

Doctoral Workshop: Enforcement of law in multi-level regulatory systems

Protecting trafficked victims in multi-level regulatory systems: national referral mechanisms

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The repression of human trafficking, both by prosecuting offenders and by protecting its victims, has been framed in a multi-level regulatory environment since the first International Agreement for the suppression of the “White Slave Traffic” enacted in 1904. Mutual legal assistance and other forms of cooperation have been developed between states to fight against transnational trafficking processes, while the regulatory environment has multiplied along the interest of supranational organizations for this topic: the United Nations, the Council of Europe, the Organization for Security and Co-operation in Europe (OSCE), etc.

The enforcement of the multi-level anti-trafficking regulatory system is similarly multi-level. State policies are complemented by their local implementation by non-governmental organizations (NGOs) dedicated to support survivors, as well as the application of increasingly mandatory compliance regimes by businesses to prevent exploitation in their value chains.

To coordinate these different levels in the protection of survivors, one original mechanism has been created: national referral mechanisms (NRMs). While their full implementation is still ongoing, they bring new perspectives on opportunities and challenges to enforce fundamental rights in our multi-level regulatory systems. To this aim, this study first frames NRMs in the fight against human trafficking to understand the necessities at the origin of their creation. Second, it offers a perspective of NRMs as systems to perfect and complement anti-trafficking laws. Third, it reflects around the design of NRMs to effectively support the protection of survivors.

1. National referral mechanisms for the protection of victims of human trafficking

1.1. Defining human trafficking

The offence of human trafficking criminalizes the process leading to the exploitation of people. It has first been comprehensively defined by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – also known as the Palermo Protocol – supplementing the United Nations Convention against Transnational Organized Crime, both texts adopted in 2000. The anti-trafficking framework has been complemented by the Convention on Action against Trafficking in Human Beings, adopted by the Council of Europe in 2005, also known as the Warsaw Convention. One of the main highlights of this text lies in article 36, which creates an evaluation mechanism, led by the Group of Experts on Action against Trafficking in Human Beings (GRETA). Finally, the European Union (EU) similarly adopted various norms, mainly two directives: 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 subject of an action to facilitate illegal immigration, who cooperate with the competent authorities; and the 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.

According to these texts, human trafficking is traditionally defined by three elements. First, the offence requires to prove an action, which materializes the process preceding the exploitation: “*recruitment, transportation, transfer, harboring or receipt of persons.*”¹ Second, this action needs to be committed through specific means, dedicated to void the consent of the victim: “*means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another*

¹ Article 4.a of the Warsaw Convention

person.”² As a result, the consent of the survivor is irrelevant to prove the offence.³ These means need not to be proven when the victim is a child: under eighteen years old, no consent can be validly given, even in the absence of any of these coercive means.⁴ Third, these actions and means are committed with a specific intent or purpose: the exploitation of victims. As the exploitation is a mere purpose, it does not need to have been committed to prove a trafficking offense. The exploitation of victims, although not defined, includes, according to the Warsaw Convention, “*at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.*”⁵ The EU adds to this list forced begging and exploitation of criminal activities.⁶

International anti-trafficking texts have long been criticized for their “*criminal justice issue*” approach, focused “*upon intelligence gathering, dismantling criminal groups, and arresting and prosecuting traffickers.*”⁷ Indeed, the Palermo Protocol and the Convention it supplements mainly regulate criminal measures.⁸ The EU text preceding the Directive 2011/36/EU, the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, received the same criticism.⁹ As the multi-level anti-trafficking regulatory environment developed, voices raised to complement this approach. According to a victim-centred approach, trafficking is seen as a violation of human rights.¹⁰ As a result, both the Warsaw Convention and the following EU texts adopted more further provisions on assistance to survivors. In particular, the Convention¹¹ and the Directive 2004/81/EC¹² create a right to a reflection period and a residence permit for survivors. However, despite special rights offered to trafficked victims and the implementation of victims’ general right to them, challenges remain to effectively protect trafficked victims.

1.2. Challenges in the implementation of trafficked victims’ protection

Survivors first need to be identified as trafficked victims. Identification can be defined as “*the way cases come to the attention of law enforcement and are classified as human trafficking offenses.*”¹³ Identification “*is frequently the only limit preventing further abuses.*”¹⁴ However, many challenges difficult this process. Lack of priority given to the topic and lack of subsequent training of agents in contact with potential trafficked victims, mainly law

² Article 4.a of the Warsaw Convention

³ Article 4.b of the Warsaw Convention

⁴ Article 4.c of the Warsaw Convention

⁵ Article 4.a of the Warsaw Convention

⁶ Article 2.3 of the Directive 2011/36/EU

⁷ A. Aronowitz, *Human trafficking, human misery: the global trade in human beings*, Praeger Publishers Inc, 1st ed., 2009, p. 27

⁸ J. Jones, “Is It Time to Open a Conversation About a New United Nations Treaty to Fight Human Trafficking That Focuses on Victim Protection and Human Rights?,” in J. Winterdyk, J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, Springer International Publishing, 2020, p. 1808, DOI:10.1007/978-3-319-63058-8_129

