Victims of Human Trafficking in the Asylum Procedure. A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Generation of EU Asylum Legislation

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CHAPTER 3

Victims of Human Trafficking

A Legal Analysis of the Guarantees for ‘Vulnerable Persons’ under the Second Phase of the EU Asylum Legislation

Vladislava Stoyanova

1 Introduction

Victims of human trafficking have been designated as a group of migrants in need of special assistance and protection. As a result, a whole legal framework has been developed which revolves around this group. Within Europe, this framework operates on two levels: the Council of Europe and the European Union (EU). In the context of the Council of Europe, States have adopted the Convention on Action against Human Trafficking (the CoE Trafficking Convention). Within the EU, two relevant legal instruments have been adopted: Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (the EU Trafficking Directive) and 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 (the EU Residence Permit Directive). EU law has added an additional layer of sophistication with its second generation of asylum legislation. The category ‘victims of human trafficking’ has been added to the groups of applicants for international protection considered to be ‘vulnerable persons’, who might be in need of special reception conditions and/or special procedural guarantees in relation to the procedure for determining their international protection needs. The Dublin mechanism, which is one of the cornerstones of the EU

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2 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 (entry into force: 1 February 2008).


4 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, OJ L 261/19, 6 August 2004.

asylum system, also needs to be considered. In particular, as with any other applicant for international protection, victims of human trafficking may be subject to Dublin transfers.\textsuperscript{6} This creates the possibility of clashes between the Dublin mechanism, as recently amended during the second phase of harmonisation of EU asylum law, and the human trafficking legal framework.

This Chapter explores the tectonic friction between the regimes for victims of trafficking, geared towards the repression of crime, and that of international protection, with its focus on refugees and human rights law. A reading of the pertinent legal norms that steers away from practices that lock migrants into either of these regimes, denying them benefits potentially available in the other, is sought. In sum, the objective of this Chapter is to investigate how pertinent legal instruments of EU law and regional international law, i.e. Council of Europe law, interact with each other.

At the same time, this Chapter also draws attention to conceptual problems concerning the categories of vulnerable persons, victims of human trafficking, applicants with special reception needs and applicants in need of special procedural guarantees. It reviews the related difficulties of identifying these special categories of applicants for international protection and critically examines the meaningfulness of the benefits attached to these categories.

The argument is structured along the following lines. Section 2 explains that the human trafficking legal framework requires that States build a procedure for identifying migrants as victims of human trafficking. This identification procedure tends towards identification of victims who may be useful for criminal proceedings. Despite this limitation which, as I argue, is embedded in the relevant legal norms, construction of an identification infrastructure has positive consequences, including the provision of social assistance to, and protection of, those individuals who have been formally identified. The focus then zooms in on protection measures which could imply non-removal from the territory of a Member State once a migrant has been identified as a victim of human trafficking. It is demonstrated that, in this respect, the possibilities for non-removal are not only very limited, but also that the human trafficking legal framework views the return of the victim as the standard solution for his/her case. Thus, the victim will logically turn to the international protection procedure.\textsuperscript{7}

Against the above background, questions about the interaction between the two procedures – i.e. the procedure for identifying migrants as victims of human trafficking and the procedure for determining their international protection needs – inevitably arise: Are victims confronted with the choice to either stay in the procedure for identification as

\textsuperscript{6} Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/131, 29 June 2013 (Dublin III Regulation).

\textsuperscript{7} 'International protection' means both refugee status and subsidiary protection status. See Article 2 of the Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 December 2011.
victims of human trafficking or switch to the international protection procedure? If they decide to stay in the international protection procedure, can they also benefit from the assistance measures envisioned under the human trafficking legal framework? In relation to these questions, Section 3.1 develops two arguments. First, that the human trafficking legal framework does not offer an alternative to the international protection procedure and as such cannot be used to undermine the procedure for granting international protection and the procedural and reception guarantees developed therein. Second, the current state of these legal norms does not offer a holistic approach and coherent application of both legal frameworks (i.e. the human trafficking legal framework and the legal framework covering international protection). Rather, as the recent study by the European Migration Network demonstrates, each Member State has its own approach.8 Certainly, Member States have discretion as to how to regulate the issue in many respects. Yet, this Chapter proposes a means by which the two legal frameworks can harmoniously co-exit. More specifically, it is submitted that the human trafficking legal framework should be offered as a measure of additional protection which, in relevant circumstances, can complement the international protection framework.

The analysis then examines various problematic aspects that emerge in relation to the application of the international protection framework to vulnerable persons, including victims of human trafficking (Section 3.2). There are serious deficiencies which might hamper the assessment of whether applicants are in need of special reception conditions or special procedural guarantees. In relation to victims of human trafficking, the analysis points out the insecure and complex meaning of the definition of human trafficking in international law. This complexity will inevitably have an impact and might even de facto block the assessment of whether applicants for international protection are victims of human trafficking. This further exacerbates the general deficiencies imbedded in the second generation of EU asylum legislation in relation to the assessment of applicants’ vulnerabilities.

Section 3.3 examines the benefits afforded to applicants once they are assessed as vulnerable persons within the international protection procedure. It is emphasised that, if an applicant is also identified as a victim of human trafficking, he/she should be also offered the benefits flowing from the human trafficking legal framework. In this regard, it is asked whether there is anything special in the ‘special’ benefits ascribed to vulnerable persons under the EU Reception Conditions Directive and the EU Asylum Procedures Directive.

Finally Section 3.4 addresses the application of the Dublin mechanism to victims of human trafficking. It is submitted that, although victims of human trafficking cannot be generally exempted from Dublin transfers, there are situations when Member States’ obligations under the human trafficking legal framework prevent their transfers.

2 Two Procedures with Diametrically Opposite Objectives

2.1 Victim Identification or Witnesses Identification?

Article 4(e) of the CoE Trafficking Convention stipulates that a victim of human trafficking 'shall mean any natural person who is subject to trafficking in human beings as defined in accordance with the definition of human trafficking.' Human trafficking is defined in Article 4(a) of the Convention. As the definition is generally explained, it has three constitutive elements: the 'action' element, the 'means' element and the 'purpose' element. Thus, in very simply terms, a migrant is a victim of human trafficking if he/she has been subjected to a coercive/deceptive process, which involves his/her recruitment, transportation, transfer, harbouring or receipt, for the purpose of exploitation.

One of the most important obligations imposed upon the States Parties to the CoE Trafficking Convention is the obligation of identifying victims of human trafficking. To that effect, Article 10(1) of the CoE Trafficking Convention prescribes that:

Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with the relevant support organizations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

Article 10(2) of the Convention adds that States ' [...] shall adopt such legislative or other measures as may be necessary to identify victims [...]'. Accordingly, States Parties to the CoE Trafficking Convention have to develop an identification infrastructure and to organize a procedure for victim identification. In other words, there needs to be a formal identification procedure conducted by mandated national authorities as designated by the national legal system. These national authorities will be entitled to confer the statuses of 'a presumed victim of human trafficking' and 'a victim of human trafficking'.

The modalities of the procedure are left for each State to determine. There are variations at the national level in terms of how the procedure is regulated (whether this is through laws adopted by the national parliament, policy guidelines and/or practices).

9 Article 4(a) of the CoE Trafficking Directive (n 2); Article 2 of the EU Trafficking Directive (n 3).
10 There has been debate as to whether human trafficking refers only to the process which might lead to exploitation or whether it can also cover the condition of being exploited. I adopt the position that it refers to the process. See J. Allain, Slavery in International Law. Of Human Exploitation and Trafficking (Martinus Nijhoff 2013).
There are also considerable variations between States Parties to the CoE Trafficking Convention concerning the national bodies which are mandated with the task of identifying victims. These could be the immigration authorities. In other countries, it is the prosecuting authorities. In some States Parties to the CoE Trafficking Convention, police units conduct the procedure. The choice made at the national level might depend on whether human trafficking is viewed more as an immigration control issue or as a law enforcement issue.

The EU Trafficking Directive contains a provision aimed at ensuring the identification of victims of human trafficking: ‘Member States shall take the necessary measures to establish appropriate mechanisms aimed at the early identification of [victims] ...’ Since this provision does not impose an obligation upon Member States to develop an identification procedure, the EU law standards are weaker than the standards established by the above quoted Article 10(2) of the CoE Trafficking Convention. The CoE instrument specifically requires the development of an identification procedure. In contrast, the EU Trafficking Directive simply refers to ‘appropriate mechanisms aimed at early identification.’

Of central importance in the identification of victims of human trafficking is the question of whether and to what extent the CoE Trafficking Convention envisions a process of victim identification distanced from criminal investigation and prosecution. Another pressing question is whether the status of a victim of trafficking can be granted notwithstanding the formal role of the person in the criminal proceedings. The CoE Trafficking Convention seems to suggest, though not unequivocally, that the status of ‘a victim of human trafficking’ is detached from the formal role of the victim in the criminal justice system. The Explanatory Report to the Convention states that: ‘[t]he identification process provided for in Article 10 is independent of any criminal proceedings against those responsible for the trafficking.’ Thus, the Explanatory Report suggests that the recognition of an individual as a victim of human trafficking and the provision of assistance and protection can take place prior to possible criminal investigation, prosecution and conviction for human trafficking. Accordingly, a migrant could be recognized as a victim of

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14 Article 11(4) of the EU Trafficking Directive (n 3) [emphasis added].
16 The Explanatory Report to the CoE Trafficking Convention, para 134.
human trafficking even if there are no identified suspects, the criminal proceedings find the suspects not guilty as the prosecutor could not prove beyond reasonable doubt the elements of the crime of human trafficking or if the suspects are convicted for other crimes since not all elements of the crime of human trafficking could be proven in conformity with the required standard of proof. In sum, a migrant can be a victim of human trafficking regardless of whether an offender is identified, apprehended, prosecuted or convicted. Accordingly, it appears that the status of a victim of human trafficking must be detached from the status of a victim of crime with a formal role in the criminal investigation and prosecution process. It also appears that the status of a victim of human trafficking has to be detached from any criminal proceedings and criminal investigation.

Still, the text of the CoE Trafficking Convention does not unambiguously preclude linking the identification of victims of human trafficking with criminal investigation and prosecution. As a result, there could be a convergence between, on the one hand, identification of victims of trafficking for the purposes of affording them assistance and protection and, on the other hand, the criminal investigation and prosecution process. The following two examples suffice to illustrate such cases.

First, the CoE Trafficking Convention does not exclude the possibility that victim identification is conducted exclusively as a facet of criminal investigation. Competent authorities that could identify victims of human trafficking include law enforcement agencies. As already mentioned, in some countries it is indeed the police, criminal investigating authorities or prosecuting authorities that have the sole authority to identify trafficked victims. Clearly, this identification is conducted in the context of the investigation of alleged crimes. The negative consequence of this is that the scope of migrants who are to be identified as victims of human trafficking might be restricted to victims who are useful to the investigation and prosecution process. The ultimate problem here is that, in the eyes of the national investigating and prosecuting authorities, a victim of trafficking exists, or, in other words, an individual might be recognized as a victim, only if he/she cooperates with the authorities in their investigation and prosecution of the crime. In a given Member State there might be no possibility for recognizing a person as a victim of trafficking solely for the purposes of affording him/her assistance; there might be a complete convergence between victim identification and the requirement of cooperation with the authorities. A situation in which an individual is recognized as a victim of human trafficking and is assisted, but does not cooperate with the authorities in relation to the investigation of the crime, might be rendered de facto impossible. Pursuant to this logic, if he/she does not cooperate, he/she would not be considered a victim of human trafficking. Similarly, a situation in which the migrant can be recognized as a victim without having any formal role in the criminal investigation and prosecution process might not be envisioned at national level.

