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# Residence permits on humanitarian grounds – A means of protection for migrant victims of trafficking in the EU

## INTRODUCTION

Although it is accepted in international instruments that victims of trafficking are persons in need of assistance and protection, what remains unclear is the type of protection their specific situation requires. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (The Protocol)<sup>1</sup> and the Council of Europe Convention on Action against Trafficking in Human Beings (The CoE Convention)<sup>2</sup> both presume that the return of victims to their country of origin is the expected outcome. Nevertheless, returning victims of trafficking to their country of origin can expose them to further harm. For instance, they can be re-trafficked, socially ostracized, or suffer human rights violations due to retaliation. Therefore, they might need protection in the form of a residence permit and assistance in the host state rather than repatriation. In this paper, I highlight the failure of the current legal framework to comprehend the trafficking phenomenon in the broader context of migration, and to adequately protect victims of trafficking in the EU. In particular, I examine the granting of humanitarian permits as a mean of protection. Although the patchwork of humanitarian residence permits systems in place across the EU is unsatisfactory in its present stage, I argue that cooperation and exchange of good practices amongst EU Member States (MSs) could improve the systems and improve protection for victims of trafficking.

<sup>1</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000 (Trafficking Protocol).

<sup>2</sup> Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197 (CoE Convention).

## Background and data

This paper is based on my master's thesis research entitled "Victim of trafficking or unprotected migrant? In search of protection solutions in the EU", which explores paths through which victims of trafficking acquire a legitimate resident status in the EU. In this study, I compared residence permits available to victims of trafficking on humanitarian grounds in the 28 EU MSs. I used data provided by GRETA<sup>3</sup>, using the period from 2015 to present as a reference.<sup>4</sup> This policy brief was written during my scholarship at the European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI).

In the first part of this paper, I explore the systemic and conceptual causes of the international and European legal systems' inability to adequately protect victims of trafficking. I demonstrate that the focus on the prosecution of traffickers results in insufficient protection for victims, the conditionality of assistance to cooperation with criminal justice authorities results in protection being inaccessible to some, and misconceptions about who victims further widen the protection gap. I conclude that victims of trafficking should be protected on "humanitarian grounds", in other words by giving them a right to remain in the destination country, regardless of their cooperation with the criminal justice authorities.

In the second part, I investigate humanitarian residence permits as a means of protection. First, I argue that EU MSs are not inclined to use humanitarian residence permits as a means of protecting victims of trafficking. Then, I assess a selection of MSs practices presenting a more favourable approach to protection. I specifically look at the Dutch model, in which the granting of a humanitarian residence permit to victims of trafficking is not linked to the criminal proceedings, at Spain's initiatives easing the administrative burden for victims of trafficking applying for residence permits, and at Italy's social integration model. I conclude that, while the use of humanitarian residence permit as a means of protection for victims of trafficking is currently unsatisfactory, an exchange of good practices on the use of the humanitarian residence permit among MSs could raise general standards and widen the scope of protection.

## THE SHORTCOMINGS OF ANTI-TRAFFICKING LEGISLATION

### The anti-trafficking legislation's focus on prosecution

The Trafficking Protocol attached to the UN Organized Crime Convention<sup>5</sup>, adopted in 2000, defines Trafficking in Human Beings (THB) as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion [...] for the purpose of exploitation".<sup>6</sup> Despite important initial disagreements over this definition,<sup>7</sup> the Protocol was quickly ratified by a significant number of states, and today counts 178 State parties.<sup>8</sup> Its quick and successful implementation can be explained by the operational cooperation it enables.<sup>9</sup> Indeed, it conveniently authorizes States to criminalize the transnational offense while staying respectful of state sovereignty. Thus, despite the intention set forth in the preamble to give equal weight to prevention of trafficking, persecution of traffickers and protection of victims, more attention is given to effective law enforcement than to protection of victims.<sup>10</sup> As a matter of fact, Part II of the Protocol, which deals with victims' protection and assistance is discretionary. States shall "consider" or "endeavour to provide for the physical safety of victims of trafficking while they are in [their] territory".<sup>11</sup> As Jayasinghe and Baglay note, the Protocol does not impose obligations on states, but "requires states to perform acts of benevolence".<sup>12</sup> At a European level, the CoE Convention on Action against Trafficking in Human Beings<sup>13</sup> sought to address these shortcomings by committing to reach "a proper balance between matters concerning human rights and prosecution".<sup>14</sup> Even if it supports the same function as the Protocol, the CoE Convention alleges to be "geared towards the protection of victims' rights and the respect for human rights".<sup>15</sup> It provides a definition of THB (identical to the one in the Protocol), and restates a series of measures for the protection of victims present in the Protocol such as identification<sup>16</sup>, assistance and support<sup>17</sup>, and non-criminalisation<sup>18</sup> but contrary to the Protocol, these provisions are mandatory. The CoE Convention also importantly establishes the Group of Experts on Actions against Trafficking (GRETA) as the monitoring body of the Convention.

<sup>3</sup> Group of Experts on Actions against Trafficking in Human Beings: a multidisciplinary panel of 15 experts, set up by the European Commission

<sup>4</sup> In the context of this study, it is important to be aware of the limited accuracy of these data and limited reliability of information on trafficking generally. For a discussion on the (un)reliability of data production, see C Vorheyer, "Knowledge Production on Human Trafficking and Everyday Governance Practices" (2018) *Routledge Handbook of Human Trafficking* 395.

<sup>5</sup> UN Convention against Transnational Organized Crime, 2225 UNTS 209.

<sup>6</sup> Trafficking Protocol Art.3.

<sup>7</sup> D McClean, "Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols" (OUP 2007) 14.

<sup>8</sup> See <https://www.unodc.org/unodc/en/human-trafficking/protocol.html>, accessed 27 August 2021.

<sup>9</sup> N Boister, "The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A "Toolbox" Rarely Used?" 16(1) ICLR (2016) 39, 45.

<sup>10</sup> Ibid.

<sup>11</sup> Trafficking Protocol Art.6(3) and Art.6(5), emphasis added.

<sup>12</sup> U Jayasinghe, S Baglay, "Protecting Victims of Human Trafficking within a "non-Refoulement" Framework: Is Complementary Protection an Effective Alternative in Canada and Australia?" (2011) 23 IJRL 489.