⁹ S.H. Krieg, “Trafficking in Human Beings: The EU Approach between Border Control, Law Enforcement and Human Rights,” *European Law Journal*, 2009, vol. 15, no. 6, pp. 775-790, DOI:10.1111/j.1468-0386.2009.00490.x

¹⁰ A. Aronowitz, *Human trafficking, human misery*, *op. cit.* note 7, pp. 27-28

¹¹ Articles 13 and 14

¹² See in particular articles 6 and 8

¹³ A. Farrell, R. Pfeffer, “Policing Human Trafficking: Cultural Blinders and Organizational Barriers,” *The ANNALS of the American Academy of Political and Social Science*, SAGE Publications Inc, May 1, 2014, vol. 653, no. 1, p. 47, DOI:10.1177/0002716213515835

¹⁴ 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, DOI:10.1007/978-3-319-28424-8_22

enforcement authorities, are often cited as two of the main challenges.¹⁵ For instance, in Germany, “the officers usually fail to identify possible victims during their raids, because the raid [...] is traditionally designed for exposing offences such as illegal residence or non-existing work permits in the area of prostitution.”¹⁶ As a result, survivors might fear law enforcement authorities due to poor relationships or threats of criminal prosecution or expulsion. Furthermore, identification is challenged by lack of self-identification of the survivors as trafficked victims: they might have “no knowledge of their rights [...] or] accept exploitation, as a means to an end [such as migration or due to] the setting of a relationship that involves power relationships.”¹⁷

To overcome these challenges, identification and protection of victims have increasingly relied on a network of practitioners: law enforcement authorities, NGOs, medical professionals, social services, employees of transport or accommodation companies, etc. In practice, NGOs are at the forefront of assisting survivors.¹⁸ Once identified, survivors must be officially recognized as trafficked victims to obtain their special rights. However, in many countries, such as in Luxembourg,¹⁹ France²⁰ and Spain,²¹ this assessment goes exclusively to law enforcement authorities. As a result, many survivors are not officially recognized as trafficked victims by the state. For instance, in Spain, “compared to 458 formally identified victims in 2017 and 2018 [the survey from NGOs] reports that 7,448 victims have been detected in the same period.”²² In France, 2,872 trafficked victims have been assisted by NGOs in 2021,²³ while 331 victims have been registered by law enforcement authorities the same year.²⁴ On the contrary, in other countries, such as in Romania, the identification of trafficked victims has been partly delegated to NGOs and other professionals.²⁵

¹⁵ 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 ; A. Farrell, J. McDevitt, S. Fahy, “Where are all the victims? Understanding the determinants of official identification of human trafficking incidents,” *Criminology & Public Policy*, 2010, vol. 9, no. 2, pp. 201-233, DOI:10.1111/j.1745-9133.2010.00621.x ; T.A. Reis et al., “Prostitute or human trafficking victim? Police discernment of human trafficking,” *Policing: An International Journal*, Emerald Publishing Limited, January 1, 2022, vol. 45, no. 2, pp. 334-345, DOI:10.1108/PIJPSM-07-2021-0094

¹⁶ J. Leser, “Policing the absence of the victim: an ethnography of raids in sex trafficking operations,” in T. Sanders, M. Laing (eds.), *Policing the sex industry: protection, paternalism and politics*, Routledge, Taylor & Francis Group, Interdisciplinary studies in sex for sale, 2018, p. 116

¹⁷ 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, DOI:10.1007/978-3-319-63058-8_86

¹⁸ M. Tzvetkova, “NGO responses to trafficking in women,” *Gender & Development*, Routledge, March 1, 2002, vol. 10, no. 1, p. 60, DOI:10.1080/13552070215893 ; A. Dölemeyer, J. Leser, “Entre coopération et conflit,” *Cultures & Conflits*, November 8, 2021, vol. 122, no. 2, p. 48

¹⁹ GRETA, “Evaluation Report - Luxembourg - Third evaluation round - Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, October 4, 2022, ¶ 162

²⁰ Article R425-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile

²¹ Ministerio de Justicia et al., “Framework protocol for protection of victims of human trafficking,” Spain, October 28, 2011, ¶ VI.A.1 and article 141.2 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, tras su reforma por Ley Orgánica 2/2009

²² C. Villacampa Estiarte et al., “Dimensión de la trata de seres humanos en España,” in C.V. Estiarte, A.P. Gargallo (eds.), *La trata de seres humanos tras un decenio de su incriminación: ¿es necesaria una ley integral para luchar contra la trata y la explotación de seres humanos?*, Tirant lo Blanch, 2022, p. 194

²³ A. Sourd, L. Benaddou, L. Vignolles, *La traite des êtres humains en France Le profil des victimes suivies par les associations en 2021*, Service statistique ministériel de la sécurité intérieure, Mission interministérielle pour la protection des femmes contre les violences et la lutte contre la traite des êtres humains, 2022, p. 4

²⁴ Service statistique ministériel de la sécurité intérieure, “La traite et l'exploitation des êtres humains depuis 2016 : une approche par les données administratives,” *Interstats*, October 2022, no. 49, p. 7

²⁵ Agenția Națională Împotriva Traficului de Persoane, “National Identification and Referral Mechanism of Victims of Trafficking in Persons,” Romania, 2019, pp. 41-43

The multiplication of actors to protect survivors and the duality of regimes (officially recognized as trafficked victim or not) creates new challenges for cooperation. Working in silos hampers the effective protection of victims. Collaborative work requires a good knowledge of the local, national, and international actors. Communication channels need to be developed. As the state relies on a multi-level enforcement of trafficked victims' protection, one mechanism was developed to structure assistance to survivors: NRMs.

