together with the necessary guarantees of counselling, information and legal assistance,[1097] represents the precondition for (P)VoTEs' effective access to justice and for the determination of their subsequent patwhay to reintegration.[1098] The previous analysis of art. 13 ECAT has highlighted that the access to the R&R shall be offered to *all* victims automatically upon emergence of reasonable grounds of THB.[1099]

Moreover, the R&R provides for the *exclusive* erogation of victim-centred assistance for a brief period of time, with the suspension of all those procedures and treatments which cannot be understood as *directly* aimed at their recovery and reflection. The unconditionality of assistance in this sense

[1095] EUATD, art. 11(1).
[1096] ECtHR, V.C.L. and A.N. v. U.K., §159.
[1097] ECAT Explanatory Report, §159.
[1098] See in this sense e.g. Chowdury and others v. Greece, §85.
[1099] See *supra,* Chapter 3, Part 1, 3.3. See OSCE, National Referral Mechanisms, Recommended Standard 44. See also Stoyanova, Article 10, 10.14: "*Crucial clarification emerging from the drafting history is that the recovery and reflection period under Article 13 immediately begins when there are reasonable grounds to believe that a person is a victim and not upon the completion of the identification process under Article 10*".

constitutes a critical aspect of an adequate implementation of the R&R. This necessity is highlighted by the victimological literature, where the satisfation of the needs of rest and reflection of trafficking survivors are deemed essential for their regaining of a sense of self-worth and autonomy. European law in this sense can be said to embody a presumption of the harmfulness of certain institutional threats (most notably deportation and involvement in criminal justice proceedings) for the immediate interests of (potential) victims to recovery and reflection.

Trafficking survivors' access to the R&R shall thus be considered the *automatic* and *exclusive* form of treatment that descends from their referral to special anti-trafficking services. In this sense, the recovery and reflection period shall be applied irrespective of the context where the victim has been detected. On the other hand, the voluntary and need-centred characters of such guarantee imply that where concurrent protection needs are present which are taken into account in a procedure different from the R&R, such period shall in principle be compatible with the victim's voluntary involvement in such procedures wherever no specific risk for the victim's recovery is identified.

The analysed evolutive perspectives of implementation of the legal guarantee of the R&R arguably represent promising bases for the development of a vulnerability-informed assistance under European law. This nonetheless, a number of questions remain open concerning the suitability of the current European legal standards concerning the R&R to afford (P)VoTEs an *adequate* assistance, i.e. one that is capable of effectively safeguarding survivors' protection needs. On one hand, the legal doctrine has frequently highlighted the highly contradictory character of the R&R as a very limited timeframe of assistance ("at least 30 days") and the subsequent provision of the ECAT stating that such period "shall be sufficient for the victim to recover".[1100] In this sense, it might be observed that art. 13 ECAT entails a very minimal understanding of recovery needs: the Convention's Explanatory Report in this sense specifies: "Victims recovery implies, for example, *healing of the wounds* and recovery from the *physical assault* which they have suffered. That also implies that they have recovered *a minimum of psychological stability* [emphasis added]"[1101] Such forms of healing and regaining of a minimum sense of security are generally addressed in clinical studies as the "immediate needs" of victims of violent crime. While their safeguard evidently constitutes a critical requisite element of any credible protection programme, the interruption of the immediate consequences of trauma does not by any means suffice to affirm that the victim has recovered from abuse.

The recovery and reflection period, as currently circumscribed in supranational law, arguably identifies a "firewall" period of time where detected (P)VoTs are exclusively assisted in their

[1100] Stoyanova, *Human Trafficking*, 107.
[1101] ECAT ER, para. 173.

emergency needs; after the expiry of such a period, no express prohibitions exist concerning criminal authorities' interaction with the victims in order to seek their collaboration in the prosecution of traffickers. This nonetheless, it shall be recalled that under the ECAT all potential victims shall have access to unconditional assistance for the whole duration of their identification procedure, an *iter* which on average lasts more than one year in European Countries. Under this point of view, the provisions of European law shall be read as distinguishing different stages and aims of the recovery process. Art. 12 ECAT in this sense is clear in stating that States Parties shall adopt "legislative and other measures" of victimological support as far as they can be considered "necessary to assist victims in their *physical, psychological and social recovery*". Similarly, recital 18 of the EUATD states that assistance measures are "necessary to enable the victim to recover", i.e., to be "able to exercise […] rights effectively".[1102] These considerations moreover, are arguably upheld by the recent development of the ECtHR anti-trafficking jurisprudence. The case of *Chowdury and others v. Greece*, for instance, has explicitly affirmed that favouring victims' physical, psychological and social recovery constitutes the primary aim of the whole bundle of operational protection measures identified under art. 4 ECHR, thus largely transcending the strict boundaries of the R&R.[1103]

The R&R thus shall not be reasonably expected to afford "recovery" *tout court*, but only that minimal level of rest which can, in certain circumstances, allow for a victim's wilful *participation* in the definition of their pathway to recovery, which, as frequently observed in the victimological literature, constitutes often a long term process.[1104] Moreover, supranational standards tend to consider that a period of *minimum 90 days* (i.e. three times the currently cogent R&R duty under the ECAT) might be sufficient "*for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and cooperation with the authorities against the traffickers, as well as to offer detailed evidence about past events*".[1105] These capabilities and levels of emotional strength might nonetheless need more time to emerge in specific cases: a possibility shall thus be available for victims to ask for an extension of their reflection period and to receive and *ad hoc* assessment conceing their ability to express themselves on the opportunity of cooperation with criminal justice authorities. The R&R, in this sense, shall be understood as part and parcel of a victim-centred legal framework of protection: the work of GRETA

[1102] See for a recent confirmation of this principle, para. 18 of the Preamble of the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims: "*The assistance should aim at [trafficking victims'] full reintegration into society, which can include access to education and training, and access to the labour market, in accordance with national law, as well as a return to an independent living*".

[1103] Chowdury and others v. Greece, §110; V.C.L. and A.N. v. U.K., §153.

[1104] See e.g. A. Brunovskis, R. Surtees *A Fuller Picture. Addressing Trafficking-related Assistance Needs and Vulnerabilities,* the Fafo/Nexus Project, 2012, available at www.fafo.no.

[1105] See e.g. Joint UN Commentary, 44.

is relevant in highlighting that a victim's express refusal to cooperate with criminal justice authorities pending R&R cannot be used as a justification for a premature interruption of such a period,[1106] which, thus, shall be understood as exclusively focused on the safeguard of victims' emergency needs.

Finally, the ability of a survivor to cooperate with State authorities shall not be equated with a complete recovery from trauma and abuse: as previously highlighted, the fulfilment of VoTEs' recovery needs require the provision of medium and long-term specialised care. Moreover, trafficking-related reflection needs have as their object a number of existential options for victims which largely exorbitate the mere opportunity of collaboration with criminal justice authorities, including most notably linguistic, labour and social integration, access to international protection, and the seeking of legal redress.[1107]

It can be concluded that the reflecton period constitutes a very short-term form of assistance, which is expressly aimed at "shielding" trafficking victims from the adverse effects of a premature involvement in criminal justice proceedings and of subjection to expulsion orders. The access to This guarantee, on the other hand, is unsuitable to fulfil the medium and longterm protection needs of victims, which on the contrary shall be addressed under the broader perspective of the *sufficiency* of assistance and support measures to meet survivors' needs of recovery and reintegration.

[1106] See e.g. GRETA, 2nd Report Switzerland, 182.
[1107] See *supra,* Chapter 3, part 2, 2.2.

7. Personalized expert support and the operational protection of (P)VoTEs

The previous analysis of the EU/CoE Anti-Trafficking legal framework has highlighted the presence of a series of positive supranational provisions that inquire on State authorities to take into account the vulnerability of trafficking victims and/or potential victims through the conduction of *needs and/or risk assessments*. Assessments are commonly understood to constitute forms of expert (clinical, victimological, criminological) evaluations of the *individual situation* of trafficking survivors, aimed at determining the necessary components of the response to their protection needs.[1108] The provision of needs assessment is affirmed as binding in European Law in the field of criminal justice proceedings[1109] and of the return of irregular migrants.[1110] No explicit affirmation of a binding duty to conduct assessments, on the other hand, can be found in the general framework of "unconditional" victim assistance and support measures under European Law.[1111]

This nonetheless, both the EUATD and the ECAT contain a number of general provisions which expressly require that trafficking survivors' personal condition of vulnerability is adequately addressed by State authorities. In this sense, art. 12(2) ECAT requires States to "take due account of victims' safety and protection needs". Such a provision must be read in conjunction with the requirements of art. 12(1), where the express aim of assistance and support is identified in favouring victims' physical, psychological and social recovery. Art. 12(7), moreover, importantly specifies the duty of State Parties to tribute particular consideration to the special vulnerability of victims. The EUATD further specifies such duty by providing a non-exhaustive list of potential situations of vulnerability which might be relevant for the determination of an adequate support treatment, including minor age, pregnancy, irregular migrant status among others.

