Netherlands International Law Review
https://doi.org/10.1007/s40802-024-00254-8

ARTICLE

Challenging Externalization by Means of Article 4 ECHR: Towards New Avenues of Litigation for Victims of Human Trafficking?

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Accepted: 25 March 2024

Abstract

The externalization of migration control undermines the protection of victims of trafficking in human beings. Pushbacks and pullbacks at sea, as well as simplified or accelerated identification procedures, exacerbate the risk of trafficking and retrafficking and prevent victims from accessing the protection to which they may be entitled in European States. In this scenario, the European Court of Human Rights can play a crucial role among international bodies and courts in ensuring effective remedies for victims in case of repatriation to their countries of origin and transit. This study examines the applicability of the prohibition of slavery, servitude and forced labour enshrined in Article 4 of the European Convention on Human Rights—whose scope now undisputedly includes trafficking in human beings—in the context of the externalization of migration control. It demonstrates that litigating unlawful refoulements under Article 4 ECHR might be very worthwhile to raise awareness of migration-related risks for victims, to strengthen the legal framework of positive obligations in trafficking cases, and to ascertain violations of anti-trafficking international obligations by European States.

Keywords Trafficking in human beings · Externalization · Article 4 ECHR · European court of human rights · Repatriation · Non-refoulement

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Published online: 29 April 2024

1 Introduction

It was 23 February 2012 when the European Court of Human Rights (hereinafter, the 'ECtHR' or 'the Court') delivered its landmark judgment in *Hirsi Jamaa and others v. Italy*, stemming from a complaint lodged in 2009.[1] At that time, the Court had to rule on one of the first cases in which the Italian Coastguard had sent migrants aboard three intercepted vessels back to Libya before they could reach Italian shores. The unanimous verdict was that Italy had breached the prohibition of torture and inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (hereinafter, 'ECHR'), as repatriation to Libya had put the applicants at risk of torture and ill-treatment. Furthermore, the conduct of pushing back a group of migrants without a proper assessment of their individual eligibility for asylum in Italy was determined to be a violation of the prohibition of collective expulsions under Article 4 Protocol No. 4 ECHR.

At the European border, the number of unlawful refoulements at sea has multiplied critically from 2009 to the present day. This is due to the runaway growth of migration flows from North Africa to Europe following the 'Arab Springs' starting from the second decade of 2000. In response, the European States, under the aegis of the European Union ('EU'), have made increasing use of several mechanisms aimed at preventing migrants from reaching their territory *before* they could have access to it.[2] Indeed, over the years, penalties for carriers transporting illegal migrants,[3] maritime interdiction operations[4] and the establishment of offshore migrant processing centres[5] have become important tools for combating irregular migration. As is acknowledged, this strategy of extraterritorial migration control—despite formally aimed at preventing illegal immigration—ultimately results in preventing immigration *tout court*[6] and it is well known in the literature as 'externalization of the borders'.[7] This model—implemented following the adoption of the European Agenda on Migration in 2015—has given rise to much criticism among scholars, activists and non-governmental organizations (NGOs). That notwithstanding, however, it seems that the EU and its Members States have not yet distanced themselves from this paradigm.[8]

In this context, the practice of pushbacks, which was under scrutiny in the *Hirsi* case, has gradually been replaced by the use of pullbacks. While the former is usually carried out by the national authorities or agents of the country of destination in order to prevent arrivals, the latter is performed by the authorities of non-European

[1] ECtHR, *Hirsi Jamaa and others v. Italy*, Appl. No. 27765/09, judgment, 23 February 2012.

[2] In this regard, Moreno-Lax and Giuffré (2019); Moreno-Lax (2020).

[3] Feller (1989).

[4] Moreno-Lax (2017b).

[5] Blay et al. (2007).

[6] *Mutatis mutandis*, Garcia Andrade (2010), p. 321.

[7] On this topic, Ryan and Mitsilegas (2010); Den Heijer (2012); Gammeltoft-Hansen (2013); Gammeltoft-Hansen (2015); Moreno-Lax (2017a); Moreno-Lax (2017b); Moreno-Lax and Giuffré (2019); Giuffré (2020); Tsourdi et al. (2022).

[8] See further on this point *infra*, at Sect. 2.1.

States on the basis of a proper *delegation* of migration control from the country of destination ('control by proxy').[9] These mechanisms, based on cooperation with countries of origin and transit of migrants, result in an 'extraterritorial' migration control and raise relevant questions for the ascertainment of State responsibility for human rights violations occurring in this context. Indeed, establishing a jurisdictional link between the management of migratory flows and State responsibility has proven more difficult when migrants are affected by the conduct of States outside their territory.[10]

This is clear from the case law of the ECtHR, whose role in condemning unlawful migration-related practices of the European States has gained momentum in recent years. Parallel to the rise of migration-related disputes[11] the Court has often played a leading role in ensuring redress for vulnerable migrants who are exposed to the risk of serious violations of human rights in case of repatriation. Similarly, over the years the Court has often reinforced certain key principles established in the *Hirsi* case, and repeatedly reaffirmed that the removal of asylum seekers to third countries without prior examination by the authorities of the removing State is contrary to Articles 3 and 4 Protocol No. 4 ECHR, and, to the extent that it prevents non-EU citizens from challenging repatriation measures before a tribunal, violates the right to an effective remedy under Article 13 ECHR as well.[12]

Without prejudice to the relevance of this jurisprudence, the entrenchment of the externalization model raises the question of whether the Court can *further* contribute to protecting victims of unlawful refoulements in this context. Specifically, is it legitimate to wonder whether there is a specific legal basis in the ECHR for enhancing the protection of *specific* categories of migrants. This inquiry is based on the assumption that migrants arrive in Europe in 'mixed' migratory movements, e.g. those comprising refugees, asylum seekers, economic migrants, unaccompanied minors and other categories of foreign nationals. Each of these groups of migrants has *specific* needs and concerns that must be addressed by national and supranational courts through constant dialogue between various judges. Among these different categories of migrants, victims of human trafficking represent a consistent and emerging group, which is also included in the list of vulnerable migrants provided by Article 21 of the Reception Directive.[13]

[9] Such a difference between pushbacks and pullbacks is taken from the Study by Allsopp et al. (2021), pp. 71–72.

[10] In this perspective, Spagnolo (2017). See further on this, at Sects. 3.1 and 3.4.

[11] See, among others, ECtHR, *Khlaifia and Others v. Italy*, Appl. No. 16483/12, judgment, 15 December 2016; *Ilias and Ahmed v. Hungary*, Appl. No. 47287/15, judgment, 14 March 2017; *Asady and Others v. Slovakia*, Appl. No. 24917/15, judgment, 24 March 2020; *N.D. and N.T. v. Spain*, Appl. Nos. 8675/15 and 8697/15, judgment, 13 February 2020; *M.N. and Others v. Belgium*, Appl. No. 3599/18, judgment, 5 March 2020.

[12] See, among others, ECtHR, *M.A. and Others v. Lithuania*, Appl. No. 59793/17, judgment, 11 March 2019; *Sharifi and Others v. Italy and Greece*, Appl. No. 16643/09, judgment, 21 October 2014.

[13] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ 2013, L 180/96-116 ('Reception Directive').

The ECtHR has already dealt with the protection of victims of human trafficking. Since the early 2000s, the Court has demonstrated noteworthy attentiveness to modern slavery practices, including human trafficking, which is covered by the prohibition of slavery, servitude and forced labour under Article 4 ECHR according to settled case law.[14] However, despite the close interrelationship between migration and human trafficking, the ECtHR has never addressed the applicability of Article 4 ECHR in the specific context of the externalization of migration control.

Invoking such a provision could be of significant value for two main reasons. First, a stance by the Court could contribute to aligning international standards in this field, which is particularly pressing in light of the fragmented national legal framework on the recognition of long-term protection for victims of human trafficking.[15] Second, the supranational legal framework of positive obligations under Article 4 ECHR is quite a recent development that requires further substantiation and expansion by the Court in order to be effective in migration-related contexts.

In light of these premises, this article explains how Article 4 ECHR could potentially be employed as a legal basis in upcoming cases regarding externalization. In particular, it intends to demonstrate that *specific* practices, e.g. pushbacks, pullbacks, simplified and accelerated identification procedures (which I will often refer to hereafter as 'externalization practices'), can be challenged by means of Article 4 ECHR. This issue is analysed from a general perspective, without a specific focus on a particular subset of trafficking (such as, for example, sexual exploitation or labour exploitation) or on victims' specific gender or age.