<sup>13</sup> CETS No.197 ("The CoE Convention").

<sup>14</sup> CoE "Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings"(2005) (Explanatory Report), para 29.

<sup>15</sup> Ibid. para 36.

<sup>16</sup> Trafficking Protocol Art.11 and 10(1); CoE Convention Art.7(1) and 10.

<sup>17</sup> Trafficking Protocol Art.6, CoE Convention Art.12.

<sup>18</sup> CoE Convention Art.26.

In the context of this paper, which looks at the possibility for victims of trafficking to be protected by a right to remain in the destination country, two articles of the Convention necessitate attention: Art.13 and Art.14(1).

Art.13 of the CoE Convention provides a “recovery and reflection period” for the victim. During this period of at least 30 days, states cannot enforce expulsion or return<sup>19</sup> and must deliver assistance (accommodation, health care, translation services, etc.). This period is designed for the victim to escape the influence of the trafficker “and/or to take an informed decision on cooperating with the competent authorities”.<sup>20</sup> As per 2019, nine EU countries have not implemented the reflection and recovery period in their legislation,<sup>21</sup> exposing the victim to a risk of premature deportation. Art.14(1) stipulates that MSs shall issue a renewable residence permit to victims of trafficking after the recovery and reflection period if their stay is considered necessary either (a) “owing to their personal situation” or (b) “for the purpose of their cooperation in investigation or criminal proceedings”.<sup>22</sup> Even though Art.14 imposes a duty of assistance, it does not oblige states to consider the victim’s personal situation. On the very contrary, it explicitly admits that protection can be granted to the victim for the sole purpose of obtaining evidence in a criminal trial. Furthermore, in some countries, testimonials are not sufficient: testimonials must be “useful” in the criminal case in order for a residence permit to be granted.<sup>23</sup> In spite of improvement on the scope of protection the CoE Convention brought by the use of mandatory phrasing, the predominance of the prosecution objectives also remains manifest in the CoE Convention.

In addition to the anti-trafficking legislation, two EU directives focus on or have implications for third country national victims of trafficking: the 2004/81/EC Directive and the 2011/36/EU Directive.

The Directive 2004/81/EC (“the Trafficking Directive”) sets out the legal framework for granting residence permits to non-EU victims of trafficking (and smuggling). It applies only in cases where victims cooperate with authorities, which somehow narrows down the possibilities offered by the convention.

The Directive 2011/36/EU binds MSs to “establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations”,<sup>24</sup> but does not provide specific mechanisms for it. Besides, it explicitly states that it does not aim to deal with the conditions of the residence of the victims of trafficking in the territory of the MSs.<sup>25</sup> However, it importantly provides that the recovery and reflection period (in Art.13 of the CoE Convention) applies “unconditionally” to every victim “irrespective of his or her willingness to act as a witness”.<sup>26</sup>

### Conditionality of assistance

Notwithstanding the theoretical “unconditionality” set forth in the Trafficking Directive, it is uncertain how the Art.13 applies outside (or in absence of) criminal investigation. The CoE Convention only indicates that the recovery and reflection period should be granted “when there are reasonable grounds to believe that the person concerned is a victim of trafficking”<sup>27</sup> but does not define precisely when this period either starts or ends. As a consequence, around half of the European states grant the period only after a formal identification of the person as victim,<sup>28</sup> thus, when she or he is already connected to a criminal investigation. In other words, since there is no systematic formal identification of a victim of trafficking in absence of a criminal investigation,<sup>29</sup> victims who are not engaged in the criminal process, stay unidentified as victims, and risk to be returned without the recovery and reflection period, and before being granted assistance. Thus, protection is made conditional to the cooperation with law enforcement authorities. Equally, Art.14 connects the granting of a residence permit with the victims’ usefulness in the criminal proceedings. Although the article contains the possibility to grant residence permits both upon cooperation (14(1)(b)), and/or on personal grounds (14(1)(a)), the former largely prevails in practice in all regions of the world.<sup>30</sup> According to the European Commission, 13 EU countries allow “exceptions to the [cooperation] requirement” based on the victim’s personal circumstances.<sup>31</sup> A more recent GRETA Report states that 14

<sup>19</sup> CoE Convention Art.13(1).

<sup>20</sup> Ibid.

<sup>21</sup> GRETA (n 1).

<sup>22</sup> CoE Convention, Art.14.

<sup>23</sup> A Gallagher, *The International Law of Human Trafficking* (CUP 2010) 276.

<sup>24</sup> Article 11(4)

<sup>25</sup> Trafficking Directive 2011/36/EU para 17.

<sup>26</sup> Ibid, para 18.

<sup>27</sup> CoE Convention Art.13(1).

<sup>28</sup> European Commission, “Communication to the Council and the Parliament on the Application of Directive 2004/81 on the Residence Permit Issued to Third- country Nationals Who Are Victims of Trafficking in Human Beings or Who Have Been the Subject of an Action to Facilitate Illegal Immigration, Who Cooperate With the Competent Authorities” [SWD(2014) 318 final], 11.

<sup>29</sup> For an overview of the EU practice in identification, see EMN, “Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures” (2014), available at [https://ec.europa.eu/anti-trafficking/emn-study-identification-victims-trafficking-human-beings-in-international-protection-and-forced\\_en](https://ec.europa.eu/anti-trafficking/emn-study-identification-victims-trafficking-human-beings-in-international-protection-and-forced_en) Accessed 3 September 2021.

<sup>30</sup> A Gallagher, *The International Law of Human Trafficking* (n 23) 976.

<sup>31</sup> European Commission Communication (n 25) 8 lists: Austria, Spain, Finland, Croatia, Italy, Portugal, Belgium, Greece, France, Luxembourg, Hungary, Netherlands, and Sweden. It is interesting to note the vocabulary used by the European Commission here : « exceptions to the requirement » seems to unvalidate the existence of the provision on the sole ground of personal circumstances.