The second example in support of the above assertion that the status of a victim of human trafficking might be inherently linked with the person’s usefulness for the criminal

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17 Ibid, para 129.
18 In some countries, there is a clear disjunction between victim identification and criminal proceedings. In the UK, for example, guidance for the authorities competent to identify victims of human trafficking is very clear as to the different contexts (identification of victims versus crime investigation). See UK Home Office, *Guidance for Competent Authorities* (n 12).
proceedings relates to the so called 'recovery and reflection period'. This period of at least 30 days is granted to persons who are presumed to be victims of human trafficking at the initial stage of the procedure for victim identification. Its rationale is to prevent the person's deportation until a conclusive decision is reached as to whether he/she is indeed a victim. Article 13(1) of the CoE Trafficking Convention, which regulates the ‘recovery and reflection period’, is drafted in the following way:

> Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her.19

The first sentence of this provision requires States Parties to adopt national legislation that provides for the possibility of a reflection period of at least 30 days. It also appears to suggest that the period could be granted where there are ‘reasonable grounds to believe’ that a migrant is a victim of human trafficking. Notably, the provision does not provide that States shall grant this period where there are ‘reasonable grounds to believe’ that a migrant is a victim. The first sentence is not structured in such a way as to explicitly confer an individual entitlement corresponding to an obligation upon the State to unconditionally grant a reflection period. Accordingly, the question as to under what conditions the period has to be granted remains open. An answer could be found in the second sentence of the above quoted provision.

The ‘and/or’ formulation in the second sentence of Article 13(1) of the CoE Trafficking Convention is particularly notable. It means that the length of the recovery and reflection period is to be determined by either of the stated conditions taken in isolation or cumulatively. This means, inter alia, that the CoE Trafficking Convention requires that the period be sufficient for the person to ‘recover and escape the influence of traffickers’. Thus, it could be argued that the duration of the period is dictated solely by the goal of protecting the individual, as distinct from the goals of any criminal investigation or prosecution which might commence or be underway. However, the reference to cooperation with the competent authorities in the second limb of this sentence is disturbing. The fact that national investigating and prosecuting authorities can be solely mandated to formally identify victims, combined with this reference to a victim of human trafficking taking ‘an informed decision on cooperating’ with them, is even more alarming. In fact, Article 13(1) of the CoE Trafficking Convention allows situations in which one would not get the status of a presumed victim without being of potential use to the criminal investigation process.

The relevant EU law is even more troubling in this respect. Article 3(1) of the Residence Permit Directive assumes that the identification of victims of human trafficking is inherently linked with the criminal investigation process. This assumption is warranted in light of the purpose of the Directive, namely, to define the conditions in which third-country nationals can be granted a residence permit linked to the length of the criminal proceedings.

As to the EU Trafficking Directive, as already mentioned above, this instrument contains a very brief and vague provision on victim identification. It stipulates that Member

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19 Emphasis added.
States have to take measures to establish appropriate mechanisms aimed at the early identification of victims.\textsuperscript{20} It is not clear whether there needs to be a distinctive legal status of a ‘victim of trafficking’ or how this status might be conferred. Therefore, the EU Trafficking Directive does not modify the above expounded analysis.

In conclusion, the trafficking legal framework does not necessarily preclude a situation in which only migrants who are of use to criminal proceedings are qualified as presumed victims of human trafficking. This flaw is embedded in the legal framework itself. In particular, the CoE Trafficking Convention and EU law on human trafficking purport to simultaneously achieve two objectives: protection of victims and effective law enforcement. Ultimately, these objectives could conflict as it is difficult to achieve protection in a criminal law framework which is subject to its own rationales relating to effective law enforcement.

2.2 \textit{Return as the Standard Resolution for Victims of Trafficking}

The domination of the criminal law rationale in the human trafficking legal framework further manifests itself in the conditions under which victims of human trafficking can be issued residence permits. If the competent national authorities reach a conclusive decision that a migrant is a victim of human trafficking, Article 14(1) of the CoE Trafficking Convention stipulates that States have to issue a renewable residence permit:

\[\text{[...]} \text{in one or other of the two following situations or in both:}\]
\[\text{a. the competent authority considers that their stay is necessary owing to their personal situation;}\]
\[\text{b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.}\]

The above provision allows States to grant residence permits only in the second situation, that is, solely to those victims who co-operate with the relevant authorities. Issuance of residence permits in such cases is thus clearly related to the usefulness of the victim for the purposes of criminal proceedings. I will not dwell more upon the conditions under which a residence permit is granted and can be withdrawn. The central point which should be underscored is that once the person is no longer useful for the criminal process the permit can be terminated.\textsuperscript{21}

A question deserving special attention in this respect concerns the fate of victims of trafficking who do not wish to cooperate, are not useful for criminal proceedings or were involved in criminal proceedings that have been terminated. The arguments which emerge from my analysis below are that (i) removal is the standard outcome awaiting victims of human trafficking, and, (ii) the CoE Trafficking Convention has strengthened the obligations upon countries of origin to facilitate and accept the return of victims, thereby making removal, in fact, easier.

Article 16(1) of the CoE Trafficking Convention stipulates that:

The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party

\textsuperscript{20} Article 11(4) of the EU Trafficking Directive (n 3).
\textsuperscript{21} Emphasis added.
\textsuperscript{22} Article 14(3) of the CoE Trafficking Convention (n 2); Article 13(1) of the EU Residence Permit Directive (n 4).
shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.

Thus, there is an obligation upon countries of origin, which are parties to the convention, to readmit their nationals. The repatriation dimension is further strengthened by the temporal obligation reflected in the expression ‘without undue or unreasonable delay’. Countries of origin are also obliged to issue, at the request of the sending State, ‘such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter’ their territory. Therefore, facilitation of the removal and subsequent readmission of the individual to their country of origin are ensured. In sum, the CoE Trafficking Convention in effect takes the form of a readmission agreement.

What obligations are imposed upon host countries in relation to the return of victims of human trafficking? Article 16(2) of the CoE Trafficking Convention provides that: When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

The formulation ‘shall preferably be voluntary’ appears self-contradictory. It is an unconditional obligation; however, at the same time, the return only needs to be ‘preferably’ voluntary. This provision ultimately implies that victims can be forcefully returned.

2.3 Conclusion

Under the relevant legal framework, identification of a migrant as a victim of human trafficking is not construed as a channel for gaining legal migration status. Such identification is rather perceived as a way of ensuring the extraction of an individual from a harmful situation, provision of some basic assistance, the potential for initiating investigation and prosecution and, finally, subsequent repatriation to the country of origin. The identification of a migrant as a victim of human trafficking and the recognition that, in fact, that nature of the experienced harm qualifies as human trafficking is not viewed as an avenue for securing an individual’s right to remain in the country of destination.

Clearly, host countries, in the exercise of their entitlement to determine who can stay on their territory, can remove migrants, including victims of human trafficking. The CoE Trafficking Convention facilitates this exercise by imposing readmission obligations upon countries of origin. While it is true that, from the perspective of a migrant, these obligations could be of assistance if he/she wishes to return, if he/she does not so the legal framework ensures that they can still be forcefully returned.

3 Victims of Human Trafficking as Applicants for International Protection

3.1 Referral to the International Protection Procedure

23 Article 16(4) of the CoE Trafficking Convention (n 2).
24 G. Noll, ‘The Insecurity of Trafficking in International Law’ in V. Chetail (ed), Mondialisation, Migration et droits de l'homme: le droit international en question (Bruylant 2007) 356.
25 Emphasis added.
Since the trafficking legal framework is useful for preventing the removal of victims only in very limited circumstances and for specific time duration, it can be expected that victims look to the possibilities offered under the procedure for granting international protection, which might prove more promising. Importantly, the human trafficking legal framework cannot function to the prejudice of the international protection framework. Article 40(4) of the CoE Trafficking Convention stipulates that:

Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

In addition, Article 14(5) of the CoE Trafficking Convention stipulates that granting a permit to migrants in their capacity as victims of trafficking who cooperate with the authorities in the context of criminal proceedings or due to their ‘personal situation’ ‘shall be without prejudice to the right to seek and enjoy asylum’. Accordingly, national legislation which presents migrants with the choice to either opt to be identified as a victim of human trafficking or to enter the procedure for determining their international protection needs is in violation of the above quoted provision.\(^26\) In addition to the safeguards in the CoE Trafficking Convention, the right to asylum under Article 18 of the EU Charter is also of importance. Gil-Bazo has convincingly argued that the right to be granted asylum has become a subjective and enforceable right of individuals under the EU legal order.\(^27\) Therefore, barring victims of human trafficking from applying for international protection is also not in conformity with the EU Charter.

The EU Trafficking Directive incorporates important provisions which link the procedure for the identification of victims of human trafficking with the procedure for determination of international protection needs. The combined interpretation of Article 11(2), Article 11(5) and Article 11(6) of the EU Trafficking Directive has the following effect: as soon as the competent authorities have ‘a reasonable-grounds indication for believing’ that the migrant is a victim of human trafficking and/or when the migrant has been identified as a victim of human trafficking, Member States are under an obligation to inform him/her of the possibility of being granted international protection pursuant to the EU Qualification Directive, the EU Asylum Procedures Directive, or pursuant to other international instruments or other similar national rules. The above obligation, however, is weakened by the introduction of the expression ‘where relevant’ in Article 11(6) of the EU Trafficking Directive. Therefore, presumed victims of trafficking have to be informed ‘where relevant’ about the possibilities offered by the international protection framework.

\(^{26}\) It has been reported that in some countries, like Ireland and Norway, the initiation of the procedure for identification as a victim of human trafficking and the granting of a reflection period is considered as incompatible with filing an application for international protection. C. Smith, Identification and Assistance of Victims of Human Trafficking in Ireland: An Article 4 ECHR Analysis (Irish Refugee Council 2012). See also Immigrant Council of Ireland, Asylum Seeking Victims of Human Trafficking in Ireland: Legal and Practical Challenges (Immigrant Council of Ireland 2011) <http://www.immigrantcouncil.ie/research-publications/publications/523-asylum-seeking-victims-of-human-trafficking-in-ireland> accessed 6 December 2014.

The addition of the expression ‘where relevant’ opens up scope for discretion on the part of national authorities. Still, the explicit mention of the EU asylum legislation might facilitate the referral of victims and presumed victims of trafficking to the procedure for determining their international protection needs.

The EU Recast Asylum Procedures Directive does not contain a provision to the effect that applicants for international protection need to be informed of the possibility for a reflection period under the EU Residence Permit Directive and/or the possibility of being assisted as victims or presumed victims of human trafficking pursuant to the EU Trafficking Directive. Therefore, no link is made between protection and the assistance provided under the human trafficking framework. This implies that there might be applicants for international protection who may not be properly referred to the procedure for identifying victims of trafficking. This in turn poses the danger that the assistance and protection measures envisioned for victims of human trafficking might not be granted in addition to those provided to asylum-seekers who have applied for international protection. I will revert to this point later in the Chapter.

3.2 Identification within the International Protection Procedure

The EU Recast Reception Directive has introduced the concepts of ‘vulnerable persons’ and ‘applicants in need of special procedural guarantees’. Crucially, the Directive explicitly lists victims of human trafficking as a group of ‘vulnerable persons’. Accordingly, in the context of the EU Recast Reception Directive, the status of victim of human trafficking has been recognized as a specific legal category to which specific benefits are attached. In addition, the EU Recast Procedures Directive has introduced the category of ‘applicant in need of special procedural guarantees’. Victims of human trafficking could also fall within the latter group of applicants.

Two questions become relevant at this junction. First, how victims of human trafficking are to be identified within the international protection procedure, and whether and how this identification relates to the identification procedure under the human trafficking legal framework. Second, once an applicant for international protection has been successfully identified as a victim of human trafficking, what relevance and significance might this have in terms of (i) reception conditions, (ii) procedural guarantees, and (iii) the application of the Dublin mechanism. Prior to discussing the above mentioned questions, one point on the scope of the forthcoming analysis needs to be made. I do not plan to engage in an extensive investigation of EU law relating to reception conditions, status determination procedures and Dublin transfers. Rather, this investigation is limited to important points in relation to victims of human trafficking as a category of ‘vulnerable persons’ who might be in need of special reception conditions or special procedural guarantees, as envisioned by the second generation of EU asylum legislation.

