

Introduction

Human trafficking is the central topic of my PhD research. Since its origins, trafficking supposed to actually “not belonging” somewhere, to “be in the wrong place.” Indeed, the very first international instrument, within the League of Nations, was the Agreement for the suppression of the “White Slave Traffic”¹ (1904), focused on borders control and the repatriation of women sexually exploited in foreign countries². Those were not primarily considered as victims, but as persons not belonging to the state they were staying in. A few years later, the International Convention for the Suppression of the White Slave Traffic (1910) offers the first definition of trafficking, as the recruitment of, only women, only for the purpose of sexual exploitation, or “*immoral purposes*,” accomplished in different countries³. The term “white slavery” disappears in 1921 with the International Convention for the Suppression of the Traffic in Women and Children⁴, but maintains the 1910 definition⁵. Those texts were meant to “*contro[l] immigration of women suspected of prostitution*,”⁶ in the post war xenophobia context, and therefore, controlling territory⁷: they set who is or is not in the right place (or country). Nowadays, the international text that defines human trafficking kept this criterion of a cross border phenomenon⁸. Such definition is laid by Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, also named the Palermo protocol (2000). Human trafficking is thus defined by the combination of three elements⁹. Firstly, it needs a certain material act: “*the recruitment, transportation, transfer, harbouring or receipt of persons*.” Secondly, those acts are perpetrated with the help of certain means. Those are, for instance, “*the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability*.” Thirdly, those acts and means are committed for a specific purpose: the exploitation of the victims. The protocol provides for a non-exhaustive list of kinds of exploitation, such as “*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*.”

¹ The term “white slavery” did not received a definition but could mean the “*the procurement, by force, deceit, or drugs, of a white woman or girl against her will, for prostitution*,” J. Doezeema, “Loose women or lost women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women,” *Gender Issues*, December 1999, vol. 18, no. 1, pp. 25-26

² L. Lammasniemi, “International Legislation on White Slavery and Anti-trafficking in the Early Twentieth Century,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 71

³ Article 1 of the 1910 convention

⁴ L. Lammasniemi, “International Legislation on White Slavery,” *op. cit.* note 2, pp. 74-75

⁵ Article 2 of the 1921 convention

⁶ L. Lammasniemi, “International Legislation on White Slavery,” *op. cit.* note 2, p. 74

⁷ Two more conventions were adopted afterwards, with very few impact, for example the International Convention for the Suppression of the Traffic in Women of Full Age (1933). It should be noted that the limitation on women has been abandoned with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949). See *Ibid.* pp. 75-76

⁸ Article 4 of the Palermo protocol and article 3 of the Palermo convention

⁹ Article 3.a of the Palermo protocol

Yet, human trafficking is not a transnational offence by nature. Posterior texts extended the definition by erasing the cross border criterion. At the European level, two texts need to be cited: the Convention on Action against Trafficking in Human Beings of the Council of Europe, also named the Warsaw convention (2005)¹⁰; and the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims of the European Union¹¹. Such extension has been transposed into national European frameworks¹². The need to broaden the legal definition is supported by the available statistics. The estimation of the UNODC reaches the conclusion that in 2018, 65% of human trafficking victims were trafficked domestically¹³. Also, in 2015-2016, nearly half of victims registered in the EU were regionally trafficked within the EU only¹⁴. Nevertheless, it should be recalled that the EU territory is not uniform. Unfortunately, those data do not divide the EU territory between all the member-states and those part to the Schengen agreement¹⁵, that permits the most advanced liberty of movement between the national territories. However, since the obligations of EU member-states to victims only divide between EU member-states and third parties without consideration of the Schengen agreement¹⁶, Europe will be understood as the EU territory¹⁷ for this study.

Although human trafficking may not be only transnational, the question of belonging in or outside Europe is still important for numerous victims. As the victims move, the question of their belonging to a place, to someone or to a group of people is by design a substantial topic. Where do you belong as a victim of human trafficking? But beforehand, what does “belonging” mean? From the legal framework, “to belong” means nothing. I will rely on the common language definitions. On the one hand, if we consider the first meaning of “to belong to,” it relates to the fact “to be the property of” (in French: “appartenir”). In that sense, victims of human trafficking usually, in a certain sense, belong to their traffickers, due to the circumstances. Sometimes, the material elements of the offence of human trafficking can also correspond to the definition of slavery¹⁸. The latter was internationally defined by the Slavery convention (1926)¹⁹ as “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*”²⁰ People are therefore considered as mere objects, without any rights and respect. A very significant example of such

¹⁰ Article 2 of the Warsaw convention

¹¹ Article 2 of the directive

¹² For France, see article 225-4-1 of the Penal Code; for Spain, see article 177bis of the Penal Code; for Romania, see article 210 of the Penal Code; for Finland, see Chapter 25, Section 3.1 of the Criminal Code

¹³ UNODC, “Global report on trafficking in persons 2020,” United Nations, January 2021, p. 55, Sales No. E.20.IV.3

¹⁴ European Commission, “Data collection on trafficking in human beings in the EU,” EU, 2018, p. 80

¹⁵ For example, Romania is still not part to the Schengen agreement, while, for the 2015-2016 period, the Romanian nationality was the first nationality of identified EU victims, *Ibid.* pp. 13, 43

¹⁶ See for example article 1 of the Council Directive 2004/81/EC 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.

¹⁷ With the exceptions of Ireland and Denmark that are not part to the Directive 2004/81/EC, see ¶21 and 22 of the preamble.

