



**REsidency STatus:
Strengthening the protection of
trafficked persons**

POLICY PAPER

Vienna, January 2021

Published by LEFÖ – *Interventionsstelle für Betroffene des Frauenhandels* (LEFÖ-IBF) in the framework of the research assessments conducted for the project REST (REsidency S**T**atus: Strengthening the protection of trafficked persons).

Copyright: “All rights reserved. The contents of this publication may be freely used and copied for educational and other non-commercial purposes, provided that any such reproduction is accompanied by an acknowledgement of LEFÖ-IBF as the source.”



This project is partly funded by the Council of Europe.

Table of Content

INTRODUCTION: POLICY PAPER REST..... 3

RESIDENCE PERMIT SCHEME FOR VICTIMS OF TRAFFICKING 3

 National Implementation 5

 Residence Permit Model 8

INTERNATIONAL PROTECTION 9

 Complementary Protection 10

 Procedural safeguards for victims in asylum procedures 10

 Incompatibility between the asylum process and the protection scheme for victims of trafficking 12

 Dublin III Regulation 12

 National Implementation 14

RECOMMENDATIONS 17

 Identification of victims of trafficking 17

 Residence permit..... 17

 Compatibility between the residence permit scheme and international protection 18

 International protection..... 18

 Application of the Dublin III Regulation with victims of trafficking 21

 Access to socio-economic rights and social inclusion 21

INTRODUCTION: POLICY PAPER REST

Victims of human trafficking are rights-holders as women, men, children, victims of crime, victims of gender-based violence, refugees, asylum seekers and migrant workers. Despite the existence of international and European legal standards on the protection of trafficked persons, the implementation at national level and the effective access to rights remain challenging.

The present study reviewed the international and European legal framework on access to residence permits and international protection for trafficked persons and its implementation at the national level in the following six countries: **Austria, France, Moldova, the Netherlands, Serbia and Spain**. The project analysed a total of 42 cases out of more than 150 selected. Considering the best interests of trafficked persons, it looked at their coherent referral to the most appropriate channel of protection securing their rights and access to a durable solution. The rationale for this study is: **Trafficked persons' access to long term or permanent residence is critical for their safety, stability, and future perspective**. The regularisation of their stay is an integral part of their right to effective remedies and access to justice. Victims of trafficking have the right to participate in legal proceedings against their perpetrators – which includes both criminal action against traffickers and civil actions to claim compensation and recovery of wages.

The REST research findings show how integrating and combining the protection under the human rights, asylum and anti-

trafficking regimes can contribute to strengthening the overall protection of the rights of trafficked persons and furthermore presents solutions to the prospects of their access to long-term protection.

RESIDENCE PERMIT SCHEME FOR VICTIMS OF TRAFFICKING

The key provisions on temporary residence permits for victims of trafficking are foreseen in two EU Directives, namely the 2004 EU-Directive¹ and the 2011 Anti-Trafficking Directive², as well as the Council of Europe (CoE) Anti-Trafficking Convention³.

Within the legal framework of the EU-Directive 2004/81/EC victims of trafficking receive support only in so far and as long as it is required by the needs of criminal prosecution, i.e. the residence permit depends on cooperation with the authorities⁴. The Directive introduces an objective criterion (beyond the victim's control) in requiring that the person's stay is deemed necessary for an investigation or judicial proceedings⁵. **However, the mere fact that a trafficked person does not want to cooperate or is unable to provide sufficient information (for reasons inherent to the nature of trafficking), or that a criminal case will not be initiated⁶, does not necessarily indicate a lack of victimhood.⁷**

The CoE Anti-Trafficking Convention foresees however, renewable residence permits not only in exchange for cooperation with the criminal justice system, but also on account of the personal situation of victims of trafficking.

¹ EU Council Directive 2004/81/EC of 29 of April 2004, on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/19 (hereinafter EU Dir 2004/81/EC).

² EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

³ Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, ETS 197 (hereinafter CoE Anti-Trafficking Convention).

⁴ The European Commission has early taken the view that the 2004 Directive is insufficiently addressing the legitimate needs and rights of victims of trafficking because "the requirement to

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

⁵ Art. 8, 13, 14 EU Dir 2004/81/EC

⁶ Mostly, the State's ability to fulfil its obligation to effectively investigate, prosecute and adjudicate trafficking depends crucially on the cooperation of victims of trafficking. Concerns are warranted about the extent to which States hold victims responsible for playing their role in the fight against trafficking.

⁷ "A distinction should be made between a "de facto" victim and a "de jure" victim. Rijken, C (2018) "Trafficking in persons: a victim's perspective, in Piotrowicz/Rijken/Uhl (Eds), Routledge Handbook on Human Trafficking, Routledge, pp.239-250.

This practice goes beyond the current standard of the EU legal framework and is implemented only by a few European countries. Out of the 42 countries evaluated by GRETA, 22 had legislation envisaging the issuing of residence permits to Victims of Trafficking, both for their personal situation and for cooperation with law enforcement⁸.

State Parties are not obliged to adopt both approaches simultaneously, which has the practical effect that States, in fact, can (and frequently will) opt for granting residence permits only to those victims who cooperate with the authorities⁹. However, this conflicts with the implementation of Art. 12, the right to unconditional assistance, of the same Convention.

As soon as there are reasonable grounds to believe that a person has been trafficked, CoE States Parties must provide the person with a **recovery and reflection period**. During this period, trafficked persons will not be expelled, and unconditional access to services and support must be available. It is essential that the recovery and reflection period in itself is not linked to present or future cooperation with the investigative or prosecution authorities¹⁰. In the countries studied, the recovery and reflection period is foreseen in the legislation of the Netherlands¹¹, Serbia¹², Moldova¹³, France¹⁴ and Spain¹⁵. The recovery and reflection period is still not established in Austria. As regulated in the CoE Convention it has a binding nature but there is no known case of its implementation in practice¹⁶.

The recovery and reflection period provision obliges States to provide victims of trafficking with a legal right not only to remain in the respective country and get assistance during legal proceedings against their perpetrators, but also after the criminal proceedings – if the safety of the person requires it.