The study first seeks to provide a context for the various links between migration and human trafficking and to highlight inconsistencies and inadequacies in international law on this subject. Indeed, in order to grasp the potential for litigation before the ECtHR in this field, it is necessary to scrutinise the pertinent international legal infrastructure and identify its deficiencies, which are even exacerbated by the externalization of migration control. For this reason, Sect. 2 of this article is devoted to the specific risks arising from the externalization practices for trafficked persons and potential victims in the European context. It shows that these risks are rooted in both the inadequacy of the EU approach to trafficking in the context of migration and in the protection gaps in international law. In particular, the deficiencies in specialized international anti-trafficking treaties (Sect. 2.2.1) and the 'troubled' interplay between refugee law and anti-trafficking law (Sect. 2.2.2) are analysed in detail.

With these premises, Sect. 3 focuses specifically on the potential of Article 4 ECHR to serve as a pathway for expanding remedies for victims of human trafficking in migration-related contexts. The analysis starts with some relevant findings of the case law of the ECtHR in other externalization-related disputes, in order to highlight that some aspects—in particular, the determination of jurisdiction—may also be highly relevant for the purposes of the applicability of Article 4 ECHR in this context (Sect. 3.1). The article then turns to the case law on Article 4 ECHR to date. First, it analyses all the touchpoints between trafficking-related positive obligations

[14] See further on this, Sect. 3.2.

[15] See further on this, Sect. 2.

under Article 4 ECHR and migration issues (Sect. 3.2); second, it outlines the emerging trends of the case law related to refugee status or residence permits for trafficked persons and potential victims, including in comparison with the Article 3 approach (Sect. 3.3). Finally, in light of this analysis, the article engages in a critical review of the strengths and weaknesses of this possible avenue of litigation and in some brief conclusions (Sects. 3.4, 4).

2 Specific Trafficking-Related Risks Arising from the 'Externalization' Paradigm

2.1 Smuggling, Trafficking and Deficiencies in the European Approach to Migration

Statistically, in Europe, a growing number of asylum claims concern victims of human trafficking.[16] Most victims seek protection to avoid the risk of being trafficked or retrafficked in their home country. Still, a percentage of victims also include non-European citizens who were exploited during their journeys because of their poverty and precariousness, which make them vulnerable to falling prey to traffickers.[17]

At the European level, an analysis of the effective protection provided to these victims has to be contextualized in the EU approach to migration, which has a strong influence on how its Member States act when controlling borders. Disrupting cross-border human traffickers' business has been included in the political migration agenda for years, but the European Agenda on Migration prioritized action against criminal networks of smugglers and traffickers in 2015.[18] With this aim, the EU Commission promoted cooperation with countries of origin and transit of migrants, considering it as a key factor in discouraging irregular migration.[19] Also, the proposal to implement stricter EU border surveillance was portrayed as a way to save lives at sea by preventing migrants from undertaking 'fatal journeys' across the Mediterranean Sea.[20]

However, both the surveillance of the EU's external borders and the cooperation with third countries have seemed to be geared more towards suppressing migrant *smuggling* than *towards combating trafficking* in human beings. Some brief clarifications are needed in this regard.

It is important to note that smuggling and trafficking, although undoubtedly related, are two distinct phenomena, which correspond to different international definitions, which are also reflected in EU legislation in this area. In particular, reference is made to the international definition of smuggling set out in the Protocol

[16] Schlintl and Sorrentino (2021), p. 58.
[17] Gallagher (2010), p. 337.
[18] EU Commission (2015), p. 8.
[19] For an analysis of the cooperation between the European and non-European States, Giuffrè (2020).
[20] IOM (2014).

against the Smuggling of Migrants by Land, Sea and Air (hereinafter, 'Smuggling Protocol'), annexed to the United Nations Convention on Transnational Organized Crime, (hereinafter, 'UNTOC Convention'), according to which the 'Smuggling of migrants' consists of procuring the illegal entry of a person into a State Party of which the person is not a national or a permanent resident in order to obtain a financial or other material benefit.[21] At the EU level, this conduct is regulated by Directive 2002/90/EC, which, however, does not include the financial gain among the substantive elements of the conduct of smuggling.[22]

Differently, trafficking in human beings, whose international definition is set out by another Protocol attached to the UNTOC Convention, e.g. the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (hereinafter, 'Anti-trafficking Protocol'), is considered to be based on the exploitation of a person's characteristics, which deprives people of their dignity.[23] This is clear from the definition of trafficking provided by Article 3 of the Anti-trafficking Protocol, which has also been incorporated into EU Directive 2011/36/EU (hereinafter, 'Anti-trafficking Directive'):

> 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs […].[24]

It is then clear that discouraging irregular migration to Europe may be functional in eradicating *smuggling,* which refers to the economic exploitation of a person's illegal entry into foreign territory, but not in responding to trafficking in human beings, which is strongly linked to the human rights of individuals.

The fact that only human trafficking is considered a serious violation of fundamental rights, halfway between transnational criminal law and human rights law, also stems from the EU law establishing specific safeguards only for victims of human trafficking. For example, EU Directive 2004/81/CE ('Residence Permit

[21] Protocol against the Smuggling of Migrants by Land, Sea and Air, New York (2000), 2241 UNTS p. 507; Doc. A/55/383, Art. 3.

[22] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ 2002, L 328/17-18, Art. 1.

[23] Gallagher (2015).

[24] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011, L 101/1-11. The Anti-Trafficking Directive sets out minimum standards to be applied throughout the EU in preventing and combating trafficking in human beings and protecting victims. These requirements provide, on the one hand, prosecution and law enforcement obligations, and, on the other, detailed provisions on assistance and support for victims of human trafficking, including child victims.

Directive') obligates States to grant specific residence permits to those victims who are willing to cooperate in criminal proceedings against traffickers. Moreover, Recital 18 of the Anti-trafficking Directive establishes that persons should be provided with assistance and support if there are reasonable grounds to believe that they would have been subjected to human trafficking, *irrespective* of their willingness to act as witnesses in criminal proceedings against their traffickers. This reflects that the protection of all *victims*—including *irregular* migrants—is essential to prevent re-victimization and to prosecute traffickers. Lastly, in December 2022, the EU Commission proposed a revision of the Anti-trafficking Directive, emphasizing the need for harmonized mechanisms to detect and identify victims of human trafficking and provide them with assistance and support. To achieve this goal, it is planned to replace the current instruments aimed at detecting trafficked persons within national asylum procedures—known as National Referral Mechanisms—with a European Referral Mechanism.[25]

That notwithstanding, such a victim's rights-based approach has not received support from EU migration policies over the past decade. As underlined in the literature, the European Migration Agenda has rather focused on curtailing *irregular migration*, neglecting a focus on migrants' fundamental rights.[26] More recently, scholars have drawn attention to the New Pact on Migration and Asylum (hereinafter, 'the New Pact') that has substantially failed in effectively reviewing this migration policy,[27] despite it being adopted to create a *fair*, *efficient,* and *sustainable* migration and asylum process for the European Union,[28] thus apparently distancing itself from the 2015 Agenda. The New Pact—which has not yet entered into force, but could be transformed into binding rules in the near future[29]—indeed gives rise to some criticism in light of the content of some of its proposals that lack due attention to the impact of some measures on groups of vulnerable people. With regard to migration-related risks for victims of trafficking, the forthcoming Asylum Procedure Regulation, which intends to introduce a mandatory border procedure aimed at *quickly* determining whether applications are unfounded or inadmissible ('border screening procedure'),[30] is particularly noteworthy. This procedure is meant to be a

[25] EUAA (2023), p. 2.

[26] Den Heijer et al. (2016).

[27] EU Commission (2020); for comments, De Bruycker (2020); Allsop et al. (2021). As is well known, the New Pact was adopted in 2020, shortly after the assignment of the EU Commission guided by Ursula Von Der Leyen, and it contains a set of policies including five proposals of Regulations, with renewed attention to solidarity between the EU Member States and protection for vulnerable groups of migrants. In particular, the Commission proposed some amendments to the Dublin Regulation, the adoption of a common procedure for determining international protection in the EU Member States, the introduction of a 'border screening procedure' and a mechanism to deal with situations of crisis or force majeure, and, lastly, the adoption of a new EURODAC Regulation concerning fingerprints.

[28] EU Commission (2020), p. 28. Emphasis added.

[29] In June 2023 the EU Member States reached an important political agreement on two pillars of the 2020 policy agenda, e.g. the adoption of an Asylum and Migration Management Regulation and the Asylum Procedure Regulation. More information here: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en (accessed 15 March).

[30] EU Commission (2020), p. 4.

'pre-screening' asylum procedure to be implemented at the external borders of the EU. Indeed, it would apply to those asylum seekers who would apply for asylum at an external 'border-crossing point', after being apprehended in connection with, or after disembarking from, a search and rescue operation.