3.2.1 The EU Recast Reception Directive – Victims of Trafficking as a Distinct Group of ‘Vulnerable Persons’

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28 Under the first generation instruments of the Common European Asylum System, victims of human trafficking were not explicitly listed as vulnerable persons. See Article 17 of the Reception Conditions Directive 2003/9/EC (OJ L 31/18, 6 February 2003).
Article 21 of the EU Recast Reception Directive introduces the concept of ‘vulnerable persons’. Victims of human trafficking are listed as vulnerable persons together with minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, persons with serious illness or mental disorders and those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation. Since Article 21 of the Recast Reception Directive uses the expression ‘such as’, it could be implied that the above simply enumerates examples. In support of this argument, one can contrast Article 21 of the Recast Reception Directive with Article 3(9) of the Return Directive. In comparison with the Recast Reception Directive, the Return Directive defines the group of vulnerable persons in an exhaustive way: the list in this Directive is closed. As the relevant provision of the Return Directive stipulates, “vulnerable persons” means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.’

However, Article 22(3) of the Recast Reception Directive sits at odds with the open-ended list contained in Article 21 of the Directive. Article 22(3) stipulates that:

Only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.

Article 22(3) of the Recast Reception Directive sits uncomfortably with an open-ended notion of vulnerability and the openness of the category of ‘vulnerable persons’. Ultimately, the effect of Article 22(3) is that Member States may decide that only those groups explicitly listed in Article 21 can be defined as vulnerable. Member States can decide that it is not possible, pursuant to their national legislation, to qualify any asylum-seeker as vulnerable for he/she has to first fall within one of the categories of vulnerable persons.

If a Member State chooses to have an open list of vulnerable groups, then there needs to be profound discussion as to the meaning of vulnerability and how vulnerability is linked with special reception needs. Since this might be a complicated exercise, vulnerability might be seen as predetermined. In this case, national authorities will need to establish whether a person falls within predefined groups of vulnerable persons. Thus, a group-based understanding of vulnerability will be applied.

In sum, since it might be the case that not all asylum-seekers will be considered vulnerable, special reception conditions might be afforded only to these limited groups of persons. Significance therefore attaches to the identification of an applicant as a victim of violence.

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31 I should not be misunderstood to be stating that Member States can disregard the list of vulnerable persons in the Recast Reception Directive. I am elaborating here on the assertion that Member States can treat the list of vulnerable persons in a flexible manner.
human trafficking, as the applicant will need to fit into this category in order to be viewed as vulnerable and in need of the special reception conditions offered by the Directive.³²

Article 22(1) of the EU Recast Reception Directive introduces another concept: ‘applicant with special reception needs’. Clearly, there is a difference between the two categories of ‘vulnerable persons’ and ‘applicants with special reception needs’. An applicant for international protection might fall within the first category, but does not necessarily fall within the second. In the logic of the EU Recast Reception Directive, not all vulnerable persons have special reception needs. However, in any case one needs to be qualified as a vulnerable person in order to be considered to be an applicant with special reception needs. To that effect, Article 2(k) of the EU Recast Reception Directive defines an ‘applicant with special reception needs’ as ‘a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.’³³ Article 22(3) of the EU Recast Reception Directive also supports the division between the two categories. Pulling the threads together, an applicant needs to be assessed as belonging to one of the groups of vulnerable persons. It then needs to be determined whether he/she has special reception needs. Therefore, the EU Recast Reception Directive incorporates a two-stage process.

Article 22(1) of the EU Recast Reception Directive imposes an obligation upon Member States to ‘assess whether the applicant is an applicant with special reception needs’. Article 22(2) of the Directive adds that ‘[t]hat assessment shall be initiated within a reasonable period of time after an application for international protection is made.’ Thus, the overall objective is not identifying vulnerable persons as such. The objective is rather identifying ‘applicant[s] with special reception needs.’ Interestingly, the EU Recast Reception Directive does not even impose an explicit obligation upon Member States to identify vulnerable persons. This gap could create a paradoxical situation. On the one hand, certain groups are defined as vulnerable and, in addition, only these groups ‘may be considered to have special reception needs’. As a consequence, a group-based approach to vulnerability has been endorsed. On the other hand, Member States are not even formally obliged to assess the applicants’ vulnerabilities and to determine whether they belong to

³² This assertion should not be misunderstood as a rejection of the possibility that an applicant who has suffered ‘serious forms of psychological, physical or sexual violence’ cannot fall within the group of vulnerable persons. Rather, what I try to highlight is that if the inclusion of the distinct category of victims of human trafficking in the list of vulnerable persons is to make any sense, then an applicant will have to be identified as a victim of human trafficking.

³³ Emphasis added.
these vulnerable groups. It can be argued that the obligation of identifying persons as vulnerable is implied from the obligation of identifying persons with special reception needs. In this way, the above depicted paradoxical situation can be avoided.

Still, in the logic of the EU Recast Reception Directive, the objective does not seem to be identification of victims of human trafficking as such. In fact, this ought to be the objective sought within the human trafficking legal framework; although, as argued in Section 1 above, that objective is not truly served since the identification is reduced to identification of ‘useful’ witnesses. The aim of the EU Recast Reception Directive in contrast focuses on identifying applicants for international protection who, in light of vulnerabilities or traumatic experiences, are in need of special reception conditions.

There is another source of contradiction in the EU Recast Reception Directive. On the one hand, this instrument does not explicitly provide for assessment of whether applicants are vulnerable persons. On the other hand, certain benefits are attached precisely to the category of ‘vulnerable persons’ and not to the category of applicants with special reception needs. This is illogical. The provisions in the Directive can make sense if, as submitted above, an implied obligation of identifying vulnerable persons is also imposed.

There are further reasons, particularly relevant to victims of human trafficking, which render the meaning of these different categories – i.e. vulnerable persons, applicants with special reception needs and victims of human trafficking – confusing. It can certainly be argued that all victims of human trafficking have gone through traumatic experiences. However, there is something peculiar about the category of victims of human trafficking which distinguishes it from all the other vulnerable persons enumerated in Article 21 of the EU Recast Reception Directive. The vulnerability of the other groups enumerated is more immediately identifiable or is a matter of assessing the current condition of the applicant. This is not to imply that age assessment (to establish whether an individual falls within the vulnerable group of a ‘minor’) is easy, or that victims of torture or rape or asylum-seekers with mental disabilities are readily visible. Rather, my argument tries to draw the reader’s attention to the legal definition of human trafficking, which denotes certain peculiarities of the group of human trafficking victims. In other words, we need to be sensitive to the following question: what do we mean by ‘victims of human trafficking’? In what follows, I submit that the legal complexity of the category of victims of human trafficking might de facto block its application under the special protection framework of the EU Recast Reception Directive.

Pursuant to the legal definition endorsed by the CoE Trafficking Convention and the relevant EU law, to qualify as a victim of human trafficking a migrant must have been subjected to a coercive/deceptive process for the purpose of exploitation. It is not necessary that he/she has been actually exploited. There is little certainty as to the level of coercion or deception required for a migrant to be categorised as a victim of trafficking.

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34 See, for example, Article 11(1) of the EU Recast Reception Directive (n 5) which regulates the issue of detention. See Section 3.3.1 below where I address the issue of detention in more details.


It is similarly unclear what ‘exploitation’ in the context of human trafficking actually means.38 ‘Exploitation’ can refer to any engagement in prostitution, including voluntary prostitution.39 ‘Exploitation’ can also refer to severe forms of abuse amounting to slavery, servitude and forced labour. The open-ended nature of the definition of human trafficking undermines its effectiveness in reflecting the gravity of abuses which migrants might experience. Notably, most applicants for international protection use the services of smugglers to access EU territory.40 This can involve truly traumatic experiences, including physical violence, rape, loss of family members etc, and can be even more traumatic than being deceived and forced to migrate to the EU for the purpose of exploitation. In this sense, smuggled migrants who apply for international protection might be as vulnerable as victims of human trafficking.

Accordingly, the category of victims of human trafficking might make little sense. It would make sense if it referred to migrants who have been subjected to ‘rape or other serious forms of psychological, physical or sexual violence’. However, these migrants in any case fall within the group of vulnerable persons. In addition, all migrants are exposed to these dangers in the process of travelling towards the EU and once within the EU territory; these threats are not unique to victims of human trafficking.41 Thus, it could be argued that the category of victims of human trafficking has no specific added value. In fact, it could even be detrimental for at least three reasons.

First, the category of victims of trafficking is always used in opposition to the category of smuggled migrants, based on the dubious premise that, in contrast to trafficked victims, smuggled migrants do not experience harm.42 This point is of course without prejudice to the possibility that smuggled migrants can fall within the category of vulnerable persons as applicants who have been subjected to forms of violence. For present purposes, the point I try to highlight here is that the overly simplistic dichotomy between trafficking victims and smuggled migrants poses the danger of dismissing the vulnerability of smuggled migrants.

38 Noll, ‘The Insecurity of Trafficking’ (n 24) 356.
39 At the time when the definition of human trafficking was adopted, the ‘purpose’ element was defined as exploitation so that conflicting positions in relation to the involvement of women in prostitution could be accommodated. See V. Munro, ‘A Tale of Two Servitudes: Defining and Implementing a Domestic Response to Trafficking of Women for Prostitution in the UK and Australia’ (2005) 14 Soc & Leg Stud 91; J. Doezema, Sex Slaves and Discourse Masters the Construction of Trafficking (Zed Books 2010); K. Kempadoo, ‘From Modal Panic to Global Justice: Changing Perspectives on Trafficking’ in K. Kampadoo (ed), Trafficking and Prostitution Reconsidered New Perspectives on Migration, Sex Work, and Human Rights (Paradigm Publishers 2005).
41 There are further issues as to what exactly a victim of human trafficking means. The category could cover persons who have been trafficked into the EU and who subsequently apply for international protection. It could also cover persons who have been trafficked into third countries, then enter the EU and apply for international protection therein.
42 Human trafficking is always defined in opposition to human smuggling. It is constantly emphasized that victims of trafficking are different from smuggled migrants. At the same time, it is also always noted that it is difficult to maintain the distinction between human trafficking and human smuggling. See J. Bhabha, Border Rights and Rites: Generalisations, Stereotypes and Gendered Migration’ in S. van Walsum and T. Spijkerboer (eds), Women and Immigration Law. New Variations on Classical Feminist Themes (Routledge 2007) 15, 27.
Second, historically, the category of victims of human trafficking is intimately linked with the experiences of migrant prostitutes.\textsuperscript{43} This continues to be the case, although theoretically all migrants, including, for example, those working in the construction industry, could also meet the international law definition of trafficking. Nevertheless, sexual exploitation continues to be the focal point of attention. This assertion should not be accepted as a denial of the severe forms of harm that migrant prostitutes experience. Rather, I try to draw attention to the fact that migrant women have been the dominant signifier in the assessment of whether or not a person is a victim of human trafficking. As a consequence, migrants who experience other forms of harm might be invisible.

Third, a migrant who has voluntarily migrated without being deceived or coerced, but who subsequently finds herself/himself in extremely abusive working conditions is not considered to be a victim of human trafficking under the relevant legal framework. I should again underscore that the definition of human trafficking refers to the process which might or might not lead to abuse, not on the actual abuses themselves.\textsuperscript{44}

In light of the above criticisms, one might choose to approach Article 21 of the EU Recast Reception Directive differently and assume that victims of human trafficking refers to migrants who have been subjected to severe forms of abuses like slavery, servitude and forced labour. The category would therefore be limited to applicants who have suffered ‘serious forms of psychological, physical or sexual violence’. If this were the case, however, the definition of the category needs to be changed as these are not necessarily victims of human trafficking; rather these could be other migrants subjected to slavery, servitude or forced labour.