Recital (18) of the EUATD under this point of view clarifies the critical nexus intercurring between special needs policing and individual assessment duties, stating that "*the practical implementation of* [assistance and support] *measures should* [be based on] *an individual assessment carried out in accordance with national procedures*,". Individual assessments should "*take into account the circumstances, cultural contexts and needs of the person concerned*"; while risk assessments should be aimed at "*protect*[ing the victim] *from retaliation, from intimidation, and from the risk of being re-trafficked*".

1108 See Meindre-Chautrand, *How to Identify,* cit., 5.
1109 See *supra,* Chapter 3, Part 1, 4.2.
1110 See *supra,* Chapter 3, Part 1, 4.1.3.
1111 See e.g. N. Yankova *et al., Protecting Victims: an Analysis of the Anti-Trafficking Directive drom the Perspective of a Victim of Gender-Based Violence*, 18 October 2017, EIGE/2017/OPER/02, 44-45.

Individual assessments, in this sense, can be understood to represent an essential feature of any kind of victimological support which aims to be need-centred and suitable to prevent the risk of secondary and repeat victimization.[1112]

Individual assessments also constitute a crucial component of States' duty to adopt adequate operational measures to protect trafficking victims under art. 4 ECHR. The Strasbourg Court has specified that in this context "protection" shall be understood as an early alert duty of safeguarding the (P)VoTEs' perspectives of recovery and their safety from further harm.[1113] While the Court has sofar refrained from substantiating a general duty of individual assessment, similar specific duties have been expressed within the specific context of criminal justice proceedings, in cases where potential survivors were participating to trials both as injured parties or as defendants.[1114] Differently, in the NRM model, the individual assessment is addressed as a crucial component of the "*treat*[ment] *as (potential) victims of trafficking*"[1115] of detected survivors throughout the whole process of their assistance, from their first encounter with State authorities to their final reintegration.

The OSCE Handbook in this sense includes individual assessments within an integrated structure of victim-centred guidelines of implementation of the general principles of assistance and support in trafficking matters. The key requisite elements of such an integrated approach are the allocation of individual caseworkers to victims; the establishment and coordinated implementation of *safety and care plans*; as well as the fulfilment of continuous care duties through the adoption of a *phased* and evidence-based approach to treatment.[1116]

First of all, "[a]*ppropriate assessment and safety planning*", is understood to be "*best conducted by allocated individual support professionals*". The NRM Handbook, in this sense, expressly provides for the appointment of an individual caseworker and/or child rights advocate to every (potential) victim detected.[1117] The possibility of a detection of the particular needs and/or fears of (P)VoTs undergoing special support, in this sense, is understood to be largely favoured through the creation of an personal relationship of trust with between each survivor and an independent case manager, who can collate all the relevant elements regarding the victim's protection needs, advocate on their behalf

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[1112] Kanics, *National Referral Mechanisms*, 308.
[1113] V.C.L. and A.N. v. U.K., §159.
[1114] See *infra,* 7.1.
[1115] J. and others v. Austria, §110.
[1116] OSCE, *National Referral Mechanism*, 261: Recommended Guideline n. 28 ("Risk and needs assessment"): "*All advocates who make referrals and bridge access to services for victims of trafficking should conduct appropriate adult or child assessments and safety planning on a regular basis and keep a record of the contact details of all services and professionals who are currently involved with the victim*".
[1117] OSCE, *National Referral Mechanisms*, 97.

and favour a prompt access to different kinds of services.[1118] Recommended Standard 43 of the OSCE Handbook in this sense provides that "*the role of independent advocate should be a recognized professional role, accredited or officially recognized by competent authorities, national authorities, law enforcement authorities and statutory social services*".[1119] The OSCE Handbook, furthermore, clarifies some relevant *procedural* aspects concerning the adequacy of assistance provision. In this particular framework, the victims' referral to services and the further communications concerning emerging protection needs, the appointments with Competent Authorities and the filing of complaints on behalf of survivors concerning the quality of the support received are assisted by *bridging* techniques.[1120]

Bridged referrals and communications thus constitute essential forms of coordination of support services at the local, national and/or supranational levels aimed at guaranteeing an integrated response to the protection needs of (P)VoTs, without the latter being forced to autonomously contact each specific support service every time that a protection need emerges. "*Independent advocates*" and "*guardian advocates for children*"[1121] constitute the essential nodes of bridged referrals. This form of victim-centred assistance might be further facilitated, especially in cross-border trafficking cases, through the institution of national "*focal points*", as recommended in the amended art. 11 of the EUATD.[1122] Focal points constitute *ad hoc* national referral authorities, capable of receving and redirecting all possible assistance requests concerning (P)VoTEs through the adoption of interoperable and secure technologies of data gathering and data sharing.[1123] The effective bridging of referral services across the EU, in turn, is suitable to strongly benefit from the development of "*guidelines of minimum requirements for National Referral Mechanisms*" promoted under the amended EUATD.[1124]

Furthermore, caseworkers shall be properly trained so to be able to understand and recognize vulnerabilities.[1125] European States shall thus deliver evidence-based and comprehensive guidance, constantly updated, to specialised service providers concerning the patterns of abuse and domination that commonly occur in the context of trafficking;[1126] the relevant data concerning the particular

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1118 Timoshkina, *Health and Social Service,* 685.
1119 OSCE, *National Referral Mechanisms,* 263. See also, for what concerns the position of trafficked children, Guideline 53.
1120 OSCE, *National Referral Mechanisms*, 99.
1121 *Ivi*, 94.
1122 See European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, art. 11(4)
1123 *Ivi,* Explanatory Memorandum, 7.
1124 *Ivi,* 14.
1125 OSCE, *National Referral Mechanisms*, 69.
1126 *Ivi,* 48-54.

exposure of certain groups to the phenomenon;[1127] as well as relevant indicators of vulnerability which might be useful to favour the emergence of specific assistance and support needs.[1128] In this sense, a crucial aspect of caseworkers' professionality shall be identified in their ability to communicate with victims in a trauma-informed and gender-sensitive way, so to increase the confidence of survivors and to minimize the risk of secondary victimization.[1129]

The results of (P)VoTEs' protection needs assessment, in the NRM model, shall constitute the basis for the development by individual support professionals of "*ongoing safety and support plans*",[1130] where the relevant risks[1131] associated to each survivor's recovery and reintegration process are enucleated; and the corresponding services which shall come into play at the different phases of assistance are identified.[1132] Safety and support plans, thus, represent working documents which shall be widely and safely circulated across special support services and within the other procedures which might involve (P)VoTEs. Their content, in other words, constitutes an essential knowledge basis for ensuring an effective access of the survivor to victim-centred protection services and for allowing a grounded legal evaluation of their story, needs and risk outside of the sphere of assistance and support.[1133]

Under the first point of view, the overall NRM structure described in the OSCE Handbook addresses local anti-trafficking services as bearers of relevant duties of coordination: interagency working partnerships in this sense are understood to be necessarily formalized within the framework of "*Operational Partnership Protocols*" (OPPs).[1134] Such local structures of victim assistance shall aim at ensuring an effective and coordinated service provision to (P)VoTEs, an objective which entails relevant duties of multidisciplinary and synergic response to protection needs.[1135] This form of holistic care is understood to involve a relevant co-ordinatory role of victim support managers in

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[1127] *Ivi,* 39-48.
[1128] See *supra,* 2.2.
[1129] See OSCE, *National Referral Mechanisms*, 75. A wealth of technical guidance documents have been recently published IOs and CSOs concerning the necessary trauma-informed methods to be adopted within NRMs. See in this sense, OSCE, *Guidance on Trauma-Informed National Referral Mechanisms and Responses to Human Trafficking*, 2023; R. Witkin – K. Robjant, *The Trauma-Informed Code of Conduct Fot all Professionals working with Survivors of Human Trafficking and Slavery*, Helen Bamber Foundation, 2018, available at helenbamber.org.
[1130] OSCE, *National Referral Mechanisms*, 338.
[1131] *Ibidem*: "*In terms of human trafficking or exploitation concerns, the issues identified below all need to be considered to support protection: Are there immediate safeguarding concerns? Is there an imminent safety risk in relation to exploitation or human trafficking? What do you plan to do to begin to address these issues?*"
[1132] *Ibidem*. The relevant services indicated in the OSCE Model are "Family / community contact"; "Accommodation"; "Health"; "Education / training / employment"; Legal support / immigration"; "Social inclusion".
[1133] See e.g. for what concerns the specific sphere of identification procedures, *supra,* para. 3.
[1134] See *Supra,* para. 1.
[1135] See in this sense the Preamble of the Victims' Rights Directive 2012/29/EU: "*Specialist support services should be based on an integrated and targeted approach which should, in particular, take into account the specific needs of victims, the severity of the harm suffered as a result of a criminal offence, as well as the relationship between victims, offenders, children and their wider social environment*".

ensuring that all services are activated in due time.[1136] The effective implementation of this task can be very demanding and time -onsuming where the coordination of various services and professionalities are required. In this sense, while referrals represent crucial aspects of the implementation of a victim-centred response, the excessive proliferation of referrals might end up hampering the coordination of support provision. A relevant best practice in this sense, which has been upheld under the CoE Convention on preventing and combating violence against women and domestic violence,[1137] is represented by the so-called "*one stop shops*". This model of organisation envisages the provision in the same physical place of the broadest possible range of special services for particular categories of survivors of serious offences, so to favour a prompt and holistic response to survivors' special protection needs. While the extension this assistance model to anti-trafficking support services has not been expressly promoted sofar in European positive law, "*one stop shops*" have been recently adopted in some European States[1138] and they have been expressly recognised by the European Commission as a potentially effective victim-centred response in the field of THB.[1139]