However, according to data collected from NGOs and practitioners, there is a high risk that such a procedure could be totally inadequate to detect certain vulnerabilities, including human trafficking cases. Indeed, given that trafficked persons are generally reluctant to share their experiences of exploitation and come to the fore,[31] the identification of them as victims requires adequate time and specific tools.[32] It follows that an effective identification of victims of human trafficking is only possible after a *thorough analysis* of their individual situation, which is incompatible with the implementation of accelerated procedures to be rapidly executed at the border.

In this respect, the border procedure that will enter into force under the forthcoming asylum procedure could further undermine the protection of victims. In the absence of proper identification, most victims may miss the chance to access the protection to which they could be entitled under the above-mentioned EU Directives.

In other words, as a press release by the NGO 'La Strada International' highlights, the provision of a border pre-screening procedure 'gives the clear impression that the commitments to identifying trafficked people are window-dressing for a proposal which aims to *deter people from arriving irregularly to Europe* and to deny people access to fair procedures in order to facilitate the deportation of as many people as possible at any cost'.[33]

These circumstances clarify that the current EU approach to migration is—still—more focused on dismantling migrant smuggling and irregular entries in European territory, thus failing to address the fight against human trafficking and exacerbating risks for victims. In this scenario, as some authors have pointed out, the European Parliament could challenge the legality of migration measures adopted at the EU level.[34] However, while European political institutions grapple with the need to rethink their approach to migration, the problem of filling legal vacuums remains, as the relevant international treaties do not contribute to increasing the protection for trafficked persons in Europe.

This last aspect is certainly worth examining for the purposes of this work, since the role of the ECtHR can only be understood in light of the shortcomings and gaps in the existing legal framework.

[31] UNHCR (2014); Schlintl and Sorrentino (2021).

[32] OSCE (2016), p. 8; Magugliani (2018), p. 21.

[33] See the document at the webpage: https://documentation.lastradainternational.org/lsidocs/3374-La%20Strada%20International%20statement%20-%20EU%20Anti-Trafficking%20Day%2018%20October%202020%20-%20def.pdf. (accessed 15 March 2024). Emphasis added.

[34] Allsop et al. (2021), p. 156.

2.2 Protection Gaps in the International Legal Framework

2.2.1 The Weakness of Migration-Related Provisions in Counter-Trafficking Instruments

Given the spread of human trafficking in cross-border dynamics,[35] international treaties dedicated to the fight against trafficking do intersect with migration issues.

Notably, the above-mentioned Trafficking Protocol, by adopting a comprehensive approach, imposes obligations on States Parties to criminalize and prosecute these crimes combined with prevention and protection measures for victims. In the context of migration, 'Repatriation Measures' (Art. 8) and 'Border Measures' (Art. 11), that apply to both the countries of origin and destination of victims, are particularly noteworthy. As for the border measures, a number of obligations are imposed on all States Parties to strengthen border controls when they are necessary to prevent and detect trafficking in persons, including the obligation to prevent trafficking by measures directed at the means of transport, and the possibility to deny the entry or revoke the visas of persons implicated in human trafficking.

Whilst the border measures do not deal with the removal of victims, repatriation measures establish some obligations for the expelling States. In particular, Article 8 establishes that the return of victims to their State of origin 'shall *preferably* be voluntary' and must be done 'with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking' (Art. 8, para. 2). Despite the fact that Article 8 is drafted in mandatory terms, the requirement of the voluntary nature of the return ends up being *discretionary*, thus weakening the scope of such a provision, which does not place any obligation on the State Party returning the victims.[36] The reason for this is rooted in the need to comply with customary international law, which leaves each State free to control the entry and expulsion of aliens from its own territory.

Similarly, the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter, 'CoE Trafficking Convention') expressly reproduces the content of these provisions in its Articles 7 and 16. Thus, neither the Trafficking Protocol nor the CoE Trafficking Convention obligates the State of destination to grant long-term and durable protection—such as a residence permit—to victims of human trafficking.

However, it is important to emphasise that, while the primary focus of the Trafficking Protocol can be identified in criminal law enforcement,[37] the CoE Trafficking Convention avowedly adheres to a human rights-oriented approach. Consistent with the explicit aim of expanding the scope of the Trafficking Protocol,[38] the CoE

[35] The international relevance of the crime of human trafficking is undisputed, although it is not necessarily a cross-border crime. In this regard, see the report of the United Nations Office on Drugs and Crime ('UNODC') (2009), p. 8.

[36] Gauci (2015), p. 181.

[37] Gauci (2015), with references at p. 175.

[38] Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005, Council of Europe Treaty Series No. 197, para. 200 (hereinafter, 'Explanatory Report of the CoE Trafficking Convention).

Trafficking Convention adds more detailed and richer provisions on the protection of victims. Among these provisions, Article 10 CoE Trafficking Convention on the identification of victims is of the utmost importance for the purposes of this paper. Specifically, this provision requires States to take appropriate measures to correctly identify victims and, importantly, not to remove from their territory a trafficked person or a person who may have been trafficked on the basis of 'reasonable grounds'.[39]

The obligation to identify the victims is the basis for all other protection obligations under the CoE Trafficking Convention. Indeed, only once a person has been identified as a potential or actual victim of human trafficking can he or she have access to all the other guarantees provided by the treaty, such as specific residence permits in the State of destination. In particular, this issue is addressed in Article 14 CoE Trafficking Convention, which establishes that States shall issue a renewable residence permit to victims if their stay is necessary due to a) their personal situation; or—*alternatively*—b) the need to allow their cooperation in criminal proceedings against their traffickers.

Unfortunately, given the wide margin of appreciation offered by Article 14, the CoE Trafficking Convention leaves States Parties free to grant residence permits only to those victims whose stay in a foreign State is necessary for the purposes of criminal prosecution.[40] Therefore, this provision does not fill the gaps already present in the EU law in this field, given that the Anti-trafficking Directive is silent on this issue and the Residence Permit Directive makes the granting of a residence permit conditional upon the victim's participation in trafficking-related investigations.[41] As a result, national legislation in this area also reflects the conditionality in long-term protection for victims and shows multiple inequalities among the EU Member States that have arisen in this field.[42]

Given that the protection obligations in specialized treaties are so scant, some years ago Gauci explored the viability of alternative legal channels to provide long-term protection to victims of human trafficking.[43] In particular, he argued that refugee law could offer less discretionary, less conditional and less limited protection than that provided by counter-trafficking instruments.[44] However, as he has recently highlighted, the practical relationship between international anti-trafficking law and refugee law is not as straightforward as this conclusion might suggest.[45] Some clarification in this regard is therefore now required.

[39] See the text of Art. 10 CoE Trafficking Convention: 'Each Party shall ensure 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'.

[40] Gauci (2015), p. 186.

[41] Ibidem.

[42] Schlintl and Sorrentino (2021).

[43] Gauci (2015).

[44] Ibidem.

[45] Gauci (2022).

2.2.2 The 'Troubled' Interplay Between Refugee Law and Counter-Trafficking Instruments

The applicability of the principle of non-refoulement to victims of human trafficking could be pivotal in the context of the externalization of borders. According to the 1951 Geneva Refugee Convention, this principle—provided by its Article 33(2)—applies to individuals who are to qualify as 'refugees' under the definition provided by Article 1(A), e.g. persons who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or unwilling to avail themselves of the protection of that country.

In the context of the anti-trafficking legal framework, the intersections with such a definition are not properly addressed by international treaties. The only references to refugee law are found in the saving clauses provided by Article 14 Trafficking Protocol and Article 40 CoE Trafficking Convention, which are limited to emphasizing that neither the Protocol nor the Convention affect the rights and obligations under the 1951 Geneva Convention and the 1967 Protocol relating to the Status of Refugees.

By contrast, both soft law and scholarship have specifically addressed the applicability of the principle of non-refoulement to victims of trafficking.

Firstly, scholars have stressed that the scope and content of the principle of non-refoulement have been significantly expanded in comparison to the intentions of the drafters of the 1951 Geneva Convention.[46] This is largely due to the numerous interactions between the human rights legal framework and refugee law. In particular, the ECtHR's case law on Article 3 ECHR has served as a basis for classifying as unlawful the removal of aliens towards States where they would be in danger of being subjected to torture, ill-treatment and degrading treatment,[47] thus aligning human rights law with the principle of non-refoulement as enshrined in the 1951 Geneva Convention.[48] Through a broad and teleological interpretation of Article 3 ECHR, the ECtHR has emphasised its fundamental value for democratic societies, which is also evidenced by the fact that no derogation therefrom is permitted under Article 15 ECHR.[49] According to this line of reasoning, it can be assumed *mutatis mutandis* that States Parties must prevent *any threat* to human dignity under the ECHR from possibly occurring in the case of deportation to other countries.

