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The Securitisation of Migration: Leaving Protection Behind?
The "hotspot approach" and the identification of potential victims of human trafficking

Noemi Magugliani

August 2018

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THE SECURITISATION OF MIGRATION: LEAVING PROTECTION BEHIND?

The "Hotspot Approach" and the Identification of Potential Victims of Human Trafficking

*Noemi Magugliani**

Abstract:

Recent developments in the European Union (EU) policy on the management of migratory flows, including the adoption of the so-called "hotspot approach" in Italy and Greece, have resulted in the implementation of a strategy that is increasingly and, it is argued, almost exclusively security-based. The inability or unwillingness to build mechanisms that, without setting aside the legitimate interests of the EU and its Member States, would have ensured appropriate human rights safeguards, as well as respect for international legal obligations, has had massive effects on the safety and well-being of migrants and of society as a whole. The implementation of a security-based policy has had a particularly significant impact on vulnerable categories of migrants, including victims of human trafficking. In fact, and despite the fact that connections between human rights and the fight against trafficking are multiple and well-established, States have consistently chosen to deal with trafficking as an immigration issue or as a matter of crime or public order. Victims of human trafficking are nonetheless still entitled to the full range of human rights but, in order to access those rights and therefore protection, a key aspect is the process of identification, which ought to be performed as soon as possible including in the context of the hotspots. The "hotspot approach" in its present form, deeply entrenched in the so-called Dublin system, however, cannot be considered in line with a human rights-based approach, and the broader security-based policy that has been implemented at European and national level has undermined the availability and accessibility of protection mechanisms for victims of human trafficking.

Keywords: human trafficking, international protection, European Union, migration policy

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ACRONYMS AND ABBREVIATIONS

AS	Greek Asylum Service
CARA	Reception Centre for Asylum Seekers (Centro di Accoglienza per i Richiedenti Asilo)
CAS	Temporary Reception Centres (Centri di Accoglienza Straordinaria)
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CoE	Council of Europe
CPA	Centre of First Assistance (Centri di Prima Assistenza)
CPSA	First Aid and Reception Centres (Centri di Primo Soccorso e Accoglienza)
CPT	European Committee for the Prevention of Torture
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EuroDac	European Dactyloscopy
Europol	EU Agency for Law Enforcement Cooperation
EURTF	EU Regional Task Force
FRA	EU Fundamental Rights Agency
Frontex	European Border and Coast Guard Agency
FRS	Greek First Reception Service
GRETA	Group of Experts Against Trafficking in Human Beings
ILO	International Labour Organisation
IOM	International Organization for Migration
NAP	National Action Plan
NRM	National Referral Mechanism
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
RIC	Greek Reception and Identification Centre
RIS	Greek Reception and Identification Service
SAR	Search and Rescue
SOPs	Standard Operating Procedures
SPRAR	Protection System for Refugees and Asylum Seekers (Sistema di Protezione per Richiedenti Asilo e Rifugiati)
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union THB Trafficking in Human Beings
UASC	Unaccompanied and Separated Children
UN	United Nations
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNODC	UN Office on Drugs and Crime

A. INTRODUCTION

Recent developments in the European Union (EU) policy on the management of migratory flows, among which the adoption of the so-called "hotspot approach" in Italy and Greece, have resulted in the implementation of a strategy that is increasingly and, it is argued, almost exclusively security-based. According to existing scholarly literature, the construction of migration as a security concern in the EU is not a new process, and the elaboration of the concept has been particularly evident in the EU migration and asylum policy.[1] Indeed, many have legitimately argued that the roots of this practice are to be found in the making of the post-Amsterdam EU: while increasing liberalisation of movement for citizens of Member States, the Maastricht Treaty of 1993 and the Schengen Convention of 1995 were based on restrictive approaches to the free movement of citizens of third countries.[2] Subsequent instruments and policy, from the common policy on asylum and immigration to the adoption of the Dublin III Regulation, the "hotspot approach" and the 2016 deal with Turkey,[3] have followed this direction and strengthened the process. "Fortress Europe", therefore, does not represent a new answer to the current migration phenomenon, but rather a long-term policy that dates back to the 1990s.[4] Nonetheless, the level of securitisation that has been reached since the beginning of the European migration *crisis* is unprecedented. By framing immigrants, asylum seekers and refugees as a security concern and as detainable subjects,[5] the EU made a deliberate choice of dismissing an approach which could have conceived asylum and immigration, whichever the so-called root causes, as human rights questions whose management would have required human rights instruments. In securing and strengthening its external walls, the EU has created a framework in which its Member States, as well as its own institutions, were able to prioritise political and economic interests over due diligence, protection and compliance with international law. The inability or unwillingness to build mechanisms that, without setting aside the legitimate interests of the EU and its Member States, would have ensured appropriate human rights safeguards, as well as respect for international legal obligations, has had massive effects on the safety and wellbeing of immigrants and of society as a whole. The implementation of a security-based policy has had a particularly significant impact on vulnerable categories of migrants, including victims of human trafficking.[6]

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[1] D. Bigo 'Europe passoire, Europe fortresse. La sécurisation et humanitarisation de l'immigration', in A. Rea (ed.) *Immigration et racisme en Europe* (Brussels Complexe, 1998); E. Guild, 'International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001' (2003) 8(3) *European Foreign Affairs Review* 331-46; J. Huysmans, 'The European Union and the Securitization of Migration' (2000) 38(5) *Journal of Common Market Studies* 751-77; S. Léonard, 'EU Border Security and Migration into the European Union: FRONTEX and Securitisation through Practices' (2010) 19(2) *European Security* 231-54.

[2] D. Kostakopoulou, 'The "Protective Union": Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe' (2000) 38(3) *Journal of Common Market Studies* 497-518; V. Guiraudon, 'European Integration and Migration Policy: Vertical Policymaking as Venue Shopping' (2000) *Journal of Common Market Studies* 251-71; and Huysmans, ibid.

[3] *EU-Turkey Statement of 18 March 2016*, European Council Press Release and Statements 144/16, www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (last accessed 13 August 2018).

[4] M. Ugur, 'Freedom of Movement vs. Exclusion: A Reinterpretation of the "Insider"-"Outsider" Divide in the European Union' (1995) 29(4) *International Migration Review* 964-99; and Léonard, 'EU Border Security' (n.1).

[5] C. Costello and M. Mouzourakis, 'EU Law and the Detainability of Asylum-Seekers' (2016) 35 *Refugee Survey Quarterly* 47-73.

[6] According to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants of international protection (recast), and building on Council Directive 2003/9/EC of 27 January 2003, Council Directive 2004/83/EC of 29 April 2004 and Council Directive 2005/85/EC of 1 December 2005, victims of human trafficking are recognised as particularly vulnerable subjects which are in need of specific procedural and substantial safeguards, together with "minors, unaccompanied

An agreed definition of trafficking was incorporated into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime. The definition that has been agreed upon is the following:

> "'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."[7]

The connections between human rights and the fight against trafficking are multiple and well established. Nonetheless, States have consistently chosen to deal with trafficking as an immigration issue or as a matter of crime or public order. Victims of human trafficking, however, are still entitled to the full range of human rights. In order to access those rights and therefore protection, a key aspect is the process of identification, which represents one of the most problematic challenges, but which also is a fundamental step in the broader assistance and support mechanism. In fact, if victims are not identified, they might face removal, detention, re-trafficking and other serious forms of harm.[8] In looking at legal and practical hurdles in this specific process, the policy framework and the Standard Operating Procedures (SOPs) of the Italian and Greek hotspots will be analysed. While the identification of migrants reaching the hotspots is considered a primary concern in terms of safety, through recognition, fingerprinting and establishment of the country of origin, the identification of migrants in terms of protection, in the present case that is to say as potential victims of human trafficking, is given a secondary role. Indeed, a recent report on Italy of the Group of Experts on Action against Trafficking in Human Beings (GRETA), which monitors the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings,[9] highlights worrying shortcomings in the identification and referral to assistance of victims of trafficking among newly arriving migrants, as well as in the compliance with the *non-refoulement* principle,[10] and similarly a report of the Greek Ombudsman on reception conditions in the hotspots has stressed how "despite the fact that the existing laws include a provision on special care for [vulnerable persons], it is proven that [their] implementation is particularly difficult, due to the significant shortcomings in the screening procedures, in combination with the inadequacy of suitable facilities".[11]

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minors, disabled people, elderly people, pregnant women, single parents with minor children, […] persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence". *See* Directive 2013/33/EU, Article 21.

[7] *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* (2000), Article 3.

[8] See: D. F. Haynes, 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers', (2004) 26(2) *Human Rights Quarterly* 221-72; A. Arhin, 'A Diaspora Approach to Understanding Human Trafficking for Labor Exploitation' (2016) 2(1) *Journal of Human Trafficking* 78-98; and D. Davy, 'Understanding the Support Needs of Human-Trafficking Victims: A Review of Three Human-Trafficking Program Evaluations' (2015) 1(4) *Journal of Human Trafficking* 318-37.

[9] Council of Europe, *Convention on Action Against Trafficking in Human Beings* (2008), Vol CETS No.197. Hereinafter 'CoE Trafficking Convention'.

[10] GRETA, *Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings* (2017) GRETA(2016)29.

[11] Greek Ombudsman, 'Migration Flows and Refugee Protection. Administrative Challenges and Human Rights Issues' (2017) p.20.

The question is whether the security-based "hotspot approach" adopted by the EU and by individual Member States, entrenched in the so-called Dublin system and underpinned by the idea that the movement of people across borders represents a non-military threat to State security, is the most appropriate tool to deal with the current migration phenomenon and, if that was the case – or at least the only politically viable response – whether such policy can be implemented in a way that is not detrimental to the protection of the rights of the individual. The first section of the paper will analyse the political and legal character of the "hotspot approach". Part 1 will examine the process that led to the adoption of the approach at European level, as well as the legal basis for its creation and implementation together with its connections with other tools of migration management, among which the common asylum policy and the main asylum legislation directives. The second part will provide both an overview and a comparison between the state of play of the hotspots in Italy and Greece, drawing on national legal frameworks and policy rather than on practice. In particular, the main differences in backgrounds, legal basis and procedures between the Italian and Greek contexts will be highlighted and reflections on the impact of such differences in the implementation of the approach will be provided. Such introduction is considered to be crucial in the understanding of the nature and scope of the "hotspot approach" as well as in providing a comprehensive picture for the evaluation of its consequences on the protection of, and attention to, people with vulnerabilities.