¹⁸ Their links are recognized in the Warsaw convention in its preamble (“*Considering that trafficking in human beings may result in slavery for victims*”), and in the EU Charter of Fundamental Rights, in its article 5, prohibiting human trafficking at the same time as slavery. See A.T. Gallagher, “Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway,” *Virginia Journal of International Law*, 2009, vol. 49, no. 4, pp. 789-848

¹⁹ And considered as customary international law, Appels Chamber, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, June 12, 2002, IT-96-23 & IT-96-23/1-A, ¶ 124

²⁰ Article 1.1 of the Slavery convention

violation could be when authors of trafficking sell the victims. Therefore, the latter “belong” to the person who bought them, which considers having the rights to use them, sold them, or even destroy them. Yet, not all cases of human trafficking involve slavery²¹, and numerous authors criticize such parallel²². On the other hand, if we consider the meaning of “belong in,” it relates to the fact “to feel happy in a place.” Yet, victims of human trafficking can’t be deemed to be happy in their situation, due to the violation of up to all of their fundamental rights²³. Therefore, Europe, in particular EU member-states, has positive obligations²⁴ to protect the victims, to make them feel like they can belong somewhere, in particular, in Europe.

Therefore, the main question of this paper is to consider how EU member states can make the victims feel like they belong in Europe. The aim of the paper is to study if the current legislation on protection of trafficked victims are adequate to make them feel like they belong in Europe. The paper is based on the study of legislations from supranational frameworks (United Nations, Council of Europe, EU) and national ones (France, Spain and Romania). To complement this legal and abstract approach, I will also rely on the literature on human trafficking regarding the efficiency of the protection of victims by the states. The paper is thus mainly a theoretical discussion, focused on the legal regulations about protection of trafficked victims.

The first part of the paper will study the rights of trafficked victims from the supranational frameworks as well as their transposition in the national legislations (I); while the second part of the paper will highlight the limits of the possibilities to belong in Europe for trafficked victims, in particular due to mostly practical challenges (II).

I. Belonging in Europe or the promise of rights

To repress human trafficking, the United Nations General Assembly set a global strategy, named the 3P strategy: prevent, protect, and prosecute²⁵. Therefore, one of the goals is to focus on the victims, to assist them in order to compensate the violations they suffered. Those rights might be useful to make them feel like

²¹ The European Court of Human Rights (ECHR) reserves slavery for most brutal exploitation situations, ECHR, *Siliadin v. France*, July 26, 2005, no. 73316/01, ¶¶ 122-123; and human trafficking was later introduced to the prohibition of article 4 of the convention, ECHR, *Rantsev v. Cyprus and Russia*, January 7, 2010, no. 25965/04.

²² Some authors criticize such use of the word slavery with relating to human trafficking. For example, the “*metaphor of slavery depoliticises what is actually a highly political issue, and in so doing, renders invisible the state's role in constructing the conditions under which some groups become vulnerable to various forms of abuse and exploitation*”, J. O’Connell Davidson, “Absolving the State: the Trafficking-Slavery Metaphor,” *Global Dialogue*, Summer/Autumn 2012, vol. 12, no. 2, p. 31. Also, by “*characterising severe exploitation as exceptional and making it into its own category, with its own heroes and villains, its ideal victim types and its solutions, the modern slavery frame hides crucial information*,” E. Kenway, *The truth about modern slavery*, London, Pluto Press, 2021, p. 9

²³ In particular regarding physical and moral integrity, see C. Zimmerman et al., *The Health Risks and Consequences of Trafficking in Women and Adolescents Findings from a European Study*, London School of Hygiene & Tropical Medicine, 2003 ; L. Ottisova et al., “Prevalence and risk of violence and the mental, physical and sexual health problems associated with human trafficking: an updated systematic review,” *Epidemiology and psychiatric sciences*, Cambridge University Press (CUP), April 12, 2016, vol. 25, no. 4, pp. 317-341 ; S. Oram et al., “Human Trafficking and Health: A Survey of Male and Female Survivors in England,” *American Journal of Public Health*, American Public Health Association, June 1, 2016, vol. 106, no. 6, pp. 1073-1078

²⁴ From the international and European legal frameworks, but also from the ECHR case law, ECHR, *Rantsev v. Cyprus and Russia*, *op. cit.* note 21, ¶ 285. For a summary of the positive obligations of states, see ECHR, *Zoletic and Others v. Azerbaijan*, October 7, 2021, no. 20116/12, ¶ 132

²⁵ General Assembly, “Resolution 64/293. United Nations Global Plan of Action to Combat Trafficking in Persons,” United Nations, July 30, 2010, A/RES/64/293 ; reaffirmed by General Assembly, “Resolution 72/1. Political declaration on the implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons,” United Nations, September 27, 2017, p. 1, A/RES/72/1

they belong in Europe. They might be divided between those offered to undocumented victims, mostly those from third-party countries (B); and other general rights (A).

A. Rights offered to any victim of human trafficking

The first historical trend to repress human trafficking shows a focus on national security and borders control. Trafficking is seen as a threat to modern States emphasized by globalization, a criminal justice issue that needs to be address in order to reduce an illegal market²⁶. Therefore, “*the provisions of the treaties were neither rights-based nor substantively strong*,”²⁷ in particular those of the Palermo protocol. Indeed, the text only provides three articles on this topic, using not so mandatory vocabulary²⁸.