Such a human rights-based approach which led to the extension of the principle of non-refoulement has largely been endorsed by other legal systems. As an example, EU Directive 2011/95/EU ('Qualification Directive') reflects the ECtHR's case

[46] Lauterpacht and Bethlehem (2003), pp. 140 et seq.; Giuffré (2020), pp. 37 et seq.

[47] See the references to the case law *supra*, n. 12.

[48] With this interpretation of Art. 3, first adopted in the *Soering* case (*Soering v. United Kingdom*, Appl. No. 14038/88, judgment, 7 July 1989), the ECtHR has granted what it calls '*protection par ricochet*' (literally: 'indirect protection'). On this topic, Saccucci (2014).

[49] *Soering v. United Kingdom* (n. 48), para. 88.

law in this field by including a broad interpretation of the 'persecution' that must be suffered for the status of a refugee to be granted.[50]

Furthermore, it is undisputed that the extension of the principle of non-refoulement has developed beyond the European regional level, as the prohibition on the removal of aliens at risk of irreparable harm upon return has been broadly interpreted by other Courts and UN Treaty Bodies on international human rights as well. Based on this practice, the prohibition of refoulement applies to cases where the life, physical integrity, liberty and security of aliens would be threatened,[51] or where they would be at risk of being subjected to serious forms of discrimination, including gender-based violence and female genital mutilation.[52] Any return should also be prevented in cases where a person would live in degrading conditions or would not have access to appropriate medical treatment.[53]

As a result, a customary principle of non-refoulement has emerged, which now covers the risk of a person being returned to a country where he or she would face *any serious human rights violation*.[54] From this perspective, trafficking in human beings—and even more so retrafficking—can undoubtedly be brought under its scope.

Such an inclusion is also supported by soft law, that touches upon the unlawfulness of the refoulement of victims of human trafficking, although it addresses this issue with the primary aim of providing legislators, legal practitioners and the judiciary with harmonized practical guidance on the concrete application of the Geneva Convention in asylum procedures.

The UNHCR Guidelines relating to the application of Article 1(A) of the 1951 Geneva Convention and/or 1967 Protocol relating the Status of refugee specify that victims of human trafficking may only be qualified as refugees when *all* the requirements of Article 1(A) are satisfied.[55] In this regard, the UNHCR stressed that 'various *acts associated with trafficking*'—such as abduction, sexual enslavement, forced prostitution and forced labour, retrafficking or reprisals from traffickers—might amount to 'persecution' within the meaning of Article 1(A).[56] Given the weak 'might amount', the Guidelines—partially diverging from scholarship—do not

[50] Specifically, Art. 9 defines 'persecution' as a 'severe violation of basic and human rights', such as acts of physical or mental violence, including acts of sexual violence or legal, administrative, police, and/or judicial measures that are in themselves discriminatory or which are implemented in a discriminatory manner. It is then implicit that the EU legislator intended to adopt an interpretation of 'persecution' that goes beyond the limited scope of the concept of torture, inhuman and degrading treatment.

[51] Inter-American Court of Human Rights (IACtHR), *Pacheco Tineo Family v. Bolivia*, Judgment of 25 November 2013, para. 135.

[52] CEDAW Committee, General Recommendation No. 32, 14 November 2014, UN Doc. CEDAW/C/GC/32, para. 23. On the applicability of the principle of non-refoulement in cases of a risk of being subjected to sexual violence, see also CAT Committee, *Njamba and Balikosa v. Sweden*, No. 322/2007, 3 June 2010, UN Doc. CAT/C/44/D/322/2007, para. 9.5.

[53] Human Rights Committee, *C v. Australia*, No. 900/1999, 28 October 2022, UN Doc. CCPR/C/76/D/900/1999, para. 8.5; IACtHR, Advisory Opinion OC-21/14, 19 August 2014, para. 229.

[54] Lauterpacht and Bethlehem (2003), p. 163; Çali et al (2020), p. 356; UNHCR (2001), para. 16.

[55] UNHCR (2006), para. 6.

[56] Ibidem, para. 15. Emphasis added.

consider that human trafficking per se embodies a kind of 'persecution',[57] thus contributing to generating uncertainties on this topic.

In addition, other significant hurdles arise when it comes to the practical recognition of refugee status. In Europe, national authorities have different and divergent approaches to the link between 'persecution' and one or more of the grounds listed in Article 1(A) Geneva Convention, namely race, religion, nationality, membership of a particular social group or political opinion. Although trafficked persons could theoretically be targeted on any of these grounds,[58] the case law on asylum claims by trafficked persons is still not uniform in this regard.

Recently, the European Union Agency for Asylum (EUAA) has provided an analysis of the most relevant asylum claims in the EU Member States[59] and has demonstrated that it is common to grant refugee protection to women who have been sexually exploited. These cases are in line with the UNHCR Guidelines, which consider it possible to identify 'women' as 'members of a particular social group' within the meaning of the Geneva Convention in line with the UNHCR Guidelines.[60] However, the downside of this approach is that the ground of the membership of a particular social group may prove inadequate when the risk of sexual exploitation concerns *male* victims. Recently in Italy, for example, the tribunal of Bologna refused to grant refugee status to a Nigerian man who was at risk of sexual exploitation, but declared him eligible for subsidiary protection on the basis of the risk of inhuman treatment that he might suffer if repatriated.[61] Reading between the lines, it is clear that the judgment was influenced by the fact that men are hardly ever perceived as members of a social group that may be exposed to sexual exploitation.

Similarly, divergencies also arise when the protection of *potential victims* is at stake.[62] While some tribunals have demonstrated a great deal of responsiveness to trafficking dynamics that might occur in the case of deportation, others still require a high evidentiary threshold to grant protection to migrants at risk of exploitation.[63] It must be taken into account, however, that the lack of evidence within judicial proceedings may be due to the absence of adequate assistance to victims in the first phases of the asylum application. As the Organization for Security and Co-operation in Europe ('OSCE') underlined:

> The initial identification of victims of trafficking in human beings presents a number of barriers and difficulties, especially in the context of the first reception and identification procedures. Many victims do not recognize themselves as such, since they may be in a transportation, post-recruitment or pre-exploitation phase, and thus it is possible that no exploitation has occurred yet. Others, particularly undocumented migrants, may avoid identifying themselves to

[57] Gauci (2022), p. 301.
[58] UNHCR (2006); GRETA (2020).
[59] EUAA (2023).
[60] UNHCR (2006), para. 38.
[61] Tribunale di Bologna, N° 6946/2019, judgment of 8 April 2022.
[62] EUAA (2023).
[63] Ibidem, p. 4.

authorities due to fear of deportation, retaliation by their traffickers, or because their behaviour has been pre-conditioned by religious rituals or beliefs that have been imposed upon them. In some cases, the victim may have a relationship with the trafficker, or may fear stigmatization, especially if the abuse they have suffered was sexual in nature. To reflect these scenarios, a unified set of identification indicators should be developed and appropriately adjusted to the specific context of the reception procedures.[64]

It is not by chance that many countries have conducted targeted awareness-raising activities to improve the adequate identification of victims among migrants and to increase the chances that they can obtain the protection to which they may be entitled.[65] However, harmonization is still required to effectively fill the gaps in this area.

Overall, therefore, only little room is left for mandatory provisions aimed at the protection of victims. The ad hoc international legislation on human trafficking provides only minimum standards in this regard, as it is mainly dedicated to law enforcement purposes.[66] It would therefore be very appropriate to raise the level of protection through a human rights-based approach. Whether and how the ECtHR can actually contribute to this is the subject of the following analysis.

3 The Role of the European Court of Human Rights in the Legal Conundrum

3.1 The Relevance of the Externalization-Related Case Law of the ECtHR

In the context of the extreme complexity of the cross-border dynamics in Europe, the need to identify vulnerable groups of migrants is crucial. However, as highlighted by the above analysis, the detection and—consequently—the protection of trafficked persons as asylum seekers is still fragmentary and incomplete given the many shortcomings and loopholes in international anti-trafficking law, which are even more serious when it comes to the obligations *vis-à-vis* migrants. Moreover, European States have not yet paid renewed attention to the risks posed by the externalization of migration control and have continued to focus on curbing irregular migration. This, despite it being undisputed that externalization fails to provide adequate identification procedures for migrants that allow for the detection—and, thus, the protection—of victims of human trafficking.