The second section will look more closely at the issue of trafficking and at the identification of potential victims in the reception centres. The third part will outline the international and national frameworks with respect to the identification of victims of human trafficking and will explore State practice in the hotspots with the objective to assess legal and practical challenges in the compliance with relevant international and national obligations. The last, conclusive part will look beyond identification and towards protection, based on the belief that the two separate obligations to identify and to protect are closely linked: Indeed, while without identification there is no access to protection, the absence of protection clearly frustrates identification efforts. This last section aims in particular at assessing whether the functioning of the hotspots can be considered in line with a human rights-based approach and to what extent the security-based policy that has been implemented at European and national level has undermined the availability and accessibility of protection mechanisms for victims of human trafficking.

B. THE "HOTSPOT APPROACH": A EUROPEAN RESPONSE TO THE MIGRATION CRISIS

1. Shifting Perspectives – From a Migration Crisis to a Policy Crisis: The Adoption of the "Hotspot Approach"

In recent years, the discourse on migration and asylum has been central to the debate in and around the European Union's structure and policies. Indeed, the topic is highly relevant in the agenda of the EU given the increased pressure on its borders, particularly after 2014,[12] and the consequent tensions between

[12] Asylum applications in the EU/EFTA per year and main countries of origin and destination (2011-2017). 2011: 341,795 (Afghanistan 30,245, Russia 18,955, Pakistan 16,475; France 57,330, Germany 53,235, Italy 40,315); 2012: 373,545 (Afghanistan 30,410, Syria 25,665, Russia 25,020; Germany 77,485, France 61,440, Sweden 43,885); 2013: 464,500 (Syria 52,750, Russia 42,275, Afghanistan 27,845; Germany 126,705, France 66,265, Sweden 54,270); 2014: 662,175 (Syria 127,890, Eritrea 46,750, Afghanistan 42,735; Germany 202,645, Sweden 81,180, Italy 64,625); 2015: 1,393,285 (Syria 383,730, Afghanistan 196,205, Iraq 130,345; Germany 476,620, Hungary 177,135, Sweden 162,550); 2016: 1,012,660 (Syria 285,285, Afghanistan 152,745, Iraq 109,070; Germany 612,500, Italy 85,050, France 61,830); 2017: 727,805 (Syria

Member States on how to respond to the challenges deriving from such phenomenon.[13] The current border pressure, which is characterised by a mixed flow of asylum seekers and so called *economic migrants*, a distinction which is omnipresent in the public debate but on which there is little consensus in literature, has in fact dismantled an already fragile harmony on migration policy within the European institutions, particularly in the European Council. A number of border States, among which Italy and Greece, have understandably raised concerns on the disproportionate inflow of migrants reaching their borders due to both their geographical location and the lack of a comprehensive, forward-looking management plan at European level. The current Common European Asylum System (CEAS) is in fact built on a framework which does not allow for an automatic mechanism of burden-sharing when it comes to State responsibility with respect to international protection: According to Regulation (EU) No 604/2013, "[w]here it is established […] that an 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".[14]

After various early attempts to create an efficient, structured and long-term tool of responsibility-sharing failed,[15] the European Commission proposed in 2015 a different approach to assist frontline States. The "hotspot approach", whose roots can be found in the 2015 European Agenda on Migration,[16] was designed to contribute to the implementation of an emergency relocation mechanism to assist Italy and Greece and was proposed by the European Commission having regard to Article 78(3) TFEU. Adopted in September 2015 through Council Decisions 2015/1523 and 2015/1601,[17] the approach envisaged the creation of reception centres supported both financially and technically by the EU's agencies, although it was clear that the responsibility of patrolling borders and processing asylum applications would have still been on Member States. The European Asylum Support Office (EASO), Frontex, Europol, Eurojust, and the EU Fundamental Rights Agency (FRA) were called to assist the work of Member States in the identification and registration of asylum seekers, in the proper evaluation of asylum applications, as well as in the coordination of returns and in the investigations aimed at dismantling smuggling and trafficking networks. In addition, the approach was expected to contribute to the implementation of a relocation scheme that would have allowed a transfer of the responsibility to process a set number of applications to other Member States due to the consideration that in 2014, 72% of all asylum applications lodged in the EU were dealt with by only five Member States. As of 2018, the "hotspot approach" is structured and supported by the EU as follows: In Italy, five hotspots have been established in Lampedusa, Messina, Pozzallo, Taranto and Trapani, for a total reception capacity of

108,000, Iraq 52,560, Afghanistan 49,055; Germany 222,625, Italy 128,855, France 98,635). See: Migration Policy Institute, *Moving Europe Beyond Crisis* www.migrationpolicy.org/ (last accessed 13 August 2018).

[13] See: F. Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (2016) 38(3) *Journal of European Integration* 311-25; P. Biondi, 'Human Security and External Burden-sharing: The European Approach to Refugee Protection between Past and Present' (2015) 20(2) *International Journal of Human Rights* 208-22; and E. Karageorgiou, 'Solidarity and Sharing in the Common European Asylum System: The Case of Syrian Refugees' (2016) 17(2) *European Politics and Society* 196-214

[14] Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Article 13.1.

[15] See: T. J. Hatton, 'The Common European Asylum System – The Role of Burden-Sharing' (2016) CESifo DICE Report 4/2016.

[16] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, COM(2015)240.

[17] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

1,850;[18] in Greece, hotspots have been established in Lesvos, Chios, Samos, Leros and Kos, for a total capacity of 6,458 and a total occupancy of 15,201.[19] Frontex is supporting operations *in loco* with a team of 492 officers (44 in Italy, 448 in Greece), while EASO is contributing with 255 Member State Experts, cultural mediators, interpreters and general staff (19 in Italy, 236 in Greece).[20]

2. Legal Basis of the Approach in EU Law and Guidelines on Implementation

The high number of actors involved in the implementation of the hotspot approach calls for a likewise high level of coordination and for a clear and detailed definition of roles and responsibilities. Nonetheless, a definite legal and policy framework with respect to the approach has not been adopted and the operational support to be provided in each and every hotspot was left to be assessed on the basis of an evaluation of the specific situation at the border of each frontline Member State.[21] Despite weighting substantially on the coherent implementation of the approach, the lack of a stand-alone legal instrument regulating the hotspot approach does not entirely deprive it of a legal basis. Indeed, both the CEAS and the Directives that have established the approach can be regarded as its foundational instruments: While the legal basis of the common asylum policy is subject to Article 78 TFEU, supported by Article 80 TFEU, as of the entry into force of the Lisbon Treaty, the secondary asylum legislation includes five main directives, namely the Reception Conditions Directive, the Procedures Directive, the Qualification Directive, the Dublin Regulation and the Temporary Protection Directive.[22] The implementation of the approach in Italy and Greece is also subject to the obligations deriving from the European Convention on Human Rights (ECHR) and from principles contained in the EU's Charter of Fundamental Rights (CFR). In addition, Member States have legally binding responsibilities stemming from other sources of international law, among which the Convention Relating to the Status of Refugees, the UN Convention against Transnational Organized Crime and its protocols, and the CoE Trafficking Convention. Therefore, notwithstanding the fact that the main purpose of the hotspots is to screen, identify and fingerprint migrants, such procedures shall take into account, and comply with, a wide range of duties and obligations deriving mainly, albeit not only, from international human rights law. From an operational perspective, the type of support envisaged by the established framework attributes tasks as follows: EASO provides assistance to the implementation of the asylum procedures and is responsible for guaranteeing the availability of accessible and comprehensible information on protection; Frontex assists

[18] The hotspots of Taranto and Lampedusa closed in March 2018. In November of 2017, it was reported that the hotspots were hosting 624 people, which is nonetheless in contrast with several reports highlighting how all hotspots regularly exceeded the official capacity (see e.g. Council of Europe, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*, CPT/Inf (2018) 13, p.12). The Italian authorities confirmed their commitment to create three further hotspots in Calabria and in Sicily during 2018. In addition, there are also several ports that function like hotspots, for example in Brindisi, Cagliari, Catania, Catanzaro, Cosenza, Crotone, Lecce, Napoli, Palermo, Reggio Calabria, Salerno, Siracusa, Sassari, and Vibo Valentia.

[19] European Parliament (2018), *Hotspots at EU External Borders. State of Play*, www.europarl.europa.eu/ (last accessed 13 August 2018).

[20] *Hotspot State of Play*, Updated 18 December 2017, https://ec.europa.eu/home-affairs/ (last accessed 13 August 2018).

[21] Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs (2017) 'Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece'.

[22] Directive 2013/33/EU; Directive 2013/32/EU; Directive 2011/95/EU; Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; and Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

Member States in the disembarkation process and the identification stage, as well as in the organisation and coordination of returns; Europol provides support in the fight against organised crime and terrorism; Eurojust offers expertise in regard to the investigation and prosecution of serious crimes, among which trafficking and smuggling; and FRA provides advice on matters regarding fundamental rights.[23] All administrative and operational aspects are managed and supervised by an EU Regional Task Force (EURTF), which includes officers from all concerned Agencies as well as national authorities and which usually coordinates more than one external border section at the same moment in time.

While it could be argued that the evaluation of the hotspot approach three years after its adoption is positive in terms of security-related objectives, therefore from the perspective of the beneficiary countries and of the EU more broadly, a completely different assessment needs to be done in terms of compliance with human rights obligations, thus from the perspective of migrants. The contrast in policy and priorities is clear: Securitisation, on the one hand, and humanisation, on the other hand.[24] While the legal framework and the SOPs lay down a sufficiently clear set of safeguards and guarantees in compliance with international law, there are substantial shortcomings in their practical implementation. In particular, "it is very disappointing that no meaningful proposals have been made to address assistance to vulnerable […] migrants",[25] among which victims of human trafficking. Indeed, notwithstanding the right to seek asylum and the principle of *non-refoulement*, the current system has been established and implemented in a way that does not offer adequate assistance and protection.