1.3. National referral mechanisms as enforcement of multi-level regulatory systems

Under guidelines developed by the OSCE, an NRM is a “*co-operative, national framework through which governments fulfil their obligations to protect and promote the human rights of victims of trafficking, coordinating their efforts in a strategic partnership with civil society organizations, the private sector and other actors working in this field.*”²⁶ NRMs are based on a human rights approach of the repression of human trafficking as well as a victim-centered approach.²⁷ They are meant to structure “*co-operation, collaboration and partnership at international, national, sub-national and local levels.*”²⁸ In practice, an NRM “*essentially concerns the process of identifying and referring victims of trafficking for assistance.*”²⁹

Despite the relevance of NRMs to organize the protection of trafficked victims in a multi-level regulatory environment, their implementation is not mandatory. The Warsaw Convention only encourages states to establish “*strategic partnerships*” with civil society, including NGOs,³⁰ especially during the identification process.³¹ Although NRMs are not yet mandatory, the GRETA has been evaluating their existence and effectivity, since the second evaluation round started in 2014. In particular, the GRETA requested if such a mechanism existed, for both national and foreign victims, for any form of exploitation. While the questionnaire of the third round of evaluation does not specifically mention NRMs, the GRETA requires countries to update their answers to the second round of evaluation, including on this topic.³² As a result, during the evaluation of Luxembourg, the GRETA considered that the 2017 roadmap was not sufficient as a NRM, since “*it does not describe the victim identification and referral procedures in detail.*”³³ Similarly, the GRETA highlights the absence of NRM in Spain³⁴ and in France.³⁵ For countries where a NRM exists, the GRETA puts emphasis in its effectivity and the reality of its functioning, such as in Romania³⁶ or Belgium.³⁷

²⁶ Office for Democratic Institutions and Human Rights, *National referral mechanisms - Joining efforts to protect the rights of trafficked persons - A practical handbook*, OSCE, 2nd ed., 2022, p. 26

²⁷ *Ibid.* p. 20

²⁸ *Ibid.* p. 21

²⁹ *Ibid.* p. 27

³⁰ Article 35 of the Warsaw Convention

³¹ Article 10.2 of the Warsaw Convention

³² 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

³³ GRETA, *Luxembourg - Third evaluation round*, *op. cit.* note 24, ¶ 164

³⁴ GRETA, “Evaluation Report - Spain - Third evaluation round - Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, June 12, 2023, p. 6

³⁵ GRETA, “Evaluation Report - France - Third evaluation round - Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, February 18, 2022, p. 4

³⁶ Underlining the lack of trained staff members at the central agency and limitation of budgets, 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, ¶ 193

³⁷ Underlining the practice to identify victims depending on their cooperation for law enforcement authorities, GRETA, “Evaluation Report - Belgium - Third evaluation round - Access to justice and effective remedies for victims of trafficking in human beings,” Council of Europe, October 20, 2022, ¶¶ 180-186

Differently, the Directive 2011/36/EU mandates Member States “to establish national rapporteurs or equivalent mechanisms,”³⁸ who measures and reports the criminal phenomenon but does not organize the referral of trafficked victims. Nevertheless, the text also requests Member States to “take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organisations.”³⁹ Considering the broadness of such provision, the 2022 Proposal to update the Directive 2011/36/EU would amend this paragraph to provide for the mandatory “Formal establishment of National Referral Mechanisms and of National Focal Points for the referral of victims.”⁴⁰ However, the proposal does not detail further the content and structure of these NRMs

As these mechanisms are in development within the EU,⁴¹ and might soon be mandatory, this paper uses NRMs as a case study to examine multi-level cooperation systems to protect human rights, in this case, those of survivors of human trafficking.

2. Leveraging national referral mechanisms to perfect hard law

First, the objective of NRMs questions the role of the law to regulate the protection of trafficked victims and the implementation of human rights. Indeed, these mechanisms will both supplement and support victims’ protection, compared to the limited drafting or role of the law.

2.1. National referral mechanisms to supplement victims’ protection

While anti-trafficking texts criminalize many forms of trafficking, the protection of survivors is legally restricted to specific victims. In particular, the specific rights of trafficked victims are mainly understood as rights to non-EU nationals.