Since the negotiation of the protocol and after its publication, voices raised to strengthen the second main trend in fighting human trafficking: seeing this traffic as a violation of human rights²⁹. Consequently, the European texts developed such approach. In particular, the Warsaw convention offers a whole chapter on “*Measures to protect and promote the rights of victims*,”³⁰ without any distinction regarding their origin or nationality. It includes how victims might be identified³¹, the obligation of the state to protect their private life³², to provide assistance “*in their physical, psychological and social recovery*,”³³ a recovery period “*to take an informed decision on cooperating with the competent authorities*,”³⁴ a residence permit in certain circumstances³⁵ and means for compensation and legal redress³⁶. Although it is included in the criminalization chapter, the convention also creates a non-punishment provision: the states may “*provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities*.”³⁷ As an exception, the convention considers only “*victims lawfully resident within its territory who do not have adequate resources and need such help*” regarding provision of medical assistance in general (not only in emergency situations) and “*access to the labour market, to vocational training and education*.”³⁸

Such distinction is not implemented in the EU 2011 directive, the provisions applicable to any victim of human trafficking³⁹, with detailed provisions regarding children⁴⁰. Yet, it might be important to recall that such text is a directive, meaning that states have a wider flexibility in its transposition.

²⁶ A. Aronowitz, *Human trafficking, human misery: the global trade in human beings*, Praeger Publishers Inc, 1st ed., 2009, pp. 23-27

²⁷ E.M. Bruch, “Models wanted: The search for an effective response to human trafficking,” *Stanford Journal of International Law*, 2004, vol. 40, p. 11

²⁸ Article 6 of the Palermo protocol on assistance and protection of victims (“*In appropriate cases and to the extent possible under its domestic law*,” article 6.1; “*Each State Party shall consider*,” article 6.3); article 7 on the status of victims (“*each State Party shall consider*,” article 7.1); and article 8 on their repatriation.

²⁹ A. Aronowitz, *Human trafficking, human misery*, *op. cit.* note 26, pp. 27-28

³⁰ Chapter III of the Warsaw convention

³¹ Article 10 of the Warsaw convention

³² Article 11 of the Warsaw convention

³³ Article 12.1 of the Warsaw convention

³⁴ Article 13.1 of the Warsaw convention

³⁵ Article 14 of the Warsaw convention; the convention also provides for a process for repatriation of victims, article 16

³⁶ Article 15 of the Warsaw convention

³⁷ Article 26 of the Warsaw convention. See also article 8 of the EU 2011 directive.

³⁸ Article 12.3 and 4 of the Warsaw convention

³⁹ Articles 11, 12 and 17 of the EU 2011 directive. Yet, those provisions are less detailed than the Warsaw convention.

⁴⁰ Articles 13 to 16 of the EU 2011 directive

Those obligations from the supranational texts are regularly checked and recalled by the ECHR and the Group of Experts on Action against Trafficking in Human Beings (GRETA) of the Council of Europe. On the one hand, the ECHR includes within the positive obligations of the state “*measures to prevent trafficking and to protect victims*,”⁴¹ when “*the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited*.”⁴² Such limitation, rejecting a general positive obligation existing in an abstract way, avoids to “*impose an impossible or disproportionate burden on the authorities*”⁴³. Those positive obligations are divided in three parts: putting in place an appropriate legal and regulatory framework, adopting operational measures for protection, and checking that those measures are effective⁴⁴. Regarding the latter, the ECHR developed that the victims’ protection should be independent from the criminal process, since, “*(potential) victims need support even before the offence of human trafficking is formally established*,”⁴⁵ and that states needed to effectively implement the non-punishment provision⁴⁶. On the other hand, the GRETA evaluates regularly all the parties to the Warsaw convention, within a mutual evaluation process. It should be underlined that the third evaluation round currently carried out focuses on one part of the protection strategy, namely, the access to justice and effective remedies⁴⁷.

Yet, not all countries have a comprehensive law regarding the repression of human trafficking and the protection of its victims⁴⁸. Provisions dedicated to them seems to focus only on foreign victims, in particular within the EU, since EU national victims don’t need residence and working permits to stay in, to belong in their new country.

B. Rights offered to third-party national victims of human trafficking

⁴¹ ECHR, *Rantsev v. Cyprus and Russia*, *op. cit.* note 21, ¶ 285

⁴² *Ibid.* ¶ 286

⁴³ *Ibid.* ¶ 287

⁴⁴ ECHR, *L.E. v. Greece*, January 21, 2016, no. 71545/12, ¶¶ 70-85 ; ECHR, *Chowdury and Others v. Greece*, March 30, 2017, no. 21884/15, ¶¶ 105-127. As the court underlined, “*the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the States’ (positive) procedural obligation*,” ECHR, *V.C.L. and A.N. v. the United Kingdom*, February 16, 2021, 77587/12 and 74603/12, ¶ 156

⁴⁵ ECHR, *J. and others v. Austria*, January 17, 2017, no. 58216/12, ¶ 115

⁴⁶ When a state prosecutes a potential or identified victim of human trafficking, it does not fulfill its positive obligation to adopt operational measure to protection victims of trafficking, ECHR, *V.C.L. and A.N. v. the United Kingdom*, *op. cit.* note 44

⁴⁷ GRETA, “Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties Third evaluation round Thematic focus: Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, 2018

⁴⁸ Indeed, the Spanish framework only provides specific rights for foreign trafficking victims. In general, trafficking victims can also rely on the common rights of any victim from the Status of the crime victim (Ley 4/2015), as in Romania (Legea privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor). They can also ask for a special protection as witnesses, but not as mere victims (Ley Orgánica 19/1994, de protección a testigos y peritos en causas criminales, in Spain and Legea privind protecția martorilor in Romania). Similarly, in France, the Code de l’entrée et du séjour des étrangers et du droit d’asile (CESEDA) only provides specific rights for foreign victims cooperating with law enforcement authorities (articles L425-1 à L425-5 and R425-1 to R425-10). In Romania, the law is more comprehensive: some rights for all trafficked victims are mentioned in the Chapter V of the Legea privind prevenirea și combaterea traficului de persoane, such as the right to information and judicial assistance (articles 43 and 44), physical protection (article 27.1), or accommodation (articles 32 and 38 for foreign victims – with does not include nationals of the EU and the European Economic Area, article 39).