C. THE IMPLEMENTATION OF THE "HOTSPOT APPROACH" AT NATIONAL LEVEL: A COMPARATIVE ANALYSIS OF ITALY AND GREECE

Despite deriving from the same legal basis and having been established according to the same framework of reference, the "hotspot approach" has been implemented with substantial differences and discrepancies between countries, as well as between hotspots. Indeed, hotspots remain national systems of migration control and are rooted in particular national contexts, even if established at European level and clearly driven by European objectives.[26] In order to assess the progress in the implementation of the approach, the analysis will be divided into three areas: background, legal framework and procedures. The underpinning question on which the assessment is based is whether the current system ensures the fundamental rights of migrants.

1. Background

The migratory pressure to which Italy and Greece have been called to respond and the political imperatives behind the States' policies are diverse. A summary analysis of data with respect to the flows of migrants in

[23] Statewatch, 'Explanatory Note On The "Hotspot" Approach' (2015), www.statewatch.org/ (last accessed 13 August 2018).
[24] See: G. Garelli and M. Tazzioli, 'The EU Hotspot Approach at Lampedusa' (2016) *OpenDemocracy*; M. Neocleous and M. Kastrinou, 'The EU Hotspot. Police war against the migrant' (2016) *Radical Philosophy* 200; and L. Ansems de Vries, S. Carrera and E. Guild, 'Documenting the Migration Crisis in the Mediterranean: Spaces of Transit, Migration Management and Migrant Agency' (2016) CEPS Paper in Liberty and Security in Europe No.94.
[25] House of Lords European Union Committee (2016) 'EU Action Plan against migrant smuggling', 4th Report of Session 2015-16, p.122
[26] See the unofficial Explanatory Note issued by Commissioner Avramopoulos to Justice and Home Affairs Ministers on 15 July 2015, as well as Annexes to the Commission Communication on managing the refugee crisis of 29 September 2015.

Italy and Greece is enough to reveal some substantial and meaningful differences in terms of numbers and categories.

	Italy	Greece
2015	153,842	856,723
2016	181,436	173,450
2017	119,369	29,718
2018*	16,531	13,435

*Table 1: No of arrivals by sea. Data source: UNHCR [*Updated 2 July 2018]*

	Italy	Greece
2015	Eritrea, Nigeria, Somalia	Syrian Arab Republic, Afghanistan, Iraq
2016	Nigeria, Eritrea, Gambia	Syrian Arab Republic, Afghanistan, Iraq
2017	Nigeria, Guinea, Côte d'Ivoire, Bangladesh	Syrian Arab Republic, Iraq, Afghanistan
2018*	Tunisia, Eritrea, Nigeria	Syrian Arab Republic, Iraq, Afghanistan

*Table 2: Top three nationalities among migrants. Data source: UNHCR [*Updated 2 July 2018]*

The peculiarities of the incoming flows of migrants witnessed by Italy and Greece are evident: On the one hand, pressure in Greece has reached its peak in 2015, when almost 860,000 new arrivals were registered, and it has then substantially decreased in 2016, 2017, and 2018 while Italy has seen lower but constant figures in the period from 2015 to 2017, and has only seen a substantial decrease in 2018; on the other hand, while Greece has mainly been the country of destination for migrants leaving from the same so-called "refugees top producing countries", the countries of origin of migrants reaching the Italian territory have been diverse and varying. The consequences of these differences on the implementation of the "hotspot approach", as well as on the logic behind its adoption, are considerable. Indeed, the evaluation of the different national contexts seems to suggest that the "hotspot approach" has been thought and created to address different sets of problems in each frontline Member State: while it has served in Italy as a measure to ensure a more systematic control of migratory flows as well as compliance with the EuroDac fingerprinting requirements,[27] it appears that the main aim of the approach in Greece has been to avoid irregular secondary movement and to support the implementation of the relocation scheme, given the higher numbers and the statistical relevance of migrants coming from top refugee producing countries. In addition, there are other significant factors to consider, among which the existence of bilateral agreements between Italy and third countries,[28] as well as role of the EU-Turkey agreement in the Greek context.[29]

[27] See: Council of Europe, *Report of the fact-finding mission to Italy by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees* (2017) Information Document SG/Inf(2017)8.

[28] The Italian authorities have signed Memoranda of Understanding with several countries, among which Egypt, Gambia, Libya, Nigeria and Sudan, in the framework of the so-called Khartoum process, the international cooperation on migration between African countries and the EU. All agreements are centred on immigration issues, and more specifically on the management of borders and on expulsions. Nonetheless, as Amnesty International has highlighted, "whether any expulsion is implemented in line with any bilateral agreement between police forces is irrelevant to its compliance with international law", and the texts have been harshly criticised because of the lack of human rights clauses and procedural safeguards. See: Amnesty International, 'Hotspot Italy: How EU's Flagship Approach Leads to Violations of Refugee and Migrant Rights' (2016).

[29] From the existence of such agreement follows a systematic, albeit insufficiently monitored, use of the concept of *safe third country* to return migrants to Turkey. It is worth noting that a number of appeals against decisions by the Greek

As it has already been highlighted, the process leading to the adoption of the "hotspot approach" has not resulted in the establishment of specific, detailed legal and operational instruments. Therefore, it follows that the realisation of the approach at national level is profoundly affected by existing conditions in Italy and Greece to the point that differences in the practical aspects of the implementation are at times significant.

2. Legal Framework

The Italian reception system, which is regulated by Legislative Decree n. 142/2015,[30] is coordinated and monitored by the Department of Civil Liberties and Immigration of the Ministry of the Interior. The system is essentially built on a two-stages reception model, according to which the government has established both first and second line reception centres (CARA, CPSA, CPA and CAS; SPRAR). Before the introduction of the Minniti-Orlando Decree,[31] adopted in February 2017 and transformed into law in April 2017, the framework accompanying the launch of the "hotspot approach" was chaotic, if not non-existent. In fact, the term *hotspot* had no equivalent in the national legal system, it lacked both a definition and a legal basis, and the regulation of all operational aspects was left to the European Commission's Communications and to the Ministry of the Interior's Circulars with no higher source of law.[32] The very essence of the operational aspect of the approach, namely the detention for the purposes of identification, had indeed no legal ground in the 1998 National Unified Text on Migration. In addition, since the status of foreigners is regulated by law as per the Italian Constitution,[33] no legal ground could be directly and legitimately sought in other sources, among which European law. The disastrous consequences of this legislative gap on the rights of migrants, especially those with particular vulnerabilities, have been repeatedly documented by, among others, Amnesty International, the CPT, and GRETA.[34] One of the main reasons behind the adoption of the Minniti-Orlando Decree was indeed to fill the *vacuum* that had been consistently highlighted by numerous governmental and non-governmental actors, among which the European Commission itself.[35] The Decree, by introducing Article 10 *ter* in the above-mentioned National Unified Text on Migration, attempted to give a legislative solution to the lack of legitimacy of the hotspots in the Italian context. According to Article 17:

> "The foreigner who has irregularly crossed an internal or external border or who has arrived in the national territory following Search and Rescue operations at sea, is accompanied to specific hotspots,

Asylum Service have been successful in challenging the application of the concept. Nonetheless, the number of returns are still worrying, as well as the lack of individual assessment in the implementation of the agreement. See: C. Costello, 'Safe Country? Says Who?' (2016) 28(4) *International Journal of Refugee Law* 601-22.

[30] Legislative Decree n.142/2015, 18 August 2015, **'**Attuazione della direttiva 2013/33/UE recante norme relative all'accoglienza dei richiedenti protezione internazionale, nonche' della direttiva 2013/32/UE, recante procedure comuni ai fini del riconoscimento e della revoca dello status di protezione internazionale'.

[31] Decree Law n.13/2017, 17 February 2017, transformed into Law 46/2017, 13 April 2017, recante disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegal.

[32] European Database of Asylum Law, 'Hotspots under a spotlight: the legality of the hotspot approach in Italy' (2017) www.asylumlawdatabase.eu/ (last accessed 13 August 2018).

[33] "The Italian legal system conforms to the generally recognised principles of international law. The legal status of foreigners is regulated by law in conformity with international provisions and treaties". Italian Constitution, Article 10.

[34] See: Amnesty International, 'Hotspot Italy' (n.28); Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 December 2015* (2016) Information Document CPT/Inf(2016)33; and GRETA, 'Report on Italy' (n.10).

[35] European Commission, *Final Communication of the Commission to the Parliament and to the Council*, COM(2015)679

> set up for rescue and assistance necessities in the framework of Law Decree 451/1995 and Legislative Decree 142/2015."[36]

The regulation also prescribes that fingerprinting and identification procedures are to be carried out in such sites, and that the access to relevant information with respect to international protection, relocation and voluntary return shall be ensured. Nonetheless, some commentators have argued that the circularity of the Minniti-Orlando Decree, that is to say its referral to Law Decree n. 451/1995 and Legislative Decree n. 142/2015, as well as its vagueness, have undermined the role of the legislative piece in establishing a solid, legal framework for the hotspots and in standardising a procedure at legislative level. As Carmela Leone has emphasised, the new norm not only fails to define the nature of the hotspots, but it also comes under the same system that had been characterising the approach as an administrative method, rather than giving it a legislative basis with an higher hierarchy.[37] It follows that the detention of foreigners in closed centres such as the hotspots still represents a deprivation of freedom which, lacking a legal basis, cannot be considered to comply with the principle of legal certainty and which is in contrast with Article 5 § 1, 2 e 4 of the ECHR, as the European Court of Human Rights (ECtHR) held in *Khlaifia and Others v. Italy*,[38] as well as with Article 13 of the Italian Constitution. The hotspots' *legal limbo*, as it was defined by Mauro Palma,[39] national Ombudsman for the rights of persons detained or deprived of their liberty, seems therefore to remain regulated only by the Ministry of the Interior's Roadmap and SOPs,[40] non-legislative and non-binding instruments which will be analysed in the next section.

In contrast with the Italian legal framework, the legislative basis of the implementation of the "hotspot approach" in Greece appears to be more solid and coherent. Before 2016, the asylum system in Greece was regulated by Law n. 3907/2011,[41] which established the Asylum Service (AS), an independent civilian authority who was attributed responsibility to examine all asylum applications, and a First Reception Service (FRS), which was created with the objective of systematically managing the incoming flows and includes both regional centres and emergency units. The adoption of the "hotspot approach" did not result in an immediate change of national laws, partly due to the fact that the execution of the project has been delayed and harshly criticised both by the Greek State and society. Indeed, when Joint Ministerial Decision n. 2969/2015 was issued and the first five First Reception Centres were established, their regulation was provided for by the previously existing framework. However, the achievement of the agreement with Turkey in 2016 had a major influence on the legal environment and constituted the basis, together with the realisation that Law n. 3907/2011 was not adequate for dealing with the new international scenario, on which the Greek government decided to reform of the whole asylum system through Law n. 4375/2016.[42] The law was

[36] Decree Law n.13/2017 (n.31) Article 17.