To summarise, in many respects it is hard to give substance to the label of a victim of human trafficking. Most notably, there is indeterminacy as to the threshold of coercion, deception and exploitation that needs to be satisfied. In fact, the complexity of the category of victims of human trafficking might pose a substantial obstacle to its application under the special protection framework of the EU Recast Reception Directive. This simply adds to the overall confusing categorisations of ‘vulnerable persons’ and ‘applicants with special reception needs’ and the perplexing relations between them.

3.2.2 Divergence or Convergence of the Assessment Procedures

Ignoring the above outlined problems and assuming that the category of victims of human trafficking encompasses vulnerable persons who have gone through severe forms of physical or psychological harm, the issue that needs to be confronted is how to identify these people. As submitted above, there is no obligation under the EU Recast Reception Directive for identifying vulnerable persons. Yet in practice, in order for Articles 21 and 22 of the Directive to make sense, an applicant for international protection might have to be assessed as a victim of human trafficking in order to fall within the category of ‘vulnerable persons’. Once within that category, it then needs to be assessed whether he/she has special reception needs. This two pronged approach to assessment might have to be severed from the identification procedure envisioned under the human trafficking legal framework (see Section 2 above) as these two assessment procedures are conducted for


different purposes and might lead to different outcomes. In very simple terms, the investigating authorities and/or the prosecutor are likely to qualify a person as a victim of human trafficking in relation to criminal proceedings that have already initiated. In contrast, within the procedure for determining international protection needs, the assessment should be independent from any concept of the usefulness of the applicant for criminal proceedings.

Yet, the EU Recast Reception Directive does not preclude linking such an assessment with existing national procedures for identifying victims of human trafficking. The second paragraph of Article 22(1) of the EU Recast Reception Directive says that the assessment ‘may be integrated into existing national procedures’. Therefore, a convergence between the two procedures is not excluded.

Some advantages which accrue from separating the assessment of whether an applicant is a victim of human trafficking within the international protection procedure from the identification of victims of human trafficking under the human trafficking legal framework have previously been mentioned. More specifically, I suggested that the pitfalls incorporated in the identification procedure under the trafficking framework could be avoided. Are there any disadvantages? There could be. First, there is no uniform status of a victim of human trafficking, since different bodies at the national level can make identifications and assessments in pursuance of their own objectives. This sits uncomfortably with the objective of having a legal system which strives for consistency and coherency.

The second disadvantage, however, appears more troubling. Applicants for international protection might not be referred to the protection and assistance measures under the human trafficking legal framework, which may, in some respects, go beyond what is available under the EU Recast Reception Directive.45 Victims of trafficking might need additional assistance from law enforcement authorities. And finally, without being referred to the assistance and protection measures under the human trafficking legal framework which *inter alia* envisons suspension of deportation under certain circumstances, victims of trafficking might be subjected to Dublin transfers. The last section of this Chapter will further elaborate on the compatibility between the Dublin mechanism and Member States’ positive obligations under the human trafficking legal framework. Thus, at this stage, this issue recedes to the background in order to reappear later in the text.

Finally, there might be a third way of approaching the relationship between the identification procedure under the human trafficking framework and the assessment procedure under the international protection framework. This alternative could materialise if the national authorities which conduct refugee status determination are authorised to grant applicants for international protection the status of victims of human trafficking. Once that status is granted, all positive obligations in relation to victims of human trafficking under the CoE Trafficking Convention, the EU Residence Permit Directive

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45 See Section 3.3 below, where I conclude that, in relation to certain areas, the human trafficking legal framework does not offer a higher level of protection than the international protection framework. However, there could be other areas where this might not be the case. For example, pursuant to Article 26 of the CoE Trafficking Convention (n 2) and Article 8 of the EU Trafficking Directive (n 3), under certain circumstances victims of human trafficking must not be criminally punished for their involvement in criminal activities committed in relation to the trafficking.
and the EU Trafficking Directive could thus be triggered. In this way, it can be ensured that the applicant benefits simultaneously from both legal frameworks. This would be the most favourable solution.

To recap, the assessment of whether an applicant is a victim of human trafficking within the procedure for determining his/her protection needs could be severed from the identification done at the national level in relation to States’ obligations under the human trafficking legal framework. The latter identification serves different purposes from the former. This split between the two identification procedures has clear advantages: the assessment as to whether the applicant is a victim of human trafficking is independent from his/her usefulness for any criminal proceedings. It might also have disadvantages: victims of human trafficking who have applied for international protection might not benefit from the assistance and protection measures that exist under the human trafficking legal framework unless they are also recognized as victims by the competent authorities under the latter framework. Clearly, the best solution would be if victims of trafficking could benefit from both legal frameworks. This could be ensured if the national authorities which conduct refugee status determination are also mandated with the task of granting the status of a victim of human trafficking.

3.2.3 The EU Recast Reception Directive – Assessment of ‘Special Reception Needs’

If this latter suggestion is endorsed, and national authorities which conduct refugee status determination are also mandated with the task of granting the status of a victim of human trafficking, then a question that requires more careful consideration is whether the Recast Reception Directive imposes any standards in relation to the assessment procedure. Does the Directive guarantee better standards than those imposed by the human trafficking legal framework?

Article 22(2) of the Recast Reception Directive stipulates that an assessment ‘needs not take the form of an administrative procedure.’ The Directive leaves the modalities as to how the assessment is to be conducted to the discretion of Member States. The EU Recast Reception Directive lays down very few requirements as to the quality of the assessment procedure. In fact, the drafting history of the Directive illustrates a clear intent to limit the rigour of any identification obligations. Initially, the Commission proposed that Member States had to ‘establish procedures in national legislation with a view to identifying […] whether the applicant has special needs [...]’. This was then weakened and reformulated as an obligation of establishing ‘mechanisms with a view to identify whether the applicant is a vulnerable person’. In its final version, Article 22(1) of the Recast Reception Directive simply refers to an assessment of whether an applicant has special reception needs.

46 Emphasis added.
47 EU Commission, Proposal for a Recast Reception Directive (n 30) 30 [emphasis added].
48 EU Commission, Amended Proposal for a Recast Reception Directive (n 30) 33 [emphasis added].
49 Thus, it is questionable whether the main concern in relation to the application of Article 17 of the first generation instrument has been adequately addressed. This concern was that in its previous version the Reception Directive did not expressly require Member States to establish a procedure for identifying vulnerable asylum-seekers. See L. de Bauche, Vulnerability in European Law on Asylum: A Conceptualization under Construction (Bruylant 2012) 11.
It is also noteworthy that procedural guarantees within the assessment procedure are not envisioned in the Recast Reception Directive. This lacuna corresponds with one of the deficiencies in the procedure for identifying migrants as victims of human trafficking under the CoE Trafficking Convention. The latter does not envision procedural guarantees, a situation which can lead to arbitrary decisions as to whether a migrant is a victim of human trafficking. The following analysis will focus on the absence of procedural guarantees in the assessment of the special reception needs of victims of human trafficking under the EU Recast Reception Directive. It is also of relevance to keep in mind the comparable absence of procedural guarantees in the human trafficking legal framework. The latter testifies to the difficulties which vulnerable applicants might face in order to receive assistance corresponding to their specific needs.

The first procedural issue of significance is what triggers the assessment of whether an applicant has special reception needs. It can safely be argued that the second paragraph of Article 22 of the EU Recast Reception Directive requires such an assessment to be triggered automatically. Therefore, each applicant for international protection will have to be automatically screened in order to determine whether he/she has special reception needs. Thus, the EU Recast Reception Directive offers a very favourable solution. However, this initial optimism fades away upon further reading of the provision. The assessment has to be made ‘within a reasonable time after an application for international protection is made.’ This formulation provides Member States with considerable flexibility as to when the assessment can begin. In my view, the test of reasonableness implies that the initiation of the assessment is contingent on the resources of each Member State. It might also require different timing for the different groups of ‘vulnerable persons.’ For example, the reasonable timeframe for initiating such an assessment might not be the same in the case of a pregnant woman or a single parent with minor children as opposed to a case that concerns victims of human trafficking. As is evident from the changes introduced in the process of recasting Article 22 of the EU Reception Directive, Member States were keen to preserve this flexibility.\footnote{Pursuant to the proposal initially submitted by the Commission, an assessment was required ‘as soon as an application for international protection is lodged’. See EU Commission, \textit{Proposal for a Recast Reception Directive} (n 30) 30.}

Another procedural issue of importance is whether an applicant can appeal a negative assessment. If the authorities determine that an applicant for international protection is not a victim of trafficking and thus he/she has no special reception needs, is he/she entitled to appeal this determination? The text of the EU Recast Reception Directive does not provide for such an entitlement.\footnote{Article 26(1) of the Recast Reception Directive (n 5) stipulates that decisions relating to the granting, withdrawal or reduction of benefits under the directive may be the subject of an appeal. This does not refer to assessments as to whether an applicant is a ‘vulnerable person’. Yet, it can be envisioned that within the framework of appealing a decision regarding the granting of benefits, arguments about the applicant’s status as a vulnerable person with special reception needs could be submitted.}

Despite the silence of the Directive in this respect, there are robust arguments supporting the position that the right to good administration, as prescribed by Article 41 of the EU Charter, requires Member States to incorporate procedural guarantees for applicants in relation to an assessment of whether they belong to the group of ‘vulnerable
persons’ and to the group of ‘applicants with special reception needs’. In other words, the EU Charter can be employed in interpreting the EU Recast Reception Directive in such a way so that it can guarantee greater protective standards.

Article 51(1) of the EU Charter provides that the Charter is addressed to Member States when they are ‘implementing European Union law’. The meaning of ‘implementing European Union law’ is yet to be settled. The leading authority to date on Article 51(1) of the EU Charter with respect to Member States is Åklagaren v Hans Åkerberg Fransson. According to this Judgment, when a Member States passes a measure for the purpose of implementing a provision of EU law, and an issue falling within the material scope of a Charter’s provision arises in relation to the national measure, application of the Charter is triggered. What is pertinent for present purposes is that when Member States take decisions on whether applicants belong to the group of vulnerable persons with special reception needs, they act within the scope of EU law, and more specifically they implement their obligations under the Recast Reception Directive. Crucially, under Article 41(2)(a) of the EU Charter, an applicant for international protection has the right to be heard before any individual measure is taken which would adversely affect him/her. A negative decision to the effect that an applicant is not in need of special reception conditions clearly has adverse consequences for the individual involved. Therefore, he/she should have access to mechanisms through which he/she can voice reasons as to why the decision should be reconsidered. The submission of such arguments by the applicant is related to the obligation upon the authorities to give reasons for their own negative decision, as imposed by Article 41(2)(a) of the EU Charter.

Another procedural issue which relates to the assessment of the reception needs of applicants who could be victims of human trafficking concerns the relevant standard of proof, namely, what standard of proof should national authorities apply when considering whether an applicant is a victim of human trafficking? Clearly such a standard should be lower than ‘beyond reasonable doubt’, the criminal law standard for the purposes of conviction. It could be suggested that the standard of ‘reasonable grounds to believe’ or, as the EU Trafficking Directive frames it, ‘reasonable grounds indication’, could be used. These standards are referred to in the CoE Trafficking Convention and the EU Trafficking Directive only for the preliminary stage of the victim identification procedure. These instruments do not indicate the standard of proof for the conclusive decision. Ultimately, therefore, national authorities are left to determine the evidential threshold for such decisions.

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52 It has been argued that the right to good administration, as a general principle of EU law, is applicable to Member States and not only to ‘institutions, bodies, offices and agencies of the Union’ as the text of Article 41 of the EU Charter suggests (Charter of Fundamental Rights of the European Union, OJ C 364/01, 18 December 2000 (entry into force: 1 December 2009)). For example, Advocate General Kokott has asserted that ‘Article 41 of the Charter of Fundamental Rights does not just contain rules of good administration by the institutions but documents a general principle of law, which authorities of Member States too must observe when applying Community Law.’ See Case C-75/08 Christopher Mellor v Secretary of State for Communities and Local Government [2009] ECR I-03799, para 33. See also the opinion of Advocate General Bot: ‘although the wording of Article 41(1) of the Charter refers to relations between individuals and “institutions, bodies and agencies of the Union”, I think that the right to good administration is incumbent in the same way on the Member States when they are implementing EU law.’ See Case C-604/12 HN v Minister for Justice, Equality and Law Reform (CJEU, 7 November 2013) para 36.