To begin with, the Palermo Protocol does not criminalize all types of trafficking, but only transnational processes.⁴² Consequently, the few provisions regarding assistance to trafficked victims were limited to non-national victims,⁴³ hence the focus on the repatriation of victims.⁴⁴ On the contrary, the Warsaw Convention and the EU framework delete this criterion.⁴⁵ As all forms of trafficking are criminalized, all victims are covered by the assistance provisions. Furthermore, the Warsaw Convention mandates States to issue a residence permit when “*the competent authority considers that their stay is necessary owing to their personal situation; [or if] the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings.*”⁴⁶

However, the EU transposition of the recovery and reflection period and the right to a residence permit, has been limited to non-EU trafficked victims. While the Directive 2011/36/EU recognizes the need of non-conditional assistance to victims, this principle finds an exception in the Directive 2004/81/EC.⁴⁷ Indeed, the latter text only mandates the implementation of these two rights to third-country nationals, meaning “*any person who is not a citizen of the Union.*”⁴⁸ First, regarding the right to a residence permit, this limitation might seem logical due to the freedom of circulation of people within the Schengen area. It could be

³⁸ Article 19 of the Directive 2011/36/EU

³⁹ Article 11.4 of the Directive 2011/36/EU

⁴⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, December 19, 2022, p. 14, COM(2022) 732 final, see article 1.4 of the proposal

⁴¹ Directorate General for Migration and Home Affairs, *Study on reviewing the functioning of Member States’ National and Transnational Referral Mechanisms*, LU, European Commission, EU, 2020

⁴² Article 4 of the Palermo Protocol

⁴³ See article 6 of the Palermo Protocol

⁴⁴ Article 8 of the Palermo Protocol

⁴⁵ Explicitly at article 2 of the Warsaw Convention

⁴⁶ Article 14.1 of the Warsaw Convention

⁴⁷ Article 11.3 of the Directive 2011/36/EU

⁴⁸ Article 2.a

noted that 53% of the trafficked victims registered in 2019-2020 in the EU were EU citizens.⁴⁹ However, not all Member States of the EU participate in the Schengen area. For instance, Romania is not part of it. Yet, most EU-citizen trafficked victims registered in the EU in 2019-2020 are Romanian.⁵⁰ The limitation of a residence permit to allow freedom of movement to third-country nationals could thus be questioned. Furthermore, the issuance of the residence permit requires the State to consider “(a) the opportunity presented by prolonging [their] stay on its territory for the investigations or the judicial proceedings, and (b) whether [they] has shown a clear intention to cooperate and (c) whether [they] has severed all relations with” the offender.⁵¹ Therefore, survivors who do not manage to extract themselves from their relationships – sometimes intimate – with the offender or those who do not wish to cooperate with law enforcement authorities, are denied a right necessary to their recovery. Second, regarding the reflection period, it is similarly limited to third-country nationals. This restriction is far more surprising. Indeed, the right allows the victim “to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities.”⁵² This right should not be linked to a transnational trafficking process. As a result of the drafting of the Directive 2004/81/EC, this limitation of special rights to trafficked victims can similarly be found in national transpositions.⁵³

On the contrary, NRMs are dedicated to the protection of all trafficked victims: they should be referred for assistance, whether they can request or not their special rights. According to the principle of non-conditionality, “NRMs ensure that all presumed or identified victims of trafficking within the jurisdiction of a state are entitled to human rights and fundamental freedoms regardless of their background, nationality, activities they may have been involved in, or their willingness to co-operate with law-enforcement authorities. This includes those who are trafficked domestically (within the borders of one country) as well as transnationally (across international borders) and online (cyber-trafficking).”⁵⁴ The objective of NRMs is to assist survivors, independently of their legal status. It relies on a broader duty to protect of States, triggered by a link between the survivor and the jurisdiction of a State.

Here, the OSCE guidance does not use the concept of “territory.” Therefore, the competence of NRMs is not limited to the formal geographic definition of a State, but to its power to control specific spaces. This decision in the drafting of the principle could be interpreted through the case law of the European Court of Human Rights (ECtHR). While a State is presumed to control and protect its population over its territory, the court extended its theory of control to a broader notion of jurisdiction. The ECtHR applied the European Convention on Human Rights to a state when controlling people outside its borders. Although

⁴⁹ European Commission, “Commission Staff Working Document Statistics and trends in trafficking in human being in the European Union in 2019-2020 Accompanying the document Report on the progress made in the fight against trafficking in human beings (Fourth Report),” EU, December 19, 2022, p. 8, SWD(2022) 429 final

⁵⁰ *Ibid.*

⁵¹ Article 8.1 of the Directive 2004/81/EC

⁵² Article 13.1 of the Warsaw Convention, see similarly article 6.1 of the Directive 2004/81/EC

⁵³ In France, the period of reflection is only considered for aliens who might fill a complaint or give testimony, article R425-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile; the residence permit is only issued for aliens who fill a complaint or give a testimony, “provided that they have severed all ties with” the presumed offender, article L425-1 of the same code. In Spain, the law refers only to aliens for the period of reflection and for the issuance of a residence permit, article 59 bis of the Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social and article 142 and 144 of the Real Decreto 557/2011. In Luxembourg, the law refers only to third-party nationals for the period of reflection and the issuance of the residence permit, articles 92 to 95 of the loi du 29 août 2008 sur la libre circulation des personnes et l'immigration. For the issuance of the residence permit, the survivor must have filled a complaint or given a testimony, or their presence is necessary for the investigation or procedure, or due to personal circumstances, and must severed all ties with the presumed offender, article 95.1 of the same law.

⁵⁴ Office for Democratic Institutions and Human Rights, *National referral mechanisms*, *op. cit.* note 26, p. 26

these cases are rare and exceptional (for example, military control), a State can be responsible of violation of human rights, for instance of a trafficked victim, when it has “*physical*,” “*effective*,”⁵⁵ “*full and exclusive*” control, even if only “*de facto*,”⁵⁶ over a territory.