This is clear from the externalization-related case law of the ECtHR that, despite not addressing specific trafficking issues, has often dealt with the *identification* of migrants. This last aspect has especially involved Article 4 Protocol 4 ECHR, which—according to settled case law, prohibits 'any measures compelling aliens,

[64] OSCE (2019), p. 12.
[65] Ibidem.
[66] Gauci (2022).

as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the *particular case* of *each individual alien* of the group [emphasis added]'.[67] It follows that a violation of this provision can only be ruled out if *every* alien has a *genuine* and *effective possibility* to submit arguments against his or her expulsion and if those arguments are examined in an appropriate manner by the authorities of the respondent State.[68]

In light of this principle, the ECtHR found violations of Article 4 Protocol 4 ECHR in cases of pushbacks and pullbacks at sea,[69] and it accelerated and simplified identification measures[70] and other mechanisms aimed at preventing irregular migration in the States Parties' territories.[71]

In some of these judgments, the Court has often had to address the question of the applicability of Article 4 Protocol 4 ECHR to conduct which has occurred *outside* the territory of the State in question. Indeed, up until the first decade of the 2000s, the majority of collective expulsion cases concerned persons who were located on the territory in question, with the consequence that the term 'expulsion' had been interpreted as removal from the respondent State's territory.[72] However, in the *Hirsi Jamaa* judgment, the Court noted for the first time that measures such as the interception of migrants on the high seas and their removal to countries of transit or origin had increasingly been used as tools for States to combat irregular immigration.[73] Therefore, in this context, the exclusion of the removal of migrants at sea from the scope of Article 4 of Protocol 4 would have rendered it ineffective in practice.[74]

With regard to this last aspect, the ECtHR emphasised that the applicability of the ECHR as a whole—and, thus, of Article 4 Protocol 4 ECHR—was founded on

[67] See, among others, ECtHR, *Čonka v. Belgium*, Appl. No. 51564/99, judgment, 5 February 2002, para. 59; *Berisha and Halijti v. the former Yugoslav Rebublic of Macedonia*, Appl. No. 18670/03, decision, 16 June 2005; *Dritsas v. Italy*, Appl. No. 2344/02, decision, 1 February 2011; *M.A. v. Cyprus*, Appl. No. 41872/10, judgment, 23 July 2013, para. 245. The Court has never departed from these principles, even though its recent case law has often proved to be inconsistent and based on a narrow interpretation of the prohibition of the collective expulsion of aliens, as also stems from the case *N.D. and N.T. v. Spain* (n. 11). Here, the ECtHR found no violation of Art. 4 Protocol 4, despite the applicants—who were attempting to cross the Melilla fence from Morocco—being turned back at the Spanish border by the *Guardia Civil* in the absence of any written procedure or identification before they could be expelled from the territory. The Court's reasoning explained that its decision was based on the applicants' conduct as they were required to make use of the official entry procedures in order to seek protection in Europe. In these circumstances, according to the ECtHR, the responsibility of Spain could be ruled out.

[68] *Khlaifia and Others* (n. 11), para. 248.

[69] *Hirsi Jamaa and others* (n. 1).

[70] See ECtHR, *Khlaifia v. Italy*, Appl. No. 16483/12, judgment, 1 September 2015, paras. 153–158. However, this ruling by the Second Section of the Court was overturned by the subsequent Grand Chamber judgment of 15 December 2016, cited above at n. 11.

[71] ECtHR, *J.A. and others v. Italy*, Appl. No. 21329/18, judgment, 30 March 2023, para. 115; *Shahzad v. Hungary*, Appl. No. 12625/17, judgment, 8 July 2021, paras. 60–68; *D.A. and Others v. Poland*, judgment, Appl. No. 51246/17, 8 July 2021, paras. 81–84; and *A.I. and Others v. Poland*, Appl. No. 39028/17, judgment, 30 June 2022, paras. 52–58.

[72] Among others, ECtHR, *Čonka v. Belgium* (n. 67); *Sultani v. France*, Appl. No. 45223/05, judgment, 20 September 2007; *Ghulami v. France*, Appl. No. 45302/05, decision, 7 April 2009.

[73] *Hirsi Jamaa and others v. Italy* (n. 1), paras. 176–177.

[74] Ibidem.

the establishment of the *jurisdiction* of the respondent State over possible human rights violations within the meaning of Article 1 ECHR. Moving from these premises, the Court stressed that when national authorities exercise their jurisdiction over the interceptions of migrants at sea and their subsequent removal to third countries, they could be held responsible for these acts even though they had taken place outside the territory of the State.[75]

The *Hirsi* case was only the first to highlight how jurisdictional determinations can be pivotal in the externalization context. Indeed, over the years, examining the jurisdictional link in cases related to migration control has often proved difficult, resulting in fragmented and fluctuating jurisprudence,[76] as will be further analysed below.[77]

However, it is of fundamental importance to take into account these more recent developments in this case law in order to examine the applicability of Article 4 of the ECHR to externalization disputes. Indeed, as can also be seen from the abovementioned case law on the protection *par ricochet* under Article 3 ECHR,[78] some of the principles laid down in this jurisprudence may also apply to future disputes relating to human trafficking.

3.2 Touchpoints between Trafficking-Related Positive Obligations Under Article 4 ECHR and Migration Issues

Trafficking in human beings has only been included within the scope of the ECHR for less than 15 years. Following a renewed responsiveness to 'contemporary slavery' in the initial years of the 2000s,[79] the ECtHR dealt with the first case concerning cross-border sexual exploitation in 2010, with its landmark judgment in *Rantsev v. Cyprus and Russia.*[80] Here, the Court concluded that trafficking in human beings fell per se under the scope of the prohibition of slavery, servitude and forced labour enshrined in Article 4 ECHR.[81] In the ECtHR's view, the absence of a specific provision in this regard could be overcome in light of the seriousness of the phenomenon of human trafficking, which could not be considered compatible with a democratic society and the values expounded in the ECHR. In reasoning in this way, it underlined that Article 4 ECHR enshrines basic values of democratic societies and, like Articles 2 and 3 ECHR, does not admit any derogation, thus placing great emphasis on the common character of these three provisions, all aimed at safeguarding human dignity.[82]

[75] Ibidem, para. 178.
[76] Mallory (2021).
[77] *Infra*, Sect. 3.4.
[78] See *supra*, Sect. 2.2.2.
[79] Scarpa (2018); Stoyanova (2017).
[80] ECtHR, *Rantsev v. Cyprus and Russia*, Appl. No. 25965/04, judgment, 7 January 2010.
[81] Ibidem, para. 292.
[82] De Sena (2019).

The broadening of the scope of the ECHR has led to a significant benefit for victims of modern-day slavery, that is the opportunity to submit individual claims before an international court, which is of the utmost importance in the context of externalization. This is not provided by specialized anti-trafficking treaties, since both the Trafficking Protocol and the CoE Trafficking Convention are not equipped with judicial bodies. Indeed, the Conference of the Parties and the Group of Experts on Action against Trafficking in Human Beings (GRETA), respectively entrusted with the monitoring of such treaties, are non-confrontational in nature and their functions do not contemplate an examination of submissions by individuals.[83]

Furthermore, the wide range of positive obligations elaborated by the ECtHR have notably contributed to linking the anti-trafficking international treaties with the victim-based perspective which is typical of the human rights language. Indeed, in elaborating specific anti-trafficking obligations under Article 4 ECHR in the *Rantsev* case,[84] the Court not only relied on the Trafficking Protocol and the CoE Trafficking Convention, but also on its case law on Articles 2 and 3 ECHR.[85] As a result, most of the positive obligations under Article 4 ECHR reflect the content of specific safeguards provided for victims of torture and degrading treatment or people exposed to threats to life. For all three provisions, the Court has identified both substantive and procedural obligations, including the obligation to put in place an appropriate legal and regulatory framework[86] to prosecute the authors of such conduct and to offer concrete and effective protection for the rights of actual and potential victims of trafficking.[87]

The *fil rouge* that links the right to life, the prohibition of torture and inhuman or degrading treatment and the prohibition of slavery, servitude and forced labour has particular importance for the sake of the investigation of new avenues for migration-related disputes. Indeed, when reading the case law on Articles 2 and 3 ECHR, it emerges that the application of the ECtHR to cases related to non-refoulement has notably expanded migrants' rights in light of an 'evolutive' interpretation of the ECHR. First and foremost, this is reflected by paragraph 2 of Article 33 Geneva Convention that applies in limited circumstances, while the ECHR admits an *absolute* prohibition of non-refoulement,[88] that is intertwined with the non-derogable and not balanceable nature of rights provided by Articles 2 and 3 ECHR. From this perspective, it must be noted that also Article 4(1) ECHR is included in the non-derogable provisions under Article 15 ECHR.