Furthermore, care and safety plans are understood to represent an essential component of a model of *continuous care*:[1140] their content and effectiveness must be periodically reassessed, taking into account the evolving needs manifested by individual survivors.[1141] The institutional responses to survivors' protection needs provided in NRMs, on the one side, and in other procedures, on the other shall be understood as connected in ensuring an effective protection of the human rights of (P)VoTEs. In this sense, the determination of an individual's pathway to reintegration through care and safety plans does not simply entail the provision of clinical treatment to victims, but it necessarily includes also the activation of a number of crucial guarantees of counselling, information and technical assistance which shall be *holistic* in kind. It can be argued, thus, that the substantial guarantees of social and legal support and counselling enshrined in art. 11 EUATD and art. 12 ECAT shall not be exclusively limited to enabling survivors' participation in criminal justice proceedings as collaborators. On the contrary, in order to be considered fit to "enable victims to exercise their rights", such forms of assisrance shall necessarily address the whole spectrum of post-trafficking livelihood options of (P)VoTEs, including their access to redress, social integration or voluntary return to their

[1136] See OSCE, *National Referral Mechanisms*, 73.
[1137] Kanics, *National Referral Mechanisms,* "Article 18.3 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, 27 which obliges parties to ensure that measures taken allow, where appropriate, for a range of protection and support services to be located on the same premises.
[1138] See e.g. European Migration Network, *Third-country national victims of trafficking in human beings: Detection, identification and protection in Luxembourg,* 2021, available at: www.emnluxembourg.lu, 9.
[1139] Kanics, *National Referral Mechanisms,* 306..
[1140] Timoshkina, *Final Report,* 8-9.
[1141] OSCE, *National Referral Mechanisms*, 310. See also European Commission, *Study on Reviewing*, 45 for a general overview of the current practice of continuous assessment in EU Member States.

home country, job orientation and/or access to medium and long term forms of social assistance in the host State.[1142]

Finally, important clarifications are provided in the OSCE NRM Handbook about the underlying *method* of determination and implementation of victim support as a necessarily *phased* process, based on techniques of relative *prioritization* of needs. Building on the relevant clinical literature,[1143] in this sense, International Organisations have recently come to understand trafficking victims' progressive regaining of freedom and autonomy as a sequence of acts of needs satisfaction, which starts from the provision of those essential needs for survival such as protection from aggressions, food, shelter, etc.; and which in turn allow assisted individual to further cultivate their opportunities for recovery, access to justice and reintegration.[1144] While no codified "hierarchy of needs" has been formalized sofar within Anti-Trafficking law, the following paragraph will clarify that a phased approach to assistance constitutes the underlying rationale of the discipline of special assistance and support enucleated in the ECAT and the EUATD.[1145]

In addition, victim-centred assistance and support is furthermore qualified as necessarily evidence-based function. Specifically, the OSCE Handbook recommends States to ensure a sufficient *differentiation* of the forms of care provided to VoTs with regard to, among others, their age, gender, type of exploitation, level of trauma, medical necessities, culture. While the peculiar aspects of such an assistance will be comprehensively identified only through a personalized support plan, the availability of differentiated support services and therapies on State territory with the objective of meeting the known demand of specific profiles of survivors contitutes a necessary measure of "*prevention through addressing vulnerability*".

The principles and guidelines of administrative organisation mentioned in this paragraph represent forms of best victim-centred practice which are essential for ensuring a prompt, comprehensive and consistent access of (P)VoTEs to safety, recovery, reintegration and redress. In light of this, the effective adoption of a mediated, bridged, need-differentiated and centralized approach to victim assistance in National Anti Trafficking Plans and in Operational Partnership Protocols should be

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[1142] Probst, *Victims' protection* 6.
[1143] Rijken, *Trafficking in Persons. A Victim's perspective*, in Piotrowicz *et al., Routledge Handbook,* 244..
[1144] *Ivi*: "*it is logical that 'rest', 'recovery', safety, and protection* […] *are identified as primary needs by trafficking victims, and building relations of trust only comes afterwards*".
[1145] See *infra,* para. 6.1.

considered part and parcel of European States' obligations of victim protection under art. 4 ECHR, both at the legal-regulatory and at the operational level.[1146]

7.1. The different phases of risk, need and vulnerability assessment in the NRM model

Coming to the concrete content of the function of assessment, it shall be repeated that, following the current victimological best practice, the personalization of assistance of (P)VoTEs shall necessarily take place through a *phased* sequence of assessments of each survivor's state of risk, need and vulnerability. The general sequence of assessments discussed in the following combines the necessary characters of individualized victim support required under EU-CoE Anti-Trafficking law, the ECtHR art- 4 case law, and clinical literature.

7.1.1 Emergency assistance and the provision of safety

The detection of potential trafficking survivors by first responders, as already mentioned, is addressed under a victim-centred approach to require first of all an assessment of the individual's immediate[1147]/emergency needs. This form of assessment is expected to focus on the determination of the vital necessities of victims in terms of survival, such as food, clothing, emergency medical treatment[1148] (primary needs assessment); and protection from repeat victimization, intimidation, retaliation (risk screening).[1149] Biological and personal security, therefore, are the primary aims of this assessment, which, in light of its emergential nature, shall take place immediately after the discovery of the victim and be conducted *before* survivors are referred to the NRM.[1150]

As previously observed, the modalities of the *pris en charge* of newly discovered victims must be understood as necessarily consensual. Several international guidance documents recommend that no mandatory treatment (such as HIV exams, medical operations, age assessments) should be provided by first responders without the prior consent of the survivor.[1151] Emergency protection needs will be at times satisfied during the first contact between survivors and first responders (e.g. provision of food, water, clothes, immediate emotional support); or, where necessary, it will follow an *ad hoc* referral of the potential victim to specialised services (e.g. medical examinations; children care

[1146] See for a recent affirmation of this principle at the EU level, the Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Preamble, paras. 15 and 32.
[1147] OSCE, *National Referral Mechanisms*, 150.
[1148] OSCE, *National Referral Mechanisms*, 103.
[1149] See e.g. ICMPD, *Guidelines,* 41.
[1150] OSCE, National Referral Mechanisms, 116.
[1151] *Ibidem.*

services), structures (e.g. safe housing) or authorities (e.g. the communication to police authorities of a risk of retrafficking and/or of retaliation).

Emergency protection from repeat victimization, in particular, must be provided through the adoption of safe modalities, especially considering the possibility that the victim is still under the influence of traffickers or that they are detected together with their perpetrators or with individuals otherwise associated with their exploitation. Necessary measures in this regard include authorities' avoidance of involvement of unknown third parties in the process assessment of survivors' emergency needs;[1152] the conduction of assessments in a safe place and through the adoption of trauma-informed methods of communication; the prompt offer of a range of available assistance solutions in accordance with the preferences of the survivor.

Under the ECtHR jurisprudence, States' operational and procedural obligations under art. 4 ECHR have been interpreted so to recognize a duty of due diligence of Member States in securing a safe transition of survivors out of their context of abuse and to create the conditions for their further recovery and reintegration.[1153] The Court's elaboration of States' "expected response" against immediate risks for victims' safety in many instances reproduces the content of the key victimological guidelines of emergency assistance provision. In the case of *Rantsev v. Cyprus and Russia*, the Strasbourg Court has considered contrary to the spirit of art. 4 ECHR an operational response to an arguable case of THB where no questioning of the survivor has been conducted by police authorities and where the potential victim has been released from custody under the control of their employer, i.e., an actor potentially involved in their trafficking.[1154]

The case of *J. and others v. Austria* has deemed the conduct of Austrian authorities in responding to the *self-detection* of two potential victims of domestic servitude compliant with the operational duty to protect under art. 4 ECHR. Key aspects of adequacy of the operational response have been identified in the fact that: a) the two survivors have been interviewed by properly trained officials immediately after the first contact with the police; b) after this first contact, they have been "treated as potential victims" and have been provided access to special forms of assistance and support.[1155] Finally, the case of *V.C.L. and A.N. v. U.K.* has specified that the absence of an immediate referral of

[1152] *Ibidem*: "*It is essential to ensure that victims are safe, and away from any contact (including being within hearing or sight) of traffickers or any other persons who have been recovered with them*[…]. *Separation from any other persons on the site can be distressing: it should be conducted as sensitively as the environment and situation allows in accordance with a trauma-informed and gender-sensitive approach*".
[1153] Rantsev v. Cyprus and Russia, §286; V.C.L. and A.N. v. U.K., §152: See *supra,* para. 2.
[1154] Rantsev v. Cyprus and Russia, §286.
[1155] J. and others v. Austria, §110.

a potential child victim to the NRM upon detection of reasonable grounds of THB represents a violation of the operational duty to protect (P)VoTEs under art. 4 ECHR.[1156]