This absent reference to the territory could strengthen the protection of survivors when their traffic process had online elements. The recovery of survivors of cyber trafficking, broadly defined as “*human trafficking facilitated or enabled or regulated through the use of the internet and other communication platforms*,”⁵⁷ might require their referral to non-criminal rights, such as the right to erase their data to protect their privacy and avoid the replicability of their abuse through the dissemination of material produced during their exploitation or the trafficking process, the right to access data to obtain criminal evidence, etc.

Therefore, NRMs would refer survivors to the adequate assistance services, would they be identified formally or not, would they have access to special rights as trafficked victims or not. This non-conditionality principle is a cornerstone to implement and protect human rights of survivors. Thus, it questions the drafting of anti-trafficking texts. It could be seen of the role of the law to define such a principle, and to apply it in the provisions on the rights of trafficked victims. NRMs are meant to be institutional mechanisms to structure the referral of survivors, it might not be their role to define the principles for their assistance. Thus, the development of such a multi-level enforcement of the human rights of trafficked victims could trigger new proposals to amend anti-trafficking norms. It could be particularly relevant to define common principles and objectives at the legal level to obtain a coherent multi-level regulatory system. What should be the role of law regarding the protection of victims is nowadays found in soft guidance through NRMs. Yet, the law, abstract and general, could validly be complemented by soft guidance for and by NRMs, more practical and technical.

2.2. National referral mechanisms to support victims’ protection

While NRMs might define principles that should be found in legal norms to guide multi-level regulatory systems, such a mechanism can also detail the legal provisions and guide the technical implementation of trafficked victims’ assistance and rights. The flexibility of soft guidance and not-fully formalized structures can adapt more quickly to the evolution of criminal *modus operandi* and to the multiple and individualized needs of survivors. The law should be abstract enough to not be amended to comprehend each evolution of the criminal processes, while other systems should be able to adjust to the daily challenges of the repression of trafficking. NRMs could support the law by providing indicators on the identification of victims; and in drafting protocols to guide the referral of victims.

First, the GRETA requests States to develop formal indicators to identify trafficked victims.⁵⁸ The International Labor Office along with the European Commission produced indicators regarding trafficking for labor and sexual exploitation, based on deceptive or coercive recruitment, abuse of vulnerability during the recruitment or at destination, exploitative conditions of work, or coercion at destination.⁵⁹ Later, the United Nations Office on Drugs and Crime developed indicators to identify trafficked victims, in particular children, with special red flags depending on the forms of exploitation (domestic servitude, sexual exploitation, labor exploitation and begging and petty crimes).⁶⁰ More detailed indicators have been developed

⁵⁵ ECtHR [GC], *Loizidou v. Turkey (preliminary objections)*, March 23, 1995, no. 15318/89, ¶¶ 57, 62

⁵⁶ ECtHR [GC], *Medvedyev and Others v. France*, March 29, 2010, no. 3394/03, ¶ 67

⁵⁷ 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, pp. 28-44

⁵⁸ GRETA, *Questionnaire Second Evaluation Round*, op. cit. note 33, p. 7

⁵⁹ International Labour Office, European Commission, *Operational indicators of trafficking in human beings Results from a Delphi survey*, September 2009

⁶⁰ UNODC, “Human trafficking indicators,” UN, 2020, online https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf (retrieved on October 10, 2021)

by some EU countries.⁶¹ However, these general indicators might not be adapted or precise enough to fit the current local trends in trafficking processes. Yet, far from all EU Member States provide indicators to detect survivors.⁶² Furthermore, indicators should be adapted to each category of practitioners who could be in contact with survivors: plane operators cannot access the same information as a health care professional. A set of indicators, well drafted, updated with current trends, and adapted and shared to well-defined practitioners, could help them to ask or look for information to assess if a person might reasonably be a trafficked victim. Considering the necessary regular update of indicators and practitioners, the law might not be the adequate tool. On the contrary, NRMs, along with national rapporteurs, could draft these indicators based on life experience of all stakeholders and by implementing political priorities and policies.⁶³ In a retro feedback process, the update of the indicators depending on the reality of trafficking processes could foster political discussions to set up new priorities.

Second, the GRETA evaluates the NRMs' members and their responsibilities.⁶⁴ This division of work is necessary to structure the assistance to survivors and connect all stakeholders. Lack of clear organization and procedures would challenge coordination between stakeholders. This can restrict a victim-centered approach, for instance, leading to the multiplication of interviews to the victims giving rise to repetition of traumas. Informal coordination relies on interpersonal relationships; thus, they might not be evenly implemented and sustain on the long term.⁶⁵ Even if local formal partnerships are built, a general framework would define common objectives and develop trust among stakeholders with different work cultures and aims – e.g., obtaining a conviction *versus* the recovery of the survivor.⁶⁶ To overcome these challenges, “NRMs allow for formalized joint working between law enforcement and victim services in the form of task forces, sub-national and local (mobile) teams and networks.”⁶⁷ The work is divided among professionals as well as among the various levels of enforcement: The centralized NRM should be complemented by “*multi-agency sub-national and local teams and networks [to] ensure swift and even responses to human trafficking nationwide and within local communities.*”⁶⁸ This structuration of NRMs can be formalized through a NRM Protocol, which “*provides essential procedures for all professionals who are working with victims of trafficking.*”⁶⁹ This core protocol can be technically developed by “*Operational Partnership Protocols [...] to clearly define the purpose and co-ordination of a joint working relationship.*”⁷⁰ These protocols should be “*drafted to ensure that: 1) Resources are located and committed for maintained co-operation and joint work; 2) All professional roles and remits are clearly defined; 3) Partnerships are maximized, with procedures for management and pathways to services made clear; and 4) Each party retains their crucial independence.*”⁷¹ Referral procedures create “*a bridge for survivors' access to services, rather than simply signposting them to services, and leaving them to locate and access these for themselves.*”⁷² These norms are set by protocols, which should be negotiated by and for the