The practice of linking residence exclusively with cooperation is not only at odds with the human rights-based approach proclaimed both in the EU and CoE treaty law. It also contradicts some of the most important provisions for the protection of trafficked persons in the same treaties.

Firstly, it contradicts States' obligations under both the 2011 Anti-Trafficking Directive and the CoE Anti-Trafficking Convention on access to **assistance and support** for victims of trafficking to enable them to exercise their rights as victims of crime and to protect them from further exploitation and harm. The protection is not limited to immediate or short-term assistance. Without a secure residence permit, the access to assistance and support for third-country nationals is seriously hampered. Thus, not only the standard of unconditional assistance is eroded but also the requirements of safety, protection, and prevention of further exploitation are not guaranteed.

Secondly, a limited residence permit through cooperation is **at odds with States' obligation to ensure access to justice** for victims of crime, pursuant to the 2012 Victims' Rights Directive,

⁸ GRETA (2020): "9th General Report on GRETA's activities", 158 p.58. Report available at: <https://rm.coe.int/9th-general-report-on-the-activities-of-greta-covering-the-period-from/16809e169e>

⁹ See Gallagher, A (2010): "The International Law on Human Trafficking", New York: Cambridge University Press.

¹⁰ See CoE, 2005, Explanatory Report to the Convention, para 175.

¹¹ The "B8 bedenktijd" permit provides access to housing, legal aid and psychological support and it is issued for a max. of 3 months. However, every month of those, the victim has to report to the police.

¹² This period of an extension of max. 90 days is, though, is not officially mentioned as such in the Law of Foreigners but named as a temporary residence permit. This issue was already pointed by GRETA (2014, par. 147).

¹³ According the Law on Preventing and Combating Trafficking in Human Beings No. 241/2005 (art. 24.4) but there is no clear procedure for its granting in practice.

¹⁴ Under the Code governing the entry and stay of foreigners and right of Asylum (CESEDA), Art. R316-2. There are concerns regarding its implementation in practice, appearing to have a focus on the aspect of reflection on a possible cooperation with the authorities.

¹⁵ Art. 59 of the Immigration Law (2000), with a modification in 2015 of its extent from 30 to at least 90 days.

¹⁶ There are reiterative recommendations of GRETA regarding the non-implementation of this right, reiterated in the Third Evaluation Round (2020), 247, p. 88. Available at: [16809eb4fd \(coe.int\)](https://rm.coe.int/16809eb4fd)

which applies to all victims of crime, irrespective of their residence status¹⁷.

In reality, the right of irregularly residing victims of trafficking to assistance, support and justice "remains only theoretical as long as they are not offered a safe option of regularising their residence status"¹⁸.

Making use of the possibility of granting residence permits based on a victim's personal situation, States can ensure that a victims' rights to assistance, support and justice, provided in both EU and CoE anti-trafficking treaty law, are fully effective.

National Implementation

The national legislations of all six countries studied provide a temporary residence permit specially designed for victims of trafficking. Among those, there are some, which provide temporary residence permits solely in exchange for cooperation (Austria, France¹⁹, Moldova) or a priori based on both, the cooperation with authorities and the personal situation (the Netherlands, Serbia and Spain). In all six countries, specific residence permits for victims of trafficking in human beings (THB) are initially limited in time. After their expiry, Spain²⁰ and the Netherlands also provide for THB specific long-term residence permits in exchange for cooperation or because of the personal situation of the victims. Nevertheless, the number of granted long-term residency status remains low. In the Netherlands, out of the total applications for (temporary) residence permits based on THB during 2014-2018 only 8% was later granted a humanitarian permanent residence permit.

France provides for a long-term residence permit only in the event of a conviction of traffickers. In Austria, Moldova and Serbia there is no specific long-term residence permit on the grounds of trafficking in human beings²¹. In practise, the application process for residence entails great bureaucratic obstacles and a lengthy decision-making process. In Austria, the average resolution period is about 6 months. Furthermore, during the application procedure, various documents, including identity papers, must be presented, whereas the withdrawal of the identity documents is actually a means for traffickers to exercise control over the victims.

Where the option of granting a residence permit on the basis of the personal situation is foreseen by national law, it needs further research how this option is used in practice, and which actors assess the personal situation. Competent authorities should use appropriate and standardised sets of indicators when assessing the personal situation of trafficked persons. In some cases studied, though, very demanding criteria are applied to the applicant's victimhood and the decision of the application is not entirely disconnected from the prospects of the investigation and prosecution of traffickers. The personal situation of trafficking victims is highly individual and complex and should be assessed by independent multi-disciplinary agencies.

Where residence permits are granted solely in exchange for cooperation, the question lays mostly on the interpretation of the term "cooperation". In the majority of countries studied, the broad concept of cooperation in the CoE Anti-Trafficking Convention is

¹⁷ EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57. It includes the right to information, right to access victim support services including shelters, trauma support and counselling, right to participate in criminal proceedings, right to have special protection needs recognized.

¹⁸ As was noted by FRA with respect to the access to justice of victims of severe labour exploitation. See FRA. 2015, p.19

¹⁹ In France, a residence permit on other grounds such as for "family and private life considerations" or "humanitarian or

exceptional considerations" may also be granted, for the Victims of Trafficking who do not cooperate with the authorities.

²⁰ The global numbers of residence permits granted on both principles are only available until 2016 and were collected by GRETA, giving a total of 127 on the basis of cooperation and 30 on the basis of the victim's personal situation (2018, paragraph 199, p.57, available at <https://rm.coe.int/greta-2018-7-frg-esp-en/16808b51e0>)

²¹ Instead, victims of THB can apply for other permits under the regular aliens' laws, with very demanding criteria, where the special situation and needs of trafficked persons are not taken into account.

interpreted restrictively in practice. More often than not, trafficked persons must file a formal complaint with the police and testify in court in order to be eligible for a residence permit. Partly it is required that the information given is verifiable and useful for the initiation of criminal proceedings against traffickers. While many victims of trafficking will have an interest in the prosecution of their traffickers, they, for reasons that are inherent to the nature of human trafficking, may not necessarily have detailed information that can then actually be used in court.