MSs grant residence permits exclusively with a prerequisite that the victim must cooperate with criminal justice authorities, and 22 countries (out of the 42 CoE countries) have on paper “envisaged” issuing residence permits both upon cooperation as well as based on the person’s personal situation<sup>32</sup>, but there is almost no evidence of Art.14(1)(a) being implemented in practice.<sup>33</sup> There is also some indication that in the (very rare) instances in which victims are not required to testify against their traffickers, they are often pressurized to do so.<sup>34</sup> Furthermore, a residence permit granted based on Art.14 expires when criminal proceedings terminate.<sup>35</sup> This means in practice that after the criminal proceedings a victim of trafficking can be returned to their country of origin regardless of, for example, health care they might be receiving, or the risk of retaliation and re-trafficking they might face in their country of origin. (Risk of retaliation which is likely to increase with the victims testifying against the traffickers<sup>36</sup>). A system of assistance so tightly attached to the criminal proceedings undermines the very quality of protection, because, ultimately, it leaves victims who do not wish to cooperate, or who cannot (as in an incapacity to provide relevant information for example) without any protection.

## Challenges related to the identification of victim

In the trafficking legislation, protection is contingent upon victimhood, but the process for defining who are victims is prone to errors.<sup>37</sup> As a result, numerous trafficking victims remain undetected. In particular, the clear-cut legal distinction between coerced victims and consenting migrants is unrepresentative of reality, and unhelpful in ensuring that those in need of protection are identified.<sup>38</sup> The trafficking legislation prompts to identify victims of trafficking

on the basis of a coercive element, though coercion is a complex concept, and the coercion of victims often ambiguous.<sup>39</sup> One aspect of the continuum of coercion is that, as noted by Gallagher, an individual can be consenting one day and trafficked the next.<sup>40</sup> The dualistic narrative only envisages the person as an “illegal” migrant or a helpless victim, disregarding the complexity of pull and push factors in migration. As a result, persons who appear to not have been forced enough to migrate are denied protection at the screening stage.

Going hand in hand with this dichotomy between coercion and consent, between deserving victims and illegal migrants are stereotypes on age, gender, race, and the creation of an “ideal victim” profile.<sup>41</sup> The anti-trafficking legislation has its historical roots in the protection of women and in offenses related to prostitution, which has led to a victim profiling based on a particular account of vulnerability.<sup>42</sup> Doezeema claims the identification process tangibly depends on how accurately the person fits this “ideal victim” picture portraying a helpless and innocent woman in her relation to sexuality and dependance.<sup>43</sup> In this regards, examining the case of Nigerian women in Italy, Serughetti noted the increased likeliness for the victim to be granted a protection, would she «perform the victim script».<sup>44</sup> Although this could be the object of a much longer discussion, what is important to remember in the context of this study, is that the identification process on which the system relies to grant protection leaves some victims undetected.

To sum up the discussion so far, the international anti-trafficking instruments theoretically intend to balance prosecution and protection objectives, but fall short in doing so in practice. Protection obligations are left vague and are predominantly conceived in relation to the victims’ usefulness in the criminal proceedings. Furthermore, the superficial categorization and stereotyping of migrants, as

<sup>32</sup> GRETA (n 1).

<sup>33</sup> JP Gauci, “Why Trafficked Persons Need Asylum”, Exploring the Boundaries of Refugee Law: Current Protection Challenges (2015), UNHCR, “International Conference: The Interface Between Trafficking in Human Being and Asylum” (2015) 16; 33.

<sup>34</sup> See examples of cases in Global Alliance Against Trafficking in Women, “Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights Around the World” (2007).

<sup>35</sup> 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 [2004] OJ L 262/19 (Residence Permit Directive) Art.13(1).

<sup>36</sup> M Vandenberg, “Complicity, Corruption, and Human Rights: Trafficking in Human Beings” (2002) 34 Case W.Res.J.Int.Law 323.

<sup>37</sup> A Dimitriadi “the interrelationship between trafficking and irregular migration” in Sergio Carrera and Elspeth Guild, *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the Eu* (2016)

<sup>38</sup> S Kneebone, “The Refugee-Trafficking Nexus: Making Good (the) Connections” (2010) 29 Refugee Survey Quarterly 137.

<sup>39</sup> Giorgia Serughetti, ‘Smuggled or Trafficked? Refugee or Job Seeker? Deconstructing Rigid Classifications by Rethinking Women’s Vulnerability’ (2018) 11 Anti-Trafficking Review 16.

<sup>40</sup> A Gallagher, “Human rights and human trafficking: quagmire or firm ground? A response to James Hathaway” (2009) 49(4) Va.J.Int.Law 817.

<sup>41</sup> E Pirjatanniemi, “Victims of Trafficking in the Migration Discourse: A Conceptualisation of Particular Vulnerability” in RHaverkamp, E Herlin-Karnell and C Lernerstedt (eds), *What is Wrong with Human Trafficking?: Critical Perspectives on the Law* (Hart Publishing 2018). See also for Finland: M Viuhko, “Restricted agency, control and exploitation: Understanding the agency of trafficked persons in the 21st century Finland”, HEUNI, Publication Series no.90, available at <https://heuni.fi/-/report-series-90>; and N Ollus, “From forced flexibility to forced labour: The exploitation of migrant workers in Finland”, HEUNI, publication series no.86, available at <https://heuni.fi/-/report-series-84>.

<sup>42</sup> L Shoops, “Room for Improvement: Palermo Protocol and the Trafficking Victims Protection Act” (2013) 17 Lewis & Clark L Rev 931.

<sup>43</sup> J Doezeema, “Loose Women or Lost Women? The re-emergence of the myth of white slavery in contemporary discourse of trafficking in women” (2000) 18 Gender Issues 1.

<sup>44</sup> Serughetti (n 39), see also HEUNI, “Unseen Victims: Why Refugee Women Victims of Gender-Based Violence Do Not Receive Assistance in the EU”, available at [http://heuni.education/ccm\\_gbv\\_outcomes](http://heuni.education/ccm_gbv_outcomes).

well as presumptions about consent and coercion, obscure the understanding of who are victims of trafficking and in need of protection.<sup>45</sup> If it seems unrealistic to think about creating a new international instrument for the protection of victims of trafficking palliating the shortcomings of the anti-trafficking legislation cited above, we can turn to other areas of law to find protection solutions. Therefore, in the next part, I evaluate national instruments used in some EU MSs to provide protection for victims of trafficking in

## HUMANITARIAN RESIDENCE PERMIT AS A MEANS OF PROTECTION FOR VICTIMS OF TRAFFICKING

In the context of this paper, I refer to “humanitarian residence permit” as including any instrument preventing deportation and allowing victims of trafficking to be granted a residence permit in the destination country on humanitarian grounds. A humanitarian residence permit therefore does not require the victim to cooperate with authorities, but is granted based on an evaluation of the victim’s personal situation (and/or the situation the victim would be in upon return). National legislations related to humanitarian visa can be based on the implementation of the CoE Convention art.14(1)(a), a special programme for the protection of victims of trafficking or a separate instrument that does not apply exclusively to victims of trafficking but to all victims of grievous crime.