A comprehensive reading of the said *dicta* suggests that a prompt, individualised and expert assessment of potential trafficking survivors' situation of risk, conducted by trained practitioners through a personal interview, represent essential components of European States' expected operational response to trafficking-related risks under Human Rights Law. The relevant domestic practice, finally, provides some examples of the possible harmonization of emergency assessments at national level. The UK NRM Guidance for instance indicates that first responders must follow *ad hoc safeguarding procedures* set out by their organisation, illustrating the methods trafficking risk assessment, the referral process, the assessment of the healthcare needs of survivors and their further provision with material conditions of safety.[1157]

7.1.2 Short-term assistance: individual risk and needs assessments

Once a (potential) trafficking survivor finds themselves in an effective situation of safety, their subsequent referral to the NRM determines the activation of a recovery and reflection period of at least one month. The adequate safeguard of survivors' victimological condition in this phase shall take place through the conduction of an *individual risk assessment* and a *needs assessment*, aimed at determining survivors' *short-term protection needs* and to formalize their *ongoing safety and support plan*. In the domestic practice of European States,[1158] risk assessments are commonly understood as focusing on the issue of victims' personal post-trafficking safety and in the determination of a form of support (housing, identity change, guarding services, data protection among others) which might be considered adequate to avoid the risk of their repeat victimization;[1159] needs assessments, conversely, entail an evaluation of the forms of support suitable to favour individual survivors' emotional and physical recovery, including psychological assistance, counselling, access to special healthcare service, etc.[1160] Generally speaking, the set of unconditional assistance and support guarantees afforded to *all* trafficking survivors under European law covers the phase of short-term needs response, to be activated while the identification procedure is pending.

1156 V.C.L. and A.N. v. U.K., §163.

1157 See e.g. U.K. Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance For Scotland and Northern Ireland*, Version 3.5, available at: https://www.gov.uk, p. 49.

1158 European Commission, *Study on Reviewing*, 45.

1159 See e.g. R. Surtees, *Listening to victims: experiences of identification, return and assistance in South-Eeast Europe*. Vienna: ICMPD 171: "*Ongoing risk assessments should be an integral part of the victim assistance framework* […] *Risk assessments should be done on on-going basis and in response to the victim's evolving situation. Risks will arguably fluctuate according to situation, times, location and involvement in criminal proceedings. It is important that service providers and law enforcement also anticipate potential future risks as different actions are taken*".

1160 European Commission, *Study on reviewing,* 61.

In line with the current best practices of victim reception and assistance, as well as with EU law, thus, short-term needs assessments should entail a dual consideration of security and recovery needs.[1161] Under the first point of view, victim assistance personnel are expected to adequately take into account the results of emergency needs assessments and to *reevaluate* the victim's "exogenous" situation of risk (i.e., their acquaintances, their history of victimization, the relevant contacts with potential aggressors) after their detachment from their situation of abuse. In addition to that, short-term needs assessments represent the method of determination of (P)VoTs' personal *recovery needs*. Such a determination should arguably focus on the *endogenous* character of the effects of victimization on the individual, their fears, physical and psychological hardships, attitudes towards their past abuse and desires of participation in processes of justice. Thus assessment shall thus not only focus on the specific effects of the experience of trafficking and exploitation on the individual: rather, it shall "accommodate to their pre-trafficking and post-trafficking vulnerabilities and experiences", too.[1162]

Both risk assessment and individual needs assessment shall be informed by a character of informed consent and they should allow for the active participation of the survivor as a privileged source of insights on the nature and extent of their protection needs. The implementation of survivors' care and safety plans during the R&R, as well as the possible evolution of the potential victim's needs during such period ground a relevant duty of *continuous monitoring* of each individual's recovery process.[1163] The adequate fulfilment of such duty requires that needs and risks assessments are repeated whenever a change in the conditions of assistance takes place and/or new protection needs emerge.[1164]

The OSCE NRM Handbook provides for the adoption of a targeted form of continuous risk and need assessment for *child victims*, which shall be primarily aimed at reconstructing the best interest of the child (so-called *BIC assessment*). Such an assessment is understood to necessarily take place as soon as possible after a child has been preliminarily identified as a (P)VoT, and progressively updated at subsequent stages, once the child's practical and health care needs have been met, their guardian advocate allocated, and safe and appropriate accommodation provided. The BIC assessment shall be able to grasp the specificities of child survivors' experience of victimization, for what especially concerns the impact of trafficking on their process of growth and sensemaking; as well as the

[1161] *Ibidem.*
[1162] Rijken, *Secondary Victimisation*.
[1163] See *supra,* 6. See also Planitzer, Art. 12,12.46: "*Amnesty International and Anti-Slavery International proposed to add the text of Article 12(7). They suggested that the text should 'expressly state that protection, services and assistance should be provided on a fully informed and consensual basis, and on the basis of periodic individualized needs assessments carried out by suitably qualified experts'*".
[1164] See e.g. OSCE, *National Referral Mechanisms*, 94.

heigthened relational dependence of children on their former exploiter, and the emotional impact descending from the interruption of such abusive relationships. BIC assessments shall be conducted by specialist professionals who adopt child-sensitive methodologies of communication, inclusion and protection from further trauma. One important peculiarity of BIC-based support provision resides in its focus on *permanence planning* for each child: the results of assessments in this sense shall be used to determine a long-term plan capable of providing the child with stability so to foster their further development as growing human beings and their fulfilment of their long-term potential.

7.1.3 Recovery needs assessments

As previously discussed, both the ECAT and the EUATD specify that necessary measures of assistance and support shall be put into place in Member States with the objective of favouring victims' personal, psychological and social recovery.[1165] When it comes to the sufficiency of such measures, the first aspect to be taken into account is the duration of assistance. In this sense, art. 10(2) of the ECAT specifies that a minimal level of assistance for preliminary identified trafficking victims shall be present for the whole duration of the identification process. Differently, art. 11 EUATD states that assistance measures shall be provided before, during and for an appropriate time after the end of criminal proceedings.

Both legal frameworks do not idicate any set timeframe of "expiry" of assistance measures: the said gauarantees, on the contrary, must be erogated "*as may be necessary*" to ensure an individual's recovery.[1166] On the same, no clear pathway of support towards victim recovery is identified under European law, an element which has frequently brought EU/CoE Member States to subject the erogation of special support services for VoTs to strict time limits in the aftermath of identification. It shall thus be asked which necessary guarantees shall be in place to ensure the recovery-sufficiency of the assistance provided to trafficking survivors and to avoid the risk that they are left vulnerable to secondary victimisation through a premature interruption of victim-centred support services. A possibility shall be necessarily provided for under national law for the *extension* of recovery assistance measures, including most notably free psychological assistance, material assistance and housing.

The current English legal framework is of particular interest under this point of view: while, in fact, until 2018, assistance services for trafficking survivors under the UK NRM used to be automatically

[1165] See *supra,* Chapter 4, 3; see *supra,* Para. 5.
[1166] V. Stoyanova*,* Article 10, 10.19: "*once a person has been conclusively identified as a victim, he/she continues to be eligible for the assistance measures indicated in Article 12(1), (2), (5), (6) and (7).36 The text of the treaty is, however, silent as to the timeframe of these assistance measures. Article 12(1) refers to a victim's recovery; thus, it is possible to argue that as long as a victim is in need of recovery, the assistance measures need to be provided*".

waived soon after the individuals' identification as a trafficking victim by domestic Competent Authorities;[1167] the strong advocacy work of a series of civil society organisations has brought the UK government to amend the NRM regulation so to introduce a so-called Recovery Needs Assessment (RNA).[1168] The RNA constitutes a mandatory verification of each trafficking survivor's state of recovery - and of their perspectives of reintegration - shortly before the legally foreseen expiry of their access to specialised services. Where additional recovery needs are found at the end of an independent administrative decision, the erogation of services is prolongued for 6 months with the possibility of applying for further extensions.

The situation of the bearers of trafficking victim status in this sense shall be accurately investigated taking into account the time and the specific forms of support necessary to sustain their pathway to recovery. In line with the principle of *continuous monitoring*, therefore, the RNA constitutes a necessary update concerning the persistence, in the phase of "medium-term assistance", of the protection needs associated to the different support services available under anti-trafficking law (safe housing, economic support, medical and/or psychological services, counselling and personalized assistance, etc). Where any of the abovementioned forms of assistance is deemed no more necessary, the RNA will act as a partial verification of victim's recovery, in line with the multi-dimensional model of the concept illustrated above.[1169]

In this regard, it is important to consider that the undue interruption of recovery-related assistance services is highly suitable to expose victims to secondary victimisation.[1170] The association of the conclusive grounds decision on victim identification to the abrupt termination of need-centred assistance services represents an interpretation of the ECAT which contradicts States' duty to adopt an *adequate* legal-regulatory framework to protect trafficking victims under art. 4 ECHR. The issuing of a conclusive grounds identification decision, in other terms, does not entail a consequent evaluation of the beneficiary's effective recovery from their harmful experience of abuse. On the contrary, such this decision constitutes a legal *condition* for a further and more comprehensive assistance to the identified victims and an essential form of *recognition* of the harm suffered by the individual and of their subsequent entitlement to special support.[1171]

[1167] R. Witkin, *Supporting Adult Survivors of Slavery to Facilitate Recovery and Reintegration and Prevent Re-Exploitation,* March 2017, available at: http://ww.antislavery.org, 7.
[1168] See e.g. K. Hutchinson, Olly, B. Mullan-Feroze, *One day at a time. A report on the Recovery Needs Assessment by those experiencing it on a daily basis,* April 2022, available at http://www.antislavery.org.
[1169] See *supra,* para. 5. See also Chapter 4, Part 2, 2.2.
[1170] OSCE, *National Referral Mechanisms*, 134.
[1171] See *supra,* para. 3.