Rights dedicated to third-party national victims of human trafficking are focused on documentation, meaning, on creating a legal link between the person and the territory of the state. It might be the start of a sense of belonging outside the scope of the criminal traffic. Moreover, such link is of importance considering that it can allow to check the conditions of other rights, for instance, for state reparation⁴⁹.

Although the main source of remedies should be the authors of the offence, the traffickers, it is not the most secure way to obtain compensation. Yet, convictions for human trafficking are still low, and even convicted, traffickers might not be solvent, by using or transferring their assets elsewhere. Thus, states have created funds to participate in the compensation of the violations suffered by trafficked victims. As the funds come from the state, the right to reparation by those funds is usually limited to certain categories of persons with a lawful link with the state. For example, in Romania⁵⁰, financial compensation to victims of crime, including trafficked victims⁵¹, is limited to nationals or foreign persons residing legally in the territory⁵². In Spain, the state offers reparation, for trafficked victims⁵³, only to Spain or EU nationals, those that “*habitually reside in Spain or are nationals of another state that recognizes analogous aid to Spanish nationals in its territory*.”⁵⁴ The criterion of habitual residence is more ambiguous, but still require the legal documentation to be authorize to stay in the country⁵⁵. As an exception, France opens the state reparation to any French trafficked victim or for any offence of human trafficking committed in the French territory⁵⁶.

Consequently, third-party victims’ rights will focus on obtaining a residence permit⁵⁷. The Palermo protocol only mentions briefly that states can “*permit victims of trafficking in persons to remain in its territory, temporarily or permanently*.”⁵⁸ The Warsaw convention provides for the creation of a renewable residence permit, when necessary due to the personal situation of the victim or “*for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings*.”⁵⁹ At the EU level, a text on that matter was published before the 2011 directive⁶⁰: the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the

⁴⁹ Medical assistance and payment for it by the social security system might also depend on the administrative situation of the victim.

⁵⁰ GRETA, “Evaluation Report - Romania - Third evaluation round - Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, June 3, 2021, ¶¶ 82-83

⁵¹ Article 21.1.a of the Lege din privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor

⁵² Article 21.2 of the Lege din privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor

⁵³ Article 1 of Ley 35/1995, de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual does not list offences but includes any violent offence with severe health damage.

⁵⁴ Article 2 of Ley 35/1995. Reparation is also open to any women, independently from her administrative status, recognized as a victim of gendered violence, but thus status requires a prior judicial decision (those victims also have specific rights under Ley Orgánica 1/2004, de Medidas de Protección Integral contra la Violencia de Género).

⁵⁵ H. Soletto, A. Grané, *La reparación económica a la víctima en el sistema de justicia*, Madrid, Dykinson, 2019, p. 402

⁵⁶ Article 706-3.2° and 3° of the Code de procédure pénale

⁵⁷ In certain cases, might also be applicable the framework for international protection, in particular, within the EU, Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, article 11.6 of the EU 2011 directive.

⁵⁸ Article 7 of the Palermo protocol

⁵⁹ Article 14.1 of the Warsaw convention

⁶⁰ Article 11.6 of the EU 2011 directive

subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. The creation of such new residence permit has been transposed in the national frameworks⁶¹.

If the right to a residence permit is logically limited to the trafficked victims in irregular administrative situation, the limitation of another right, to a reflection period, might be questionable. Such right is meant to permit to the victim to *“to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.”*⁶² The cooperation with law enforcement authorities is not limited to foreign victims and the cooperation of national victims might also be needed. Yet, national provisions only consider such period for aliens⁶³, while national victims could require a certain time of recovery before being able to take a decision regarding filling a complaint or cooperating with law enforcement authorities. Therefore, such reflection period might be seen as another provision to help foreign victims to feel like they belong in the EU, giving them more time to take the best decision for them.

To make trafficked victims feel like they belong in Europe, the European legal frameworks offer them various rights. Some are general, applicable to any victim; and other are particularly meant for foreign victims, those that do not legally belong in the concerned EU country. Therefore, the meaning of “to belong in,” from a legal perspective, seems to focus on the regular or irregular administrative situation of a person. Yet, various challenges question the efficiency of those rights and this primary meaning of “belonging” through a legal link for the territory of the state.

⁶¹ France: article L425-1 of the CESEDA, permit for one year, or article L425-4, permit for six months; Spain: article 59 bis.4 of the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social and article 144 of the Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, permit for five years; Romania : article 130 of the Ordonanța de urgență nr. 194/2002 privind regimul străinilor în România (in relation with article 39^1.2 of the Lege privind prevenirea și combaterea traficului de persoane), permit for six months.

⁶² Article 13.1 of the Warsaw convention, with a minimum of thirty days of reflection period.

⁶³ France: article R425-1 and R425-2 of the CESEDA, reflection period of thirty days (such period opens the right to work and to benefit from an allowance, social assistance and police protection, article R425-4); Spain: article 59 bis.2 of the Ley Orgánica 4/2000, reflection period of, at least, ninety days (limited to aliens in irregular administrative situation – opens the right to temporal residence, assistance and protection), and article 142 of the Real Decreto 557/2011; differently in Romania (including nationals): article 39^1 of the Lege privind prevenirea și combaterea traficului de persoane for aliens (opening right for accommodation and protection of article 38), and article 39^2 for nationals (opening right to *“benefit from psychological counseling, medical and social assistance, medicines and food, as well as accommodation, upon request, in sheltered centers or dwellings”*), reflection period of a maximum of ninety days.