### The reluctance to grant humanitarian visas

Despite a number of soft law instruments aiming to restrict the conditionality of protection,<sup>46</sup> only about half of the countries who have ratified the CoE Convention grant residence permits on grounds unrelated to the criminal trial.<sup>47</sup> Amongst these countries, just a few can present evidence of the use of these provisions.<sup>48</sup> Indeed, the vast majority of states who “*envisage*”<sup>49</sup> dissociation of the protection from criminal investigation fails to practically do so.

As typical examples, France and the UK grant residence

permits on humanitarian grounds to THB victims in exceptional circumstances, at the discretion of authorities, based on “private reasons” (for France), and on “compassionate grounds” (for the UK) but these mechanisms are barely used in practice.<sup>50</sup> This cannot be explained by an absence of victims of trafficking in these two countries: 1439 victims have been identified in 2015 in France representing “only a small proportion of actual trafficking victims”;<sup>51</sup> and 674 victims were identified the same year in the UK for 1824 pending decisions.<sup>52</sup> In light of these important quotas, the quasi-absence of humanitarian visas issued raises questions on those states’ willingness to use of their legislation related to humanitarian residence permits.

A second example could be countries such as Denmark or Hungary, who have not granted any permit on humanitarian grounds to victims of trafficking so far, despite the existence of national instruments.<sup>53</sup> Even if these countries have a lower number of victims than UK and France (95 were identified in Denmark in 2015<sup>54</sup>; Hungary did not provide data from 2015, but GRETA speculated on a range of 300-500 a year between 2014 and 2018), they are still both countries of destination for trafficked people. The complete absence of permits on humanitarian grounds granted calls the very existence of national instruments into question.

As a third example, some MSs such as Greece or Luxembourg provide data that is too ambiguous to properly evaluate the legislation’s implementation. Whether humanitarian visas have been granted or not (and in which circumstances) is unclear. The Greek government declared not having granted any residence permits based on humanitarian grounds until 2016, but it also argued having “issued/renewed” 17 such permits in 2017, 23 in 2018 and 23 in 2019 in a response to GRETA’s recommendations.<sup>55</sup> The vagueness of the vocabulary used leads to misunderstanding and cannot prove that the Greek instrument is efficient. Similarly, the government of Luxembourg, in justification for the absence of data on permits granted on humanitarian grounds, contended that the records were deleted from the statistics as the victims quickly received residence permits enabling them to work.<sup>56</sup> Although the issuing of work permits sounds favourable and worth noting in the context of this study, the unavailability of statis-

<sup>45</sup> V Stoyanova, *Human Trafficking and Slavery Reconsidered* (OUP, 2017), at 32.

<sup>46</sup> See Art. UN Trafficking Guidelines Art.6(1), CoE Explanatory Report; UNODC, “Legislative Guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime” (United Nations 2004), para 62.

<sup>47</sup> GRETA (n 1) mentions 22. I have identified : Spain, The Netherlands, Finland, UK, Switzerland, Hungary, France, Denmark, Luxembourg, Sweden, Greece, Denmark, Norway, Belgium, Austria, Italy, Portugal, Croatia, Cyprus, Georgia, Ireland and Germany.

<sup>48</sup> See GRETA Country Reports.

<sup>49</sup> Expression from GRETA (n 1).

<sup>50</sup> In France zero were granted between 2013 and 2017. See GRETA Country Report on France (2017) para 126, available at <https://rm.coe.int/greta-2017-17-fgr-fra-en/16807454bf>; GRETA Country Report on the UK(2016) para 224, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806abcde>.

<sup>51</sup> GRETA Country Report on France (n 50) para 16.

<sup>52</sup> GRETA Country Report on the UK (n 50).

<sup>53</sup> GRETA Country Report on Denmark (2016) para 120, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806662af> ; GRETA Country Report on Hungary (2019) para 139, available at <https://rm.coe.int/greta-evaluation-report-on-hungary-2nd-evaluation-round-/168098ff118>.

<sup>54</sup> GRETA Country Report on Denmark (n 53) para 12.

<sup>55</sup> See GRETA Country Report on Greece (2017), available at <https://rm.coe.int/greta-2017-27-fgr-gre-en/168075f2b6>; Government’s Reply to the Committee of the Parties’ Recommendations (2020), available at <https://rm.coe.int/cp-2020-02-greece/16809eb4db>.

<sup>56</sup> GRETA Country Report on Luxembourg (2018) para 126, available at <https://rm.coe.int/greta-2018-18-fgr-lux-en/16808ee46c>.



tics and details on mechanisms used make it unprofitable.

Going further in their reluctance to grant permits on humanitarian grounds, Finland and Sweden recently narrowed down their related legislation. In 2016, Finland repealed the section 88a of the Aliens Act which enabled issuing residence permits for persons who could not get a refugee status nor subsidiary protection but whose return was impossible (due to conflict, environmental catastrophe, poor human rights, etc)<sup>57</sup>, a decision criticized by e.g. the UN committee on the elimination of Racial Discrimination.<sup>58</sup> This permit category was not specifically aimed to victims of trafficking, but repealing can be seen as a further indication of reluctance to provide permits on humanitarian grounds. The Finnish Aliens Act still includes particular provisions for victims of trafficking who have been refused asylum: they can obtain a permit on compassionate grounds<sup>59</sup> if they are in exceptional and particularly vulnerable personal situation (such as a serious health condition) but the issuing of such permit remains scarce.<sup>60</sup> In a similar move, Sweden started applying restrictions on humanitarian visa or residence permits through a temporary legislation in 2015.<sup>61</sup> It repealed the possibility to obtain a permanent permit or temporary permit for victims in “exceptionally distressing circumstances”, except if it is contrary to Sweden’s international obligations.<sup>62</sup> However, it is not clear from the (absence of) data what difference the change in legislation it made in practice.