In line with a victim-centred approach, the focus must be on putting the needs, problems, and fears of victims before the interest of law-enforcement.

This must include the explicit objective of social inclusion of trafficked persons, in particular the right to work, to family reunification, health and social care on the same basis as for other permanent residents and nationals.

In Spain, a residence and work authorization may be granted in exceptional circumstances if it is deemed necessary as a result of the cooperation in investigations or criminal proceedings against traffickers, as well as in response to their personal situations. This permit allows the holder to work for others or on her/his own account, in any occupation, sector of activity and territorial scope¹.

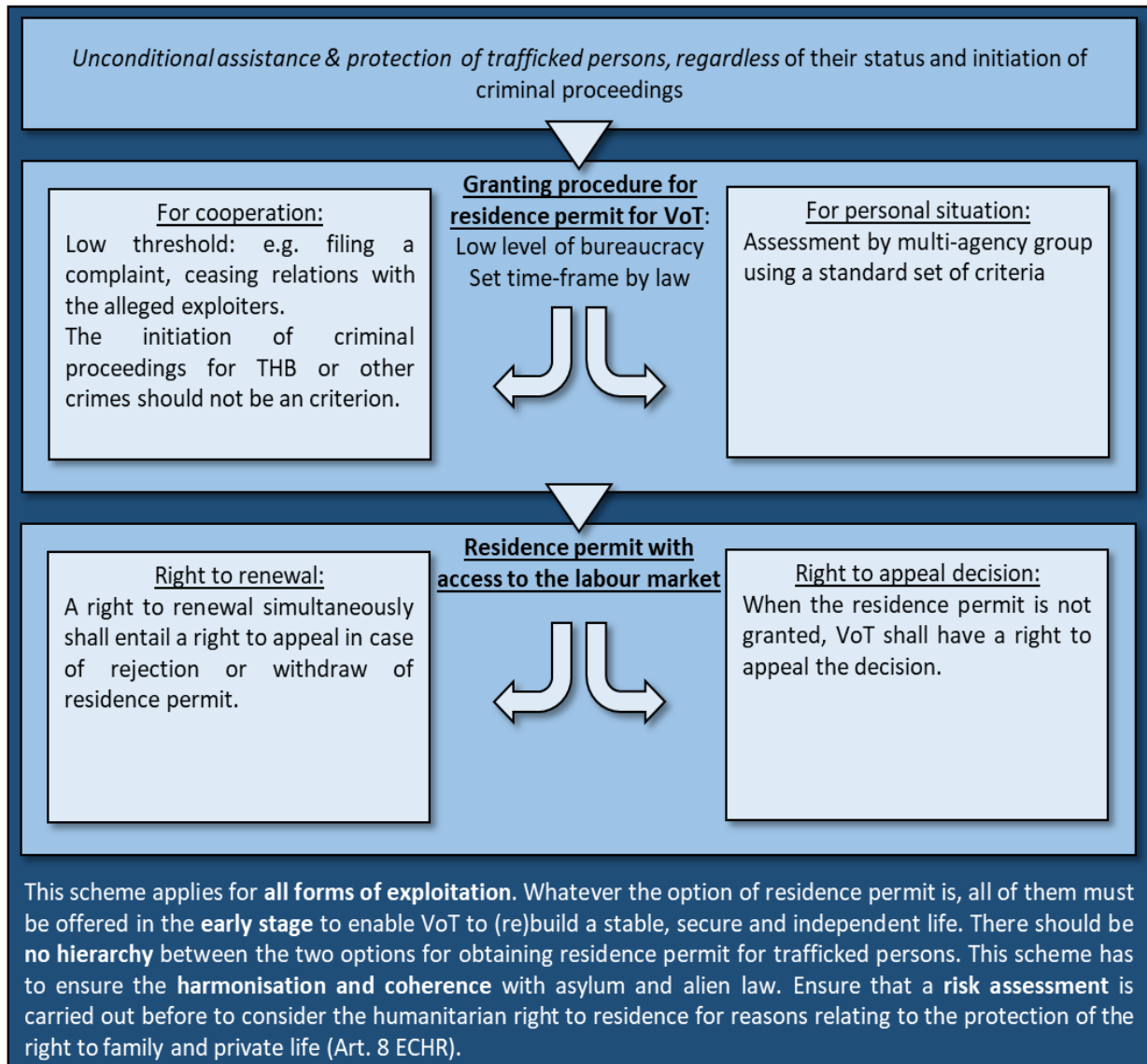
The following table gives an overview of the different THB specific residence permit systems in each country reviewed after the recovery and reflection period.

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

	Austria	France	Moldova	Netherlands	Serbia	Spain
THB specific temporary residence permit	Yes	Yes	Yes	Yes	Yes	Yes
Granting conditions	On-going legal proceedings (criminal or civil)	Cooperation in criminal proceedings against traffickers (or “process of exiting prostitution”)	Cooperation in criminal proceedings against traffickers	Cooperation in criminal proceedings against traffickers or exceptional circumstances (safety, health)	Cooperation in criminal proceedings against traffickers or personal situation	Cooperation in criminal proceedings against traffickers and/or personal situation
Initial length	1 year	1 year	6 months	1 year	At least 6 months (cooperation) or up to 1 year (personal situation)	1 year
Reasons for withdrawal	Public interest conflict	Multiple (e.g. renewal of contact with trafficker/s, suspension of criminal proceedings)	Multiple (e.g. renewal of contact, cessation of cooperation)	Discontinuation of investigations/proceedings, dismissal, acquittal	Multiple (e.g. renewal of contact, cessation of cooperation/discontinuation of proceedings)	If conditions of granting are no longer fulfilled
Renewal	As long as legal proceedings are on-going	As long as criminal proceedings are on-going	Semi-annually (up to 5 years)	Twice (on-going legal proceedings)	Under the same conditions	Annually (on-going legal proceedings)
Access to labour market	With additional work permit	Yes	No	Yes	With additional work permit	Yes
Family reunification	In principle	In principle	In principle	In principle	In principle	limitations
THB specific permanent residence permit	No	Yes (only in the event of a final conviction)	No	Yes	No	Yes
Right to appeal	Yes, to the administrative Court	Yes, to the administrative Court	Yes, to the administrative Court	Yes	Yes, to Ministry of Interior	Yes

Residence Permit Model

Based on the findings of the study, the project consortium proposes a model for granting residence permits to trafficked persons, that recognizes trafficked persons as holders of certain human rights. This model illustrates how integrating and combining the protection under the human rights and anti-trafficking regime with coherent harmonization of the asylum regime can contribute to a durable solution for a foundation of safety and stability and future perspective.