II. Non-belonging in Europe or the challenges to implement rights

The right to a residence permit, exposed as the main link to make the victims feel like they belong in Europe, faces threats for an effective application. Within classical human trafficking cases, the legal and practical conditions for granting this right, and in general the status of trafficked victim limit the possibilities to belong in Europe (A). Also, evolving human trafficking, relying on new technologies, is reducing the importance of the link between the territory and the victim (B).

A. Challenges linked to classical human trafficking

On the one hand, the right to a residence permit for foreign trafficked victim is legally limited by the conditions that need to be checked. On the other hand, and strongly linked, the attribution, in general, of the status of trafficked victim supposes their prior correct identification.

Indeed, residence permit are not granted to any foreign trafficked victim. In the Warsaw convention, such right was relying on two grounds (personal situation or cooperation with law enforcement authorities⁶⁴); yet, in the EU 2004 directive, the residence permit can only be issued if the victim “*has shown a clear intention to cooperate and [...] has severed all relations with those suspected of acts.*”⁶⁵ This is very clear in the French legal framework: the residence permit will only be granted if the victim fills a complaint or testify in the criminal proceedings against a prosecuted person⁶⁶. In Romania, the ground of granting a residence permit for the personal situation of the victim also disappeared: the right of temporary residence might be accorded only if the victim has a “*clear intention to cooperate or cooperate with the competent authorities in order to facilitate the identification and prosecution of participants in the commission of the crimes of which they are victims,*” “*ceased their relations with the persons suspected*” and if it is “*opportune for the conduct of judicial investigations.*”⁶⁷ Only Spain opens widely the residence permit, including for grounds of personal situation of the victim⁶⁸. Consequently, a residence permit is not an altruistic right, but an exchange between information and the right to belong in the country. Such requirement is due to the fact that investigations on human trafficking are mainly grounded on victims’ testimonies: “*victim testimony is virtually an absolute necessity in most human trafficking cases,*”⁶⁹ in particular “*to prove the elements of force, fraud, or coercion of the victim. As a result, [...] their testimony provides the most compelling evidence against the trafficker.*”⁷⁰

⁶⁴ Article 14.1 of the Warsaw convention

⁶⁵ Article 8.1.b and c of the EU 2004 directive

⁶⁶ If the victim severed their links with such person, article L425-1 of the CESEDA. Alternatively, a shorter residence permit can be granted for trafficked victims that were also prostitutes and follow a program to stop such activity, article L425-4. Additionally, the reflection period is only granted to the victims likely to fill a complaint or to testify, article R425-1.

⁶⁷ Article 130.2 of the Ordonanța de urgență nr. 194/2002. Refusal to cooperate is a ground for revocation of the permit, article 130.6.c.

⁶⁸ Or for cooperation of the victim in the criminal proceedings, article 144.1 of the Real Decreto 557/2011

⁶⁹ A. Farrell, C. Owens, J. McDevitt, “New laws but few cases: understanding the challenges to the investigation and prosecution of human trafficking cases,” *Crime Law Soc Change*, March 2014, vol. 61, no. 2, p. 158, online <http://link.springer.com/10.1007/s10611-013-9442-1> (retrieved on May 20, 2021); K. Bales, S. Lize, “Investigating Human Trafficking,” *FBI Law Enforcement Bulletin*, April 2007, vol. 76, no. 4, p. 26

⁷⁰ A. Farrell, B. Kane, “Criminal Justice System Responses to Human Trafficking,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 653

Yet, not all victims are likely to cooperate with law enforcement authorities: according “to INTERPOL, less than 0.5% of victims worldwide agree to testify”⁷¹. Those limits also hinder their probability to be identified.

It might be logical, but in order to grant the general status of trafficked victim that opens to the attached rights, those victims need to be identified: “the possibility for identification is frequently the only limit preventing further abuses.”⁷² Unfortunately, such identification faces both practical obstacles and legal ones. At the practical level, “local officials [fail] to prioritize the problem of human trafficking and inadequate training to prepare law enforcement and other first responders to identify cases.”⁷³ Also, it can be seen as part of “the hidden nature of the crime.”⁷⁴ Identification is further hindered by the own victims that do not see themselves as victims. Self-identification can be limited due to numerous factors, for example “no knowledge of their rights,” the “accept[ance of] exploitation, as a means to an end” which is migration, or when the “exploitation takes place within the setting of a relationship that involves power relationships governed by a “moral economy” that legitimizes those imbalances.”⁷⁵ Indeed, “complex relationships that frequently exist between victims and the perpetrators of human trafficking [...] fuel the underreporting of the crime.”⁷⁶

Those practical limits to identification might be further emphasized if such process is limited to state law enforcement authorities and not open to nongovernmental authorization specialized in the assistance of victims. Usually, the state is the only entity in charge of identifying officially victims of trafficking, in order to open them the attached rights to such status. In Spain, the identification of any victims of trafficking is made by any “competent authorities,”⁷⁷ while it is explicit that for non EU victims, such process can only be done

⁷¹ L. Trautman, M. Moeller, “The Role of the Border and Border Policies in Efforts to Combat Human Trafficking: A Case Study of the Cascadia Region of the US-Canada Border,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 994. Law enforcement authorities have to face many obstacles due to the situation and emotions of the victims, the personal nature of the victimization and the trauma of the victimization, M. Graw Leary, “Fighting Fire with Fire: Technology in Child Sex Trafficking,” *Duke Journal of Gender Law & Policy*, 2014, vol. 21, pp. 291-292. Also, poor “relationships between potential human trafficking victims and the police” can limit the likelihood of victims to testify and participate to the criminal investigation. Such relationships are hindered by the fact that victims fear the police, often due to traffickers that lie “about police brutality and deportation” or incarceration, K. Bales, S. Lize, “Investigating Human Trafficking,” *op. cit.* note 69, p. 29. Finally, fear of retaliation from their traffickers can impede victims to testify, M. Graw Leary, “Fighting Fire with Fire: Technology in Child Sex Trafficking,” pp. 291-292.