⁶¹ M. de Cock et al., *Guidelines for the first level identification of victims of trafficking in Europe*, Project “Development of Common Guidelines and Procedures on Identification of Victims of Human Trafficking,” EU, June 2013

⁶² Directorate General for Migration and Home Affairs, *National and Transnational Referral Mechanisms*, *op. cit.* note 43, p. 38

⁶³ Office for Democratic Institutions and Human Rights, *National referral mechanisms*, *op. cit.* note 26, pp. 123-124

⁶⁴ GRETA, *Questionnaire Second Evaluation Round*, *op. cit.* note 33, p. 7

⁶⁵ B. Lavaud-Legendre, *Approche globale et traite des êtres humains - De l'« injonction à la coopération » au travail ensemble*, CNRS, July 1, 2018, p. 125, online <https://halshs.archives-ouvertes.fr/halshs-02177213> (retrieved on October 29, 2021)

⁶⁶ A. Dölemeyer, J. Leser, “Entre coopération et conflit,” *op. cit.* note 18, pp. 56, 64

⁶⁷ Office for Democratic Institutions and Human Rights, *National referral mechanisms*, *op. cit.* note 26, p. 73

⁶⁸ *Ibid.* p. 34

⁶⁹ *Ibid.* p. 84

⁷⁰ *Ibid.* p. 35

⁷¹ *Ibid.* p. 73

⁷² *Ibid.* p. 99

stakeholders. By avoiding a formal law, anti-trafficking actions gain flexibility and adaptability to groundwork and daily necessities, by being closer to survivors' reality. Therefore, protocols drafted within NRMs would support the law in sharing guidance procedures to implement survivors' human rights.

NRMs highlight the relevance of complementing hard law with guidance documents or soft law. As the law should remain abstract to frame the repression of human trafficking, its principles and victims' rights, multi-level regulatory systems need to leverage other mechanisms to reach an effective implementation of their objectives. In particular, the protection of human rights requires to reflect on the purposes of the law and its limits, while acknowledging the relevance of institutional and organizational mechanisms. Those can detail technical and practical guidance for groundwork practitioners, while offering feedback to political institutions based on a reality check. However, the current implementation of NRMs raise specific concerns in the implementation of human rights in multi-level regulatory environments.

3. Designing national referral mechanisms from a victim-centered approach

When studying institutional structure and competences of existing NRMs, this new tool dedicated to the protection of trafficked victims interrogates the broadness and limits of cooperation systems to implement human rights in multi-level regulatory environments.

3.1. National referral mechanisms as a platform for anti-trafficking actors

To assess the effectivity of NRMs in the EU, it should be studied their actual composition and the roles of their stakeholders.

Regarding the participants of NRMs, the OSCE advises the structure to “*be as inclusive as possible*.”⁷³ Relevant members would be: “1) *National government institutions*; 2) *Sub-national and local administrations*; 3) *Public sector, including all statutory services and non-statutory services for adults, and national child protection systems for children*; 4) *Independent advocates allocated for each adult*; 5) *Guardian advocates allocated for each child to provide specialist, individual support (or their national equivalents)*; 6) *National healthcare services*; 7) *Civil society organizations including specialist anti-trafficking NGOs, trade unions, faith-based organizations, and community-based organizations and unions*; 8) *Legal aid service providers*; 9) *Independent legal advice and representation services*; and 10) *Intergovernmental organizations*.”⁷⁴ At the European level, the list of members of NRMs keeps on growing as new practitioners are involved in the identification and protection of trafficked victims. However, their composition is far from harmonized. Not all EU countries links their cooperation system to a national rapporteur; different ministries, or governmental actors are included in each country. While law enforcement authorities are included in all cooperation systems, not all EU countries include judicial authorities. Many cooperation systems involve social services, some of them dedicated to children or to women survivors. Other bodies such as labor inspectorates and migration and asylum-related services might be involved. However, few countries involve local public bodies such as municipalities or business companies.⁷⁵ Although this lack of harmonization is due to the local division of tasks and implementation of the anti-trafficking policy, it might hinder a European collaboration between cooperation systems. Furthermore, the involvement of actors needs to be flexible to adapt to the necessities of survivors. It could thus surprise the absence of online service providers, although European countries recognize that “*the use of Internet both in recruitment and in the exploitation of THB victims [is] a factor increasing the difficulties faced by law enforcement authorities working on detection and*

⁷³ *Ibid.* p. 31

⁷⁴ *Ibid.* p. 33

⁷⁵ Directorate General for Migration and Home Affairs, *National and Transnational Referral Mechanisms*, *op. cit.* note 43, pp. 37-38

*identification of victims.*⁷⁶ It could be highlighted that the French report on minor prostitution involved main social networking companies, while no specific cooperation has been developed with them.⁷⁷ Therefore, one main challenge in designing cooperation systems to enforce human rights in multi-level regulatory environment lies in the definition of its stakeholders. A limitation to governmental bodies would limit the practical impact of an NRM. The election or exclusion of specific NGOs depending on national priorities might limit a comprehensive protection of survivors, for instance sex workers or men. On the contrary, broadening the scope of NRMs to too many stakeholders might create confusion.