INTERNATIONAL PROTECTION

Contrary to most schemes for residence permits for victims of trafficking, the **international protection regime is based on a human rights and humanitarian consideration and is centred on the recognition of the person's need for protection from persecution.** During the recent years of growing mixed migration flows in Europe, the nexus between asylum and trafficking has become more apparent. The awareness and understanding of the potential for long-term protection of trafficked persons – that the refugee legal regime and the non-refoulement obligations provide – need to be strengthened. The reasoning here is to ensure **a coherent and synergic application of the anti-trafficking, asylum and human rights law** towards the protection of trafficked persons. When the asylum applicants are trafficked persons, it is necessary to guarantee their rights both as victims of trafficking and as vulnerable asylum applicants.

Depending on the individual circumstances of the case, a victim's trafficking experience may be relevant for consideration or entitlement to refugee status or other forms of complementary protection²², either based on the 1951 Refugee Convention or the non-refoulement obligations under international law, EU law and the ECtHR²³. These international treaties enable the person to access a renewable residence permit of varying length, as well as the right to work and other

socio-economic rights such as equal access to healthcare and vocational training as nationals.

International and European legislation on THB contains a specific saving clause to safeguard the right to asylum of trafficked persons and to provide protection from refoulement²⁴. Furthermore, the CoE Anti-Trafficking Convention postulates that granting a residence permit to a victim "*shall be without prejudice to their right to seek and enjoy asylum*"²⁵. The EU Anti-Trafficking Directive also makes a direct link to foster referral of victims to asylum procedures. It requires States to inform, where relevant, a presumed victim about the possibility of being granted international protection²⁶.

To qualify for refugee status, she/he must satisfy the criteria of the refugee definition as per the 1951 Refugee Convention.²⁷ The UNHCR Guidelines explains how the refugee definition is applied to victims of trafficking and persons at risk of trafficking.²⁸

UNHCR Guideline N. 7 points out how the trafficking experience may fundamentally threaten the very right to life and encompasses serious human rights violations. When assessing the risk that such persecution would occur in case of return (forward-looking test), the individual's trafficking experience is to be taken into account as it impacts upon his or her fear of returning home. In THB cases consideration needs to be given also to the cumulative harm to the individual that may be caused by a persistent and repeated pattern of discrimination, ostracism, rejection or

²² The focus here is on ECtHR case law under Art. 3 which is equally relevant for subsidiary protection under the EU Dir 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OK L377/9.

²³ Non-refoulement obligations are established under Art 33 of the 1951 Refugee Convention; Art. 7 of the 1966 International Covenant on Civil and Political Rights; Art. 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 14 of the UN Trafficking in Persons Protocol, which refers to the principle of non-refoulement in the context of asylum. In European law, non-refoulement is set in: Art. 2 and 3 of the European Convention of Human Rights; Art. 78(1) of the Treaty on the Functioning of the

EU; Art. 4, 18 and 19 of the EU Charter of Fundamental Rights; Art. 21 of the Qualification Dir; Art. 9 Asylum Procedures Dir 2013/32/EU; Art. 5 Return Dir 2008/115/EC.

²⁴ Art. 14 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; art. 40.4 CoE Anti-Trafficking Convention require States to respect their obligations under international humanitarian law, international human rights law and refugee law. See also Preamble para.9 EU Dir 2011/36/EU.

²⁵ Art. 14.5 CoE Anti-Trafficking Convention.

²⁶ Art. 11 EU Dir 2011/36/EU

²⁷ Art 1A Refugee Convention, reiterated in Art 2 Qualification Dir

²⁸ UNHCR, (2006), Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, HCR/GIP/06/07.

punishment by the family and community or by the authorities, which in turn could create an intolerable situation for the traumatised victim, amounting to persecution²⁹. Examining the well-founded fear entails considering both the person's state of mind (i.e. his or her fear) supported by the objective situation (well-founded)³⁰.

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

Complementary Protection

The refugee legal regime, together with the non-refoulement obligations under the ECtHR jurisprudence, prohibit States from returning victims to countries where they would face serious harm and give victims the possibility to receive international protection³¹.

ECtHR case-law on non-refoulement sets out legal criteria that can guide the application of Art. 3 in asylum cases, including those in which the applicant is a victim of trafficking.³²

- Risk of ill-treatment by private groups, not only public authorities³³.
- Assessment of the existence of a real risk:³⁴ The assessment has to take into account not only the evidence submitted by the applicant but also all other relevant facts and materials from

other reliable and objective sources such as UN and reputable NGOs.³⁵

- Distribution of the burden of proof:³⁶ This is quite challenging for trafficked persons as they may fear retaliation by traffickers and also face difficulties in providing a consistent and circumstantiated account because of their traumatic experience. Yet, the competent domestic immigration authorities must establish *proprio motu* what the prevailing situation in the receiving country is and the respective state's ability to provide protection³⁷.
- Past ill-treatment as an indication of risk.
- Membership of a targeted group

Procedural safeguards for victims in asylum procedures

Ensuring fair and efficient asylum procedures³⁸ is essential in and for the process of determination of the international protection needs of a person.

The **Qualification Directive**³⁹ recognises victims of trafficking among the vulnerable persons, with special reception needs. This is, however, contingent upon the recognition of a presumed victim and hence on how a vulnerability assessment is organised at the different stages of the asylum process (e.g. registration, reception, lodging of the application, personal interview, Dublin procedure). This process needs to be reconciled with existing national referral

²⁹ UNCHR (2006), Guidelines on International Protection No.7 para 15 and para 18.