53 Case C-617/10 Åklagaren v Hans Åkerberg Fransson (CJEU, 26 February 2013) para 20.
In conclusion, each Member State can decide how to assess whether applicants for international protection are victims of human trafficking with special reception needs. The EU Recast Reception Directive imposes no limitations on the right of States which might enhance the quality of the assessment procedure. I argue that Article 41 of the EU Charter, which incorporates the right to good administration, could have restraining functions in this respect.\(^{54}\)

3.2.4 The EU Recast Asylum Procedures Directive – Assessment of the Need for ‘Special Procedural Guarantees’

The EU Recast Asylum Procedures Directive introduces the concept of an ‘applicant in need of special procedural guarantees’. Pursuant to Article 2(d) of the Directive, an applicant in need of special procedural guarantees is ‘an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances.’ Applicants with special procedural needs are to be distinguished from applicants with special reception needs. For example, a person might have special reception needs without being in need of special procedural guarantees. Recital 29 of the EU Recast Asylum Procedures Directive provides useful illustrations that can be used as indicators for assessing whether an applicant is in need of special procedural guarantees:

- Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.

The label ‘victims of human trafficking’ is not explicitly mentioned here. This might have advantages since an applicant does not need to be labelled as a victim of human trafficking. Rather, applicants who have undergone ‘serious forms of psychological, physical or sexual violence’, whether or not they are victims of human trafficking, might be considered in need of special procedural guarantees.

In contrast to the Recast Reception Directive, the Recast Asylum Procedures Directive does not introduce a separate concept of ‘vulnerable persons’ and, accordingly, there is no enumeration of distinct groups who should be considered to be vulnerable. It needs to be briefly mentioned that the Recast Asylum Procedures Directive indirectly refers to the notion of vulnerable groups as defined in the Recast Reception Directive. In particular, Article 31(7)(b) of Recast Asylum Procedures Directive stipulates that Member States ‘may prioritise an examination of an applicant’ assessed to be an applicant with special reception needs. The Recast Directive also uses the concept of vulnerability in relation to the conditions under which a personal interview with the applicant has to be conducted.\(^{55}\) Specifically, Member States have to ensure that the person who conducts the interview is competent to take account of the vulnerability of the applicant.

Under Article 24(1) of the EU Recast Asylum Procedures Directive, Member States are obliged to assess whether the applicant for international protection is in need of

\(^{54}\) It should be briefly noted that Article 41 of the EU Charter (n 52) is also relevant when Member States implement their obligations under Article 11(4) of the EU Trafficking Directive (n 3). The latter provision requires Member States to ‘take the necessary measures to establish appropriate mechanisms aimed at the early identification of [...] victims [of human trafficking].’

\(^{55}\) Article 15(3)(a) of the Recast Asylum Procedures Directive (n 5).
‘special procedural guarantees’. There needs to be an automatic assessment within a reasonable period of time after an application is made. The Preamble of the Directive recommends that ‘Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken.’\textsuperscript{56} Where special procedural needs become apparent at a later stage of the procedure, Member States shall address these needs, without necessarily restarting the procedure.\textsuperscript{57}

It is not necessary that Member States have distinct procedures for assessing whether applicants are in need of special procedural guarantees. They might integrate the assessment into existing national procedures, including into the assessment under the EU Recast Reception Directive of applicants with ‘special reception needs’. The assessment also does not need to take the form of an administrative procedure. In sum, the modalities of the procedure are left for each State to determine.\textsuperscript{58}

In conclusion, in a similar fashion to the assessment of ‘special reception needs’ under the Recast Reception Directive, the Recast Asylum Procedures Directive imposes no restraints on Member States which might enhance the quality of the procedure to assess the needs of applicants for special procedural guarantees.

3.2.5 Conclusion

Certain deficiencies might hamper the achievement of the objective of affording special reception conditions and procedural guarantees to vulnerable applicants, including victims of human trafficking. First, the EU Recast Reception Directive and the EU Recast Asylum Procedures Directive do not impose an obligation upon Member States to identify vulnerable persons. This is prone to create paradoxical situations. On the one hand, certain groups are defined as vulnerable. Only these groups ‘may be considered to have special reception needs’ and certain benefits therefore attach to these groups. On the other hand, Member States are not even obliged to assess whether applicants belong to these vulnerable groups. Rather, Member States have to assess whether applicants have special reception needs or are in need of special procedural guarantees. Second, the quality which such an assessment has to comply with is of dubious value since no standards are explicitly imposed upon Member States.

Third, while the inclusion of victims of human trafficking to the group of vulnerable persons might appear a progressive development, this view does not appreciate the complex issues which this inclusion brings about. It is submitted that the complexity of the category of victims of human trafficking, and the existence of a separate identification procedure geared towards the effectiveness of criminal proceedings, might be substantial obstacles for the application of the special protection framework of the EU Recast Reception Directive. This obstacle contributes to the overall confusing categorisations of ‘vulnerable persons’, applicants with special reception needs and applicants in need of

\textsuperscript{56} Ibid, Recital 29.
\textsuperscript{57} Ibid, Article 24(3).
\textsuperscript{58} Member States are provided with wide discretion as regards the modalities to identify applicants in need of special procedural guarantees. EU Commission, \textit{Detailed Examination of the Amended Proposal Accompanying the Document Amended Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection Status (Recast), COM(2011) 319 final, 1 June 2011, 9.}
special procedural guarantees and the perplexing relations between these categories of persons.

In light of the disadvantages ensuing from the separation between the two identification procedures (one under the human trafficking legal framework and the other under the international protection framework), the alternative suggested above could ensure that applicants benefit from both legal frameworks. National authorities that conduct refugee status determinations could be also mandated with the task of granting the status of a victim of human trafficking. Such an approach would ensure that applicants receive the benefits attached to this status under the human trafficking legal framework.

3.3 Benefits of Identification

The objective of this section is to evaluate the ensuing benefits once an applicant for international protection is assessed to have special reception needs or to be in need of special procedural guarantees.

3.3.1 Reception

What significance does the assessment of an applicant to be a victim of human trafficking have in terms of reception conditions? Recital 14 of the EU Recast Reception Directive states that:

The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.

In more concrete terms, three considerations flow from this provision: the circumstances in which vulnerable persons can be detained; the modalities of reception conditions including the standard of living that needs to be ensured; and finally the issue of health care. In the process of examining these three issues, I make parallels with the standards established under the human trafficking legal framework. These parallels are necessary to demonstrate any divergences and convergences between the two regimes in relation to the benefits guaranteed to individuals who fall within their personal scopes.59

(a) Detention

Vulnerable persons are not generally exempted from detention; neither is the detention of vulnerable persons envisioned as a measure of last resort.60 On the one hand, Article 11(1) of the Recast Reception Directive clearly recognizes the possibility that vulnerable persons can be detained as any other applicant for international protection. On the other hand, this provision places certain procedural duties upon Member States when they resort to the detention of vulnerable persons. In particular, Article 11(1) of the Reception Directive requires regular monitoring of their situation. However, where this monitoring reveals that, for example, the health of the person is badly affected, the Directive does not stipulate what measures need to be taken to address these concerns. The purpose of the monitoring

59 There could be other points in relation to which a comparison could be made between the two legal frameworks (the human trafficking legal framework and the international protection framework). For example, Article 12(4) of the CoE Trafficking Convention (n 2), Article 11 of the EU Residence Permit Directive (n 4) and Article 15 of the EU Recast Reception Directive (n 5) regulate access to the labour market.

60 Compare Article 11(1) with Article 11(2) of the Recast Reception Directive (n 5). The latter refers to minors and stipulates that they ‘shall be detained only as a measure of last resort.’
is therefore not particularly clear. Article 11(1) also adds that when a decision is taken to detain vulnerable persons, their physical and mental health shall be of primary concern. Vulnerable persons also need to be provided with ‘adequate support’. Each Member State can decide what ‘adequate support’ means and what ‘primary concern’ with their health implies.

The issue of administrative detention of victims of trafficking has been left unaddressed by both the CoE Trafficking Convention and the EU Trafficking Directive. There have been recommendations to the effect that victims of human trafficking should not be detained. Yet, these have remained non-binding. The Recast Reception Directive provides some limitations on the ability of States to detain victims of human trafficking who are assessed as vulnerable applicants for international protection. However, as alluded to in the previous paragraph, the contours of these limitations cannot readily be depicted in concrete terms. The weak framing of Article 11(1) of the EU Recast Reception Directive leads one to question whether the distinction of the situation of vulnerable persons has any true value.

The obligations under the EU Recast Reception Directive relating to the detention of vulnerable persons underwent substantial modifications in the recast process of the instrument. The Commission’s initial formulation was relatively robust and it provided that:

Persons with special needs shall not be detained unless an individual examination of their situation by a qualified professional certifies that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention. Where persons with special needs are detained Member States shall ensure regular monitoring and adequate support.

This formulation established as a rule that vulnerable persons shall not be detained. However, exceptions were envisaged as long the physical and mental health of such persons, as well as their well-being, would not significantly deteriorate because of this detention. Nevertheless, the requirement for certification by a qualified professional did place considerable limits on States’ prerogatives. It was precisely this requirement that was removed in the second proposal submitted by the Commission. In the final version of the Recast Directive, the provision on detention of vulnerable persons was further watered down as even the rule relating to not detaining vulnerable persons was eventually removed.

(b) Adequate Standard of Living and Material Reception Conditions

Article 17 of the Reception Directive outlines the material reception conditions that need to be provided to applicants for international protection. It requires that these conditions have to provide for an ‘adequate standard of living’ which can guarantee the applicants’ subsistence and protect their physical and mental health. Article 17(2) simply adds that the adequate standard of living has to be ensured in the specific situation of vulnerable

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persons. This means that vulnerable persons are not, in principle, entitled to additional benefits because of their vulnerable status or that they need to be provided with enhanced reception conditions; the same standards apply to them. However, depending on the individual circumstances of vulnerable persons, there might be a need for additional measures in order for Member States to meet the required standard.

It should be also noted that even though an applicant is not qualified as a ‘vulnerable person’, he/she might still be in need of special measures to ensure an adequate standard of living as required by Article 17(2) of the Recast Reception Directive. Accordingly, the fact that one does not fit into the category of ‘vulnerable persons’ cannot be used as an argument to undermine the standard set by Article 17(2) of the Reception Directive.

Article 18 of the EU Recast Reception Directive regulates the modalities of material reception conditions. In relation to accommodation, Article 18(3) stipulates that Member States shall take into consideration the situation of vulnerable persons in two circumstances: first, when they are accommodated in premises during the examination of their applications made at the border or in transit zones, and; second, when they are residing in accommodation centres. The obligation to take into consideration the situation of vulnerable persons does not necessarily mean that they have to be provided with additional measures, however there needs to be an individual assessment as to what they might need.

Article 18(9) of the Recast Reception Directive is a complex provision which calls for careful scrutiny. It provides that:

In duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:

(a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
(b) housing capacities normally available are temporarily exhausted.

Such different conditions shall in any event cover basic needs.

Clearly, Article 18(9) of the Recast Reception Directive depicts situations in which reception standards can be lowered. How can this provision affect applicants with ‘special reception needs’? During the assessment as to whether an applicant has ‘special reception needs’, he/she might not necessarily be provided with the material conditions which incorporate the consideration of his/her status as a vulnerable person (as required by Article 18(3) of the Recast Reception Directive). Thus, at the time of assessment, he/she might not have access to the conditions provided for vulnerable persons. This period should be as short as possible, which relates to the requirement in Article 22(1) of the Recast Reception Directive that the assessment of whether an applicant has special reception needs shall be initiated ‘within a reasonable period of time after an application for international protection is made’. Yet, there is no set time limit as to when the outcome of the assessment should be forthcoming.