Similar to Articles 2 and 3 ECHR, Article 4 ECHR must be widely interpreted. This precisely emerges with regard to specific procedural obligations. As an example, when reading the *Rantsev* case, it emerges that the obligation to penalise and

[83] Forlati (2013).
[84] *Rantsev v. Cyprus and Russia* (n. 80), paras. 285 et seq.
[85] Stoyanova (2017), p. 321.
[86] ECtHR, *Siliadin v. France*, Appl. No. 73316/01, judgment, 26 July 2005.
[87] ECtHR, V.*C.L. and A.N. v. United Kingdom*, Appl. Nos. 77587/12 and 74603/12, judgment, 16 February 2021.
[88] GRETA (2020), para. 7.

prosecute traffickers also includes the duty to investigate situations of *potential* trafficking, independently of a complaint from the victim.[89] Once again, in analogy with torture or threat to life cases, criminal authorities must act on their own motion and proceed as soon as the matter has come to their attention.[90] Of course, as a counterbalance to this safeguard, positive obligations must be interpreted in such a way as not to 'impose an unbearable or excessive burden on the authorities'.[91] Moreover, as the Court itself clarified, '[f]or there to be a positive obligation to take concrete measures in a given case, it must be shown that the State authorities *were* or *should have been aware* of circumstances giving rise to a *reasonable suspicion that an individual was*, or was in real and immediate danger of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Council of Europe's anti-trafficking convention'.[92] In particular, States' responsibility only arises in cases in which, notwithstanding such an awareness, States fail to protect the victim.

It is understood, however, that the national authorities of the State Parties can only be said to be unaware of the victim status of eventual applicants if they do not *fraudulently* avoid examining the applicants' personal situation. It follows that these limits to Article 4 ECHR set out by the Court should not apply when the State itself puts in place measures that are precisely aimed at exposing trafficked or exploited persons at risk.

Obligations with such a wide scope might be of special interest if applied to abuses *vis-à-vis* migrants. Furthermore, in some cases, the Court has explicitly taken migration issues into account. Specifically, according to the ECtHR, the obligation to take *operational measures* to protect trafficked persons or potential victims of trafficking[93] may include the duty to adopt specific preventive measures by means of migration policies. Indeed, as the Court made clear in the *Rantsev* judgment, 'immigration rules must address relevant concerns relating to *encouragement*, *facilitation* or tolerance of *trafficking*'.[94]

An additional link between the positive obligations under Article 4 ECHR and migration measures can be found in the Court's case law on the right to effective remedies for trafficked persons who are willing to cooperate in criminal proceedings against their traffickers. As Stoyanova underlined, in these cases the obligation to protect victims also includes the duty not to repatriate them until they have accessed an effective remedy under Article 13 ECHR.[95] Furthermore, States must ensure that victims avail themselves of the substantive remedies to which they are entitled for breaches of Article 4 ECHR.[96]

[89] *Rantsev v. Cyprus and Russia* (n. 80), para. 288.
[90] The Court also refers, *mutatis mutandis*, to the case of *Paul and Audrey Edwards v. the United Kingdom*, Appl. No. 46477/99, judgment, 14 March 2002, para. 69.
[91] *V.C.L. and A.N. v. the United Kingdom* (n. 87), para. 154.
[92] *Rantsev v. Cyprus and Russia* (n. 80), para. 282. Emphasis added.
[93] ECtHR, *S.M. v. Croatia*, Appl. No. 60561/14, judgment, 25 June 2020, para. 305.
[94] *Rantsev v. Cyprus and Russia* (n. 80), para. 284. Emphasis added.
[95] Stoyanova (2017), pp. 407–414.
[96] Ibidem.

From this brief overview, at least two conclusions can be drawn.

First, it is clear that the States' positive obligations can be tested against a number of externalization practices that facilitate human trafficking and exacerbate the risk of revictimization. In this respect, the obligation to provide an adequate legal framework could be the basis for challenging the adoption of migration laws that fail to address migration-related risks arising from externalization, especially the risk of preventing victims from being identified. Indeed, as Stoyanova noted, '[t]he victim identification procedure is certainly part of the "regulatory framework" and if it fails to ensure "practical and effective protection" …, it might fail to meet the standards of states' positive obligations under Article 4 ECHR'.[97]

Accordingly, for example, pushbacks at sea—which can also be qualified as 'collective expulsions' within the meaning of Article 4 Protocol 4 ECHR—are clearly at odds with the positive obligation to protect victims and to prevent human trafficking under Article 4 ECHR. Moreover, this obligation could also be read in conjunction with Article 10 CoE Trafficking Convention, which, according to the Explanatory Report of the CoE Trafficking Convention, seeks to avoid aliens being immediately removed from the country before they can be identified as potential victims of human trafficking.[98]

It follows that state authorities that return potential victims on reasonable grounds before the identification process is complete violate both Article 10 of the Trafficking Convention and ECHR standards. According to this interpretation, all externalization measures that produce such an effect should be considered incompatible with Article 4 ECHR. Besides pushbacks and pullbacks at sea, accelerated or simplified identification procedures may also be found to be hardly compatible with the ECHR to the extent that they prevent the detection of vulnerabilities and an appropriate assessment of the personal situation of each migrant. Furthermore, the right to an effective remedy and, more generally, all rights of defence are frustrated when migrants are removed before they can participate in criminal proceedings against their traffickers.

Secondly, given the inextricable link between Article 2, Article 3 and Article 4 ECHR, it would be consistent with a systemic interpretation to apply the protection *par ricochet* also in relation to Article 4 ECHR. Indeed, according to the Court, the ECHR must be interpreted in light of the criteria of Article 31 of the Vienna Convention on the Law of Treaties.[99] In particular, the Court provided that 'the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article [31], [*omissis*]'.[100] Following these criteria, it is clear that Article 4 ECHR must be interpreted in accordance with its object and its purpose,[101] which is—ultimately—the broadest protection of fundamental human rights.

[97] Stoyanova (2020), p. 143. In this sense, also Schlintl and Sorrentino (2021), p. 58.

[98] Explanatory Report of the CoE Trafficking Convention (n. 38), para. 131.

[99] ECtHR, *Golder v. United Kingdom*, Appl. No. 4451/70, judgment, 21 February 1975, para. 30.

[100] Ibidem.

[101] Art. 31 Vienna Convention on the Law of Treaties, para. 1.

If the Court were to consider Article 4 ECHR as a legal parameter to qualify removals of aliens as unlawful, this would strengthen the specific anti-trafficking positive obligation in the framework of the ECHR. In this way, the ECtHR could contribute to filling the numerous gaps in protection for victims at the international and regional levels. In particular, it could help to shed light on the nexus between refugee law and the fight against trafficking in human beings, which remains unclear and fragmented at the international level.

However, despite these premises, the ECtHR has never concretely applied the protection *par ricochet* when the specific risk of trafficking or retrafficking has been examined under Article 4 ECHR. The reasons for this will emerge from an in-depth analysis of the jurisprudence, which is now required.

3.3 Emerging Trends in the ECtHR's Case Law Related to Refugee Status or Residence Permits for Trafficked Persons and Potential Victims

Although the legal framework of positive obligations under Article 4 ECHR is currently being developed, thus raising interesting issues for migration-related disputes, relevant case law thereon is still sparse compared to other provisions of the ECHR. Such a marked difference, which is even more pronounced in the context of migration-related claims, is clearly illustrated by a general comparison with the case law on the prohibition of inhuman and degrading treatment under Article 3. In addition, the many similarities between situations related to the dynamics of trafficking and inhuman treatment contribute to a significant narrowing of the demarcation lines between the scope of the two regulatory provisions. From this perspective, the approach of the ECtHR contributes to uncertainties in an already ambiguous legal framework. As a result, protection *par ricochet* of victims of human trafficking has so far often been considered as an issue related to Article 3 ECHR, even when the factual circumstances have resembled trafficking in human beings and the risks of retrafficking. This might explain why some victims of trafficking in the past have invoked Article 3 in some applications before the ECtHR.[102]

However, in the author's view, there are several reasons for bringing trafficking-related conduct under the umbrella of Article 4 ECHR instead of Article 3 ECHR. First, it would be more consistent and in line with the interpretation of the prohibition of slavery, servitude and forced labour, which is explicitly designed to combat serious phenomena of exploitation, such as modern slavery practices. Indeed, given that the contours of the international legal regime of modern slavery are still undefined,[103] it is necessary that international bodies and courts seek clarity and avoid confusion between the phenomena of the exploitation of the person—to which trafficking in persons can be attributed—and other serious human rights violations. It is not by chance, and in line with this perspective, that in its recent *S.M. v. Croatia* judgment the ECtHR devoted a lengthy part of its reasoning to explain why human

[102] As an example, ECtHR, *Idemugia v. France*, Appl. No. 4125/11, decision, 27 March 2012.
[103] Scarpa (2018), p. 6.

trafficking falls within the scope of Article 4 ECHR, and it cannot be excluded that it may raise some issues that also affect other provisions of the ECHR.[104]

Second, by means of a complaint based on Article 4 ECHR, the applicant could specifically challenge the conduct of the respondent State that does not grant him or her the *specific* status of a victim of human trafficking. However, when relying on Article 4 ECHR, it is understood that the applicant must provide evidence of a *specific* risk of being trafficked or retrafficked in the event of removal. In this respect, it is plausible that these risks have so far never been invoked in externalization-related disputes because the international legal framework is still less comprehensive than that prohibiting torture and is therefore less researched.