³⁰ Hathaway J C & Foster, M (2014), well-founded fear, in *The Law of Refugee Status*, Cambridge University Press, p. 91-181.

³¹ Stoyanova (2011), p. 34, 42; ECtHR (2020)

³² ECtHR, J.K. v. and Others v. Sweden, Application No. 59166/12, 23 August 2016.

³³ ECtHR, K. and Others v. Sweden, para 80. See also ECtHR – Tarakhel v. Switzerland, Application No 29217/12, Judgment of 4 November 2014, para 104. The source of the risk of ill-treatment is irrelevant when assessing the situation, any source of risk may be relevant.

³⁴ ECtHR, F.G. v. Sweden, para 115

³⁵ ECtHR, K. and Others v. Sweden, para 90.

³⁶ ECtHR, K. and Others v. Sweden, para 94-96

³⁷ ECtHR, K. and Others v. Sweden, para 98

³⁸ Safeguards are established in four legislative tools of the Common European Asylum System (CEAS), namely the Qualification Directive, the Recast Reception Conditions (RCD) Directive, the Recast Asylum Procedures Directive (APD) and the Dublin III Regulation.

³⁹ Dir 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OK L377/9.

mechanisms (or similar structures) for victim's identification and support.

The **Reception Conditions Directive**⁴⁰ does not exclude the detention of vulnerable applicants but requires that it shall be used as a measure of last resort and ensuring primary consideration for their health. In the trafficking context, this provision needs to be reconciled with non-punishment obligations towards victims.

The recast **Asylum Procedures Directive** recognises applicants' need for special procedural guarantees as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Such guarantees include the possibility of avoiding accelerated procedures or procedures at the borders, which are inadequate for handling claims lodged by victims.

The NGOs working in the project REST reported over the past five years **an increasing number of asylum seekers who were trafficked**⁴¹. In Spain, this group accounted for 39% of total trafficking survivors assisted by Proyecto Esperanza in the period 2013-2019. In France, 20% of the new beneficiaries supported by CCEM in 2019 had lodged an asylum application, comparing with no case of any beneficiary involved in the asylum system in 2013. In Austria, 28% of trafficked persons assisted by LEFÖ-IBF were involved in asylum procedures in 2019, and 6% out of the total were beneficiaries of international protection.

The national legislation of all countries studied, except for Moldova⁴², recognises victims of trafficking as a vulnerable group entitled to special procedural and reception guarantees in asylum procedures but the actual screening for detection of trafficked persons as vulnerable applicants is still challenging. There is actually no precise data on the number of victims of trafficking identified in asylum systems. European laws require national authorities to

provide protection as soon as they have a reasonable indication of trafficking. The identification of trafficked persons among asylum applicants needs to be focused on addressing their vulnerability and protecting their rights. This remains challenging in practice, due to several gaps:

- Lack of specific regulation that could make the identification and referral systematic, rather than random.
- Lack of effective mechanisms for a timely identification of trafficked persons among asylum applicants: victims are sometimes identified in return procedures; there are no proactive and systematic efforts to identify victims in immigration detention centres; the identification still requires a formal process by the law enforcement.

Promising practice to tackle this gap: in Austria, there are on-going efforts to train and raise awareness of actors in the asylum system, as well as among NGOs and staff working in reception and detention centers.

- The majority of victims identified, are female victims of sexual exploitation; victims of trafficking for labour exploitation and other forms of trafficking seem to be neglected.
- Shortage of resources and interpreters during the asylum procedure, which results in an inadequate setting to foster trust and encourage the person's disclosure of their experience.
- Limited access to psychosocial counselling.
- Lack of specific THB training for authorities working in asylum agencies and at borders.

⁴⁰ Dir 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180/96.

⁴¹ In Moldova, though, there is no experience in handling cases of asylum seekers who were trafficked.

⁴² Its national Asylum Law refers to victims of inhuman and degrading treatment and victims of violence.

Promising Practice to tackle this gap: In Spain, in October 2019, the Department of Migration of the Ministry of Labour, Migration and Social Security together with the Gov. Delegation against Gender Violence of the Ministry of Equality launched a pilot procedure for the identification and referral to support potential victims of trafficking seeking asylum at the Madrid Barajas Airport. It is based on cooperation between the Asylum Office and five NGOs. Where asylum officers detect signs of trafficking among those seeking for asylum at the airport, they inform the Red Cross, which has a team at the airport providing social support. The Red Cross, in turn, contacts one of the NGOs specialized in assistance to victims of trafficking to meet the potential victim, assess his/her situation and confirm whether there is any evidence of trafficking. The NGOs inform the victim about rights and options and the possibility to be referred to general reception for asylum seekers or a reception centre for vulnerable applicants, or to a specialized facility for trafficked persons. The NGO further prepares a report with findings and recommendations on referral for the Asylum Office. Initial data indicates that 15 potential victims (of which 9 women and 6 men) were detected between July and December 2019.

Incompatibility between the asylum process and the protection scheme for victims of trafficking

Another tension concerns the (in)compatibility between these two procedures. In some cases, victims of trafficking with a pending asylum claim apply for temporary residence permits in accordance with the law. In some cases, their requests are rejected because they have to wait for their asylum claims to be determined since the law allows to do both in parallel (France). In other cases, once the asylum applicant applies for a temporary residence permit on THB grounds, the asylum process is suspended; or even their residence permit is withdrawn, once they apply for asylum (Austria). A promising practice in Spain allows

for both the asylum procedure and the process of victim identification and assistance to run parallel. A person who has been granted a reflection/recovery period as a victim of THB can apply for asylum within 3 months, i.e. the usual timescale is extended according to the applicant's vulnerability. A person who has a provisional residence and work permit as a victim of trafficking, either because of collaborating with the authorities or because of their personal circumstances, can simultaneously request asylum. If she/he is recognised as a refugee, then she/he must decide which of the permits she/he wants to keep.

Dublin III Regulation⁴³

Evidence at national level points to growing numbers of victims of trafficking subjected to Dublin procedures. In the Netherlands, 53% of victims registered with CoMensha were involved in Dublin procedures in 2018.