All this considered, it shall be argued that a recovery needs assessment shall be included in national legal or regulatory frameworks disciplining the special assistance and support available to formally identified trafficking survivors.[1172] The appointment of personal caseworkers to victims in this sense represents a crucial support measure for ensuring the adequate transmission of the results of the periodic assessments of the progess of survivors' care and safety plans. These professionals, moreover, are best placed to advocate survivors' access to the special forms of assistance recognised to formally identified victims, including labour market orientation, vocational training and free legal assistance.

For those victims who are not legally resident on State territory, moreover, the proven persistence of their recovery needs is suitable to constitute the basis for the granting of a residence permit in light of their "personal situation" pursuant to art. 14 ECAT. Even where such permits are not granted, the persistence of recovery needs and the reasonable possibility that they can be fulfilled in survivors' countries of origin shall constitute, as already mentioned, the object of an *ad hoc* pre-return assessment, with the connected duty of European States to halt return proceedings where a relevant risk of "*revictimization*" is found.[1173]

[1172] In the same sense, see Stoyanova, *Human Trafficking and Slavery,* 127: "*the timeframe of the assistance is contingent on the recovery needs of the victims. No explicit requirement for formalized assessment as to these needs after the expiration of the recovery and the reflection period is incorporated in the convention. An argument that implicitly such an assessment is required is not without power, though*".

[1173] Art. 16(5) ECAT. See *supra,* Chapter 3, Part 1, 4.1.3.

8. “Do no harm”: the integrated protection of foreign (P)VoTEs within the Common European Asylum System

The termination of the recovery and reflection period opens the stage for the initiation of proceedings materially concurrent with the process of assistance and support of trafficking victims, such as criminal justice procedures, labour law lawsuits and administrative proceedings connected with the immigration status of the survivor in the host Country. These procedures and their legal consequences are at times suitable to interfere with the interests of recovery and security of VoTs, and States are thus expected to evaluate the risks to the human rights of survivors involved therein on a case-by-case basis.

The EU CEAS in this regard represents a relevant site of emergence of State obligations of protection of (P)VoTEs under art. 4 ECHR: on one hand, asylum seekers are addressed in EU legal texts as mixed populations within which individual and/or collective situations of vulnerability to trafficking and/or secondary victimisation frequently emerge.[1174] On the other hand, the status of applicants for international protection in EU Member States is largely regulated through their involvement in a complex series of *procedures*, with the consequent creation of legally-enabled situations of *proximity* between the said presumed situation of potential risk and the ordinary overviewing functions of State authorities.[1175] Moreover, the legal status of applicants under the CEAS makes them totally reliant on State intervention for the satisfaction of their human rights needs. This aspect of critical dependence from State support has constituted the basis for the qualification of asylum seekers as a *vulnerable group* in the famous ECtHR case of M.S.S. v. Belgium and Greece.

In light of the above, the known frequent presence of trafficking survivors within flows of asylum seekers *en route* to Europe grounds a presumption of a general trafficking-related risk in CEAS procedures. The adaptation of border procedures, reception conditions, as well as asylum determination procedures to adequately address trafficking-related vulnerability shall thus be considered the object of critical State duties under both the operational and legal-regulatory limbs of art. 4 ECHR. Several important developments in this sense can be found in positive law and in developing human rights standards of monitoring bodies in this field.

One relevant example can be identified in the context of hotspots and of the large scale processes of population profiling, data gathering and protection needs assessment which take place at the external borders of the European Union. The situation of proximity between migrant populations and border

[1174] See *supra,* Chapter 2, Part 1, 1.3.
[1175] See *supra,* para. 2.

authorities in the context of hotspots can be considered of extreme relevance for what concerns (P)VoTEs' credible prospects of accessing adequate protection. On one hand, the mandatory subjection of foreigners arriving at several EU external borders to hotspot procedures constitutes the relevant expression of EU MS objectives of migration control, which *objectively* creates the condition for a State acknowledgment of trafficking-related vulnerability.[1176] In this sense, States' duties of trafficking *prevention* under the ECAT include the obligation to "*strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings*".[1177] In order to ensure the effectivity prevention, it can be held, a duty of *proactive screening* of trafficking-related-vulnerability shall included mandatorily in such procedures.[1178]

The essentiality of proactive screening in the context of hotspots emerges with even greater relevance when we consider the current state of EU policy of border management. The recent developments of domestic legislation in countries such as Italy and Greece, as well as the new instruments of the Pact on Migration and Asylum currently under negotiation at the EU level, are reshaping the treatment of migrants at the external borders of the EU as a site of possible critical limitations of their rights to freedom of movement, legal assistance, and access to services. Specifically, the new asylum procedures regulation institutes the so-called "accellerated and border procedures", which generalize the possibility of a default containment in border zones of all asylum seekers entering illegally at the EU external borders and/or of those asylum seekers deemed to come from "safe third countries". These individuals will be in turn subjected to a speedier and less guaranteed process of examination of their asylum application than the ordinary one mandated under the Asylum Procedures Directive.

The cited forms of restriction of the liberty of asylum seekers at the external borders have been variously denounced as suitable to undermine the position of those foreigners who hold special protection needs,[1179] including notably trafficking survivors. As previously observed, several legal instruments of the CEAS stipulate that Member States shall take into consideration the situation of vulnerable persons (also) at the moment of their immediate accommodation at the border[1180] and during the examination of applications made at the border or in transit zones, through the conduction of ad hoc assessments.[1181] Art. 24(3) of the EU Asylum Procedures Directive in this regard specifies that the identification of an applicant as "*in need of special procedural guarantees*" shall halt the

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1176 OSCE, *Uniform Guidelines*, 16-17. See also M. Ventrella, Identifying Victims of Human Trafficking at Hotspots by Focusing on People Smuggled to Europe*, Social Inclusion*, 5, no. 2, (online) 5-6.
1177 See *supra,* Chapter 3, Part 1, 1. See also Greta 2020 Report Germany, 45.
1178 See e.g. EMN, *Identification of Victims*, 18.
1179 See e.g. K. Aberg, Examining the Vulnerability Procedure: Group-based Determinations at the EU Border*, Refugee Survey Quarterly*, 2022, 41, 52-78.
1180 Directive 2013/33/EU, art. 22.
1181 Directive 2013/32/EU, art. 24.

application of accelerated and border procedures in their case, "*where an adequate support cannot be provided within the framework of the said procedures*".[1182]

Moreover, the proposal for a Screening Regulation currently included in the EU Pact on Migration and Asylum introduces a duty of "*health and vulnerability screening*"[1183] of all asylum seekers who file their request at external borders and who do not fulfil the entry conditions set out in art. 6 of the Schengen Border Code.[1184] The "*vulnerable situations*" which shall be subjected to screening under the proposed regulation include the situation of victims of torture and of those individuals who are considered to hold special needs under art. 20 of the EU recast Reception Conditions Directive.[1185] This latter norm, as previously observed,[1186] expressly indicates victims of trafficking in human beings as special protection bearers. Moreover, art. 6(7) of the proposed Screening Regulation stipulates that anti-trafficking rapporteurs shall be involved in the provision of health and vulnerability checks; the Preamble of the proposal further specifies that the intervention of the said rapporteurs is required "*wherever the screening reveals facts relevant for trafficking in line with Directive 2011/36/EU*".[1187]

In this regard, the aim of the said health and vulnerability screening to provide "timely and adequate support" to its beneficiaries[1188] shall be read in conjunction with the provisions on trafficking victims assistance of the EUATD, which are in turn expressly aimed at "*establish*[ing] *appropriate mechanisms aimed at the early identification of, assistance of and support for victims*".[1189] This joint reading arguably reveals the necessity to include the cited "health and vulnerability screening" within the standard operating procedures provided under national referral mechanisms. In this regard, GRETA has recently affirmed that vulnerbility screening must be necessarily characterised by a proactive detection of human trafficking indicators and of signs of vulnerability to trafficking.[1190] The authorities in charge of health and vulnerability screening shall thus be adequately staffed with specially trained anti-trafficking first responders, who should be charged with tasks of immediate assistance of survivors upon detection and referral to services. Moreover, any first-instance

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1182 Directive 2013/32/EU, art. 24(3).

1183 Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) no 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final, Art. 9.

1184 Proposal for a Screening Regulation, Art. 3.

1185 Proposal for a Screening Regulation, art. 9(3).

1186 See *supra,* Chapter 3, Part 1, para. 1.3.

1187 Proposal for a Screening Regulation, Preamble, (21).

1188 Proposal for a screening regulation, art. 9(3).

1189 EUATD, art. 11(4).

1190 Group of Experts on Action against Trafficking in Human Beings, 10th General Report on GRETA's Activities, April 2021, available at https://rm.coe.int, point 97: "*GRETA stresses the importance of ensuring that the screening process enables the detection of indicators of trafficking in human beings or signs of vulnerability to being trafficked*".

determination of protection needs arising from the said indicators and risk factors must necessarily be based on the results of a further risk and vulnerability assessment,[1191] carried out after the provision of essential conditions of safety to the survivor.