[37] C. Leone, 'La disciplina degli hotspot nel nuovo Art. 10 *ter* del D.Lgs. 286/98: un'occasione mancata' (2017) *Diritto, Immigrazione e Cittadinanza*, Fascicolo n.2/2017.

[38] ECtHR, *Khlaifia and Others v. Italy* [GC], Application No.16483/12, 15 December 2016, §§ 66-73.

[39] Italian National Ombudsman for the Rights of Persons Detained or Deprived of their Liberty (2017) 'Comunicato stampa. Primo rapporto tematico del Garante nazionale sui Centri per migranti', available in Italian www.garantenazionaleprivatiliberta.it/ (last accessed 13 August 2018).

[40] Italian Ministry of the Interior, 'Standard Operating Procedures (SOPs) applicable to Italian hotspots' (2016).

[41] Law 3907/2011 on the establishment of an Asylum Service and a First Reception Service, transposition into Greek Legislation of the provisions of the Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals and other provisions, www.refworld.org/docid/4da6ee7e2.html (last accessed 13 August 2018).

[42] Law 4375/2016 on the organization and operation of the Asylum Service, the Appeals Authority, the Reception and Identification Service, the establishment of the General Secretariat for Reception, the transposition into Greek legislation of the provisions of Directive 2013/32/EC on common procedures for granting and withdrawing the status of international protection.

specifically designed to regulate the implementation of the approach, giving it a tailored legal basis and introducing a number of guidelines on the identification and registration procedures, as well as on the specific role of each actor.[43] In particular, Article 14 offers a solid basis to the operations of the EU agencies, which may provide assistance in the reception and identification procedures. At the same time, however, while Law n. 4375/2016 introduced a fast track asylum border procedure to reduce the stay in the hotspots, not without raising complex questions on the impact on compliance with procedural and qualification guarantees provided for in both EU and national law,[44] it did not fully address the implementation of the recast Reception Conditions directive – particularly of Article 8, which raised the issue of the restriction of freedom of movement within the Reception and Identification Centres in a number of reports and cases in front of national and international courts.[45] The Greek government subsequently adopted Law n. 4399/2016 which, amending Law n. 4375/2016, expands the role of EASO during the admissibility interview. The introduction of the law has been heavily contested with respect to the issues of competence and standards, not only as far as procedural safeguards are concerned, but also in consideration of the use by EASO of the *safe third country* concept with respect to Turkey.[46] The existence of the EU-Turkey Statement is indeed another key aspect in understanding one of the main dissimilarities in the implementation of the approach in Greece with respect to Italy. In fact, according to the Statement, people crossing the Greek borders and reaching the islands after March 20, 2016 must not be moved to the mainland until their asylum application is duly examined.[47] The consequence of such obligation on the "hotspot approach" is massive, significantly changing the original conception of the structure of the *crisis points* from facilities in which to "swiftly identify, register and fingerprint incoming migrants"[48] to genuine detention (and pre-removal) structures.

3. Procedures

On 8 February 2016, the Italian government adopted SOPs drafted by the Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and the Department of Public Security, which defined the procedures to be applied both in the hotspots and in non-hotspots disembarkation areas.[49] The document provides guidelines on definitions of, access to and operational sequences to be followed within the hotspots. According to Section A of the SOPs, a hotspot is "a designated area […] where, as soon as possible as consistently with the Italian regulatory framework, new arrivals land safely and are subjected to medical screening, receive a leaflet on legislation concerning immigration and asylum, they are controlled, pre-identified, and, after having been informed about […] the possibility to apply for international protection, they are fingerprinted".[50] The hotspot, however, is also defined as a *method of teamwork*, a cooperation between the Italian authorities and the European support teams aiming "at the interest of guaranteeing the

[43] Law 4375/2016, Chapter B, Articles 9, 10, 11 and 14

[44] A. Papapanagiotou-Leza and N. Garipidis, 'Implementing the "Hotspot Approach" on the Greek islands: Legal and Operational Aspects' (2017) *Diritto, Immigrazione e Cittadinanza*, Fascicolo n.1/2017.

[45] See: ECtHR, *M.S.S. v. Belgium and Greece* [GC], Application No.30696/09, 21 January 2011; ECtHR, *Rahimi v. Greece*, Application No.8687/08, 5 April 2011; and ECtHR, *Mahammad and Others v. Greece*, Application No.48352/12, 15 January 2015; European Council on Refugees and Exiles (ECRE), *The Implementation of the Hotspots in Italy and Greece: A Study* (2016), and Greek Ombudsman, 'Migration Flows and Refugee Protection: Administrative Challenges and Human Rights Issues' (2017).

[46] See: ECRE, ibid; and Costello 'Safe Country?' (n.29).

[47] See: European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council, next operational steps in EU-Turkey Cooperation in the field of migration*, COM(2016)166 final, https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-166-EN-F1-1.PDF (last accessed 13 August 2018).

[48] European Commission, *European Agenda on Migration* (n.16) p.6.

[49] Italian Ministry of the Interior, Department for Civil Liberties and Immigration, and the Department of Public Security, 'Standard Operating Procedures (SOPs) applicable to Italian hotspots'.

[50] SOPs, ibid., p.4.

most sustainable solutions for incoming third country nationals".[51] Section B lays down a detailed framework for the operational sequence, which should conform to the following order: search and rescue operations (SARs), landing, health screening and early identification of vulnerabilities, transportation to the hotspot sites and security checks, delivering of information, pre-identification, identification, photo fingerprinting, reception in the facilities, de-briefing and exit. The stay within the hotspot "should be as short as possible, compatibly with the national legal framework".[52] Despite the presence of such guidelines, a number of concerns have been raised with respect to the procedures of fingerprinting, identification and access to international protection.[53]

As previously highlighted, one of the main objectives of the approach is to select and qualify migrants through a system aimed at distinguishing *economic* migrants from asylum seekers: interviews are conducted in order to establish countries of origin and reasons behind the arrival in Italy, in order to complete the so-called "*foglio-notizie*", or information sheet. Despite the SOPs state that "the assignment of nationality is in no case appropriate for establishing the assignment to the individual of a definitive legal status and does not preclude the exercise of the right to seek international protection", a concept which was also reaffirmed by the Court of Appeal in its Ordinance No. 5925/2015,[54] Caritas Europa published a position paper in June 2016 highlighting how "people coming from sub-Saharan African countries that are considered safe are issued with deportation orders as soon as they arrive on the Italian territory [and] are not informed [of] asylum possibilities".[55] Concerns have also been expressed with respect to the assessment of vulnerabilities within the hotspot premises, particularly due to the lack of clarity around procedures and responsibility, but also due to the absence of remedies and accountability mechanisms. Section B.9 of the SOPs deals with provisions for Unaccompanied and Separated Children (UASC) and other persons with specific needs, including potential victims of trafficking. According to the guidelines, "once a possible case of human trafficking has been identified, the person will be separated from the remaining stream of persons being identified [and] the IOM will conduct a first interview with the victim with the support of cultural mediators".[56] In the event of positive identification, the victim shall be transferred to an appropriate shelter, in which particular reception conditions are ensured, and granted access to protection regardless of the willingness to press charges. Despite the existence of such framework, the main obstacle for accessing any kind of protection for victims of human trafficking still lies in their identification, without which all subsequent steps are, one could argue, meaningless. As emphasised beforehand, SOPs are non-legislative and non-binding acts which do not apply in the event of discrepancies with current legislation and which lack the strength to provide a clear and uniform framework to be followed during and after disembarkation. Caritas Italiana, which has been monitoring the implementation of the "hotspot approach", harshly criticised the lack of procedural clarity, supporting the idea that the hotspot system was "essentially a sort of no-land".[57] Indeed, despite some operational and structural similarities, practice tends to differ among disembarkation areas as well as among *official* hotspots, depending on the availability of human and economic resources.

[51] Ibid.

[52] Ibid., p.9. However, while the Italian Roadmap published by the Ministry of the Interior foresees a limit of 24-48 hours, a number of more recent Ministerial Circulars set the limit at 72 hours, and field research has shown that, on average, migrants spend few days within the hotspots premises.

[53] See: Amnesty International, 'Hotspot Italy' (n.28); ECRE, *Study* (n.45); Council of Europe, 'Report of fact-finding mission' (n.27); and Directorate General for Internal Policies of the Union (2017) 'Background Information for the LIBE Delegation on Migration and Asylum in Italy – April 2017'.

[54] Court of Appeal, Cass. Sez. VI civ., ord. 5925 of 25/03/2015 n. 5925

[55] Caritas Europa, 'The Hotspot Approach: Position Paper' (2016) www.caritas.eu/news/the-hotspot-approach (last accessed 13 August 2018).

[56] SOPs (n.49) p.18.

[57] Caritas Europa, 'Position Paper' (n.55).

Unlike the Italian context, in which no guidelines are provided through legislative instruments, the operation of the hotspots or Reception and Identification Centres in Greece has been regulated by Law n. 3907/2011, and subsequently by Law n. 4375/2016, which redefined the identification and registration procedures. Several provisions regarding the operational aspects of the hotspots are contained in Law n. 4375/2016 and will now be analysed. According to Article 14, "third-country nationals or stateless persons entering without complying with the legal formalities in the country shall be directly led, under the responsibility of the police or port authorities dealing in accordance with the relevant provisions, to a Reception and identification Centre".[58] Within such centres, which are managed by the Reception and Identification Service (RIS, former FRS), the AS is competent to "inform applicants for international protection of the examination procedure for their applications, including the rights and obligations under this [and to] receive, examine and adjudicate at first instance on applications for international protection";[59] the police, port authorities and the army are involved in various levels of assistance throughout the procedure, particularly during transfers and surveillance, as well as during identification, nationality assessment and returns;[60] while EU agencies, such as Frontex and EASO, "may provide assistance in the reception and identification procedures in the context of their competences",[61] and UNHCR and IOM "may monitor the [reception and identification] procedures, provide information to persons falling under [the same] and provide any other form of assistance, in accordance with the mandate and the competences or each agency",[62] on the basis of Memoranda of Understanding to be concluded with the RIS.