There are several drawbacks in the application of the Dublin procedure. Unnecessary, lengthy, and costly procedures both for asylum authorities and applicants for international protection who are left in a prolonged state of limbo, face reduced standards and are at risk of human rights violations.

The Dublin III Regulation does not include specific provisions for trafficked persons, except for child victims. Yet, it is often applied to complex situations involving victims of trafficking and its time efficiency logic is often at odds with the protective obligations under the anti-trafficking and human rights legal regimes. When in the course of a Dublin procedure, there are reasonable grounds for the presumption of THB, States have to comply with their due diligence obligations. The study underscores some common challenges concerning: the screening process with the personal interview, the individual guarantees of safety, adequate reception and protection,

⁴³ EU Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for

examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31

the detention of victims and the limitations of risk assessment practices.

The personal interview, which is required to determine the State responsible for the asylum application (Art 5 Dublin III), is often carried out in a setting, which is not conducive to the detection of trafficking vulnerabilities. Time pressure and shortage of resources for interpretation and counselling limit the possibilities of detection of trafficking. Only NGOs with a regular presence in pre-removal facilities sometimes detect trafficking cases among applicants in Dublin procedures (Austria, France). The very tight timeframe hinders both the process of victim identification and the possibility of running an effective criminal investigation on trafficking. This practice contravenes States' positive obligations under article 4 of the ECtHR and the obligations set under the CoE Anti-trafficking Convention and the EU Anti-Trafficking Directive on identification, assistance and recovery period.⁴⁴ When there are "reasonable grounds to believe that a person has been a victim of trafficking, that person shall not be removed [...] until the identification process as a victim has been completed."⁴⁵ The person is entitled to assistance in the physical, psychological and social recovery.

Furthermore, when trafficked persons are transferred to the responsible State under the Dublin Regulation, **the individual guarantees of safety, adequate reception and protection are not secured**, since often there is no information sharing and coordination of assistance by the authorities. These practices also contravene Dublin requirements on information exchange to secure the rights and immediate special needs of vulnerable groups⁴⁶. Practice shows that mainly close cooperation between NGOs of different EU Member States contributes to better

protection of the rights of trafficking victims. Another critical shortcoming in Dublin procedures concerns the fact that trafficked asylum seekers subjected to Dublin III are often placed in administrative detention⁴⁷. Detention is very problematic as it leads to the re-victimisation of the person at the hands of the State. Not only does this indicate a failure to implement the obligations on the identification and assistance of trafficked persons, but it also breaches the non-punishment provision established under the CoE and EU anti-trafficking law.⁴⁸

The principle of non-refoulement also applies in case of indirect removal to an intermediary country including a Member State of the Council of Europe (e.g. **Dublin return**). National practices indicate, though, a lack of engagement in a comprehensive risk assessment to ensure compliance with this principle. Yet, a Dublin transfer may result in bringing the individual back into the hands of the criminals that recruited and exploited them in the first place. Further, the fact that victims have not received assistance, lack a safety net and are not adequately referred for protection heighten the risks. The approach of domestic courts to appeals on Dublin transfers is not uniform. There are instances where the Court requires the State to take charge of the application for international protection lodged by a trafficking victim, even if such examination is not their responsibility.⁴⁹ In other words, the Court may decide that the discretionary clause under the Dublin III Regulation may be used. For example, in Austria, in several cases, the trafficked asylum seeker was granted a temporary residence permit linked to ongoing criminal investigations for trafficking, and the authorities suspended the Dublin transfer taking charge of the asylum claim. In France, some Dublin transfers have been suspended to

⁴⁴ ECtHR (2020); Art 10 CoE Anti-Trafficking Convention; Art 11 EU Anti-Trafficking Directive in conjunction with Art 6 EU Directive 2004/81/EC.

⁴⁵ Art 10.2 CoE Anti-Trafficking Convention; CoE Explanatory Report, para. 131.

⁴⁶ Articles 31-32 of the Dublin III Regulation refer to victims of torture, rape or other serious forms of psychological, physical and sexual violence. Victims of THB are not specifically addressed under Dublin III

⁴⁷ Under the Dublin III Regulation, detention is a measure of last resort, based on an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

⁴⁸ Art 26 CoE Anti-Trafficking Convention, Art 8 EU Anti-Trafficking Directive.

⁴⁹ Art 17, Dublin III Regulation

avoid the risk of infringing non-refoulement obligations or Art. 4 of the ECtHR (Prohibition of slavery and forced labour) in a case where the person has been previously exploited in the first country of entry. This has been possible due to NGOs intervention. Of particular interest is the following case of appeal in the Netherlands on account of the positive obligations to protect victims of trafficking and vulnerable asylum seekers.

The Court examined the question whether a complaint of THB precludes the Dublin transfer of an asylum seeker victim of trafficking and requires the State to exercise discretion under Art. 17 of the Dublin Regulation. The case concerned an asylum seeker from Uganda, who applied for asylum in the Netherlands but was rejected because he had a Schengen Visa issued by Spanish authorities. The applicant had repeatedly expressed the wish to report being a trafficked person, imprisonment and rape, but for some reasons it took a long time for an intake interview with the police. Therefore, he could not seek a temporary residence permit for trafficking victims. The applicant claimed a breach of the positive obligations of the State to combat human trafficking and to protect its victims as per ECtHR Rantsev Judgment and the EU Anti-Trafficking Directive. In addition, the applicant claimed that the State should have made use of the sovereignty clause under Art. 17 of the Dublin Regulation given his vulnerability, as a refugee and a victim of trafficking. The Court found that the transfer decision did not provide sufficient reasons as to why the transfer to Spain did not constitute disproportionate hardship in this case, given the special and individual circumstances of the claimant. The Court ruled that the appeal was well-founded and annulled the Dublin transfer decision.

National Implementation

National research indicates that in five countries out of the six studied, except for Moldova, competent adjudicating authorities started to recognise the international protection claims of trafficked persons⁵⁰. In most States, trafficking is recognised as a form of persecution that occurs on the grounds of membership of a particular social group. In other instances, trafficked persons are granted complementary forms of protection, namely subsidiary protection, on account of a risk of serious harm should they return to their country of origin.