⁷² S. Howell, “Systemic Vulnerabilities on the Internet and the Exploitation of Women and Girls: Challenges and Prospects for Global Regulation,” in H. Kury, S. Redo, E. Shea (eds.), *Women and Children as Victims and Offenders: Background, Prevention, Reintegration*, Springer International Publishing, 2016, p. 588

⁷³ A. Farrell, “Improving Law Enforcement Identification and Response to Human Trafficking,” in J. Winterdyk, B. Perrin, P.L. Reichel (eds.), *Human trafficking: exploring the international nature, concerns, and complexities*, Boca Raton, Fla., CRC Press, 2012, p. 185

⁷⁴ A. Farrell, C. Owens, J. McDevitt, “New laws but few cases,” *op. cit.* note 69, p. 158

⁷⁵ M. van Meeteren, J. Hiah, “Self-Identification of Victimization of Labor Trafficking,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, pp. 1608-1609

⁷⁶ M. van der Watt, “A Complex Systems Stratagem to Combating Human Trafficking,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 765. In that respect, the lover boy method could be mentioned, that basically consists for the trafficker to make the victim fall in love with him, A. Lavorgna, *Transit crimes in the Internet age: How new online criminal opportunities affect the organization of offline transit crimes*, doctoral thesis, University of Trento, December 2013, p. 121 ; Department of State, “Trafficking in persons report,” United States of America, June 2019, p. 200 ; B. Lavaud-Legendre, C. Plessard, G. Encrenaz, “Prostitution de mineures – Quelles réalités sociales et juridiques ? [Rapport de recherche],” Université de Bordeaux, CNRS - COMPTRASEC UMR 5114, October 30, 2020, p. 26, online <https://hal.archives-ouvertes.fr/hal-02983869/document> (retrieved on January 21, 2021) ; F. Bovenkerk, M. van San, “Loverboys in the Amsterdam Red Light District: A realist approach to the study of a moral panic,” *Crime, Media, Culture: An International Journal*, August 2011, vol. 7, no. 2, pp. 185-199

⁷⁷ Article 59 bis.1 of the Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social

by “law enforcement authorities with specific training in the investigation of human trafficking and in the identification of its victims.”⁷⁸ Also, the Framework protocol is very clear that formal identification is only made by police units⁷⁹, although some other actors, including nongovernmental organizations, can refer victims to them⁸⁰. Similarly, the French law only considers the identification of victims by only police or gendarmerie services⁸¹. On the contrary, what is acknowledgeable about the recent Romanian National Identification and Referral Mechanism of Victims of Trafficking in Persons, is that all relevant actors are able to identify victims, including nongovernmental organizations⁸².

Therefore, due to both legal and practical obstacles, relying on trained actors during all the process of assistance of trafficked victims is primordial. It is further enhanced in the absence of a comprehensive law to repress human trafficking and to assist victim, like in Spain, where professional need to rely on various general regulation. Also, even with a law specific to human trafficking, it needs to be particularly detailed. For example, free legal aid is granted to trafficked victims in the specific law in Romania⁸³, while it is not included in the generic law on the victim status⁸⁴. As a result, some judges still refuse free legal aid to trafficked victims⁸⁵.

Consequently, due to the limits to grant residence permit and general rights to trafficked victims due to the challenges to identify them, many victims face repatriation (that might be lawful but still non-voluntary). As victims are sent back to their origin countries, it crushes their possibilities to belong in Europe. Further, such opportunity is also reduced considering the evolution of the *modus operandi* of the traffickers, with the rise of cyber trafficking.

B. Challenges linked to cyber human trafficking

Cyber trafficking can be defined restrictively as “*the ‘transport of persons,’ by means of a computer system, Internet service, mobile device, local bulletin board service, or any device capable of electronic data storage or transmission to coerce, deceive, or consent for the purpose of ‘exploitation’.*”⁸⁶ Under the wording of e-trafficking, Milivojević offers a wider definition: “*human trafficking facilitated/enabled or regulated through*

⁷⁸ Article 141.2 of the Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social

⁷⁹ Ministerio de Justicia et al., “Framework protocol for protection of victims of human trafficking,” Spain, October 28, 2011, ¶ VI.A.1

⁸⁰ *Ibid.* ¶ V.D.1

⁸¹ Article R425-1 of the CESEDA

⁸² It is indirect when the victim is detected by other actors: the detection is notified to the National Agency, and a posterior interview is run to officially identify the person as a victim, by the Regional Centers of the National Agency, or nongovernmental organizations, Agenția Națională Împotriva Traficului de Persoane, “National Identification and Referral Mechanism of Victims of Trafficking in Persons,” Romania, 2019, pp. 41-43

⁸³ Article 44 of the Lege privind prevenirea și combaterea traficului de persoane

⁸⁴ Article 14 of the Lege din privind unele măsuri pentru asigurarea informării, sprijinirii și protecției victimelor infracțiunilor

⁸⁵ GRETA, “Romania - Third evaluation round,” *op. cit.* note 50, ¶ 46

⁸⁶ V. Greiman, C. Bain, “The Emergence of Cyber Activity as a Gateway to Human Trafficking,” *International Journal of Cyber Warfare and Terrorism*, 2012, vol. 12, no. 2, p. 12 ; see also A. Sykiotou, “Cyber trafficking: recruiting victims of human trafficking through the net,” in N.E. Kourakēs, C.D. Spinellis (eds.), *Europe in crisis: crime, criminal justice, and the way forward: essays in honour of Nestor Courakis*, Ant. N. Sakkoulas Publications L.P., 2017, p. 1549

*the use of the internet and other communication platforms.*⁸⁷ Such uses by the traffickers modify the link between them and the victims and between the latter and national territories.