A more detailed description of reception and identification procedures is given in Article 9, and includes: a) registration and fingerprinting; b) identity and nationality screening; c) medical screening; d) provision of information about rights and obligations; e) attention to vulnerabilities; and f) referral of those wishing to apply for international protection as well as of those not wishing to do so to the relevant authorities.[63] People entering the hotspot premises are placed under a status of restriction of liberty for a maximum of three days in order to complete the above procedures, a period which can be extended up to twenty-five days if the procedures cannot be completed within 72 hours.[64] However, "in case of third country nationals or stateless persons arriving in large numbers and applying for international protection […] while they remain in Reception and Identification Centres", an expedite border procedure shall apply.[65] Following the adoption of the EU-Turkey Statement and in response to the increased pressure on limiting the risk of absconding, nonetheless, Greece has been enforcing geographical restrictions for migrants present on the "hotspot islands" after the end of the detention period prescribed by law, with the result that thousands of asylum seekers have been deprived of their liberty of movement and have lived, or are currently living, in overcrowded conditions for months while their asylum applications are pending.[66] The length of stay in the hotspots, however, is not the only worrying operative aspect. From inadequate reception conditions to the lack of information and guidance, the partial implementation of the current legislation as well as the lack of

[58] Law n. 4375/2016, Chapter B, Article 14.
[59] Ibid., Chapter A, Article 1.
[60] Ibid., Chapter B, Articles 11 and 14.
[61] Ibid., Chapter B, Article 14. In addition, Law 4399/2016 amending Law 4375/2016 has given EASO the right to conduct, and not only assist, the first degree interviews within the hotspot premises. *See* Law 4399/2016, Article 86.
[62] Ibid., Chapter B, Articles 14 and 48.
[63] Law n. 4375/2016, Chapter B, Article 9.
[64] Ibid., Chapter B, Article 14.
[65] Ibid., Chapter C, Article 60.
[66] European Commission, 'Annex to the Report from the Commission to the European Parliament, the European Council and the Council, Sixth Report on the Progress made in the implementation of the EU-Turkey Statement', COM(2017)323 final, Annex 1, p.5.

specific SOPs have contributed to the creation of a chaotic, and at times disturbing, situation on the islands. A key issue which appears not to be addressed in the hotspots is the identification of vulnerabilities, despite Law n. 4375/2016 states that "reception and identification procedures shall include […] e) attention to those belonging to vulnerable groups"[67] and that "in any event, throughout the reception and identification procedures, the Manager and the staff of the Centre shall […] ensure that that the third-country nationals or stateless persons: […] d) receive, if they belong to vulnerable groups, the appropriate treatment for each case".[68] However, even if Article 14 defines vulnerability broadly, including victims of peoples' trafficking, and vulnerable individuals are exempted from both the border and the EU-Turkey Statement procedures,[69] the identification of vulnerabilities was reported as not being seen as a priority and, notwithstanding the existence of a Memorandum of Understanding on the matter with the EU's Agency for Fundamental Rights,[70] there is no clear referral mechanism in which to channel identified potential victims.[71] In addition, although Law n. 4375/2016 envisaged that "[a] joint decision of the Ministers of Interior and Administrative Reconstruction and of Health, [should have] establish[ed] the General Operating Regulation of the Reception and Identification Centres and Units",[72] the Greek authorities are still to adopt detailed SOPs to be applied within the hotspot premises.

4. Concluding Remarks

Differences in background, legal framework and procedures in the Italian and Greek contexts have resulted in an inconsistent implementation of the "hotspot approach". The categories and number of incoming migrants, combined with the existence of bilateral agreements with third countries and peculiarities of each national legal system, have favoured an *ad hoc* interpretation and application of the broad mandate of the European Commission's approach. In varying degrees, however, a common feature is the prevalence of security concerns over protection duties: in both Italy and Greece, registration, fingerprinting and removals have been placed at the centre of any measure related to the realisation of the approach. Protection of and attention to people with vulnerabilities, a concept interpreted in a way according to which it includes both asylum seekers as held in i.e. *M.S.S. v. Belgium and Greece* and in *Tarakhel v. Switzerland*,[73] as well as all "illegal immigrants [who run] the risk of being arrested, detained and deported",[74] have been given a marginal role in policy and law, despite the existence of a strong international and European framework, as well as several legal obligations with which Member States shall comply.

D. TRAFFICKING IN HUMAN BEINGS AND THE IDENTIFICATION OF POTENTIAL VICTIMS

The nature and the degree of protection that is available for victims of human trafficking is defined by, and is to be sought in, the intersection of several sources of law, among which international law, European law and national law. While international law provides a solid, although general, framework which will be briefly

[67] Law n. 4375/2016, Chapter B, Article 9.
[68] Ibid., Chapter B, Article 14.
[69] Law n. 4375/2016, Chapter C, Article 60.
[70] Memorandum of Understanding between the Hellenic Republic, Ministry of Migration Policy and the European Union Agency for Fundamental Rights, done in Brussels on 30 November 2016.
[71] ECRE, *Study* (n.45) p.11.
[72] Law n. 4375/2016, Chapter B, Article 17.
[73] ECtHR, *M.S.S. v. Belgium and Greece* (n.45); ECtHR, *Tarakhel v. Switzerland* [GC], Application No.29217/12, 4 November 2014, §118.
[74] ECtHR, *Chowdury and Others v. Greece*, Application No.21884/15, 30 March 2017, §§96-97. *See* also *Aden Ahmed v. Malta* App No.55325/12, 23 July 2013, §97.

assessed, most of the analysis in the current chapter will focus on the European, Italian and Greek legal structures – with particular references to the legal and practical challenges in the identification process within the hotspot premises.

1. The International Framework

Trafficking in human beings constitutes a transnational crime whose definition has been agreed upon in the framework of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime. In Article 3 of the Protocol, trafficking is defined as:

> "[…] 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."[75]

Understanding and evaluating the phenomenon of trafficking is an extremely complex task. On the one hand, the dissimilar transpositions of the internationally agreed definition into national legislations has contributed to create different standards between countries, as well as heterogeneity in the understanding of the concept; on the other hand, the collection of data is scarce and the few available sources tend to report only identified victims, which are but a small part of the total number of people affected by the phenomenon. Since trafficking in human beings constitutes a violation of several human rights, it is argued that a human rights-based approach, opposed to one based on security – or even on criminal law or labour law, is needed in tackling the phenomenon.[76] The primacy of human rights has been recognised, among others, by the Office of the UN High Commissioner for Human Rights (OHCHR) in its Recommended Principles and Guidelines on Human Rights and Human Trafficking, according to which "the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims".[77] Although such approach is generally understood as "a conceptual framework for dealing with [phenomena that are] normatively based on international human rights standards and that is operationally directed to promoting and protecting human rights",[78] the manner in which this translates into practice is still widely debated, with standards that are different between geopolitical areas and countries. Nonetheless, it seems clear that ensuring the rights of trafficked persons is substantially linked to a fully functional and far-reaching identification process. Indeed, "[the] failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory".[79] As the former UN Special Rapporteur on trafficking, Joy Ngozi Ezeilo, argued, "in accordance with international law, a person should be recognized as a victim of a human rights violation from the moment he or she suffers harm as a result of such violation, and not on the basis of the application of prohibitively high criteria for having such status 'conferred' onto him or her",

[75] *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime* (2000), Article 3.

[76] For an overview of different approaches, see: R. Pati, 'States' Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v Cyprus and Russia*' (2011) *Boston University International Law Journal* 79-142.

[77] Office of the UN High Commissioner for Human Rights (OHCHR), 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) p.1.

[78] Office of the UN High Commissioner for Human Rights (OHCHR), 'Human Rights and Human Trafficking' (2014) Fact Sheet No.36, p.8.

[79] Ibid., p.12. See also: OHCHR (n.77) Guideline 2, p.4.

and therefore States have "obligations to […] exercise due diligence in the identification of trafficked persons".[80] However, and despite the fact that the duty to identify potential victims of human trafficking is implied in a wide range of legal instruments aimed at victim protection and support, a recent report highlights how identification "continues to be […] very often post hoc and too closely tied to the need to identify victims for criminal or immigration processes, rather than being pre-emptive in circumventing situations of exploitation that may increase susceptibility to trafficking".[81]

The already mentioned OHCHR Recommended Principles and Guidelines contain a range of detailed and practical steps for the consideration of Member States, among which developing guidelines and procedures for all relevant actors involved in the processing of irregular migrants, providing training to such actors, cooperating nationally and internationally with public and private bodies, as well as ensuring that potential victims receive information that enables them to understand trafficking and to seek assistance if they wish to do so.[82] Building on this roadmap, in March 2007 the UN Office on Drugs and Crime (UNODC) launched the UN Global Initiative to Fight Human Trafficking, in partnership with ILO, OHCHR, UNICEF, OSCE, and IOM, and a few years later the UN General Assembly (UNGA) adopted the Global Plan of Action to Combat Trafficking in Persons, Especially Women and Children and established the UN Voluntary Trust Fund for Victims of Trafficking.[83] On the specific issue of identification of potential victims, Member States have reaffirmed their commitment to, *inter alia*, "strengthen […] the capacity of relevant officials likely to encounter and identify possible victims of trafficking in persons, such as law enforcement personnel [and] border control officers".[84] Indeed, victims of trafficking, who are generally unlawfully in a country, find themselves in a particularly vulnerable position as a result of their legal status - as it was also recognised in the case of *Zhen Zhen Zheng v. The Netherlands*, where a particular emphasis was put on the consideration that "victims of trafficking find themselves in a very vulnerable situation and that they should receive guidance on the use of the appropriate remedies".[85] It follows that the victims' awareness of their own rights is at times tremendously scarce, or that other factors may contribute to the denial of their right to access both protection and an effective remedy, such that "the application of States' due diligence obligations […] is particularly critical to ensure the rights of trafficked persons".[86]

While the international framework has been built to address general principles in the fight against trafficking in human beings and in the protection of victims, it lacks both region-specific details and enforcement mechanisms. Regional and national structures have attempted to strengthen, define and refine the existing construction in order to better adapt it to their specific needs. In the context of the "hotspot approach", it is relevant to analyse how the Council of Europe and the EU have shaped and acted upon global strategies to target the phenomenon and to comply with international standards and legal obligations.