Whether the trafficked person has a well-founded fear of persecution on account of a Convention ground and whether she or he will be able to access sufficient state protection depends upon the individual circumstances of the case. **A growing body of case law in Europe recognises survivors of trafficking as a gender-based social group that will suffer some form of persecution if returned to their country.** In several cases examined, persecution is motivated by their membership in a particular social group that is defined by gender and nationality as immutable and innate characteristics. In other cases, the social group is defined through a social perception approach that shows how the defining characteristics of the group (e.g. the past trafficking experience) set them apart from society, make them socially visible and cognisable.⁵¹ In several asylum cases, the adjudicating authority or the Court has recognised women from Nigeria, or more restrictively from Edo state, as belonging to a particular social group, sharing a distinct identity, which they are unable to change.⁵² In other cases, "Victims of Trafficking whose return is perceived by the surrounding society as a failure, or who return with health problems" constitute the particular social group.⁵³

⁵⁰ This is the case in Austria, France, Serbia and Spain, as well as in other European countries (e.g. Italy, Germany, UK). In Moldova, there is no experience with these cases. In the Netherlands, there is a paucity of data concerning this topic.

⁵¹ UNHCR Guidelines Social Group 2002

⁵² Case law in France from EDAL: Court nationale du droit d'asile (CNDA), N°10012810 of 24-03-2015; National research – Serbia.

Examples from case law in Italy: Tribunale di Venezia, Acc. N. 4243/2018 del 27/7/2018 RG n. 10118/2017; Tribunale di Genova, Acc. N. 370/2019 del 5/2/2019, RG n. 70/55/2018; See also Rigo, E, (2019), La vulnerabilità nella pratica del diritto d'asilo: una categoria di genere?, Etica & Politica, XXI,

⁵³ EASO, Country Guidance: Nigeria, 2019, p. 60.

Ms M., 18 years old from Nigeria, was lured away with promises of a job in Europe. She came from a low-income family and had no formal education and agreed to pay back 40.000€ for travel expenses without realising the scale of her debt. To seal the agreement, the woman was subject to a voodoo ritual. She travelled to Morocco with a man who abused her. She was several months pregnant when she crossed the Gibraltar Strait on a small boat to reach Spain. Upon arrival, she received humanitarian assistance. She was instructed to apply for asylum but did not reveal her true story. Only shortly after, her traffickers moved her to another town and forced her to engage in prostitution to pay her debt. When her asylum application was rejected, traffickers moved her to Switzerland and forced her to continue working. They threatened to kill her family if she did not pay her debt. While in Switzerland, Ms M. filed another asylum application, but since her fingerprints had been registered in EURODAC, she was transferred to Spain under the Dublin III Regulation. In Spain, Ms M. was placed in a temporary reception centre for vulnerable persons run by the NGO CEAR. CEAR staff detected trafficking indications and referred her to Proyecto Esperanza for an interview and support. She revealed what she had been going through and accepted to stay in Proyecto Esperanza's shelter. Staff from both CEAR and Proyecto Esperanza assisted her in filing a second asylum application providing relevant information about her ordeal. She was in an abysmal physical and mental health state. Due to fear of retaliation by her traffickers, she refused to report her situation to the police for formal identification as a victim of trafficking. Her family in Nigeria lived under constant threat. One day a group of men burnt down her family house and assaulted her brother. Afterwards, her parents were killed by gunshots. This information was presented to substantiate her asylum claim, and finally, in March 2018, Ms M. was granted refugee status.

As the case shows, sometimes victims of trafficking do not reveal the real story in their first asylum interview. Only at a later stage, once they are supported, they provide a more detailed account of their trafficking experience. This may raise questions concerning their credibility and their duty to cooperate in providing information to substantiate their claim. **This is why asylum determining authorities need to be aware that such situations reflect a victims' subjugation to the trafficker.**

Traffickers may direct victims towards the asylum system to regularise their status and move them across the Schengen area. It is a deliberate traffickers' strategy of control to instruct the victims on what to tell in the first interview. This does not mean that a trafficked person's claims are not valid. The determining authorities should also appraise the vulnerability, fears and trauma that victims of trafficking face, which could also influence the victims' attitude. A recent judgment of the Court of Bologna appreciated this complexity. The Court vividly observed: "the difficulty and reluctance to narrate some aspects of her experience can plausibly be justified because of the fear of exposing herself to judgments and the evident discomfort of recalling situations and events of profound physical and psychological suffering".⁵⁴

Difficulties in remembering facts, details or the chronology of events are indications of trauma and a Post-Traumatic Stress Disorder. Trafficked persons may also exhibit an unexpected aggressive attitude or very passive and dismissive manners, or other behaviour that may affect their credibility. The expertise of reputable and experienced NGOs helps the determining authority in realising the reasonableness of the victim's fear and the severity of the past persecution. The support of NGOs and explanatory documentation can contribute to substantiating the individual claim of the trafficked person. Moreover, this

⁵⁴ Tribunale di Bologna, Accoglimento n. cronol. 3442/2019 del 29.07.2019, RG n. 18606/2018.

expertise can contribute to establishing the nexus element of the claim by providing insightful information on the conditions in the country of origin, the influence of traditional practices (e.g. voodoo practises) or the government's unwillingness or inability to protect the person.

There are cases where the nexus between the risk of persecution and a 1951 Convention ground is not confirmed. In others, many adjudicators deny trafficked persons international protection because of restrictive interpretations of the already rigorous criteria of the refugee definition. When there is still a risk of serious harm in case of a return and the state is unable to provide effective protection, complementary protection may be granted, not to leave the person with the only option of returning to their traffickers and/or repay their debt.

Practice shows that victims of trafficking often face a **culture of disbelief** which is stressed when there is no formal complaint against the traffickers, even though the reporting to the police is not a legal requirement to determine refugee status. The assessment on the merits of the asylum claim cannot be linked to the willingness or ability of the victim to cooperate in criminal proceedings against the exploiter(s). Nor can it be conditioned on the quality and relevance of the victim's contribution to the identification and persecution of them.