To be able to cooperate, to fill a complaint or to testify against traffickers, victims need data about them. In general, even outside the scope of cyber trafficking, the offence might be complex and “*victims may not have sufficient information about criminal networks to develop criminal investigations.*”⁸⁸ Regarding cyber trafficking, victims may not know the real name of their trafficker (if they only shared pseudonyms⁸⁹), or their phone number if they communicate through a tool that does not require it (such as messenger or snapchat⁹⁰), or their address. The use of digital tools is known to better hide identity, transactions, communications, thanks to encryption⁹¹, virtual private networks⁹², proxies⁹³, absence of identification checks, using websites registered outside the jurisdiction where the offence is committed⁹⁴, ... On the other hand, any digital action leaves a sign, which may be found and used by law enforcement authorities. In that sense, the internet is seen as a double-edged sword⁹⁵. But for now, if relying mainly on the testimonies of victims, even when identified and willing to testify, they may not be of major use for the criminal prosecution.

Further, some *modus operandi* linked with the evolutions of human trafficking will enhance the lack of self-identification by the victims. For example, the method of the “lover-boy”⁹⁶ means to make a victim fall in love with the trafficker. They increasingly make contact through the Internet⁹⁷ and may rely on digital profiling to dig into the vulnerabilities of the victims⁹⁸. Their actions as girl/boyfriend figures result in destroying any resistance and forging a link of lover instead of a link of exploiter⁹⁹.

On the other hand, new kinds of human trafficking permit reduce the link with the European territory. Firstly, advertisement can be seen in Europe, in order to spread information about exploitation outside Europe. Examples of those operations are sex tours or tourism¹⁰⁰ and transplant tourism. Prosecution is more

⁸⁷ S. Milivojević, “Gendered exploitation in the digital border crossing?: An analysis of the human trafficking and information-technology nexus,” in M. Segrave, L. Vitis (eds.), *Gender, Technology and Violence*, Routledge, 2017, p. 29

⁸⁸ A. Farrell, B. Kane, “Criminal Justice System Responses to Human Trafficking,” *op. cit.* note 70, p. 647

⁸⁹ J. van Rij, R. McAlister, “Using Criminal Routines and Techniques to Predict and Prevent the Sexual Exploitation of Eastern-European Women in Western Europe,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 1694

⁹⁰ V. Bouché, “Survivor Insights The Role of Technology in Domestic Minor Sex Trafficking,” *Thorn*, January 2018, p. 45

⁹¹ O. Shentov, A. Rusev, G.A. Antonopoulos, *Financing of Organised Crime: Human Trafficking in Focus*, Center for the Study of Democracy, EU, 2018, p. 94 ; Department of State, “Trafficking in persons report,” United States of America, June 2017, p. 32

⁹² J. van Rij, R. McAlister, “Using Criminal Routines and Techniques to Predict and Prevent the Sexual Exploitation,” *op. cit.* note 89, p. 1694

⁹³ A. Sykiotou, “Trafficking in human beings: Internet recruitment - Misuse of the Internet for the recruitment of victims of trafficking in human beings,” Council of Europe, 2007, p. 29

⁹⁴ J. van Rij, R. McAlister, “Using Criminal Routines and Techniques to Predict and Prevent the Sexual Exploitation,” *op. cit.* note 89, p. 1694

⁹⁵ M. Chawki, M. Wahab, “Technology Is a Double-Edged Sword: Illegal Human Trafficking in the Information Age,” *DROIT-TIC.fr*, 2004

⁹⁶ A parallel can be made with the technic of “grooming,” a “*situation whereby a potential offender will set up opportunities to abuse by gaining the trust of the child in order to prepare them for abuse,*” relying on a sense of friendship, J.A. Kloess, A.R. Beech, L. Harkins, “Online Child Sexual Exploitation: Prevalence, Process, and Offender Characteristics,” *Trauma, Violence, & Abuse*, April 2014, vol. 15, no. 2, p. 128

⁹⁷ F. Bovenkerk, M. van San, “Loverboys in the Amsterdam Red Light District,” *op. cit.* note 76, p. 195

⁹⁸ S. Yu, “Human Trafficking and the Internet,” in M. Palmiotto (ed.), *Combating human trafficking: a multidisciplinary approach*, CRC Press, 2015, p. 65 ; UNODC, “Global report on trafficking in persons 2020,” *op. cit.* note 13, p. 122

⁹⁹ B. Lavaud-Legendre, C. Plessard, G. Encrenaz, “Prostitution de mineures,” *op. cit.* note 76, p. 26

¹⁰⁰ A. Fraley, “Child Sex Tourism Legislation Under the PROTECT Act: Does It Really Protect?,” *St. John’s Law Review*, 2005, vol. 79, no. 2, p. 455

difficult due to the distance and to involving various territories, but also in case of “*prostitution carousel [with] the continuous movement of prostitutes over different areas.*”¹⁰¹ The latter, transplant tourism¹⁰² interacts with trafficking for exploitation of removal of organs¹⁰³, with the complicity of medical insurance agents or travel agencies specialized in medical tourism¹⁰⁴. Donors’ countries are mainly developing countries, such as Pakistan or India, while receivers’ countries are leading by United States and Japan¹⁰⁵.