That Article 4 can provide an appropriate benchmark for complaints is evidenced by the number of applications for the removal of victims of human trafficking that have already invoked this provision. These cases deserve particular attention as they reflect the 'unexpressed' potential of Article 4 ECHR.

A first strand of these cases concerns non-EU nationals who had challenged expulsion orders before the Court, but then obtained a residence permit in one of the EU Member States while their application was still pending. Two of these cases, namely *L.R. v. United Kingdom*[105] and *O.G.O. v. United Kingdom*,[106] were dismissed. They were factually similar, as both applicants had invoked the risk of being retrafficked in the case of removal to their respective countries of origin (namely Albania and Nigeria). In these cases, the ECtHR stressed that the applicants had lost the 'quality of a victim' as required by Article 34 ECHR, since they had been granted the status of a refugee during the course of proceedings before the Court. Thus, any violation by the respondent States could not be assessed.

Despite the many similarities with these two cases, the Court approached the case of *L.E. v. Greece* somewhat differently.[107] This case had been submitted by a Nigerian woman forced into prostitution in Greece. The applicant, who had arrived in Europe due to a promise of work in nightclubs and bars, had managed to escape and denounce her trafficker, and then to apply for asylum in Greece. However, she complained that she had to wait more than nine months for the authorities to grant her the status of a victim of human trafficking, thus alleging a failure to fulfil positive obligations under Article 4 ECHR. In upholding the applicant's complaints, the Court held Greece responsible, but did not specifically address the issue of the eventual victim's *refoulement* to her country of origin, as she had already obtained a residence permit in the United Kingdom. As a result, the violation of Article 4 ECHR could only be assessed in light of the multiple delays and shortcomings in criminal

[104] *S.M. v. Croatia* (n. 93), paras. 276–303.
[105] ECtHR, *L.R. v. United Kingdom*, Appl. No. 49113/09, decision, 14 June 2011.
[106] ECtHR, *O.G.O. v. United Kingdom*, Appl. No. 13950/12, decision, 18 February 2014.
[107] ECtHR, *L.E. v. Greece*, Appl. No. 71545/12, judgment, 21 January 2016.

proceedings against the applicant's trafficker.[108] Interestingly, however, the Court did not exclude this hypothesis.

Even more interesting aspects emerge from the applications which have been declared *inadmissible.*[109]

In *F.A. v. United Kingdom*[110] the applicant was a sexually exploited woman who invoked the right not to be repatriated to Ghana, her country of origin. She had challenged an expulsion order under both Article 3 and Article 4 ECHR as she needed to have access to necessary medical treatment for HIV which she had contracted in the United Kingdom as a direct result of trafficking and sexual exploitation. In particular, she complained that her expulsion would have put her at risk of being subjected to inhuman and degrading treatment, given the impossibility to access healthcare in her country, and to be subjected to retrafficking in Ghana. Once again, the Court could not engage the applicability of Article 4 ECHR for refoulement cases, but only due to non-compliance with the procedural rules of the Court: the applicant had not fulfilled the requirement of the exhaustion of domestic remedies under Article 35(1) ECHR.

Similarly, in *V.F. v. France*[111] the Court declared that the application of a Nigerian woman forced into prostitution was inadmissible. However, the reason for the inadmissibility was the lack of concrete evidence that the applicant had arrived irregularly in Europe and had then been caught up in the web of sexual exploitation. In particular, the Court found that the information provided by the applicant was not sufficient to prove that the police knew or should have known that the applicant was the victim of a human trafficking network when they issued the deportation order.

However, despite this outcome, the judgment raised interesting issues in light of some assessments of the ECtHR. Indeed, the Court stated that it was 'aware of the scale of the trafficking of Nigerian women in France and the difficulties experienced by these women in reporting to the authorities with a view to obtaining protection'[112] and that 'the question of the extraterritorial application of Article 4 of the Convention to this aspect of the complaint could arise, particularly in view of the *non-derogable* and *absolute nature* of that provision'.[113]

In reading these lines, it is evident that here the Court not only contemplated the application of protection *par ricochet* under Article 4 ECHR, but also adopted similar criteria as those elaborated with regard to the expulsion of aliens under Article 3 ECHR. Indeed, according to this case law, the assessment of whether there are

[108] Precisely due to this aspect, *L.E. v. Greece* raises many interesting issues about the relationship between Art. 4 and Art. 6 § 1 (the right to a fair trial within a reasonable period of time) and Art. 13 (the right to an effective remedy) of the Convention. In fact, the Court held that the defendant State had also violated these provisions, on the one hand, because of the excessive length of the proceedings, and, on the other, because of the absence in domestic law of a remedy by which the applicant could have enforced her right to a hearing within a reasonable period of time.

[109] The list of these cases is available online on the website www.echr.coe.int. In particular, see the Factsheet of the ECtHR 'Trafficking in human beings', updated to June 2020.

[110] ECtHR, *F.A. v. United Kingdom*, Appl. No. 20658/11, decision, 10 September 2013.

[111] ECtHR, *V.F. v. France*, Appl. No. 7196/10, decision, 29 November 2011.

[112] *V.F. v. France* (n. 111), section c), lett. i).

[113] *V.F. v. France* (n. 111), section c), lett. ii). Emphasis added.

substantial grounds for believing that the applicant faces such a real risk of being subjected to torture or inhuman or degrading treatment inevitably requires the Court to examine the conditions in the destination country in the light of the standards of Article 3 of the Convention.[114] Similarly, in *V.F. v. France* the Court combined the assessment of the *personal situation* of Ms V.F. under Article 4 ECHR with the assessment of the *situation in the applicant's country of origin*.

Still, there are several aspects of this decision that are puzzling. First, it is highly questionable what the Court found about the applicant's likelihood of being subjected to sexual exploitation in Nigeria. Indeed, the Court stressed that such a risk was limited given that the Nigerian legislation to prevent prostitution and to combat trafficking networks had made considerable progress, although it had not fully achieved its aims.[115] In 2019, Human Rights Watch reported that, despite the lack of comprehensive data on human trafficking within Nigeria, the country remains one of the countries with the largest number of trafficking victims abroad, particularly in Europe.[116] Moreover, it is well known that, if repatriated, Nigerian women are easily subjected to retrafficking, social stigmatization and marginalization.[117]

It therefore seems that the Court tends to adopt a restrictive approach when the risk of trafficking or retrafficking is under scrutiny. This is also reflected in the *high threshold* that is required to prove the status of victimhood or, alternatively, of other circumstances related to the personal situations of victims.

3.4 Strengths and Limitations of the Applicability of Article 4 ECHR to the Unlawful Refoulement of Victims of Human Trafficking

The overview of the emerging trends from this jurisprudence highlights both the strengths and the limitations of the prohibition of trafficking in human beings within the ECHR. With regard to the first profile, it becomes clear that Article 4 ECHR provides a legal parameter that can be invoked in the context of migration-related—and, consequently, externalization-related—disputes.

On the other hand, however, it is necessary to be aware of the several limitations in the practical application of this provision. The case law reveals the strict requirements of the Court for the application of protection *par ricochet* in this field, especially with regard to the high threshold for evidence of the risks to which trafficked persons or potential victims may be exposed. However, this does not only presuppose that effective legal assistance may hardly ever be accessible to victims of human trafficking—given their poverty, precariousness and vulnerability to exploitation.[118] Indeed, it is also essential for victims to be fully aware of their status as victims in order to come forward, disclose and share evidence of their personal

[114] Among others, ECtHR, *Mamatkulov and Askarov v. Turkey*, Appl. Nos. 46827/99 and 46951/99, judgment, 4 February 2005, para. 67; *F.G. v. Sweden*, Appl. No. 43611/11, judgment, 23 March 2016.
[115] *V.F. v. France* (n. 111), section c), lett. ii).
[116] Human Rights Watch (2019), p. 22.
[117] IOM (2017), p. 9.
[118] See *supra*, Sect. 2.1.

situation. In light of the above, it is clear that such conditions are frustrated by externalization practices.