Restrictive approaches, lack of gender-sensitivity and shortcomings in addressing vulnerability impact adversely on the evaluation of the international protection needs of victims and persons at risk of trafficking in many countries. In some cases, the inconsistencies and the difficulties in sharing their stories are deemed indications of trafficking and vulnerability. Yet, it should be the State's obligation to set the conditions for his or her vulnerability to be addressed and to provide an enabling, safe and confidential

environment to foster the disclosure of the trafficking experience and the feared persecution. This is also important to prevent re-victimisation of the person at the hands of the state.

During the determination process, which may last a long time, and afterwards, the support of NGOs remains critical to help the person in overcoming trauma, in empowering and accompanying her or him in the rehabilitation process, in finding employment, in accessing remedies and in becoming socially included. It takes a village and a long time to support the person on the journey from being a victim to becoming a citizen.

There is still a long way to go to achieve a consistent application of international and European refugee law and human rights law relevant to the situation and needs of trafficked persons seeking asylum. The referral to the system of protection for trafficked persons does not preclude the possibility of seeking asylum, and vice versa, being an asylum seeker cannot preclude access to support and justice as a victim of trafficking.

RECOMMENDATIONS

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

Identification of victims of trafficking

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

Residence permit

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

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

Compatibility between the residence permit scheme and international protection

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

International protection

- Call on States to ensure that trafficked persons have fair and effective access to asylum procedures and that both victim protection standards and asylum procedural guarantees are systematically applied.
- Guarantee the right of trafficked persons to seek and enjoy refugee status where they meet the legal criteria of the 1951 Convention. In doing so, ensure that due account is taken of how their trafficking experience contributes to informing a valid asylum claim building on the UNHCR Guidelines N. 7 and GRETA Guidance Note on international protection.

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

- Asylum actors should consult specialised anti-trafficking actors during: a) the identification of trafficking victims; b) the assessment of and response to their specific needs (including in terms of reception, protection and procedural guarantees); c) the refugee status determination procedure, including concerning the situation and risks in the country of origin.
- Ensure systematic training of asylum officers on UNHCR Guidelines N.7 on trafficking in persons and on CoE GRETA Guidance note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection, as well as on assessing trafficking vulnerabilities, handling applications and interviewing trafficked persons. Such training should also include interviewing measures to reduce/prevent re-victimisation.
- Monitor the impact of systematic trainings, especially their implementation and the outcome of advocacy activities.
- Raise the awareness and appreciation of the asylum determining authorities and the judiciary competent on international protection matters about the significance of the trafficking experience in the asylum determination, as well as about the vulnerability of trafficked persons seeking asylum and the impact of trauma in their ability to recall situations and events of profound physical and psychological suffering.
- Ensure that a thorough risk assessment is conducted before issuing a return decision, including a decision on a Dublin transfer to ensure compliance with non-refoulement obligations. Regardless of whether the person is in the asylum procedure or not, ensure that a risk assessment at least takes in to account the following:
 - dangers to their life and health,
 - risk of torture, inhuman or degrading treatment,
 - risk of persecution (e.g. ostracism, social exclusion or discrimination to the extent that it would amount to persecution),
 - risk of reprisal or serious harm by traffickers and their associates (incl. issues related to the person's trafficking experience, the presence of a debt),
 - risk of re-trafficking,
 - risk of detention and prosecution for status-related offences,
 - the capacity and willingness of the home country authorities to effectively protect the trafficked person and/or her/his family from possible intimidation, violence and harm,
 - the availability of and actual access to social assistance programmes, including safe accommodation, medical, legal and psychological aid, and the opportunities for employment and sustainable means of existence.
- Secure access to asylum claims by victims of all forms of trafficking. Especially acknowledge trafficking for forced labour, domestic servitude, forced begging and forced criminality that equally jeopardise human dignity and may entail severe violations of human rights amounting to acts of persecution.
- Incorporate/include the contribution and expertise of reputable and experienced NGOs in the asylum determination process through the submission of evidence on matters such as the psychological and or mental health evaluation of the trafficking victim, the reasonableness of a victim's fear, the severity of past persecution, the impact of trauma and the credibility of the victim, the conditions in the country of origin and the state's inability or unwillingness to provide effective protection.
- Guarantee the right of trafficked persons to seek and enjoy complementary protection where there is a risk of being exposed to a treatment that would violate the prohibition of torture, inhuman and degrading treatment or punishment.

Application of the Dublin III Regulation with victims of trafficking

- Ensure that trafficked asylum seekers in Dublin procedures are not discriminated in their access to support and in the scope of protection of their rights as victims solely because they fall within the realm of applicability of the Dublin III regulation.
- Call on States to exercise their sovereignty clause, as per Art. 17 of the Dublin III Regulation, and examine the asylum application claim lodged by a trafficked person, even if such examination is not its responsibility under the Dublin criteria.
- Ensure a risk and vulnerability assessment during the Dublin procedures.
- Establish communication channels between Dublin Units and specialized NGOs to ensure clear coordination in cases of removal of a trafficked person and an adequate reception and follow-up of his/her assistance.
- Gather the data of victims of trafficking reallocated under the Dublin III Regulation.

Access to socio-economic rights and social inclusion

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

METHODOLOGY CLARIFICATIONS

This Policy Paper has been designed in the framework of the project REST (REsidency SStatus: Strengthening the protection of trafficked persons), a two-year project. The project is coordinated by LEFÖ-IBF (Austria) and implemented in cooperation with partner-organisations located in five European countries: Comité Contre l'esclavage Moderne (CCEM) in France, Proyecto Esperanza in Spain, CoMensha in the Netherlands, La Strada Moldova in Moldova and Astra in Serbia.

The policy paper was prepared based on national country fiches and an in-depth analysis of the international and European provisions on the rights to residence and international protection of trafficked persons. In this analysis we examined international and European legal frameworks on access to residence permits and to international protection for trafficked persons and subsequently examined their implementation on national levels in the countries of the partner-organisations using a standardized questionnaire. Furthermore, the project analysed a total of 42 cases out of more than 150 selected to identify promising practices, gaps and barriers in the effective implementation of legal standards, and to further design a Guide of Promising Practices.



This project is partly funded by the Council of Europe.