Secondly, the exploitation sometimes does not even need for the demanding person to move from Europe: the traffic is deemed to take place entirely online. Indeed, human trafficking occurs in the mainstream pornography sector¹⁰⁶. Victims can be exploited through live videos¹⁰⁷ (via Skype¹⁰⁸ for example; that way, sex tourism can go online¹⁰⁹), sex chats¹¹⁰, or the selling of photography¹¹¹, reducing “*the need for transportation and transfer of victims.*”¹¹² However, it is false to affirm that trafficking takes place wholly online¹¹³: logically, the commission of the acts has to take place somewhere, not on the cyberspace, and the consequences of them are real for the victim.

Further, the demanding person might be the global population, without our knowledge or because we prefer to not know. It is the case since long ago due to our consumerism societies, independently from cyber trafficking. Electronic components are crafted from rare materials extracted in mines in Africa by persons, included children, sometimes in slavery conditions. The fashion sector relies on industries in Asia were

¹⁰¹ J. van Rij, R. McAlister, “Using Criminal Routines and Techniques to Predict and Prevent the Sexual Exploitation,” *op. cit.* note 89, p. 1699

¹⁰² A. Sykiotou, “Cyber trafficking,” *op. cit.* note 86, p. 1556 ; Global programme against trafficking in human beings, “Toolkit to Combat Trafficking in Persons,” UNODC, United Nations, 2008, p. 506

¹⁰³ A. Caplan et al., “Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs,” Council of Europe and United Nations, 2009, p. 58

¹⁰⁴ K. Bruckmüller, “Trafficking of Human Beings for Organ (Cells and Tissue) Removal,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham, Springer International Publishing, 2020, p. 328

¹⁰⁵ C. d’Estrée, “Voices from Victims and Survivors of Human Trafficking,” in J. Winterdyk, B. Perrin, P.L. Reichel (eds.), *Human trafficking: exploring the international nature, concerns, and complexities*, Boca Raton, Fla., CRC Press, 2012, p. 88

¹⁰⁶ R. D’Angelo, “Une enquête pour traite des êtres humains expose les pratiques de l’industrie du porno,” *Mediapart.fr*, November 23, 2020 ; La Presse canadienne, “Mindgeek, société mère de Pornhub, visée par une poursuite aux États-Unis,” *Radio-Canada.ca*, Radio-Canada.ca, June 18, 2021, online <https://ici.radio-canada.ca/nouvelle/1802513/sites-porno-consentement-exploitation-sexuelle-feras-antoon-mindgeek> (retrieved on June 24, 2021) ; G. Turner, “Pornhub: Canadian MPs Finally Invite Sex Worker Advocates,” *XBIZ*, April 19, 2021, online <https://www.xbiz.com/news/258640/pornhub-canadian-mps-finally-invite-sex-worker-advocates> (retrieved on April 25, 2021)

¹⁰⁷ Conseil fédéral, “Prostitution et traite d’êtres humains à des fins d’exploitation sexuelle Rapport,” Switzerland, June 5, 2015, p. 71 ; Eurojust, “Strategic project on Eurojust’s action against trafficking in human beings Final report and action plan,” EU, October 2012, p. 16

¹⁰⁸ C. Dettmeijer, “Speech of the Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children On the occasion of the Chairpersons’ meeting on Human Trafficking in the Digital Age,” La Haye, March 14, 2016

¹⁰⁹ UN.GIFT, “The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna Background Paper 017 Workshop : Technology and Human Trafficking,” UNODC, United Nations, February 2008, p. 12 ; Rapporteuse spéciale sur la vente d’enfants, la prostitution des enfants et la pornographie mettant en scène des enfants, “Rapport,” Human Rights Council, General Assembly, United Nations, December 22, 2014, ¶ 42, A/HRC/28/56

¹¹⁰ Conseil fédéral, “Prostitution et traite d’êtres humains,” *op. cit.* note 107, p. 71 ; Europol, “Intelligence Notification 15/2014 Trafficking in human beings and the internet,” EU, October 2014

¹¹¹ K. Maltzahn, “Digital dangers Information & communication technologies and trafficking in women,” *APC Issue Papers Series*, August 2006, p. 2

¹¹² UNODC, “Global report on trafficking in persons 2020,” *op. cit.* note 13, p. 120

¹¹³ I. Chatzis, “Traite, esclavage et travail forcé au XXI^e siècle : un état des lieux,” *Diplomatie*, December 2020, no. 106, p. 44 ; D. Hughes, “Sex Tours via the Internet,” University of Rhode Island, 1997 ; UNODC, “Global report on trafficking in persons 2020,” *op. cit.* note 13, p. 28

working conditions might be equated with forced labour. But we also rely on similar practices to peacefully interact online. Casilli highlights that “*Today most of these digital relations of production are shaped by wage labor, slave labor, unpaid labor, precarious labor, and freelance labor, making the international division of digital labor a vast and complex network of interconnected, global processes of exploitation.*”¹¹⁴ It happens so within the gig economy, where “*crowdsourcing services that match recruiters and workers to perform small, repetitive, and often unskilled tasks,*”¹¹⁵ or for content regulation online, the use of foreign human moderators being on the rise¹¹⁶.

Therefore, the victims are not even in the European territory, although the exploitation profits to Europeans. It increases the gap between victims their possibilities to belong in Europe, questioning the role of states outside their borders and of individual decisions. To repress such kind of trafficking, the focus is still on prosecution (extended jurisdiction for example), but not on the protection of victims. Taking a human right approach of the phenomenon, with the objective of victims belonging in Europe, it may be thus need to question the interpretation of the definition of human trafficking.

¹¹⁴ A.A. Casilli, “Digital Labor Studies Go Global: Toward a Digital Decolonial Turn,” *International Journal of Communication*, 2017, vol. 11, no. Special section “Global Digital Culture”, p. 3950

¹¹⁵ *Ibid.* p. 3938

¹¹⁶ S.T. Roberts, *Derrière les écrans*, La Découverte, October 15, 2020

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