A second challenge of NRMs lies in the competences that are shared among its stakeholders. While they were originally conceived for referral and support of survivors of human trafficking, the role of existing NRMs seems to not reach the expectations of the OSCE. First, the scope of affected survivors is still limited. For instance, assistance to survivors might still be restricted to formally identified trafficked victims and excludes presumed victims.⁷⁸ Some local Spanish protocols for identification are still only applicable to trafficking for sexual exploitation and the national protocol only offers a guidance of resources for survivors of this purpose of trafficking.⁷⁹ While an EU report considers that “*All Member States have developed procedures and mechanisms for detection of potential victims of THB within their NRMs,*”⁸⁰ this mechanism can be very limited in practice. The main example is France. While the EU announces that France has a NRM, the French National Advisory Commission on Human Rights, when evaluating the implementation of the second national plan against human trafficking, estimates that there is still no French NRM.⁸¹ Indeed, the “NRM” has been constructed as a mere “*interministerial circular containing a non-exhaustive of victim identification indicators,*”⁸² with no procedure regarding the referral of victims. Thus, in 2021, the EU estimated that the “*involvement of civil society organisations in the identification of victims and their referral for support is [still] a challenge.*”⁸³ Therefore, countries should be concerned of the concrete role of the NRM. These mechanisms should indeed produce guidance and norms, but their relevance is mainly practical. They require financial means and coordination structures involving trained practitioners.

As a result, while NRMs meant to connect stakeholders, their implementation seems to struggle to go further than a guidance role and to improve the daily work of practitioners with a common objective for survivors’ assistance. Both hard and soft law shows its current limits in coordinating multi-level support of survivors of human trafficking, due to the lack of concrete measures, questioning the relevance of political prioritization to connect all levels of a complex regulatory system. While the drafting of the law and other documents still highlights limitations in adopting a fully victim-centered approach, the enforcement of multi-level regulatory systems

⁷⁶ *Ibid.* p. 39

⁷⁷ Groupe de travail sur la prostitution des mineurs, *Rapport sur la prostitution des mineurs*, France, June 28, 2021

⁷⁸ Directorate General for Migration and Home Affairs, *National and Transnational Referral Mechanisms*, *op. cit.* note 43, pp. 43, 45

⁷⁹ X. Miranda-Ruche, C.V. Estiarte, “La atención a las víctimas de trata de seres humanos. Un análisis crítico del protocolo marco español desde una perspectiva comparada,” *Alternativas. Cuadernos de Trabajo Social*, Universidad de Alicante, July 1, 2021, vol. 28, no. 2, p. 150, DOI:10.14198/ALTERN2021.28.2.01 ; Gobierno de España, “Guía de Recursos Existentes para la Atención a Víctimas de Trata con Fines de Explotación Sexual,” Spain, July 2018

⁸⁰ Directorate General for Migration and Home Affairs, *National and Transnational Referral Mechanisms*, *op. cit.* note 43, p. 38

⁸¹ CNCDH, “Avis - Evaluation du plan d’action national contre la traite des êtres humains (2019-2021),” January 12, 2023, ¶ 4, A-2023-1

⁸² Mission interministérielle pour la protection des femmes contre les violences et la lutte contre la traite des êtres humains, Secrétariat d’Etat chargé de l’égalité entre les femmes et les hommes et de la lutte contre les discriminations, “2nd plan d’action national contre la traite des êtres humains 2019-2021,” France, 2019, p. 14

⁸³ European Commission, “Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021-2025,” EU, April 14, 2021, p. 13, COM(2021) 171 final

should be accompanied by extra-legal measures, from budget related to the creation of a common work culture.

3.2. From national to transnational referral mechanisms

Finally, another challenge of NRMs is their geographical limitation: they are for now developed primarily at the state level. While human trafficking does not need to be transnational, many survivors are connected to various jurisdictions. As a result, a national referral only might not scope the full breadth of their needs.

Therefore, cooperation between NRMs is needed to comprehensively assist survivors of a highly transnational criminal process. However, such a cooperation is obfuscated due to the wide diversity of NRMs within the EU. Cooperation mechanisms can be formal or informal,⁸⁴ while no single point of contact is recommended by OSCE guidelines in drafting NRMs for transnational referrals. This is increasingly challenging as EU “*mechanisms identified are frequently based on a complex legal and nonlegal (e.g. policy) reference framework comprising a number of documents of different origin, nature and binding force,*” which could lack a lack of mutual understanding of each national system.⁸⁵ Such a diversity might create blunt referral, with no coordination of efforts between both countries. Survivors might then be transferred from one system to another, while not being able to map the complexity of their needs that could be in various jurisdictions simultaneously. However, the EU already drafted about coordination between various national enforcement systems, such as the “*lead supervisory authority for the cross-border processing*” under the GDPR.⁸⁶ The experience gained from these provisions could provide insights to develop stronger relationships between NRMs.