All these considerations clarify the material impossibility of ensuring a sufficient level of victim-centred assistance to (P)VoTEs at the external borders in the frame of accelerated and border procedures. On one hand, an acceleration of the examination of the asylum claims of detected PVoTEs, through the significant limitation of their procedural guarantees, is very likely to undermine competent authorities' diligent response to their special situation of need. The relevant difficulties associated with the victim-centred response to situations of trauma and the critical importance of unconditional and immediate assistance for victims of trafficking in order to effectively participate to legal procedure have been indicated by GRETA as critical grounds to require that the asylum requests of trafficking survivors are always examined in regular procedures.[1192]

On the other hand, the limitation of the freedom of movement of VoTs through their subjection to border procedures clearly undermines their effective access to several essential guarantees of the recovery and reflection period. This aspect has been notably underlined by the Court of justice of the European Union in a case concerning the detention of asylum seekers at EU States' internal borders in application of the Dublin Regulation.[1193]

The Court in this occasion has taken the opportunity to clarify the aims and the scope of the guarantees associated to the activation of the R&R under the EURPD. First of all, the R&R shall to apply to *all* third country nationals, irrespective of their status on a Member State territory. The ECJ in this sense has specified that, irrespective of the presence of a concurrent interest of the Member State concerned regarding migration management and prosecution of serious crime, the situation of trafficking victims upon discovery requires first and foremost the creation of suitable conditions for recovery and security. In this sense, the Court reiterated that the guarantees of the R&R shall be activated at the earliest stage whenever reasonable grounds of trafficking are found to be present. The return of a potential victim of trafficking to the EU MS where they had made their first entry in the Union's territory in this sense was found to amount to a form of "expulsion order" prohibited under art. 6(2) of the EURTD.[1194] Furthermore, the Court held that the removal of an individual at risk from State territory is contrary to the aims of victim assistance enshrined in art. 7 of the EURTD *as vulnerable*

[1191] See *supra,* 6.1.2.
[1192] GRETA, *10th General Report*, point 115.
[1193] EMN, *Identification of victims,* 23.
[1194] Court of Justice of the European Union (Fourth Section), 20 October 2022, O.T.E. vs. Staatssecretaris van Justitie en Veiligheid, C-66/21, para. 66.

victims. Finally, the enforcement of return orders is addressed as a measure likely to perpetuate the said vulnerability: the Court in this sense has expressly acknowledged trafficking survivors' position of vulnerability not as a mere product of crime and/or of individual characteristics, but crucially of the level of societal responsiveness that from a situation of endangerment derives.[1195]

This particular case clarifies the crucial importance of the unconditional and specialised assistance of asylum seekers who are also (P)VoTs for the purpose of their adequate victim-centred protection and of their effective access to international protection.[1196] This consideration calls into question the necessity of adequately coordinating the relevant provisions concerning the reception of asylum seekers and the essential guarantees of an adequate assistance under the Human Trafficking legal framework. On this particular issue, the provisions of the EU Reception Conditions Directive shall constitute a relevant guidance for determining the potential scenarios of such an overlapping of need-based procedures. As already mentioned, art. 22 of the 2013/33 Directive specifies that the determination of asylum seekers' special protection needs shall be conducted (also) as soon as the individuals are assigned an accommodation within national reception systems.[1197] For what concerns the peculiar situation of trafficking victims, such provision can be understood to require the evaluation of the adequacy of the reception treatment provided to meet the special needs of individual (P)VoTs. In this sense, the current national practice often highlights a common reality of indiscriminate housing of (potential) trafficking survivors, including victims of violence and children, within "ordinary" migrant reception centres. Such a solution has been frequently deemed[1198] largely violative of (P)VoTs' protection needs, in line with the requirement that trafficking victims are provided with *dedicated* structures provided in supranational law.

The risk that undetected survivors are housed in general migrant reception structures shall be contrasted by national authorities through the adoption of credible risk prevention protocols, suitable to adequately "*take into account the situation of vulnerable persons such as* […] *victims of human trafficking*".[1199] In this sense, several reception centres[1200] operate a trafficking screening of all new

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[1195] *Ivi*, para. 61.

[1196] See e.g. Council of Europe, *Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025)*, August 2021, 10: "*The implementation of the previous action plan showed that there is a need to enhance support and assistance to persons in vulnerable situations in access to asylum procedures, and necessary services. This would require, in particular, vulnerability screening to be part of the reception system and alternatives to detention to be put in place*".

[1197] Art. 22, Directive 2013/33/EU. See in this sense Petin, *Exploring,* 7: "*Identification of the vulnerable asylum-seekers' special needs is indeed the cornerstone of the protective system. [...] Article 22 of the recast RCD makes it clear that Member States have an obligation to assess whether asylum-seekers have special needs. All asylumseekers are concerned, not only the ones listed as vulnerable, for which special needs are presumed*".

[1198] Planitzer, Article 12*,* 12.21.

[1199] Directive 2013/33/EU, art. 21.

[1200] L. De Bauche, *Vulnerability in European Law on Asylum: a Conceptualization under Construction,* Bruylant, 2013, 114-15.

hosts, and where indicators of trafficking are found, they refer the concerned individuals to dedicated shelters for trafficking victims.[1201] A relevant duty of specialization of the authorities involved in the reception of asylum seekers, as well as of relevant *coordination* between such authorities and anti-trafficking services, thus represent key corollaries of States' positive obligation to adopt an adequate legal or legulatory framework under art. 4 ECHR.[1202]

Finally, some relevant considerations can be made concerning the interplay between the procedures of victim identification, assistance and support and the parallel conduction of asylum procedures. A relevant interpretive issue in this respect concerns the relationships between the recovery and reflection period and the victim's access to asylum procedures. The relevant monitoring work of GRETA has critically highlighted that in several CoE State Parties, especially where the trafficking victim status is associated with the issuance of an ad hoc residence permit, the access of (P)VoTs to the recovery and reflection period is legally defined as preclusive of their possibility to file a request of international protection.[1203] Such a legal limitation cannot be considered compatible with a holistic and victim-centred approach which shall be adopted by States in the fulfilment of their duties of victim protection. The EUATD in this sense is explicit in requiring States to take into account jointly the trafficking victims' recovery need and their needs of international protection. The joint reading of the provisions of artt. 11(2), 11(5) and 11(6) EUATD in this sense suggests that, as soon as Competent Authorities have a 'reasonable grounds indication for believing' that a migrant is a victim of human trafficking, they shall inform them of the possibility of applying to international protection under the CEAS.

Similarly, art. 40(4) ECAT provides for the non-interference of the said Convention with the "rights, obligations and responsibilities of States and individuals under international law, *including,* where applicable, *the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*".[1204] Moreover, art. 14(5) ECAT states that the issuing of a residence permit to victims owing to their status as trafficking survivors "shall be without prejudice to the right to seek and enjoy asylum",[1205]

[1201] See e.g. the Council of Europe *Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025),* available at www.coe.org, 10: "*The implementation of the previous action plan showed that there is a need to enhance support and assistance to persons in vulnerable situations in access to asylum procedures, and necessary services. This would require, in particular, vulnerability screening to be part of the reception system*".

[1202] See for a recent affirmation of this principle at the EU level, Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Preamble, para. 19: "*Member States should take into account, in the course of asylum procedures, the specific situation of vulnerability of victims of trafficking who can be in need of international protection, including, where applicable, through* […] *special reception needs in accordance with* [the forthcoming EU reception conditions directive]"

[1203] See e.g. GRETA, *10th General Report,* para. 149. See also Sax, Article 13*,* 13.42.

[1204] ECAT, Art. 40(4). See in the same sense V. Stoyanova, *Human Trafficking and Slavery*, 140-41.

[1205] ECAT, art. 14(5).

a provision that arguably clarifies the necessary character of mutual *non-exclusiveness* of the systems of international protection and victim-centred protection of (P)VoTs. Such a direct connection between victim identification and the international protection procedure is, in turn, specifically provided for within most NRM models, where an *ad hoc* referral to asylum authorities is mandated in the cases where detected victims of THB manifes the intention to apply for international protection.