Overall, MSs seem reluctant to grant residence permits on humanitarian grounds notwithstanding their international obligations and the availability of mechanisms in their legislation. However, some isolated national examples which lead to more advantageous outcomes for victims are worth examining.

## Exemption from the cooperation requirement: the case of the Netherlands

The Netherlands is one of the very few countries to provide, in some situations, residence permits on humanitarian grounds exempt from the cooperation requirement,<sup>63</sup> and does so effectively. Under what is known as the “B9 Regulation”, the Netherlands acknowledges the fact that victims of trafficking might exceptionally be unable to cooperate.<sup>64</sup> It deals with situations where (i) the victim is in a physical or mental incapacity to testify or (ii) the action of lodging a complaint against traffickers exposes the victim to a risk of retaliation.<sup>65</sup> An application for this type of visa can be done after an unsuccessful asylum claim, should the person be able to prove his or her victimhood.<sup>66</sup> This type of residence permit is valid for a year and can be renewed<sup>67</sup>, if the victim can show that it is impossible for him or her to return to his or her country of origin<sup>68</sup>, and then generally ends up in permanent residence.<sup>69</sup> Although this system still requires the intervention of law enforcement (through the mandatory police statements identifying the person as a victim of THB offence) and fails to consider the situation where the victim does not have any relevant information to share about the traffickers,<sup>70</sup> it is a step towards more adequate protection. Indeed, the Dutch law proposes an alternative standpoint for protection with better consideration for the victims’ situation. The guidelines on the application of the B9 regulation stress the importance of taking into account specific cultural backgrounds, family relationships, social norms and government policies in the country of origin to evaluate the risk of retaliation.<sup>71</sup> By tangibly examining the consequences of a premature return, this legislation moves beyond the focus on criminality, concretizing by a small step what is called by the Office of the High Commissioner for Human Rights

<sup>57</sup> Country report on Finland (2019) para 156, available at <https://rm.coe.int/report-concerning-the-implementation-of-the-council-of-europe-convention/168094c77b>.

<sup>58</sup> UN Committee on the Elimination of Racial Discrimination, 2017 Concluding observations of the twenty third periodic report on Finland (CERD/C/FIN/CO/23), para 34, available at [https://www.refworld.org/publisher/CERD/FIN/5978a4114\\_0.html](https://www.refworld.org/publisher/CERD/FIN/5978a4114_0.html).

<sup>59</sup> Section 52a, subsection 3 of the Aliens Act (301/2004).

<sup>60</sup> GRETA country report on Finland (n57) para 156. A recent report published by the non-discrimination ombudsman also shows that in the rare cases victims of trafficking receive protection on humanitarian grounds, it is almost never granted in relation to trafficking, available in Finnish at [https://syrjinta.fi/documents/25249352/92496363/lhmiskaupan+uhrien+oleskelulupak%C3%A4yt%C3%A4nt%C3%B6+\(pdf\).pdf/a25f0b4b-c548-ff3c-35d0-9b0eae8eb3a1/lhmiskaupan+uhrien+oleskelulupak%C3%A4yt%C3%A4nt%C3%B6+\(pdf\).pdf?t=1632807528068](https://syrjinta.fi/documents/25249352/92496363/lhmiskaupan+uhrien+oleskelulupak%C3%A4yt%C3%A4nt%C3%B6+(pdf).pdf/a25f0b4b-c548-ff3c-35d0-9b0eae8eb3a1/lhmiskaupan+uhrien+oleskelulupak%C3%A4yt%C3%A4nt%C3%B6+(pdf).pdf?t=1632807528068).

<sup>61</sup> Act 2016:752, entered into force on 24th November 2015.

<sup>62</sup> At the exception of children who cannot be returned due to health conditions.

<sup>63</sup> With Spain and Finland, see EMN, ‘Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures’ (2014) European Migration Network Study 1, 12.

<sup>64</sup> Aliens Decree 2000, Art.3.48.1(d).

<sup>65</sup> Ibid. Note that children also have the same exemption with a statement from the police stating their age.

<sup>66</sup> Aida Asylum Information Database, “National Country Report the Netherlands” (2013).

<sup>67</sup> Aliens Decree 2000, Article 3.51(h).

<sup>68</sup> GRETA Country Report on the Netherlands (2018), available at <https://rm.coe.int/greta-2018-19-fgr-nld-en/16808e70cc>.

<sup>69</sup> Ibid.

<sup>70</sup> Although not specifically in relation to the Netherlands, the point that some victim might not have any relevant information to share was made by R Raffaelli, ‘The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience’ (2005) 10 German Law Journal 3.

<sup>71</sup> Aliens Act Implementation Guidelines 2000, Chapter B9.

(OHCHR) the “human rights approach to trafficking”.<sup>72</sup> It apprehends EU standards with a flexibility which could be inspiring for other MSs. Besides, the Dutch system shows efficiency of practice in comparison to most other MSs: 173 temporary permits and 54 permanent permits were granted to victims of trafficking on humanitarian grounds in 2015, and 156 temporary permits and 54 permanent permits in 2016.<sup>73</sup>

### Procedural improvements: The case of Spain

The mechanism in place in Spain is not as effective as in the Netherlands, but some small facilitation in the procedures is worth noting.

In Spain the residence permit issued just after the recovery and reflection period is for 5 years,<sup>74</sup> which is the longest residence permit on humanitarian grounds granted in the EU at first application. It is extendable and allows the person to work. Some countries such as the Netherlands, as mentioned above, grant long-term permits but only through the renewal of a first permit, thus necessitating a re-application, adding a procedural burden onto the victim. Furthermore, Spain also allows victims who do not possess identity documents to be granted residence permit.<sup>75</sup> An exemption of the requirement to provide documents can be made, especially if the production of the document endangers the victim<sup>76</sup> (i.e. contacting the trafficker or going to the embassy). As trivial as it sounds, a lack of identity documents still restricts access to protection for victims of trafficking in several MSs.<sup>77</sup>

Moreover, the number of humanitarian permits issued to victims of trafficking in Spain is notably growing. Although it stays overall minimal, the progression in statistics is representative of the mechanism viability. When only 1 was granted in 2011, 2 in 2012<sup>78</sup>, 4 in 2013 and 12 in 2014, 19 were granted in 2015 and 30 in 2016<sup>79</sup>.