[80] UN Human Rights Council, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo', A/HRC/17/35/Add.6.
[81] UN General Assembly, 'Report of the Special Rapporteur on trafficking in persons, especially women and children', A/70/260 §24.
[82] OHCHR (n.77) Guideline 2.
[83] UN General Assembly, 'Resolution adopted by the General Assembly on 30 July 2010. United Nations Global Plan of Action to Combat Trafficking in Persons', UN Doc A/RES/64/293.
[84] Ibid., §29.
[85] *Zhen Zhen Zheng v. The Netherlands*, Individual opinion by Committee members Mary Shanthi Dairiam, Violeta Neubauer and Silvia Pimentel (dissenting), CEDAW/C/42/D/15/2007 §8.1.
[86] UN General Assembly, 'Report of the Special Rapporteur' (n.81).

2. The European Framework

In assessing approaches and policies on combating human trafficking and on protecting its victims in the European region, two frameworks shall be taken into account: on the one hand, the Council of Europe's Convention on Action Against Trafficking in Human Beings and the European Court of Human Rights (ECtHR); on the other hand, the EU's directives and agendas.

Adopted in 2005, the CoE Trafficking Convention defines trafficking broadly, including:

> "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",[87]

and frames it not only as a violation of human rights, but also as an offence to the dignity and integrity of the human being. The Council of Europe's definition of trafficking is also key when it comes to the issue of consent, which remains one of the most discussed topics in the field of trafficking and in the debate around the distinction between trafficking and smuggling.[88] Indeed, Article 4 of the Convention affirms that "the consent of a victim of 'trafficking in human beings' to the intended exploitation […] shall be irrelevant where any of the [previously mentioned] means […] have been used".[89] Not unlike the United Nations, the Council of Europe has recognised the importance of the identification of potential victims of human trafficking, stressing how "each Party shall provide its competent authorities with persons who are trained and qualified […] in identifying and helping victims […] and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations".[90] In addition, Article 10 of the Convention establishes a positive duty on the State to identify victims of human trafficking by adopting legislative or other necessary measures. As a procedural safeguard, Article 10 poses an obligation to "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 […] has been completed".[91] GRETA, the body that is responsible for monitoring the implementation of the Convention, regularly publishes reports on the compliance of States Parties with their obligations. Of particular relevance is its 5th General Report, covering the period from 1 October 2014 to 31 December 2015, in which a thematic section has been dedicated to the issue of identification and protection of victims of trafficking among asylum seekers, refugees and migrants.[92] Problems in the structure and process for the identification of victims of trafficking have constantly appeared among the main gaps in the implementation of the Convention in all GRETA's reports, with considerable and worryingly similar shortcomings in the compliance with Article 10

[87] CoE, *Trafficking Convention* (n.9) Article 4.
[88] See: S.V. Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45 *Indiana Law Review* 483-511; A.T. Gallagher, 'The International Legal Definition of "Trafficking in Persons": Scope and Application', in P. Kotiswaran (ed), *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017); and J. Elliot, *The Role of Consent in Human Trafficking* (Routledge, 2015).
[89] CoE, *Trafficking Convention* (n.9) Article 4.
[90] Ibid., Article 10.
[91] Ibid.
[92] GRETA (2016) '5th General Report on GRETA's Activities', §90-100.

that have been noted and highlighted with respect to several States, among which Serbia, the former Yugoslav Republic of Macedonia, Italy, and Spain.[93]

Working alongside and under the aegis of the Council of Europe, the European Court of Human Rights has in time come to deal with a number of cases involving human trafficking. Although trafficking is not mentioned in the European Convention on Human Rights (ECHR) and the ECtHR appears not to be directly responsible for overseeing States' compliance with any other Convention but the ECHR, the argument that "only GRETA can supervise the implementation of the CoE Trafficking Convention needs to be rejected",[94] in favour of an integrated view of the ECHR and other international legal instruments. Indeed, the Court has repeatedly stated that "the [ECHR] should so far as possible be interpreted in harmony with other rules of international law of which it forms part"[95] and it has unanimously found that human trafficking fell squarely within the scope of Article 4, a rarely used provision,[96] in the landmark judgment on the case of *Rantsev v. Cyprus and Russia*.[97] Drawing substantially on the provisions of the Palermo Protocol and on the CoE Trafficking Convention, the Court affirmed several key principles that have shaped its approach to cases of human trafficking. Indeed, in *Rantsev v. Cyprus and Russia* the Court held not only that "the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking",[98] but also that if State authorities are aware or ought to be aware of the existence of an episode or of a risk of trafficking, the failure to take appropriate measures to protect the individual amounts to a violation of that person's rights,[99] notwithstanding the fact that the positive obligation to "take operational measures must […] be interpreted in a way which does not impose an impossible of disproportionate burden on the authorities".[100] In addition, as a general principle, the obligations deriving from the ECHR apply to any State Party regardless of the existence of exceptional circumstances such as the current migratory pressure: State's policies and procedure must in fact remain in full conformity with human rights obligations and must not prejudice access to and enjoyment of protection and assistance,[101] particularly when a situation in which violations of human rights occur is known, or should be known, to the authorities.[102]

The case of *G.J. v. Spain*, which would have shed a light on several challenges around human trafficking, and particularly on the contrast between a human rights-based and a security based approach, was regrettably declared inadmissible by the Court and thus leaves some questions unanswered. It would have been of utmost interest and importance, particularly for the purpose of this work, to look at the approach of the Court to the NGO Women's Link Worldwide's argument according to which "the actions taken by the

[93] All GRETA's country reports are available at www.coe.int/en/web/anti-human-trafficking/country-reports (last accessed 13 August 2018).
[94] V. Stoyanova, 'Brief in Response to the Swedish Government's Submissions in *C.A. and P.A. v. Sweden*' (2017).
[95] ECtHR, *Al-Adsani v. United Kingdom* [GC], Application No.35763/97, 21 November 2001, §55.
[96] At the time of the delivery of the judgment, there had only been one earlier case in the context of human trafficking within Article 4, that is to say the case ECtHR, *Siliadin v. France*, App No.73316/01, 25 July 2005.
[97] ECtHR, *Rantsev v. Cyprus and Russia*, Application No.25965/04, 7 January 2010, §282. *See* also ECtHR, *M. and Others v. Italy and Bulgaria*, Application No.40020/03**,** 31 July 2012, §151. For an interesting analysis of the inclusion of trafficking under Article 4, see: V. Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) *Netherlands Quarterly of Human Rights* 163-94; Pati, 'States' Positive Obligations' (n.76); and J. Allain, '*Rantsev v. Cyprus and Russia*: The European Court of Human Rights and Trafficking as Slavery' (2010) 3(10) *Human Rights Law Review* 546-57.
[98] ECtHR, *Rantsev v. Cyprus and Russia*, ibid. §284.
[99] Ibid., §286.
[100] Ibid., §287. *See* also ECtHR, *Osman v. United Kingdom* [GC], Application No.23452/94, 28 October 1998, § 116. For a commentary on the Osman test applied to cases of human trafficking, see: Stoyanova, 'Dancing on the Borders' (n.97).
[101] ECtHR, *Khlaifia v. Italy* (n.38).
[102] ECtHR, *Chowdury v. Greece* (n.74) §§110-115.

domestic authorities had reduced the problem to one of mere migration, without taking account of the particular vulnerability of the applicant given her position as a victim of trafficking".[103] In more recent case-law, the Court nonetheless took some steps forward by further integrating the positive obligations under Article 4 of the ECHR and the CoE Trafficking Convention. Three cases are key in this respect: *L.E. v. Greece*, *J. and Others v. Austria*, and *Chowdury v. Greece*.[104] In *L.E. v. Greece*, the Court's conclusion that the "identification and formal conferral of the status of a victim of human trafficking […] are absorbed under the positive obligation of taking protective operational measures under Article 4 of the ECHR"[105] suggests a deeper connection between the CoE Trafficking Convention and the EU law on trafficking, on the one hand, and the ECHR, on the other. In *J. and Others v. Austria*, the Court explicitly considered "whether […] authorities complied with their positive obligation to identify and support the applicants as (potential) victims of human trafficking",[106] referring for the first time to a positive duty on the State to identify victims of human trafficking differentiated from the duty to investigate. In addition, the Court "made it clear that the identification and the assistance of victims is independent from any criminal proceedings", and that "(potential) victims need support even [and, it could be argued, especially] before the offence of human trafficking is formally established, otherwise this would run counter to the whole purpose of victim protection in trafficking cases".[107] Given the current situation, particularly within the hotspots, such assistance is crucial and it is therefore essential to recall how the Court, considering the specific vulnerabilities of potential victims of trafficking, has emphasised the positive duty of identification since its early case-law on Article 4, even if only implicitly, by for example stressing "the obligations […] in the context of the Palermo Protocol and, subsequently, the Anti-Trafficking Convention to ensure adequate training to those working in relevant fields to enable them to identify potential trafficking victims".[108] Lastly, in *Chowdury v. Greece*, the Court held that "Article 4 of the Convention can, under certain circumstances, impose on the State a duty to take tangible and appropriate measures to fight human trafficking and to protect both recognised and potential victims of trafficking" and that "in particular, the positive obligations that weight on Member States […] need to be interpreted in the light of the Council of Europe Convention", which shall be interpreted according to the manner in which it is interpreted by GRETA.[109]

A functional process of identification clearly depends on the physical presence of the suspected victim on the territory. Therefore, an additional safeguard is provided for in the CoE Trafficking Convention, which states that "upon reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory" before the identification process is completed.[110] Nonetheless, the bar to return a potential victim of human trafficking is not only connected to the completion of the identification procedure: as the Court highlighted in *F.G. v. Sweden*, it could be linked to a risk of serious harm upon return, so that no one can be "subjected to *refoulement* to his or her country of origin or any other country where he or she risks incurring serious harm caused by any identified or unidentified