Under a different point of view, the relevant data concerning the detection and identification of trafficking victims show that in many cases the referral of an individual as a (P)VoT concretely follows their contact with the authorities tasked with the evaluation of their asylum application. The previous legal analysis has clarified that the authorities tasked with the evaluation of applications for international protection can well act also as competent authorities in the procedure of identification of trafficking victims.[1206] Several issues can be identified when it comes to asylum authorities' duties of favouring an effective protection of such individuals. First of all, the known frequent involvement of VoTs in international protection procedures inquires once again national authorities to include proactive screening protocols within the said procedures. The recent practice of asylum commissions and judges at the national level provides some encouraging trends in this regard.[1207] Already in a 2014 Report concerning the identification of trafficking victims within International protection and forced return procedure, the European Commission highlighted how thirteen out of twenty-four EU Member States had rules in place which provided for the proactive screening of all migrants and/or asylum seekers, or of selected groups of them considered to be exposed to a particular risk, at a certain stage of immigration and/or asylum procedures.[1208]

Furthermore, the detection of (P)VoTEs within the international protection procedure in turn inquires competent authorities to ensure a prompt response to the survivor's emergency and immediate needs, enabling the survivor's access to a recovery and reflection period. This necessity in turn requires that a possibility of suspending the evaluation of (P)VoTEs' demand for international protection is provided in national law, at least for the duration of the recovery and reflection period.[1209] On the same, such suspension shall not be considered as an automatic consequence of the detection of (P)VoTs, who might well ask to take part to asylum procedures already during the R&R. These relevant options shall be read in conjunction with the cited provisions of the EU Asylum Procedures Directive, which provides for the possibility that Member States prioritize the examination of the asylum application coming from particularly vulnerable individuals. A victim-centred reading of such

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1206 See *supra,* Para. 5. See also EMN, *Identification of Victims*, 21-22.
1207 See e.g. European Commission, *Study on Reviewing,* 41-42.
1208 EMN, *Identification of victims,* 19.
1209 GRETA *10th General Report 2020*, para. 94.

a duty arguably requires that, when it comes to (P)VoTs, the applicant's informed consent to such prioritisation is considered and the relevant procedural arrangements are taken so to adapt the examination of the asylum request to the special protection needs highlighted through the prior assessment of the victim's condition by specialised services.

On this latter aspect, art. 24 of the 2013/32 Directive extends States' duties of individualisation of assistance to all those cases where "*the applicant is an applicant in need of special procedural guarantees*". A coherent reading of this provision in conjunction with the relevant framework of trafficking victim assistance suggests that asylum authorities shall be considered in charge of determining the relevant measures of procedural protection of (P)VoTs within asylum procedures, with a diligent coordination with special protection services.[1210] Such authorities, in turn, shall adequately adapt their process of judgment on international protection requests to the peculiarities of potential trafficking cases. This requirement of procedural accuracy shall be satisfied, most notably, through an expert evaluation of grounds of vulnerability in the assessment of the credibility of the statements of VoTEs, through the adoption of a contextually sensitive and victimologically principled evaluation of the behaviour and of the statements of the victim-applicant. On the other hand, the individual grounds of vulnerability revealed through victim-centred assessment shall form the basis of asylum authorities' evaluation of the risks associated to a denial of international protection, including most notably the risk of retrafficking and of persecution in the Countries of origin of the survivors.

[1210] Stoyanova, *Article 10*. See on this point Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Article 11a: "*Member States shall ensure complementarity and coordination between the authorities involved in anti-trafficking activities and the asylum authorities. Member States shall ensure that victims of trafficking are able to exercise their right to apply for international protection or equivalent national status, including when the victim is receiving assistance, support and protection as a presumed or identified victim of trafficking in human beings*".

Conclusion

The different chapters of this thesis have sought to provide a comprehensive account of the normative content and effects of the concept of vulnerability within the European legal framework against trafficking in human beings. The main findings of this research can be synthesised as follows:

1. “Vulnerability” indicates a state of hardship faced by an individual or a population group in avoiding and/or contrasting a future and uncertain harm and/or in coping with the consequences thereof. In the international policy discourse concerning THB, the subjects of vulnerability are the individuals who are exposed to the effects of a criminal threat of trafficking. The harm that they are threatened with is an offence to their human rights.

2. The references to vulnerability in anti-trafficking law describe a *continuum* of relevant experiences, which includes individual and collective situations of proneness *to* trafficking, the experience of subjection to traffickers and exploiters, and the victimological condition of survivors in the aftermath of trafficking. This whole spectrum of subjective-objective states is addressed in this thesis under the name of “trafficking-related vulnerability” (TRV).

3. Vulnerability represents a central concept within the international legal definition of THB. Both international and European (EU/CoE) law define THB as the intersection of three requisite elements: a material conduct of “supply”, a purpose of “exploitation”, and the adoption of coercive and/or abusive means. “Abuse of a position of vulnerability” (APOV) is included in the latter category: while THB is commonly understood to be often perpetrated through coercion, compulsion and threat, APOV is a typical trafficking means which entails the use of forms of motivational pressure which are not in themselves violent, threatening or deceptive.

4. The means of APOV thus represent a residual and general account of the phenomenology of THB and of severe exploitation, which best epitomises the core traits of the harmfulness and wrongfulness of such forms of interpersonal behaviour. Its internal structure supports the understanding of TRV as a continuum: “*position of vulnerability*”, in this regard, is defined as “*any state of hardship*” suitable to render the individual exploitable through the exertion of forms of motivational pressure.

5. In order to have trafficking, the said *ex ante* condition of precarity must have been subsequently *abused*: the trafficker shall acquire an active role in turning an individual’s adverse socio-economic situation into an interpersonal setting of domination. The “abuse” of the said state of hardship, in other terms, marks the transition of a victim from a situation of *ex ante vulnerability* to a situation of “vulnerability to exploitation”. In contemporary social theory, this latter condition is defined as “pathogenic vulnerability”.

6. The legal definition of THB stipulates that the manifestation of consent by a victim shall be considered irrelevant where the means of trafficking (including APOV) are exerted. On the same, APOV is defined in several soft-legal instruments as the "*situation where the victim has no real and acceptable alternative but to submit to the abuse involved*". In the first Chapter of the thesis, it has been argued that the "real and acceptable alternative" *rationale* represents a flawed form of representation of the effects of THB and exploitation on victims. Vulnerability and the abuse thereof arguably do not have much to do with a lack of choice on the side of the victim. Rather, they rely on *traffickers'* wilful instrumentalisation of victims' condition of existential precarity through the proposal of readily available options of subsistence based on the submission to exploitation.

7. In criminal-legal terms, thus, a victim's consent to exploitation and the abuse of their position of vulnerability can theoretically coexist. The criminal blameworthiness of trafficking shall be considered as independent from considerations of victim agency or voluntariness, to include instead the *intrinsically* harmful effects of coercive and/or abusive practices of supply of individuals, on one hand; and their suitability to concretise an actual and immediate risk of subsequent exploitation, on the other.

8. Besides its central role in the international definition of THB, the legal concept of vulnerability is deployed in European Law to describe the peculiar *status* of trafficked persons. EU law refers to VoTs as "vulnerable subjects" and/or as bearers of "special protection needs" in several specific legal frameworks, including the EU Anti Trafficking Directive; the EU Victims Rights Directive; and the instruments of the Common European Asylum System. The recognition of formal categories "particularly vulnerable individuals/applicants/victims" here is considered conducive to access to a "special" form of protection of their human rights.

9. Nonetheless, the protection needs attributed to VoTs in EU law are notably fragmented and vague: each of the legal frameworks considered takes into account its own notion of "vulnerability", understood as a form of context-specific hardship faced by specific categories of individuals in the enjoyment of their human rights within the particular procedure regulated in the instrument concerned (criminal justice, asylum, reception conditions). State duties to "take in due account" the situation of particularly vulnerable individuals/applicants/victims, moreover, is often left problematically undefined in its key principles and methods of implementation. The vulnerabilisation of particular categories in EU legal texts, finally, constitutes a process of exceptionalization of protection deservingness, which is problematically essentialising and suitable to overlook the relevant role of State policies in producing and reproducing the same situations of vulnerability.

10. The International and European Human Rights legal frameworks, conversely, consider VoTs' vulnerability as a byproduct of THB *as a serious violation of human rights*. Vulnerability in this sense is once again seen as a *continuum* of situations of ineffective protection of VoTs' human rights: THB exacerbates previous social and relational situations of vulnerability and is also a source of further vulnerabilities for its victims. This human rights-based approach to TRV is declined in binding terms in the CoE Convention Against Trafficking (ECAT). Differently than in the context of EU law, the ECAT defines trafficking victimhood in substantial terms as the material experience of the human rights violations descending from THB. The State and its capacity to protect constitutes a crucial actor in the determination of the level of human rights effectivity enjoyed by trafficked persons and individuals at risk of THB.

11. Vulnerability, nonetheless, remains an object of episodic and, at times, inconsistent references in European Anti-Trafficking Law. The second Chapter of this thesis has highlighted that a comprehensive understanding of the content and normative effects of TRV can be coherently grasped having regard to the jurisprudence on State responsibility of the European Court of Human Rights. Vulnerability, thus, is addressed as an element of a theory of human rights effectiveness and, thus, as a crucial attribute of the abovementioned substantial conception of trafficking victimhood. THB, in turn, is addressed as a self-standing human rights violation in the jurisprudence of the ECtHR, which is best captured under art. 4 ECHR and its connected bundle of special State obligations. TRV, thus, is defined as an integral part of the system of protection of human rights afforded by art. 4 ECHR

12. Vulnerability is first addressed as a defining feature of the freedom from trafficking as an *absolute* right under the ECHR. Building on the prior reconstruction of the role of vulnerability in the international definition of THB, in the second part of Chapter 2, it is argued that the inclusion of THB within the scope of protection of art. 4 ECHR can be explained in light of its suitability to create a *pathogenic vulnerability* to severe exploitation of VoTs. The subjection of someone to THB, in this regard, grounds an unacceptable individual and immediate risk of slavery, servitude, forced and/or compulsory labour, i.e., the practices expressly prohibited under art. 4 ECHR. THB, in this sense, shall be understood as a practice suitable to violate the protective content of art. 4 ECHR as an essential guarantee of individual and collective freedom from relationships of domination. The disempowering effects of APOV on the freedom of human rights bearers, in turn, are found to constitute the common character of wrongness of all the offences prohibited by art. 4 ECHR (slavery, servitude, forced labour, THB).