Despite encouraging signs, the system also suffers from deficiencies. In particular, the Spanish Framework Protocol<sup>80</sup> does not mention the obligation to inform victims of their rights, an omission which is particularly problematic in regard to victims claiming asylum and whose claims have been refused.

This becomes particularly concerning when we consider that asylum claims on grounds of THB were systematically rejected in Spain until 2016.<sup>81</sup> Moreover, the issuing of visas on personal grounds reveals stereotypical trends. In 2016, out of the 30 permits, 22 were granted to women, amongst which 13 were Nigerian women<sup>82</sup>.

### A Social Pathway: the case of Italy

Although recently repealed,<sup>83</sup> the previous Italian protection system for victims was the inspiration for drafters of the CoE Convention.<sup>84</sup> The Art.13 of the 228/2003 law provided victims of trafficking with a short-term special support programme<sup>85</sup> (the Art.13 Programme) and Art.18 of the Decree No. 286/98 provided with a long(er)-term protection and integration programme (the Art.18 programme). As for the reflection and recovery period, through the Art.13 programme, victims were entitled to assistance including accommodation, health care and legal assistance for a period of three months, renewable once for another three months.<sup>86</sup> The Art.18 Programme offering a longer protection is the focus of the analysis here. It granted a special permit to third-country nationals for reasons of social protection and conditional upon the person’s participation in a social reintegration programme. It was not specifically addressed to victims of trafficking but to any individual whose safety is at risk as a result of being a victim of violence or extreme exploitation. There were two options to apply for this programme: the judicial path and the social path. Under the judicial path (an equivalent of the Art.14(1)(b)), the public prosecutor requested a residence permit upon the victim’s cooperation with law enforcement authorities. Under the social path (an equivalent of the Art.14(1)(a), which is of interest for this study, NGOs or social services who identified a situation violence or serious exploitation of a foreign national could request a residence permit, irrespective of whether the victim was willing to cooperate with authorities. The rights granted via the programme included access to health care, access to study and to employment. The permit was originally valid for six months and could be extended for a year or longer. It could also be

<sup>72</sup> OHCHR, “Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking”(2010) HR/PUB/10/2.

<sup>73</sup> Ibid.

<sup>74</sup> Regulated by Art.59bis, para 4 of Organic Law 4/2000 on the Rights and Freedom of Foreigners in Spain and Their Social Integration, reformed through the Aliens Act No.2/2009 and Art.143 and 144 of Royal Decree 557/2011.

<sup>75</sup> Article 59 bis, paragraph 4, of Organic Law 4/2000 on the Rights and Freedoms of Foreigners in Spain and Their Social Integration, reformed through the Aliens Act No. 2/2009, as well as Articles 143 and 144 of Royal Decree 557/2011

<sup>76</sup> GRETA Country Report on Spain (2018) para 201, available at <https://rm.coe.int/greta-2018-7-frg-esp-en/16808b51e0>.

<sup>77</sup> There are administrative problems linked to the identity victim in Belgium, Bulgaria, Greece, Lithuania, Netherlands and Poland. See also European Commission Communication (n 28).

<sup>78</sup> GRETA Country Report on Spain (n 76) para 212.

<sup>79</sup> GRETA Country Report on Spain (n 76) para 199.

<sup>80</sup> “Framework protocol for protection of victims of human trafficking”, available at <https://rm.coe.int/168070ac7e>.

<sup>81</sup> GRETA Country Report on Spain (n 76) para 202.

<sup>82</sup> Ibid. para 199.

<sup>83</sup> Decree-law No. 113/2018 on international protection, immigration and public security (the Salvini Decree) amending provisions of the Legislative Decree No. 286/98 (Consolidated Act on Immigration) and Legislative Decree No. 142/2015.

<sup>84</sup> Pera A, ‘The Residence Permit for Third-Country Nationals Who Are Victims of Human Trafficking: A Double-Face Instrument between Compliance Strategy and Protection of Human Rights’ (2017) 24 Journal of Financial Crime 347.

converted into a residence permit for employment if the person was employed at the time of the expiry of the first residence permit, or a residence permit to study should the person be enrolled in a course of studies.

While the CoE Convention is mainly directed (at least in practice) towards an “awarding” protection (permit in exchange for cooperation with authorities), the Italian law offered an alternative based on humanitarian grounds/ based on social integration. Indeed, the decision for the issuing of a permit was based on one hand on the person’s need for protection, and on the other hand based on his or her willingness to integrate into Italian society.<sup>87</sup> Moreover, the programme leaned towards a long-term solution, allowing the victim to stay in Italy beyond the social integration programme. While advantageous for the victims of trafficking on paper, the system also suffered from deficiencies in practice. Firstly, obtaining a long-term employment visa (after the original visa of six months) presupposed the victim to be completely integrated and be able to find a job during the six month period, which in reality was unlikely (especially considering language barriers or labour market crisis). Secondly, even if there was a dissociation of the procedure from criminal proceedings in theory, the dissociation was unclear in practice. There could still be an expectation for the victims to gather information for the criminal trial.<sup>88</sup> Furthermore, the Questura (police superintendent who issues the permits) could, for the purpose of examining the permit application, refer to the judicial body to examine the reliability of information provided by the person on his or her victimhood. Hence, in some instances, the social path was no different from the Judicial path.<sup>89</sup>

Thirdly, although the Ministry of Equal Opportunities (the programme’s coordinator) has clearly expressed that the programme aims to apply to all victims of trafficking<sup>90</sup>, the Art.18 also ends up predominantly taking care of women in prostitution.<sup>91</sup> This can partly be explained by a problem of stereotyping as cited earlier; but also by this programme being mainly implemented by catholic organisations (who are often the only local actors with sufficient resources), which pursue a religious purpose, and also endorse a religious process (including redemption, etc.).<sup>92</sup> Between 2015 and 2018, almost all identified victims were young Nigerian women involved in sexual labour.<sup>93</sup>