[103] ECtHR, *G.J. v. Spain*, Application No.59172/12, decision of 21 June 2016, §32.
[104] ECtHR, *L.E. v. Greece*, Application No.71545/12, 21 January 2016; ECtHR, *J. and Others v. Austria*, Application No.58216/12, 17 January 2017; and ECtHR, *Chowdury v. Greece* (n.74).
[105] V. Stoyanova, '*L.E. v. Greece*: Human Trafficking and States' Positive Obligations' (2016) *Strasbourg Observers*, https://strasbourgobservers.com/2016/02/02/l-e-v-greece-human-trafficking-and-states-positive-obligations/ (last accessed 13 August 2018).
[106] ECtHR, *J. and Others v. Austria* (n.104) §§109-110.
[107] V. Stoyanova, '*J. and Others v. Austria* and the Strengthening of States' Obligation to Identify Victims of Human Trafficking' (2017) *Strasbourg Observers*, https://strasbourgobservers.com/2017/02/07/j-and-others-v-austria-and-the-strengthening-of-states-obligation-to-identify-victims-of-human-trafficking/ (last accessed 13 August 2018).
[108] ECtHR, *Rantsev v. Cyprus and Russia* (n.97) §296.
[109] ECtHR, *Chowdury v. Greece* (n.74) §§103-104.
[110] CoE, *Trafficking Convention* (n.9) Article 10(2).

person or public or private entity [including] trafficking in human beings".[111] In general, the prohibition of *refoulement*, which may consist in "expulsion, deportation, removal, extradition, formal or informal transfer, 'rendition', rejection, refusal of entry or any other measure which would result in compelling the person to remain in or return to his or her country of origin",[112] is a solid principle of customary international law, as well as a treaty rule in respect of which no derogations are permitted and no reservations are admitted, as recognised by the ECtHR in, among other cases, *Hirsi Jamaa and Others v. Italy*.[113]

Alongside the Council of Europe and the ECtHR, the EU has developed a number of strategies to tackle human trafficking, among which the European Agenda on Migration, the European Agenda on Security, and the EU Action Plan against migrant smuggling (2015-2020).[114] The most relevant tools for this analysis, however, are the already mentioned Directives 2011/36/EU and 2013/33/EU. Directive 2011/36/EU, not unlike other global strategies, calls for a victim-centred approach in implementing any measure to fight human trafficking, which is defined as a serious crime and a gross violation of fundamental rights prohibited by the CFR.[115] Indeed, one of the main principles of the Directive concerns the establishment of tools and services to help victims recover, among which the provision of a reflection and recovery period, together with access to protection and justice. Although framed differently, and arguably less rigorously, than the CoE Trafficking Convention, the Directive also poses a positive obligation on States to "take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to [trafficking]"[116] and to "establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims".[117]

The early identification of potential victims and their access to protection, assistance and support are also inextricably linked with overall reception conditions and living standards. For all third-country nationals and stateless persons who lodge an application for international protection, Directive 2013/33/EU lays down standards for reception conditions which should "suffice to ensure [asylum seekers] a dignified standard of living and comparable living conditions in all Member States".[118] In general, the Directive provides broad-spectrum provisions on reception conditions, mainly focusing on detention conditions and safeguards, as well as modalities for material reception conditions. The implementation of these obligations has

[111] ECtHR, *F.G. v Sweden* [GC], Application No.43611/11, 23 March 2016, §7.
[112] Ibid., §7.
[113] ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No.27765/0912, 23 February 2012, §§146-158.
[114] European Commission, *European Agenda on Migration* (n.16); European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security*, COM(2015)185 final; and European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Action Plan against Migrant Smuggling* (2015 – 2020), COM(2015)285 final
[115] EU, *Charter of Fundamental Rights of the European Union*, Article 5(3).
[116] Directive 2011/36/EU, §11(2). Complementary to Directive 2011/36/EU, 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, introduces the possibility for every victim of human trafficking to be granted a reflection period during which he or she can make a decision on whether to collaborate with the authorities in criminal proceedings. For an analysis of the Directive and its limits, see: V. Roth, *Defining Human Trafficking and Identifying its Victims. A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers, 2012) pp.186-189; V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2017) pp.89-90, 136-138; and A.T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010) pp.100-103.
[117] Directive 2011/36/EU, §11(4).
[118] Directive 2013/33/EU, §11.

nonetheless been substantially undermined and damaged by the emergency and security-based approach to the European *migration crisis*, as it is widely documented by the Asylum Information Database's research.[119] The use of detention as an accommodation strategy, coupled with growing discrimination on the grounds of nationality and shortcomings in assessing vulnerability and special needs have brought the reception conditions system on the verge of collapsing – at least from a human rights perspective, and particularly for people with special needs.

In accordance with Article 21 of Directive 2013/33/EU, victims of human trafficking fall within the definition of applicants with special needs and shall therefore be granted tailored reception conditions – without prejudice to other general provisions, such as access to information, the right to documentation, and detention safeguards. Article 11 on the detention of vulnerable persons, Article 17 on general rules on material reception conditions and healthcare, as well as Article 22 on the assessment of the special reception needs of vulnerable persons, are of paramount significance. According to the Directive, "Member States shall ensure that [an adequate] standard of living is met in the specific situation of vulnerable persons",[120] taking into account gender and age-specific concerns. The basis for an effective implementation of the Directive is once again the identification process: as the European Commission's report on the implementation of the Directive highlighted, the "identification of vulnerable asylum seekers is a core element without which the provisions of the Directive aimed at special treatment of these persons will lose any meaning".[121] According to Article 22, "Member States shall assess whether the applicant is an applicant with special reception needs" through an assessment that "shall be initiated within a reasonable period of time after an application for international protection is made".[122] However, it is hard to see how the assessment can be carried out without a clear, structured and standardised screening system, which is not provided for in Directive 2013/33/EU nor in Directive 2011/36/EU. Although the latter envisaged the adoption of "measures […] support[ing] the development of general common indicators of the Union for the identification of victims of trafficking",[123] there is no uniform and sure method to proceed with the identification of vulnerabilities. Despite the absence of a systematic method, tools to assist in the identification procedure are available, among which the EASO Tool for Identification of Persons with Special Needs (IPSN) and the IOM Handbook on Direct Assistance for Victims of Trafficking.[124] These guidelines lay down detailed operational procedures to be followed in the assessment of vulnerabilities, highlighting hurdles to overcome and indicators to observe. A person, indeed, might not identify him or herself as a victim, so that it is on the responsible officer to consider if there are any signs, objective and subjective, that might suggest that the person has been trafficked. EASO and IOM have provided a list of such indicators, among which physical indicators; psychosocial indicators such as attitude, mood and affect, thought process, self-perception, and relation to others; and environmental indicators like country of origin information, treatment by others and/or related to the applicant. Other pieces of evidence which might be relevant for the identification of victims of trafficking are statements by the applicant or by other persons, observations, referrals by actors who have been in contact with the person, documents submitted or collected by the authorities, and medical evidence.

[119] See: *Asylum Information Database*, www.asylumineurope.org/2016 (last accessed 13 August 2018).
[120] Directive 2013/33/EU, Article 17(2).
[121] European Commission, *Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of January 27th 2003 laying down minimum standards for the reception of asylum seekers*, 26 November 2007, COM(2007)745 final, point 3.5.1.
[122] Directive 2013/33/EU, Article 22(1).
[123] Directive 2013/33/EU, §4.
[124] See: EASO, *Tool for Identification of Persons With Special Needs (IPSN)* http://ipsn.easo.europa.eu/easo-tool-identification-persons-special-needs (last accessed 13 August 2018); and IOM, *The IOM Handbook on Direct Assistance for Victims of Trafficking* (2007) https://publications.iom.int/books/iom-handbook-direct-assistance-victims-trafficking-0 (last accessed 13 August 2018).

In the context of the implementation of the "hotspot approach" in Italy and in Greece, particularly where decisions are made on an expedite basis and where access to legal aid and effective remedies is scarce, it is crucial that the assessment be immediate in order to avoid an incoherent, incomplete and partial implementation of Directives 2011/36/EU and 2013/33/EU, as well as, more broadly, to avoid the creation of legal ambiguities and of widespread infringements of the rights of human trafficking victims. In order to guarantee an appropriate standard of protection, national laws should be in line and complying with international standards, that is to say they should at least criminalise trafficking in all forms, provide for an early identification and a referral mechanism for victims, both in principle and in practice, as well as for structured training of law enforcement and border officials, guarantee access to the hotspots to NGOs and other relevant actors such as social workers and lawyers, and they should contain procedural safeguards which prevent further harm to identified and potential victims of trafficking.

3. The Italian and the Greek Frameworks

The definition of the crime of trafficking and the terms of its prosecution are contained in Article 601 of the Italian Penal Code, as introduced by Law n. 228/2003, National Law against Trafficking in Human Beings, and modified by Law Decree n. 24/2014, which states the following:

> "Whoever recruits, transfers inside or outside the territory of the country one or more persons; concedes authority over a person, hosts one or more persons who find themselves in the conditions set out in Article 600;[125] or whoever leads any of the aforesaid persons through deceit or obliges such person by making use of violence, threats, or abuse of power; by taking advantage of a situation of vulnerability, of physical or mental inferiority, or need; or by promising money or making payments or granting other kinds of benefits to those who are responsible for the person in question, to induce or force them into labour, sexual services, begging or any illicit activity leading to exploitation, as well as exploitation for the purpose of removal of organs, shall be punished with imprisonment from eight to twenty years".[126]

The main provisions with respect to the protection of victims are, on the other hand, Article 18 of the National Law on Immigration, Legislative Decree n. 286/1998 on residence permits on social protection grounds, and Article 13 of Law n. 227/2003 on the establishment of a special assistance programme for victims of human trafficking. In addition, a biennial National Action Plan Against Trafficking and Serious Exploitation (NAP) was approved in February 2016.[127] The NAP, which is structured in accordance with the five priorities identified by the EU Strategy,[128] introduced substantial measures aimed at strengthening the four "Ps" – prevention, prosecution, protection, and partnership. In particular, it is worth recalling the establishment of a National Referral Mechanism (NRM), which was conceived as a victim identification and support process which would create a cooperation framework for all groups involved in trafficking cases (i.e. the police, border police,

[125] Article 600 of the Italian Penal Code defines the victim of human trafficking as a person reduced or maintained in a state of continued subjection, forced into labour, sexual services, begging or exploitation of illicit activities.
[126] Italian Penal Code, Article 601.
[127] *National Action Plan Against Trafficking and Serious Exploitation*, adopted by the Council of Ministers on 26 February 2016, available at www.pariopportunita.gov.it/materiale/piano-dazione-contro-la-tratta-e-il-grave-sfruttamento/ (last accessed 13 August 2018).
[128] European Commission, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016' https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_strategy_towards_the_eradication_of_trafficking_in_human_beings_2012-2016_1.pdf (last accessed 13 August 2018).

asylum case officers, local authorities and NGOs), as well as the adoption of guidelines on rapid identification to be applied "also amongst particularly vulnerable groups, such as illegal migrants, including unaccompanied minors and asylum seekers".[129]

According to the guidelines, all actors that might come in contact with potential victims of human trafficking, especially law enforcement officers who tend to be the first responders within the hotspots, shall "(a) always be aware of the possibility that they might encounter victims of serious crimes; (b) consider that a situation of trafficking, exploitation or aiding and abetting might be hidden behind a simple case of 'irregular' migration; (c) avoid aggressive attitude and behaviours",[130] and inform the relevant contact points of the situation, as well as the person of the availability of protection mechanisms. Identification is defined as a two-stage process – comprised of a preliminary and a formal identification: while the first one is aimed at responding to the victim's primary needs and at channelling potential victims into the correct legal path, the latter is intended to confer to the person the official status of victim of human trafficking according to national laws, after the person has enjoyed a period of reflection and recovery. The Ministerial guidelines go even further, stressing how, "considering the complexity of the crime of trafficking, a person that claims to be a victim shall be given the benefit of the doubt and treated as a potential victim".[131] While the formal identification phase was conceived to be performed at a later stage, and by officers with a high expertise in the field of trafficking, the first screening does fit the purpose and structure of the hotspots insofar it is not aimed at conferring a legal status, but rather at making a first assessment with a view to refer the situation to the appropriate authorities.