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64 Article 18(1)(c) of the Recast Reception Directive (n 5) provides for an additional type of accommodation, namely ‘private houses, flats, hotels or other premises adapted for housing applicants.’ Pursuant to Article 18(3) of the Directive, the needs of vulnerable persons might not be taken into consideration in relation to the above enumerated types of accommodation.
As to Article 18(9)(b) of the Recast Reception Directive and its relevance to vulnerable persons, it seems that when housing capacities are exhausted, Member States can provide lower material reception conditions than they are otherwise required to. This would clearly affect the reception standards guaranteed to vulnerable persons, since they are not exempted from the overall lowering of the standards.

In many respects, the standards under the CoE Trafficking Convention and the EU Trafficking Directive are not dissimilar to the reception standards contained in the EU Recast Reception Directive. Victims of trafficking and presumed victims must be provided with ‘at least standards of living capable of ensuring victims’ subsistence through measures such as the provision of appropriate and safe accommodation and material assistance.’ These provisions reflect the language of Article 17(2) of the EU Recast Reception Directive. Importantly, under the human trafficking legal framework this assistance has to be provided to even presumed victims of trafficking. This implies that, in contrast to the above position in the context of Article 18(9) of the Recast Reception Directive, during the identification process these standards cannot be lowered. Neither can the standards envisioned by the human trafficking legal framework be lowered when housing capacities are exhausted.

Lastly, it is noteworthy that when victims of human trafficking have formal roles in criminal proceedings, for instance as witnesses, they may have to be provided with additional protection. The EU Trafficking Directive has a specific provision addressing the protection needs of victims in the context of the criminal proceedings and investigations. Clearly, these need to be ensured in addition to the above outlined reception conditions.

(c) Health Care

Article 19(2) of the Recast Reception Directive stipulates that ‘Member States shall provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.’ This provision needs to be compared with Article 19(1) of the Recast Reception Directive. The latter sets the general standard in terms of health care for applicants for international protection:

Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.

It follows that Member States can limit health care to ‘emergency care and essential treatment of illness and of serious mental disorders.’ By contrast, vulnerable persons who are also considered to be applicants with special reception needs have to be provided with more than emergency care and essential treatment. They need to be provided with ‘necessary medical or other assistance’ and ‘appropriate’ mental health care. In light of Article 19(1), in order for Article 19(2) of the Recast Reception Directive to acquire meaning, necessary medical assistance cannot be limited to emergency care. In addition, appropriate mental health care cannot be restricted to ‘essential treatment of illnesses and of serious mental disorders’. Article 19(2) of the Recast Reception Directive must be

65 Article 11(5) of the EU Trafficking Directive (n 3). See also Article 11(1)(a) of the CoE Trafficking Convention (n 2).
66 Article 12 of the EU Trafficking Directive (n 3).
67 Emphasis added.
underpinned by the presumption that vulnerable persons assessed to be applicants with special reception needs are provided with higher standards. The actual substance of these higher standards is, however, hard to determine. It might be left to the national legislation of each Member State to define what necessary medical assistance and appropriate health care mean in this context.

A brief reference to the wording of the provision regulating health care for applicants with special reception needs, as initially proposed by the Commission, is valuable. The initial framing was more robust since it set a clearer standard as to what ‘necessary’ assistance and ‘appropriate’ mental health care could mean. The proposal advanced by the Commission read: ‘Member States shall provide necessary medical or other assistance to applicants who have special needs, including appropriate mental health care when needed, under the same conditions as nationals.’

At this junction, it should also be noted that, through the use of different terms, concepts and standards in relation to health care, the Recast Reception Directive creates a confusing situation which does not facilitate its actual implementation by Member States. More specifically, the issue of health care is also covered by Article 25(1) of the Recast Reception Directive:

Member States shall ensure that persons who have been subjected to torture, rape or other serious acts of violence receive the necessary treatment for the damage caused by such acts, in particular access to appropriate medical and psychological treatment or care.

This provision calls for three remarks: first in relation to its personal scope, second concerning the benefits that it ensures and, third, in connection with the standard of ‘necessary treatment’. First, the personal scope of the provision covers ‘persons who have been subjected to torture, rape or other serious acts of violence.’ These persons also clearly fall within the category of vulnerable persons as outlined in Article 21 of the Recast Reception Directive. Yet, a separate provision has been introduced to address their access to treatment, including medical treatment. As a consequence, they do not need to be assessed as applicants with special reception needs in order to benefit from ‘necessary treatment’. This appears to be a positive development. However, it creates confusion as to the different categories introduced in the Recast Reception Directive and the benefits attached to the different categories.

Second, when it comes to the benefits envisaged, it needs to be stressed that Article 25 of the Recast Reception Directive does not refer without further qualification to ‘necessary treatment’, as such treatment has to be ‘for the damage caused by such acts’. Accordingly, a causal requirement is laid down in that the treatment needs to be provided for damage which has been caused by torture, rape or other serious acts of violence. If applicants are in need of treatment in relation to other damage, then Article 19(2) of the Recast Reception Directive is applicable if the applicants are also assessed to be applicants with special reception needs. Importantly, the plain wording of Article 25(1) suggests that the serious acts of violence do not need to be related to the alleged persecution in the country of origin. This means that even applicants who have experienced violence in the Member State can be covered. This makes the provision relevant to victims of human

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trafficking as persons who have been subjected to serious acts of violence. However, how the above mentioned causal requirement is to be established, how the sources of damage are to be determined and how the different sources of damage are to be distinguished is hard to comprehend.

Third, Article 25(1) of the Recast Reception Directive refers to the standard of necessary treatment but does not define it. In an attempt to do so, Article 25(1) adds that necessary treatment means ‘in particular access to appropriate medical and psychological treatment or care’. The reference to ‘appropriate’ does not introduce any clarity here. As already concluded above, the national legislation and practice of Member States will be decisive in determining the level of medical and psychological assistance that applicants will receive.

How is the issue of health care regulated under the human trafficking legal framework? The EU Trafficking Directive stipulates that (presumed) victims of trafficking need to be provided with ‘necessary medical treatment including psychological assistance’. Thus, from the wording of this provision, there seems to be no difference with the EU Recast Reception Directive. Both directives use the standard ‘necessary’ treatment. However, it must be stressed that under the EU Trafficking Directive the standard of ‘necessary’ treatment applies even to presumed victims of trafficking. This is certainly not the case under the EU Recast Reception Directive. There is an additional difference between the EU Trafficking Directive and the EU Recast Reception Directive. In order to benefit from ‘necessary medical or other assistance’, it is not enough that the applicant is assessed to be a vulnerable person, including a victim of human trafficking. Pursuant to Article 19(2) of the Recast Reception Directive, he/she also needs to qualify as an applicant with special reception needs.

3.3.2 Procedure
What significance does the successful qualification of an applicant as a victim of human trafficking have in terms of procedural guarantees? To answer this question the following will be examined: first, the meaning of the requirement for ‘adequate support’, second, the application of accelerated or border procedures to human trafficking victims and, third, the potential prioritisation of such persons’ applications for protection.

No comparison with the human trafficking legal framework will be made here. Both the CoE Trafficking Convention and the EU Trafficking Directive nonetheless incorporate provisions relating to procedural rights: ‘translation and interpretation service, when appropriate’; ‘counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand’; ‘legal assistance and free legal aid [...] under the conditions provided by its [States Parties’] internal law’. Clearly, these could be of relevance in the context of the international protection procedure. However, as the phrasing of these provisions suggests, States have preserved

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69 Article 11(5) of the EU Trafficking Directive (n 3).
70 Article 12(1) of the CoE Trafficking Directive (n 2) [emphasis added].
71 Ibid, Article 12(1) of the CoE Trafficking Directive. See also Article 11(5) of the EU Trafficking Directive (n 3).
72 Article 14(4) of the CoE Trafficking Convention (n 2) [emphasis added]. See also Article 12(2) of the EU Trafficking Directive (n 3). The EU Trafficking Directive restricts the provision of legal representation to situations when the victim has a role in the relevant justice system.
considerable discretion about the conditions under which these procedural guarantees can be triggered and afforded. This makes the assessment of their actual impact difficult in practice.

(a) Adequate support
Recital 29 of the Recast Asylum Procedures Directive provides that applicants considered to be in need of special procedural guarantees ‘should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection.’ In this connection, Article 24(3) of Recast Asylum Procedures Directive stipulates that:

Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

The following comments are compelling in relation to Recital 29 and Article 24(3) of the Recast Directive. The meaning of ‘adequate support’ is left unspecified. Recital 29 asserts that provision of sufficient time is a constitutive part of ‘adequate support’, but this is not reflected in the actual wording of Article 24(3) of the Recast Asylum Procedures Directive. Ultimately, the meaning of ‘adequate support’ is left unclear and open to interpretation on a case-by-case basis by each Member State. As the Commission has clarified ‘[t]his rule aims to provide maximum flexibility to Member States to find the actual modalities to implement this provision in various cases.’

In the initial recast proposal submitted by the Commission, such support was outlined more concretely: ‘Where needed, they shall be granted time extensions to enable them to submit evidence or take other necessary steps in the procedure.’ This formulation allowed considerable latitude for Member States to decide when time extensions might be needed. However, the provision at least specified what adequate support might mean.

In its current version, the value of the reference to adequate support in Article 24(3) of the Recast Asylum Procedures Directive is impossible to assess.

(b) Accelerated Procedures, Border Procedures, Suspensive Effect and Prioritization of Examination
Article 24(3) of the Recast Asylum Procedures Directive has a second paragraph which also deserves examination:

75 It has been noted that the key safeguards relating to persons with special procedural needs have been ‘watered down to the point of meaningless’. S. Peers, The Revised Asylum Procedures Directive: Keeping Standards Low (Statewatch 2012) 8.
Where such adequate support cannot be provided within the framework of the procedures referred to in Article 31(8) and Article 43, in particular where Member States consider that the applicant is in need of special procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, Member States shall not apply, or shall cease to apply, Article 31(8) and Article 43.

Article 31(8) and Article 43 of the Recast Reception Directive concern accelerated procedures and procedures conducted at the border or in transit zones. What follows from Article 24(3) of the Recast Asylum Procedures Directive is that no block exemptions from accelerated and border procedures are applied to applicants with special procedural guarantees.\(^\text{76}\) Rather, exemptions are possible only when adequate support, including sufficient time, cannot be provided within the framework of accelerated procedures and procedures at the border or in transit zones.\(^\text{77}\) In addition, exemptions are not possible in principle to all applicants with special procedural guarantees. An additional requirement is nonetheless prescribed, namely, that the special procedural guarantees need to be a result of the fact that an applicant has been subjected to torture, rape or other serious forms of violence.

The last sentence of Article 24(3) of the Recast Asylum Procedures Directive requires some further consideration:

Where Member States apply Article 46(6) to applicants to whom Article 31(8) and Article 43 cannot be applied pursuant to this subparagraph, Member States shall provide at least the guarantees provided for in Article 46(7).

Article 46(6) of the Recast Asylum Procedures Directive outlines certain circumstances in which an application for international protection might not have an automatic suspensive effect.\(^\text{78}\) In these circumstances, ‘a court or tribunal shall have the power to rule whether or

\(^\text{76}\) See also Recital 30 of the Recast Asylum Procedures Directive (n 5): ‘Where adequate support cannot be provided to an applicant in need of special procedural guarantees in the framework of accelerated or border procedures, such an applicant should be exempted from these procedures’.