To overcome these challenges, the current solution has been the development of transnational referral mechanisms (TRMs). They are defined as “*an operational framework linking the different stakeholders from two or more countries involved in identification, referral, assistance, repatriation, and monitoring by defining clear roles for each stakeholder, along with procedures to follow, to ensure the protection of the victims’ human’s rights all along their reintegration path.*”⁸⁷ A model of TRM has been developed by the International Organization for Migration⁸⁸ and bilateral and multilateral TRMs have been funded by the EU. Yet, these projects mainly focus on the return of survivors, meaning their departure from the identification country to return to their origin country. Moreover, for now, “*law enforcement professionals prefer informal methods of identification and referral, finding them to be cheaper and faster, and rejecting more formal processes as added layers of bureaucracy, and thus delay.*”⁸⁹ Therefore, there is no supranational institution to structure the referral of survivors at the EU level or to coordinate collaboration between NRMs. Yet, certain stakeholders could better fit in a TRM rather than an NRM, due to their transnational nature. Frontex could participate in such a TRM, as there are no within the Schengen area. Online service providers could be centralized in a TRM, to overcome the hurdles for survivors’ protection when part of the trafficking process is by nature a-territorial.

⁸⁴ Directorate General for Migration and Home Affairs, *National and Transnational Referral Mechanisms*, *op. cit.* note 43, p. 19

⁸⁵ *Ibid.* p. 24

⁸⁶ Article 56 of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data

⁸⁷ International Organization for Migration, *Enhancing the Safety and Sustainability of the Return and Reintegration of Victims of Trafficking*, CARE & TACT projects, European Commission, no date, p. 47

⁸⁸ IOM, “TACT | Transnational referral mechanism Model,” *IOM France*, no date, online <http://www.iomfrance.org/tact/index.html> (retrieved on November 16, 2023)

⁸⁹ Directorate-General for Migration and Home Affairs (European Commission) et al., *Study on comprehensive policy review of anti-trafficking projects funded by the European Commission: final report*, LU, Publications Office of the European Union, 2016, p. 63

4. Conclusions

Multi-level regulatory systems challenge the implementation of human rights, especially when enforced by multiple stakeholders. Such a challenge is to be found in the repression of human trafficking, a highly transnational offence, internationally harmonized but locally implemented. This repression is supported by a strong commitment to support survivors of this crime, although it questions the traditional enforcement of law. Indeed, the original role of law enforcement authorities is transformed to increasingly include the support of survivors. Furthermore, this enforcement is complemented by external actors to the State, particularly NGOs, mainly in charge of the practical assistance to survivors.

To coordinate these actions with a victim-centered approach, supranational organizations advocate for the implementation of National Referral Mechanisms, aimed at the concrete detection, identification, and support of survivors. While not being legally mandatory for now, they appear as a good practice to be developed to ensure the coverage of all necessities of all survivors. They complement and support the law by setting principles to the assistance of survivors, connecting all stakeholders, and remaining flexible to adapt to the individual necessities of survivors. Yet, the increasing relevance of NRMs questions the role of the law by highlighting the limitations in the legal provisions to assist survivors. NRMs are meant as comprehensive systems to build a network between all stakeholders to support all survivors. On the contrary, the law still frames a traditional enforcement of the protection of trafficked victims, limited to State institutions and aimed at specific survivors. As a result, concrete cooperation mechanisms aspire to broaden the scope of the law by setting general principles. That questions the repartition of competences between law and guidance frameworks or soft law. Nevertheless, not all norms around NRMs should turn to hard norms, to maintain flexibility in their functioning to adapt and update to criminological realities and needs of survivors. This is particularly relevant in the development of indicators to detect victims and to extend NRMs to the adequate scope of practitioners.

Despite these praiseworthy theoretical drafting of NRMs and their objectives, their concrete implementation still questions their adequacy to effectively protect human rights of survivors. First, one can doubt of the extension of stakeholders participating in NRMs to effectively assess the full needs of survivors. Survivors' recovery might extend further than their status of victim, therefore requiring involving an increasingly large number of stakeholders. The extension and the decision in including or not specific stakeholders would be a core challenge of a multi-level enforcement system to draft comprehensive cooperation around protection of human rights. Second, many NRMs are still mainly dedicated to improving stakeholders' awareness and skills but drafting guidance on identification and detection. Not all Member States have drafted concrete procedures for referral, sharing of information, and other real measures for the assistance of survivors. As multi-level regulatory systems propose to build cooperation mechanisms, they will face challenges in leveraging law, including soft law, to implement concrete changes. These mechanisms cannot be effective without complementary measures, including specific budgets and human resources. Third, NRMs remain national and face limits to protect survivors which human rights have been or are threatened over various jurisdictions. Cooperation between mainly have a purpose restricted to repatriation, and some stakeholders such as certain NGOs and business are by nature transnational. Therefore, the enforcement of multi-level regulatory systems opens the door for a discussion about the role of the EU in the concrete referral of survivors of human trafficking and the implementation of human rights.