Notwithstanding these difficulties, Italy is the country who granted the highest number of residence permits to victims of trafficking in the EU and on an increasing curve up to 2018.<sup>94</sup> 228 victims of trafficking were granted temporary residence permit in 2015, 316 in 2016, and 419 in 2017<sup>95</sup>. Since the end of 2018, the humanitarian protection status afforded by the Legislative Decree no. 286/98 has been replaced by the Consolidated Programme of the Salvini Decree.<sup>96</sup> The new law does not offer residence on humanitarian grounds but does grant permits for specific reasons in an exhaustive list (domestic violence, work exploitation, urgent need of medical care, forced migration due to natural disaster and persons who have performed acts of civil value). The UNHCR,<sup>97</sup> GRETA,<sup>98</sup> and scholars<sup>99</sup> all expressed concerns on the consequences of such change for people in need of international protection, including victims of trafficking. The programme is now interrupted due to COVID-19, and no assessment of it has been published yet.<sup>100</sup>

<sup>85</sup> Law n. 228/2003 is available at: [www.camera.it/parlam/leggi/03228l.htm](http://www.camera.it/parlam/leggi/03228l.htm).

<sup>86</sup> Although GRETA in its last Country Report on Italy notes that in the absence of a binding legal framework guaranteeing time for a reflection and recovery, there is always a possibility for THB victims not enrolled in the programme to be deported prior to their identification.

<sup>87</sup> S Caneppele, M Mancuso, “Are Protection Policies for Human Trafficking Victims Effective? An Analysis of the Italian Case” (2013) 19 European Journal on Criminal Policy and Research 259.

<sup>88</sup> Pera (n 84) See also the judgment of TAR Trentino Alto Adige, no. 128 (2 April 2003), in which the Tribunal withdrew the residence permit of a victim who ceased cooperation.

<sup>89</sup> Pera (n 84).

<sup>90</sup> See Ministero Pari Opportunità, “Il fenomeno della tratta”, available at [http://www.pariopportunita.gov.it/I-SERVIZI/ATTIVITA/notizie/Legge\\_Tratte.doc.cvt.htm](http://www.pariopportunita.gov.it/I-SERVIZI/ATTIVITA/notizie/Legge_Tratte.doc.cvt.htm).

<sup>91</sup> GRETA Country Report on Italy (2019), available at <https://rm.coe.int/greta-2018-28-fgr-ita/168091f627>.

<sup>92</sup> R Puggioni, « Looking for Some Coherence : Migrants In-Between Criminalisation and Protection in Italy » in E Guild and J Niessen (eds), *Immigration and Criminal Law in the European Union* (Martinus Nijhoff Publishers 2006).

<sup>93</sup> Report submitted by the authorities of Italy on measures taken to comply with Committee of the Parties Recommendation CP/Rec(2019)02 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (2020), available at <https://rm.coe.int/cp-2020-04-italy/16809eb4d5> at 5.

<sup>94</sup> It has been described as the EU best practice by J Goodey (2004) “Sex trafficking in women from Central and East European countries: promoting a “victim-centred” and a “woman-centred” approach to criminal justice intervention” *Feminist Review*, 76,26–45; and M Agheniței, “The Victim Outside the Trial: Illegal Immigration and the Residence Permit” (2012) 4 *Contemporary Readings in Law and Social Justice* 528.

<sup>95</sup> GRETA Country Report on Italy (n 91).

<sup>96</sup> Decree-law No. 113/2018 on international protection, immigration and public security.

<sup>97</sup> See [https://www.unhcr.org/it/notizie-storie/notizie/unhcr-richiama-lattenzione-sullimpatto-provvedimenti-sulla-protezione-internazionale-oggi-discussione-al-senato/?fbclid=IwAR3O\\_0oTCpapMEPMutXPO93Z48XmbZ90uocEhnHcMX9R-YJINY4xVZszavg](https://www.unhcr.org/it/notizie-storie/notizie/unhcr-richiama-lattenzione-sullimpatto-provvedimenti-sulla-protezione-internazionale-oggi-discussione-al-senato/?fbclid=IwAR3O_0oTCpapMEPMutXPO93Z48XmbZ90uocEhnHcMX9R-YJINY4xVZszavg).

<sup>98</sup> GRETA Country Report on Italy (n 91).

<sup>99</sup> Pera (n 84).

<sup>100</sup> See Report submitted by the authorities of Italy on measures taken to comply with Committee of the Parties Recommendation CP/Rec(2019)02 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (2020), available at <https://rm.coe.int/cp-2020-04-italy/16809eb4d5>.



## CONCLUSION: INCREASING PROTECTION STANDARDS BY AN EXCHANGE OF GOOD PRACTICES

This paper has outlined the failure of the anti-trafficking legislation to acknowledge that, in some circumstances, victims of trafficking can only be protected by granting a residence permit, either to escape from further human rights violations or to recover from the mental, physical etc. consequences of trafficking. In order to effectively protect victims of trafficking, the EU and MSs would need to understand trafficking from a more comprehensive standpoint.<sup>101</sup> This means taking a step back from the exclusive focus on the criminal justice process, and envisaging trafficking as a manifestation of global inequalities where complex push and pull factors operate forcing people into migration. In order to provide comprehensive protection, MSs need to dissociate protection of victims of trafficking from the criminal justice framework and immigration control. This could e.g. be done by focusing on the victims' entitlement to humanitarian residence permits. Despite a general unwillingness of MSs to grant such permits to victims of trafficking, some positive measures can be observed. In particular, the dissociation of the protection from the criminal investigation in the Netherlands, the reduced administrative burden for victims in Spain, and the social integration approach in Italy are promising practices that place the rights of the victim at the core.

Neither ideal nor fully efficient at the moment, the use of humanitarian visas would be a viable solution to improve victims of trafficking's protection prospects. A more effective system could be developed through a benchmarking exercise: an exchange of good practices could motivate MSs to either make proper use of their existing national legislation related to humanitarian residence permits, or to adopt new measures based on other countries' practices.