\(^\text{77}\) The exemption of victims of torture, rape or other serious forms of violence was a crucial issue in the negotiations of the Recast Asylum Procedures Directive. See S. Peers, The Second Phase of the Common European Asylum System: A Brave New World – or Lipstick on a Pig? (Statewatch 2013) 12. Pursuant to the initial proposal submitted by the Commission, accelerated procedures were not to be applied to applicants who had been subjected to ‘torture, rape or other serious forms of psychological, physical or sexual violence’. See EU Commission, Proposal for a Recast Asylum Procedures Directive (n 74) 43. See also EU Commission, Communication from the Commission to the European Parliament Pursuant to Article 294(6) of the Treaty on the Functioning of the European Union Concerning the Position of the Council on the Adoption of a Proposal for a Directive of the European Parliament and of the Council on Common Procedures for Granting and Withdrawing International Protection, COM(2013) 411 final, 10 June 2013, 5. The Council of Europe has also recommended that victims of torture and sexual violence be excluded from accelerated procedures due to their vulnerability and the complexities of their cases. See Council of Europe, Parliamentary Assembly, Accelerated Asylum Procedures in Council of Europe Member States, Resolution 1471 (2005), 7 October 2005.

\(^\text{78}\) These circumstances relate to decisions considering an application to be manifestly unfounded, decisions considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d) of the Recast Asylum Procedures Directive (n 5) (these provisions relate to circumstances in which another Member State has granted international protection, when another State is considered to be a first country of asylum or when the case concerns a subsequent application without new elements), decisions considering rejection to reopen the case, decisions not to examine or not to examine fully the application because there is a safe third country.
not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting *ex officio*.’ If Article 46(6) of the Recast Directive is applied (which implies that there is no automatic suspensive effect) to applicants in need of special procedural guarantees who cannot participate in accelerated and border procedures, then at least the safeguards in Article 46(7) of the Directive need to be ensured. These guarantees are:

(a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and
(b) in the framework of the examination of the request referred to in paragraph 6 [the request for remaining on the territory of the Member State], the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

If the conditions referred to in points (a) and (b) are not met, paragraph 5 [automatic suspensive effect] shall apply.

The rationale behind Article 46(7) of the Recast Asylum Procedures Directive is to ensure certain procedural guarantees to applicants whose claims are under examination at the border or in transit zones of the Member States and who cannot benefit from automatic suspensive effect.

To simplify the analysis, I will introduce an example. Suppose a victim of human trafficking applies for international protection (I will call her Anna) at the border. She is channelled into an accelerated procedure since she presented a false passport to the authorities in order to mislead them. Within one week, she is issued with a negative decision. She wants to appeal and requests that a tribunal takes a decision that she can remain on the territory of the Member State. The vexing question here is when the authorities could possibly have the necessary time to assess whether she is a victim of serious forms of psychological and physical violence and, as a result, an applicant in need of special procedural guarantees. One might further wonder when the authorities at the border will have the time to assess whether or not adequate support can be provided within the border procedure. By the time such assessments are made, a negative decision will most probably already have been issued, rendering Article 24(3) of the Recast Procedure Directive meaningless.

As to the last sentence of Article 24(3), it is not only likely to be practically meaningless, but it is also paradoxical for the following reason. The text of Article 46(7) of the Recast Asylum Procedures Directive outlines certain minimum procedural guarantees to be applied to border procedures and procedures in transit zones. Pursuant to the third sentence of Article 24(3) of the Directive, this very minimum is to be applied to situations in which border and accelerated procedures cannot, since the applicant has been assessed to be an applicant in need of special procedural guarantees. Almost ironically, applicants in need of special procedural guarantees are *not* provided with special guarantees.

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79 See Article 31(8) of the Recast Asylum Procedures Directive (n 5), which outlines the circumstances in which Member States may decide that the examination procedure be accelerated and/or conducted at the border. Anna's case falls within the scope of Article 31(8)(c) and (d) of the Directive.

80 See ibid, Article 46(6).
The gist of the third sentence of Article 24(3) of the Recast Asylum Procedures Directive is that applicants in need of special procedural guarantees are not necessarily entitled to automatic suspensive effect. Article 46(6) and Article 46(7) of the Directive which regulate exemptions from suspensive effect can nonetheless apply to such persons. These two provisions contain vague recommendations to the effect that it might not be possible to ensure adequate support to applicants in need of special procedural guarantees without suspensive effect within accelerated and border procedures. However, these recommendations are so vague that they are virtually rendered meaningless. It is therefore difficult to see how Anna can actually be assisted in relation to the violence that she has experienced.

Finally, the question whether the applications submitted by vulnerable persons have to be prioritised will be reviewed. Article 31(7) of the Recast Asylum Procedures Directive stipulates that Member States may choose to prioritize an examination of an application for international protection ‘where the applicant is vulnerable, within the meaning of Article 22 of Directive 2013/33/EU, or is in need of special procedural guarantees, in particular unaccompanied minors.’ Clearly, the Recast Asylum Procedures Directive does not contain hard rules as to whether and when an examination of the application can be prioritised.

3.3.3 Conclusion
The second generation of EU asylum legislation places considerable focus on vulnerable persons. This is illustrated by the various provisions of the Recast Reception Directive and the Recast Asylum Procedures Directive which address vulnerable applicants. The tangible significance of these provisions is, however, questionable. The provisions do not contain clear and precise rules. Rather their formulation is vague to the point of being meaningless. The provisions relating to detention, material reception conditions, support during the procedure, border procedures, accelerated procedures, suspensive effect and prioritisation of the examination of the application do not contain a high degree of rigour in that they leave considerable discretion to Member States in their implementation. Health care is the only benefit which appears to present some added value for victims of human trafficking.

4 The Application of the Dublin Mechanism to Victims of Human Trafficking

The Dublin III Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. A brief summary of these criteria is compelling for the purpose of further examining the application of this instrument to victims of human trafficking. These criteria give priority to the presence or residence of family members. The responsible State will then be the one that has issued a valid residence permit or a valid visa. When it is established that the

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81 See also ibid, Recital 30: ‘The need for special procedural guarantees of a nature that could prevent the application of accelerated or border procedures should also mean that the applicant is provided with additional guarantees in cases where his or her appeal does not have automatic suspensive effect, with a view to making the remedy effective in his or her particular circumstances.’

82 Emphasis added.

83 Articles 9, 10 and 11 of the Dublin III Regulation (n 6).

84 Ibid, Article 12.
applicant has ‘irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection.’ Article 13(1) of the Dublin III Regulation adds that ‘[t]hat responsibility shall cease 12 months after the date on which the irregular border crossing took place.’ As will emerge below, this addition is of quite some significance in relation to the situation of victims of human trafficking. When these criteria cannot be applied, including when the above mentioned twelve-month period has expired, the Member State in which the applicant ‘has been living for a continuous period of at least five months [...] before lodging the application for international protection’ shall be responsible for examining the application for international protection. As argued below, the latter obligation is also of high relevance to victims of human trafficking.

In contrast to the Recast Reception and Asylum Procedures Directives, which pay specific attention to victims of human trafficking, the Dublin Regulation does not take into account the special circumstances of such persons. This might allow situations in which the national authorities do not assess whether an applicant could be a victim of human trafficking prior to the Dublin transfer. This outcome might be averted by the operation of Article 5 of the Dublin III Regulation. This provision requires Member States to conduct a personal interview with the applicant prior to determining the Member State responsible for processing the claim. However, Article 5 of the Dublin III Regulation needs to be approached with caution, since it does not make these personal interviews compulsory in all circumstances. In fact, Article 5(2) of the Dublin III Regulation envisions circumstances in which the personal interview can be omitted. For example, when the applicant has already provided the relevant information for determining the Member State responsible by other means, there is no obligation to conduct such an interview.

In a recent study, the European Migration Network reported that Member States have diverse practices in relation to the transfer of victims of human trafficking. In light of these divergences, the objective in this section is to examine whether the human trafficking legal framework imposes certain restraints upon Member States in relation to the application of the Dublin mechanism. Are there circumstances in which the obligations imposed by the Dublin III Regulation come into conflict with Member States’ obligations under the human trafficking legal framework? Indeed, even when Member States

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85 Ibid, Article 13(1).
86 Ibid, Article 13(2).
87 There is one exception which relates to minors. Article 6(3) of Dublin III Regulation says that: ‘In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors: [...] (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking.’
88 ‘In most Member States a Dublin transfer no longer applies if a person is suspected to be a victim of trafficking either case to case (AT, CY, CZ, EL, EE, FI, MT, NL, PL) or at the discretion of the competent authority (BE, FR, SE, UK), or on specific grounds outlined in national law (CY, FI, SI, UK, NO). In such cases, the hosting MS takes responsibility for processing the application. In remaining (Member) States, a transfer can only be stopped on grounds of being a victim of trafficking if a different administrative process is considered to apply – i.e. if a victim is granted a reflection period/residence permit for victims (BE, EE, FI, FR, IE, LU, NL, SE, UK, NO), if a (pre-trial) criminal investigation into the crime is initiated (DE, EE, FI, FR, IE, IT, LU, NL, SE, UK, NO) or if official identification process have been initiated (FR). EMN, Identification of Victims of Trafficking (n 8) 7.
administer Dublin transfers they continue to be bound by their obligations under the human trafficking legal framework and human rights law.\(^8\)

For the purposes of making the forthcoming analysis manageable, I would like the reader to conceive the following situation. A migrant has illegally entered the EU through country A. After this she/he was trafficked into country B, where he/she was subjected to abuse. After escaping or being saved from the trafficking situation, he/she applies for international protection in country B. The responsible authorities in country B seek his/her transfer back to country A under the Dublin mechanism.\(^9\)

What are the responsibilities of country B under the CoE Trafficking Convention? In very simple terms, the Convention imposes the following obligations: (i) identification of victims based on the two stage process, namely, a preliminary stage and a conclusive stage,\(^9\) (ii) providing assistance to presumed victims,\(^9\) (iii) issuing a residence permit in certain circumstances.\(^9\) The Convention does not envision the possibility that a presumed victim be transferred to another State during the preliminary stage of identification. It is in fact quite clear to the effect that:

\([…]\) if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2 [emphasis added].\(^9\)

During this preliminary stage of identification, the person may be granted a ‘recovery and reflection period’ of at least 30 days. It can therefore be expected that for at least 30 days the person is to remain in country B. In addition, pursuant to Article 13(1) of the CoE Trafficking Directive, country B has to regularise his/her stay during the ‘recovery and reflection period’. This raises the question as to whether Article 12(1) of the Dublin III Regulation can be triggered. The latter provides that if the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining his/her application for international protection. Accordingly, setting into motion Article 12(1) of the Dublin III Regulation is a conceivable option here.

Nonetheless, there might be one obstacle in this case. Article 13(1) of the CoE Trafficking Convention does not necessarily require States to issue a valid residence document. The provision can be interpreted to the effect that States have to legislate in order to authorise the presumed victim to stay in the country; however, it does not impose an obligation upon States Parties to issue a residence permit. The Explanatory Report of

\(^{89}\) Recital 32 of Dublin III Regulation (n 6). The Judgment MSS v Belgium and Greece (Appl no 30696/09 (ECHR GC, 21 January 2011)) demonstrates how the Dublin mechanism could clash with Member States' obligations under human rights law.

\(^{90}\) I assumed that both countries (A and B) are EU Member States bound by the Dublin mechanism, the Residence Permit Directive and the CoE Trafficking Convention. In the forthcoming analysis, I focus on the provisions of the CoE Trafficking Convention since they are more robust than the provisions of the Residence Permit Directive.

\(^{91}\) Article 10 and Article 13(1) of the CoE Trafficking Convention (n 2). See Section 2 above.

\(^{92}\) Ibid, Article 12. See Section 3.2.1 above.

\(^{93}\) Ibid, Article 14(1).