Beyond these procedural aspects, however, the potential of Article 4 ECHR in the context of externalization remains considerable. Indeed, from a general perspective, such litigation before the ECtHR would make it possible to overcome some legal hurdles arising from the application of other international law rules, *in primis* refugee law. First and foremost, the protection ultimately afforded to migrants by the ECHR is clearly structurally broader than that provided by the Geneva Convention, as it does not depend on any of the grounds listed in the definition of a 'refugee'. Additionally, as Gauci points out, even provided that 'trafficking' is understood as 'persecution' within the meaning of Article 1(F) Geneva Convention, it is necessary for the exploitative conduct to have taken place *in the country of origin* in order for refugee protection to be granted.[119] Indeed, the definition of a 'refugee' presupposes that protection is sought against the asylum seeker's country of origin.[120]

Gauci also underlines that, in trafficking-related claims, more often the question arises as to *where* the persecution took place, since '[t]rafficking is a persecutory process composed of various parts, often occurring across multiple international boundaries and over a period of time that may take place in different locations'.[121]

In the ECHR legal framework, such effects could easily be overcome, as the positive obligation to protect victims of human rights violations is triggered *whenever* a State Party exposes individuals to a foreseeable violation in another country, whether or not it is the country of origin.[122] The lesson from the often mentioned *Rantsev v. Cyprus and Russia* judgment shows that the responsibility of States can be assessed in light of the feasibility of taking measures to protect victims of human trafficking within the limits of their own territorial sovereignty.[123] Specifically, in this case, although the violation of the right to life of the applicant's daughter—a Russian woman, Ms Rantseva—had taken place entirely in Cyprus, the Court found that Russia had *jurisdiction* over the applicant's claims.

Since the obligation to identify victims is a corollary of the obligation to protect trafficked persons or people being at risk of being trafficked, it follows that the ECHR Member States have to identify and ensure assistance to them *once [these] migrants are within their jurisdiction*.[124]

Thus, as with *any* case involving the externalization of borders before the ECtHR, the outcome of the appeal hinges on the ascertainment of jurisdiction. This means that the interpretation of this concept from the ECtHR also plays a crucial role in trafficking-related disputes.

As is well known, although 'jurisdiction' within the meaning of Article 1 ECHR is essentially territorial, the ECtHR has resorted to extraterritorial jurisdiction in

[119] Gauci (2022), p. 301.
[120] See Sect. 2.2.2.
[121] Gauci (2022), p. 301.
[122] *Soering v. United Kingdom* (n. 48).
[123] *Rantsev v. Cyprus and Russia* (n. 80), para. 208.
[124] Stoyanova (2020), p. 138.

several cases where a special justification was found in the States' control 'over an area'[125] or 'over persons'.[126] However, these models of jurisdiction—known, respectively, as *spatial* and *personal*—are often applied together and overlap. In addition, more recently, some international law scholars have envisaged that—to a limited extent—the ECtHR may even resort to a *third* model of extraterritorial jurisdiction, which applies to States' activities that, although carried out on their territory, have an 'impact' on the human rights of individuals abroad.[127] This model—which presupposes an even broader interpretation of the concept of jurisdiction—is mainly known in the literature as 'functional' jurisdiction[128] or jurisdiction with 'extraterritorial effects'.[129] While such a model of jurisdiction seems to have been repeatedly endorsed by some of the UN treaty-monitoring bodies,[130] the ECtHR is still cautious on this point. Indeed, despite timid openness towards this model in some specific cases,[131] the ECtHR has never explicitly endorsed nor rejected this interpretation of Article 1 ECHR.[132]

Against this background, it is difficult for scholars to reconstruct a coherent conceptualization underpinning the jurisdictional threshold under Article 1 ECHR. Despite very valuable attempts to systematise this issue,[133] in practice the jurisprudential criteria still seem to be tailor-made for case-by-case solutions, thereby creating many uncertainties for victims of violations.[134] From this perspective, eventual submissions under Article 4 ECHR would not be subject to any exception. It follows that some future developments on this issue, which may result from cases that are

[125] ECtHR, *Loizidou v. Turkey*, Appl. No. 15318/89, judgment, 23 March 1995; *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, judgment, 8 July 2004; *Catan and Others v. Moldova and Russia* [GC], Appl. Nos. 43370/04, 8252/05 and 18454/06, judgment, 19 October 2012.

[126] ECtHR, *Issa and Others v. Turkey*, Appl. No. 31821/96, judgment, 16 November 2004; *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07, 7 July 2011.

[127] Mauri (2019).

[128] Moreno-Lax (2020); Giuffré (2021); Milanovic (2020); Milanovic (2021).

[129] Stoyanova (2023).

[130] Human Rights Committee, *A.S. and others v. Italy and Malta*, Comm. No. 3043/2017, Decision (Malta, CCPR/C/130/D/3042/2017) and Views (Italy, CCPR/C/128/D/3043/2017) of 27 January 2021 [in this regard, see also the comment on this topic, Minervini (2021)]; Committee on the Rights of the Child, *L.H. and Others v. France*, CRC/C/85/D/79/2019–CRC/C/85/D/109/2019, 2 November 2020, and *F.B. and Others v. France*, CRC/C/86/D/R.77/2019, 4 February 2021.

[131] See, for example, the case of ECtHR, *Kebe v. Ukraine*, Appl. No. 12552/12, judgment, 12 January 2017, also mentioned by Mauri (2019), p. 259. This case concerned two Eritrean nationals and an Ethiopian national on board a Maltese-flagged commercial vessel in the port of Mykolayiv. Here, the applicants requested asylum but the Ukrainian coastguards prevented them from disembarking and entering the country. Interestingly, here the ECtHR found that the jurisdictional link was not the presence of the Maltese-flagged ship in Ukrainian territory (according to the model of 'territorial' jurisdiction), but, rather, the fact that Ukraine was deemed to be in a position to decide whether or not to authorise the applicants' entry. Such an interpretation of jurisdiction appears to be much more akin to a 'functional' model of jurisdiction.

[132] Mauri (2019).

[133] Stoyanova (2023), pp. 219 et seq.

[134] Çali et al. (n. 54).

still pending before the Court,[135] would also be highly relevant to the litigation here at stake.

4 Conclusions

International and European legal standards on the protection of trafficked persons and potential victims in the context of migration need to be urgently reinforced and harmonized. Many loopholes in and deficiencies of anti-trafficking international law have contributed to uncertainties and ambiguities, such as the right of trafficked persons and potential victims to be granted the status of a refugee or, at least, to be given a special kind of long-term protection in the States where they may seek asylum.

The strengthening of such a legal framework is all the more necessary in the light of the externalization of migration control, which undermines the existing and weak obligations of States to protect victims and even increases the risks and vulnerabilities of migrants. While the European political agenda formally intends to implement concrete action against trafficking in human beings, specific trafficking-related risks for migrants have not yet received sufficient attention from institutions in the most recent migration policies. European States still do not engage in a comprehensive approach that could shed light on the negative impact of externalization on victims.

Against this background, the ECtHR can play an important part in reconciling anti-trafficking international law with human rights law. Since trafficking in human beings has been included within the scope of Article 4 ECHR, the ECtHR, by means of a jurisprudential interpretation of positive obligations under Article 4 ECHR, could strengthen the legal framework of positive obligations related to human trafficking and deliver judgments that have to be implemented by Council of Europe States Parties. A different approach by the Court to specific protection measures in the area of migration control would be valuable, as these obligations are the source of most of the uncertainty and ambiguity among European states. Despite the limitations of applying Article 4 ECHR in this area, this provision has many strengths in that it could provide victims with broader protection compared to refugee law. In addition, increasing interaction between Article 4 ECHR and the Trafficking Convention has the potential to clarify and raise international standards in terms of victim identification and assistance.[136]

Although the ECtHR has not yet applied the protection *par ricochet* under Article 4 ECHR in its past jurisprudence on externalization, this article has shown that such an outcome would be consistent with the purpose and characteristics of Article 4 ECHR and with the positive obligations prescribed for trafficking cases as well. Indeed, in the past, migration-related claims brought by trafficked persons have never addressed such issues, but only because of the particular circumstances and contingencies of these cases. Increased awareness of the potential of Article 4

[135] As an example, *S.S. and Others v. Italy*, Appl. No. 21660/18.

[136] Stoyanova (2020).

ECHR could thus widen the avenues of litigation for victims in the context of the externalization of borders.

Funding Open access funding provided by Università degli Studi di Firenze within the CRUI-CARE Agreement.

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