As a comparison, the EU Commission is currently undertaking such a methodology for the improvement of MSs practices on the resettlement of refugees. It facilitates the dialogue between experienced countries and countries lacking operational knowledge or capabilities, through formal activities (conferences, twinning projects, etc.<sup>102</sup>), and informal support (conversations at the margin of formal events, email exchanges, etc.<sup>103</sup>). While the exchange of good practices in resettlement has often had fragmented results, it has also proven efficient in enhancing capabilities of MS and in running effective programmes.<sup>104</sup> Well-designed and successfully implemented instruments for ensuring the humanitarian protection of victims of trafficking could equally be the object of a dialogue to enrich existing systems and harmonize protection for victims of trafficking across the EU. The exchange could include sharing of good practices such as the ones identified in this paper, as well exchanging views on issues such as identification procedures or the lack of harmonization in data collection, in order to enhance the protection standards of victims of trafficking.

<sup>101</sup> T Obokata, "Global Governance and International Migration: A Case Study of Trafficking of Human Beings" (2010) 29 Refugee Survey Quarterly 120.

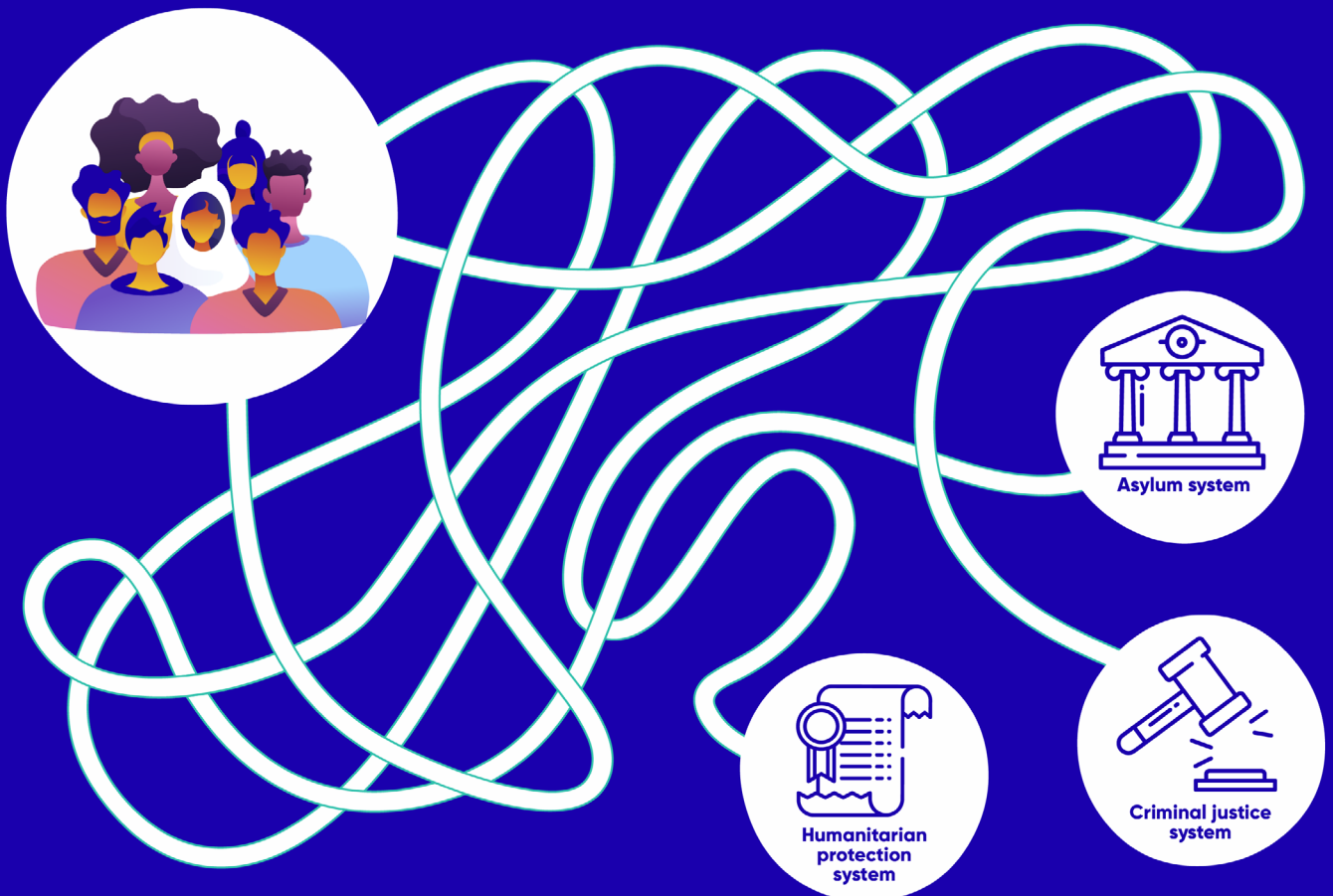
<sup>102</sup> This include for example the European Resettlement and Integration Technical Assistance (EURITA) the European Resettlement Network (ERN), the EU Action on Facilitating Resettlement and Refugee Admission through New Knowledge(EU-FRANK).

<sup>103</sup> See H Beirens, A Ahad "Scaling Up Refugee resettlement in Europe: The Role of Institutional Peer Support" (2018) Migration Policy Institute Europe, available at [https://www.migrationpolicy.org/sites/default/files/publications/ResettlementPeerSupport-Final\\_Web.pdf](https://www.migrationpolicy.org/sites/default/files/publications/ResettlementPeerSupport-Final_Web.pdf)

<sup>104</sup> H Beirens, S Fratzke, "Taking Stock of Refugee Resettlement: Policy Objectives, Practical Tradeoffs, and the Evidence Base", 2017, Migration Policy Institute Europe. Available at <https://www.migrationpolicy.org/research/taking-stock-refugee-resettlement-policy-objectives-practical-tradeoffs-and-evidence-base>.

## A tortuous path to protection

Victims of trafficking arriving in the EU face a protection dilemma: they have to choose between different and sometimes conflicting protection paths available through the asylum, criminal and humanitarian systems.



## The comprehensive approach to protection

The victim is *at the centre* of several legal instruments, including anti-trafficking, asylum and humanitarian but also human rights obligations, gender-based protection, and prohibition of torture.