\(^{94}\) Ibid, Article 10(2).
the CoE Trafficking Convention confirms this interpretation; it does not go as far as to say that States have to issue residence permits. States have to legislate to enable the presumed victim to remain in the country; however, States are free to choose how national legislation shall regulate the issue. The EU Residence Permit Directive does not diverge from these standards in any meaningful way since it does not guarantee the issuance of a residence permit during the reflection period. Accordingly, it is not certain that Article 12(1) of the Dublin III Regulation can be set into motion. This will depend on the national legislation of the Member State concerned. If the national legislation provides that a presumed victim has to be issued with a residence permit, then Article 12(1) of the Dublin III Regulation could apply.

Some further scrutiny of Article 13(1) of the CoE Trafficking Convention is required here. This provision reads that the ‘recovery and reflection period’ has to be sufficient ‘for the person concerned to recover and escape the influence of traffickers.’ In practice, there might be situations where a Dublin transfer to the reception system of country A will make it difficult, if not impossible, to recover and escape the influence of traffickers. Therefore, in these situations a Dublin transfer could be in violation of Article 13(1) of the CoE Trafficking Convention.

In the above depicted scenario, the duration of the recovery and reflection period might have to be prolonged. This proposition is not uncontroversial since the text of Article 13(1) of the CoE Trafficking Convention allows State Parties to legislate for a recovery and reflection period limited to 30 days. However, the second sentence of Article 13(1) of the Convention which asks for a sufficient duration provides some support for the proposition. In particular, the period has to be sufficient for the person to recover and escape the

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95 At the time of the drafting of the CoE Trafficking Convention, the Council of Europe Parliamentary Assembly proposed that States should be under an obligation to issue residence permits covering the reflection period. See Council of Europe, Parliamentary Assembly, Draft Council of Europe Convention on Action against Trafficking in Human Beings, Opinion No 253 (2005), 26 January 2005, para 14. This proposal is not reflected in the text of the CoE Trafficking Convention.

96 The Explanatory Report to the CoE Trafficking Convention (para 178) states that: ‘The words “it shall not be possible to enforce any expulsion order against him or her” mean that the victim must not be removed from the Party’s territory during the recovery and reflection period. Although free to choose what method to employ, Parties are required to create a legal framework allowing the victim to remain on their territory for the duration of the period. To meet this end, in accordance with national legislation, each Party shall provide victims, without delay, with the relevant documents authorising them to remain on its territory during the recovery and reflection period.’ Similarly, Article 6(1) of the EU Residence Permit Directive (n 4) stipulates that the national legislation has to specifically regulate the duration and the starting point of the reflection period.

97 Article 6 and Article 2(d) of the Residence Permit Directive (n 4) do not oblige Member States to actually issue residence permits for presumed victims during the ‘reflection period’. Article 6(2) of the Directive states that during the reflection period, ‘it shall not be possible to enforce any expulsion order.’ At no point does the Directive say that a residence permit has to be issued during the reflection period. In fact, there is a specific provision, namely Article 6(3) of the Directive, which states precisely the contrary: ‘The reflection period shall not create any entitlements to residence under this Directive.’ Therefore, in its effects the EU Residence Permit Directive is not different from the CoE Trafficking Convention. It envisions that the reflection period has to be somehow regulated by national legislation (see Article 6(1) of the Directive which provides that: ‘The duration and starting point of the period referred to in the first paragraph shall be determined according to the national law.’). However, this does not necessarily imply issuance of a residence permit.

98 Emphasis added.
influence of traffickers. Thus, it could be argued that if transfer to country A is not administered for the above mentioned reason, then the period of recovery will have to be extended to at least five months. In this way the responsibility of country B for conducting a material consideration of the application will be triggered.99 Alternatively, country B may have to examine the application based on the discretionary clauses under the Dublin III Regulation.100 The entitlement of the presumed victim, as guaranteed by the Regulation, to have his/her application for international protection examined, can also favourably impact the above analysis.101

States’ positive obligations under Article 4 of the European Convention of Human Rights (ECHR) also need to be considered.102 States Parties to the ECHR have the positive obligation to investigate situations of trafficking upon reasonable suspicion of ill-treatment.103 This investigation has to be effective, which means that it has to comply with certain qualitative standards.104 Depending of the factual circumstances of the case, it might be hardly conceivable that an investigation can be undertaken and the standards provided for in the European Court of Human Rights (ECtHR) case law complied with, if the presumed victim is transferred to another Member State. Thus, country B might be under an obligation to investigate the crime. It might be the case that the investigation extends beyond 12 months. In this situation, the last sentence of Article 13(1) of the Dublin III Regulation becomes relevant. As a result, the responsibility of country A to examine the applicant's claim will cease since 12 months will have passed after the date on which the borders of country A were irregularly crossed.

If country B reaches the decision that the applicant is a victim of human trafficking and the 12 months period has not yet expired, this decision by itself does not entitle the person to remain in country B. This implies that the Dublin transfer might be executed. If country B reaches a conclusive decision that the applicant is a victim of human trafficking and grants him/her a residence permit pursuant to Article 14(1) of the CoE Trafficking Convention, then clearly country B will have to examine his/her asylum claim.

If country B decides not to grant a residence permit under the human trafficking framework – since, for example, the applicant’s stay is not ‘necessary for the purpose of [his/her] co-operation with the competent authorities in investigation or criminal proceedings’ and the twelve month period has not expired – then country B might proceed with the transfer to country A. In this case, country B has to comply with its obligations under Articles 31 and 32 of the Dublin III Regulation relating to the exchange of relevant information, including health data, before the transfer is carried out.105 Relevant information includes any formal identification of the applicant as a human trafficking victim.

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99 Article 13(2) of the Dublin III Regulation (n 6).
100 Ibid, Article 17.
101 Ibid, Article 3(1).
102 Article 4 of the ECHR (ETS No 005, 4 November 1950 (entry into force: 3 September 1953)) enshrines the right not to be held in slavery or servitude and the right not to be required to perform forced or compulsory labour.
103 Rantsev v Cyprus and Russia App no 25965/04 (ECtHR, 7 January 2010) para 288.
104 ‘It [the investigation] must also be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. […]. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.’ ibid, para 288.
105 See also Recital 34 of the Dublin Regulation III (n 6).
victim. This exchange of information is of crucial significance for country B to enable it to comply with its obligations in relation to vulnerable persons under the Recast Reception and Asylum Procedures Directives.

To conclude, applicants who are presumed victims of human trafficking or conclusively determined to be so do not benefit from a blanket exemption from the Dublin mechanism. Yet, depending on the case in question, Dublin transfers might have to be averted in order to ensure that Member States fulfil their obligations under the CoE Trafficking Convention and human rights law.

In these concluding paragraphs, and in contrast to the above micro-analysis of legal norms, a broader perspective on these two legal regimes is necessary. If human trafficking refers to the movement of the victim by means of deception/coercion, as the pertinent legal definition stipulates, then moving the applicant back against his/her will to the country from which he/she was trafficked appears to be far from acceptable. Such transfers sit at odds with the rationale behind the Dublin mechanism, namely the prevention of ‘asylum shopping’. After all, as the definition of a victim of human trafficking suggests, the victim was deceived or coerced to move to country B. Therefore, he/she arguably did not voluntary initiate the process.

It should be also considered that human trafficking might raise more complex situations involving more than two countries. For instance, the person might have been trafficked in country A and subject to abuse therein, and after this may have moved or have been moved to country B. People might also have been trafficked in transit countries and then moved into the EU. Since trafficking is about movement and the facilitation of that movement by means of deception and coercion, various countries could be involved in this...

106 The position of the UK Home Office is as follows: 'To adopt a policy that allows a claim of trafficking to provide a blanket override of provisions of Community law in the form of the Dublin Regulation risks opening a potential area of abuse. This is why it is important that the UK does not provide a general exemption for victims of trafficking which would undermine the intent of the Dublin Regulation, but considers claims on an individual basis.' ECPAT UK, The Trade in Human Beings: Human Trafficking in the UK, Memorandum (ECPAT UK 2008) para 24 <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23we04.htm> accessed 6 December 2014.

107 In relation to human rights law, in the above analysis I mention only the positive obligation of conducting an effective investigation under Article 4 of the ECHR. However, other human rights obligations are also of relevance. Clearly, a transfer should not be administered if there is a real risk that the applicant will be subjected to inhuman or degrading treatment in the receiving Member State which receives him/her. The fact that the person to be transferred is a victim of human trafficking will have an impact on the determination as to whether the reception conditions in the receiving Member State reach the threshold of degrading treatment. For example, in the context of detention, the ECtHR has held that the conditions have to be adapted to the position of vulnerable individuals. See Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006) paras 102–103.

108 In this context, the AIRE Centre, Asylum Aid, ECPAT UK and Poppy Project have argued that victims of human trafficking should never be subjected to Dublin transfers. See Anti Trafficking Legal Project (ATLeP), Call for Exception from Dublin II Procedures for Victims of Trafficking, Joint Submission with AIRE Centre, Asylum Aid, ECPAT UK and Poppy Project (ATLeP 2008) <http://www.atlep.org.uk/policy-work-and-publications/publications-list/call-for-exception-from-dublin-ii-procedures-for-victims-of-trafficking/> accessed 6 December 2014.

109 See the Introduction to this volume.
process. As such, the relation between the Dublin mechanism and the human trafficking legal framework will be more complicated.

5 Conclusion

In light of the limited possibilities offered to victims of human trafficking to remain on the territory of host States under the CoE Trafficking Convention and the EU Residence Permit Directive, it can be expected that such persons will apply for international protection. Ideally, migrants who have been subjected to serious forms of violence should be able to benefit from the assistance and protection measures provided under both the human trafficking legal framework and the international protection framework. This can be guaranteed if the two legal frameworks do not operate in a fragmented manner. This implies that victims of human trafficking have to be referred to the international protection procedure where their special needs in terms of reception conditions and procedural guarantees are properly assessed. It also implies that applicants for international protection are properly identified as victims of human trafficking; an identification which should trigger the protection measures that exist under the human trafficking legal framework, including suspension of Dublin transfers under certain circumstances.

As explored in this Chapter, the operation of the assistance and the protection measures under these legal frameworks, both taken in isolation and in conjunction, could be hindered. The identification procedure under the human trafficking legal framework appears to be geared towards the identification of ‘useful witnesses’. This drawback can be avoided in the context of the international protection framework where a separate assessment could be made. However, the EU Recast Reception Directive does not necessarily demand such separation, and had left the issue to the discretion of Member States. A favourable solution which Member State could opt for would be one in which the national authorities that conduct refugee status determination are also mandated with the task of granting the status of a victim of human trafficking, in this way triggering the assistance and protection measures that exist under both legal frameworks.

Additional obstacles which might de facto block the operation of assistance measures relates to the concept of human trafficking itself. The operation of the human trafficking legal framework is based on an ambiguous definition of human trafficking, the conceptual limits of which are hard to define. Problems will inevitably emerge in the context of the assessment of whether applicants for international protection fall within the categories of victims of human trafficking and vulnerable persons. These problems could further exacerbate the difficulties inherent in the assessment of applicants’ vulnerabilities as regulated by the EU Recast Reception Directive and the EU Recast Asylum Procedures Directive. These directives have failed to regulate the issue in a consistent and robust way.

The absence of consistency and of sufficiently robust provisions in the EU Recast Reception Directive and in the EU Recast Asylum Procedures Directive relate to the following points. First, there is no explicit obligation imposed upon Member States to identify vulnerable persons. This leads to paradoxes in the text of the EU Recast Reception Directive since it stipulates that only groups of vulnerable persons may be considered to have special reception needs. In addition, although there is no explicit obligation to assess whether applicants are vulnerable persons, certain benefits are attached to groups of vulnerable persons. Second, the modalities of the assessment as to whether applicants are
in need of special reception conditions or special procedural guarantees are left to Member States to determine. This opens the possibility of low quality decision making. Third, the actual significance of any assessment as a vulnerable person is hard to predict. The provisions in the second phase of EU asylum legislation which address the needs of vulnerable persons are so vague that there is a real risk that they could be rendered meaningless in practice.