13. In several instances, the Court refers to vulnerability as a common feature of THB as a particularly dangerous social *phenomenon* suitable to threaten individuals' and communities' effective enjoyment

of human rights. The protection of individuals from THB is considered particularly urgent and challenging in light of the extreme harmfulness of the offence, which connotes it as a critical threat to democratic freedom, and of a series of commonly known connatural features of trafficking, which connote it as a hard-to-tackle threat for States and communities. These latter features include THB's character of transnationality; its suitability to create situations of isolation, intimidation and mistrust which critically undermine victims' possibility of accessing their rights; its particularly traumatic and hyper victimizing effects; and its suitability to exacerbate existing inequalities through the creation of uncontrasted societal relationships of domination. VoTs as a social group are thus considered "vulnerable victims" by the ECtHR in light of their significant likelihood of facing an ineffective State response to their protection needs.

14. TRV, moreover, is addressed in the Court's jurisprudence as a empirical determinant of human rights risks. Applicants in art. 4 ECHR cases have been considered "particularly vulnerable" in light of: a) their particular likelihood to be subjected to THB as a consequence of their condition of *exposure*; b) their inability to effectively contrast a trafficking-related-threat, in light of their condition of relevant disadvantage; c) their lielihood to suffer from particularly harmful consequences when subjected to THB, in light of their personal or situational characters of "susceptibility". The adequate protection of the rights of individuals under art. 4 ECHR shall take into account these empirical vulnerabilities, at both the legal-regulatory and operational-procedural levels.

15. Both presumptive and empirical notions of TRV play a major role in determining the essential conditions for the fulfilment of States' positive obligations under art. 4 ECHR. In this regard, any adequate institutional response to the threat of THB must target the systemic vulnerabilities commonly endured by VoTs: States shall build a special *capacity* to deliver effective human rights protection to such individuals by adequately addressing their collective vulnerability as a social group. On the other hand, the methodology of determination of trafficking-related risks and the development of an *in casu* response to it shall be built upon a diligent *assessment* of the empirical vulnerabilities of those who are subjected to such risk.

16. While the rules of human rights responsibility provide a sound theoretical basis for assessing the role of vulnerability under European law, trafficking survivors' special rights to protection find their most detailed regulation in EU/CoE positive law. The ECtHR jurisprudence in this regard has progressively defined the scope of positive State obligations against THB as a standard of diligence which is informed by States' fulfilment of the duties of trafficking prevention, victim identification, special assistance, non-punishment and access to compensation. These special protection duties represent codified institutioanl responses to the abovecited "categorial" situation of vulnerability of

trafficking survivors in their enjoyment of hyman rights. The interpretation of these duties in line with the relevant principles of effective human rights protection under the ECHR thus contributes to define a working legal "infrastructure of protection" carved out of TRV.

17. This interpretive operation is suitable to produce relevant consequences for what concerns both the *subjective* and *objective* scope of application of trafficking-related special protection guarantees. On one hand, positive obligations under the Convention inquire that States adequately respond to THB as both a *risk* in itself to art. 4 ECHR and as a *source* of further threats to individuals' right to freedom. Once the special guarantees of identification, assistance and support and non-interference enshrined in positive law are understood as a crucial component of States' duties to protect under art. 4 ECHR, their subjective scope of application will have to include not only VoTs, but also victims of severe exploitation and individuals at risk of THB. On the other hand, the objective scope of victim-centred rights and guarantees shall be determined through their preordination to the satisaftion of fundamental victim interests that lie at the basis of the function of protection under art. 4 ECHR. These interests have been found to coincide with the safeguards of security, recovery, access to justice and reintegration.

18. The development of vulnerability-based responses to trafficking-related protection needs shall entail, at the legal-regulatory level, the targeting of the categorial forms of TRV identified in the ECtHR jurisprudence. At the operational-procedural level, States shall develop working methods of detection, assessment of - and reaction to - empirical TRVs in individual cases. The combination of these two imperatives of protection lies at the basis of two founding functions of human rights protection under art. 4 ECHR, i.e. prevention through addressing vulnerability and victim-centred protection. The said functions and their underlying principles represent suitable working examples of the normative role which TRV holds in structuring a comprehensive and integrated system of human rights-based protection of art. 4 ECHR.

19. The said vulnerability-based protection functions find their dedicated regulatory basis in the so-called National and Transnational Referral Mechanisms. NRMs constitute integrated frameworks of rules have the safeguard of the rights of (P)VoTEs as their exclusive objective. They are primarily aimed at building *capacity* of anti-trafficking actors in ensuring human rights protection. The NRM model is based on a broad coordination of public and private, national and local actors, which shall operate on the basis od *ad hoc* victim-centred protocols.

20. The institutional response to TRV has been, in turn, investigated in the context of identification of trafficking survivors. Identification, it has been held, constitutes the essential precondition for the delivery of an effective protection of the human rights of VoTs under art. 4 ECHR. Anti-trafficking

practitioners shall thus be able to recognise indicators and risk factors of human trafficking and severe exploitation. Given that the detection of situations of trafficking risk by States is notably hindered by the subterranean and "invisible" nature of THB, the vulnerability-based analysis of Chapter 4 has highlighted the essentiality that States abide to their duties of *proactive screening* of potential trafficking survivors. This requirement has been found to represent a crucial corollary of the principle of prevention through addressing vulnerability as applied in the context of States' duty to adopt *adequate operational measures to protect* trafficking victims and potential victims.4

21. The capacity of a State to detect and formally identify (P)VoTEs largely relies on the prior circulation of expert knowledge concerning the determinants and effects of vulnerability on their situation of ineffective access to rights. TRV, thus, must be made the object of an explicit discourse by the State and this elaboration shall inform the expert guidance provided to anti-trafficking first responders and competent authorities. First responders shall be able to focus on vulnerability as a component of individual risks under art. 4 ECHR; they shall also be trained to grasp reasonable grounds of trafficking victimhood from the observation of vulnerabilities. Competent Authorities shall deploy a number of vulnerability-informed methods in the procedure of identification of VoTs. Evidence gathering and the evaluation of credibility of victim statements shall take into account the various hardships faced by VoTs in providing a testimony and exaustive evidence concerning their experience of victimisation.

22. States' duties of victim assistance and support, on the other hand, shall be aimed at "undoing" those individual conditions of victimological vulnerability which constitute the "pathogenic" consequences of THB. "Special protection" must thus be conceived as an individualized process centred on the needs and preferences of each survivor. The expression of an informed consent to protection shall be safeguarded thorugh the provision of a dedicated support to survivors by specialised caseworkers and through the adoption of trauma-informed methods of communication. The State, moreover, shall ensure that the essential core of the guarantees of special support (data protection; access to the NRM; recovery and reflection; participation in the identification procedure; access to special assistance and to redress) are available to all (P)VoTEs unconditionally. On the same, survivors shall be free to refuse assistance and support at any time.

23. The post-trafficking situation of VoTs is characterised by a relevant risk of secondary and repeat victimization, denial of justice and social exclusion. The encounter between the State and survivors shall thus be understood as the origin of a relationship of pris en charge which is primarily aimed at minimizing the risk of further harm and of creating suitable conditions for recovery. These objectives are best addressed through a victim-centred approach, which shall be able to inquire on each

individual's specific protection needs and to provide a timely and targeted access to special assistance and support services. A central method of such a victim-centred response has been identified in the function of need and risk assessment. VoTs' access to recovery and reintegration are thus phased processes of ripristination of human rights effectivity which shall be actualised in each individual case through the joint assessment of and subsequent response to empirical vulnerabilities.

24. Finally, the victim-centred approach to protection entails a State duty of *minimization* of the risk of interfering with survivors' processes of recovery and reintegration. The involvement of trafficking victims in particular legal *procedures* is often qualified in positive law as characterised by a serious risks of secondary victimisation. Specifically, European States and potential victims find themselves in a relevant situation of *proximity* within the procedures of the so-called Common European Asylum System. This proximity, it has been argued, gives rise to penetrant requirements of "preparedness" on States to fulfil the abovementioned duty of minimization of the risk of secondary and repeat victimization. Crucial components of this duty have been once more found to reside in a) the necessary adoption of *ad hoc protocols of proactive screening* within different procedures of the CEAS, including hotspot procedures and the reception of asylum seekers; b) the duty to ensure in any case the effective and unconditional access of survivors to the recovery and reflection period, especially where the Dublin Regulation and the Asylum Procedures Directive are applied; c) the provision of specialist anti-trafficking training and *ad hoc* methodologies *of need, risk and vulnerability assessment* to all national authorities involved in the implementation of the instruments of the CEAS, which shall be able to effectively coordinate their action with the one of specialist anti-trafficking authorities whenever arguable sign of trafficking-related-risk emerge.

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