The existence of these guidelines is even more important considering that, in analysing the sea routes in the Mediterranean, IOM has come to the conclusion that there has been a tremendous increase in the number of potential victims of human trafficking, particularly among individuals coming from selected countries: indeed, in a recent report based on data collected in disembarkation sites, IOM affirmed that the phenomenon of trafficking could affect up to 80% of individuals, who tested positive to at least one human trafficking and other exploitative practices indicator.[132] More generally, looking at the number of potential victims of human trafficking that have been identified and assisted during the last few years, it is clear that the phenomenon has grown since the beginning of the *migration crisis*.

[129] *National Action Plan* (n.127).
[130] Ibid., Annex 2: Guidelines on the definition of an early identification mechanisms for victims of human trafficking and serious exploitation.
[131] Ibid.
[132] IOM (2017) 'Analysis: Flow Monitoring Surveys. The Human Trafficking and other Exploitative Practices Prevalence Indication Survey June 2017', http://migration.iom.int/docs/Analysis_Flow_Monitoring_and_Human_Trafficking_Surveys_in_the_Mediterranean_and_Beyond_14_June_2017.pdf (last accessed 13 August 2018). The survey was conducted between February and May 2017 in Sicily, Apulia, Lombardy, Liguria and Friuli Venezia Giulia, therefore covering both the North and the South of Italy. The sample represents 42 different countries of origin for a total of 2,769 interviews. According to the surveys, "migrants with the highest share of positive responses come from Ghana, Bangladesh, Somalia, Senegal (with more than 94% of positive responses)", while "Moroccans and Nigerians have shares of positive responses for around 86% of the cases". See also: IOM (2017) 'Human Trafficking through the Central Mediterranean Route', p.9; and IOM (2018) 'Analysis: Flow Monitoring Surveys. The Human Trafficking and other Exploitative Practices Prevalence Indication Survey', available at http://migration.iom.int/docs/FMS_CT_Analysis_male%20female_Central_Eastern_2017.pdf (last accessed 13 August 2018).

	2014/2015	2016
Potential victims of human trafficking informed and assisted by IOM	3,380	8,227
Identified victims of human trafficking	2,195	6,599
Victims reported to the authorities or to anti-trafficking networks	142	425

Table 3: No of victims identified and assisted by IOM in disembarkation areas and reception centres. Data source: IOM

Since 2006, IOM collaborates with the Department of Civil Liberties and Immigration of the Ministry of Interior and the Italian border police to identify victims of human trafficking arriving by sea.[133] In the hotspots' framework, it has been assigned a prominent role in the identification of victims. The organisation is present in disembarkation areas as well as in reception centres with a specific mandate which derives from the SOPs elaborated by the Ministry of the Interior, as well as from the organisation's own mandate.[134] UNHCR is also present at the hotspots and provides legal advice and information on the Italian asylum system, although not focusing on human trafficking.

The phenomenon of trafficking in Greece is different, both quantitatively and qualitatively, with respect to Italy, which also means that the institutional response of the Greek Government has but a few parallels with the Italian one. The offence of trafficking was introduced into the Greek Criminal Code through Law n. 3064/2002, subsequently amended by Law n. 3875/2010. Articles 323A and 351 of the Criminal Code respectively define the crime of trafficking, the terms of its prosecution and the specific offence of trafficking for sexual exploitation as follows:

1. A person who, by the use of force, threat of force or other coercive means, or by imposition or abuse of power, or by abduction, recruits, transports, transfers inside or outside the territory of the country, retains, harbours, delivers with or without a benefit a person to another person, or receives a person, with the purpose of removing cells, tissues or organs of the body or exploiting the labour or begging thereof,[135] shall be punished by a maximum penalty of ten years' imprisonment and by a fine of ten thousand to fifty thousand euros.
2. The perpetrator shall be punishable [also] if, in order to achieve the [goals stipulated in paragraph 1], he/she achieves the consent of a person by fraudulent means or deceives this person by exploiting his/her position of vulnerability by making promises, gifts, payments or giving other benefits.[136]

[133] IOM has been present on the territory with several projects, among which project Praesidium and project ADITUS, implemented in collaboration with other organisations such as UNHCR, the Italian Red Cross, Save the Children, the Ministry of the Interior and the European Commission, as well as local organisations and the judiciary.

[134] The activity of IOM in the field of counter-trafficking revolves around three main actions: early identification, assistance and referral to the authorities, and capacity building. IOM staff working in the most affected disembarkation areas, most of them in Sicily, has developed a list of targeted, significant indicators that could be useful in early identification processes, although it would be crucial to be able to assess each person's individual story in order to gather more evidence of other indicators which are invisible *prima facie*. Established in 2000, an anti-trafficking helpline is accessible to individual victims, State organisms and private bodies for referrals and self-referrals. See: IOM (2017) 'Human Trafficking through the Central Mediterranean Route' (in Italian) www.italy.iom.int/sites/default/files/news-documents/RAPPORTO_OIM_Vittime_di_tratta_0.pdf (last accessed 13 August 2018).

[135] Article 351 of the Greek Criminal Code specifies also "the purpose of sexual exploitation either by [the perpetrator] or by another person", thus including all categories of human trafficking.

[136] Greek Criminal Code, Article 323A.

In addition, Law n. 3064/2002 and Presidential Decree n. 233/2003 establish and refine a mechanism of assistance to victims, Law n. 4198/2013 transposes Directive 2011/36/EU and establishes the Office of the National Rapporteur on Trafficking in Human Beings, while Government Decision n. 30840 provides for an NRM. While a NAP had been in place until 2012, the Greek Government has yet to adopt a new one.

According to Law n. 4375/2016, the RIS shall be responsible for, among others, the identification of vulnerable persons, with the Manager of the Centre or the Unit who shall "refer persons belonging to vulnerable groups to the competent social support and protection institution".[137] Once a vulnerable person has been identified, he or she should be both exempted from border procedures and referred to a RIC located inland or to other appropriate structures in order to continue and complete the reception and identification procedure.[138] A framework for identification procedures is currently provided for in Law n. 4251/2014, which defines victims of trafficking as "both the natural person for whom there are substantial reasons to be considered victim of any of the crimes provided [in Presidential Decree n. 233/2003], before criminal prosecution, and the person against whom any of the above crimes were committed and for which proceedings were opened, whether the person has entered into the country legally or illegally",[139] and identifies the Public Prosecutor's Office as the only authority with competence to grant such status.

Both in 2016 and 2017, IOM analysed mixed migration flows in the Eastern Mediterranean route looking for data on human trafficking and other exploitative practices.[140] While numbers appear to be fairly less significant than those of the Central Mediterranean route, the report nonetheless indicates that around 10% of individuals answered positively to at least one trafficking indicator, with higher rates amongst Pakistani, Afghans, and Syrians. A worrying, and different with respect to Italy, trend highlighted by the 2016 report is that adolescent youth appeared to be more affected by trafficking than adults. Not unlike in the Italian context, IOM has been given a prominent role in the identification of people pertaining to vulnerable groups, among which victims of trafficking in human beings: in fact, a Memorandum of Understanding was signed in line with Article 14 of the Law n. 4375/2016, assigning the organisation a role in "provid[ing] information to persons falling under reception and identification procedures and provid[ing] any other form of assistance, in accordance with [its] mandate and [its] competences".[141] However, the Greek hotspots still lack SOPs as well as detailed guidelines on the identification process and procedures. In March 2017, the Fifth Report on the Progress made in the implementation of the EU-Turkey Statement informed that "the [RIS], together with EASO, are working on defining some of the vulnerability categories and developing a Standard Medical Assessment Template for the processing of vulnerable persons".[142] To date, however, there are no tools nor procedural guidelines available to operators in the hotspots to manage and facilitate any sort of vulnerability assessment. The gap has been filled by a number of NGOs, particularly medical organisations, that have

[137] Law n. 4375/2016, Chapter B, Articles 8 and 14.
[138] Ibid., Chapter B, Articles 14 and 60.
[139] Law n. 4251/2014, Part One, Chapter A, Article 1(xi).
[140] IOM (2017) 'Migrant Vulnerability to Human Trafficking and Exploitation: Evidence from the Central and Eastern Mediterranean Migration Routes', http://publications.iom.int/books/migrant-vulnerability-human-trafficking-and-exploitation-evidence-central-and-eastern (last accessed 13 August 2018); and IOM, 'Flow Monitoring Survey, June 2017' (n.132).
[141] Law n. 4375/2016, Chapter B, Article 14.
[142] European Commission, 'Annex to the Report from the Commission to the European Parliament, the European Council and the Council. Fifth Report on the Progress made in the implementation of the EU-Turkey Statement', COM(2017)204 final.

played a crucial role in assisting vulnerable groups the hotspots through temporary working contracts signed with the Ministry of Migration Policy, even if lacking a specific framework for action.[143]

(a) Legal and practical challenges

The first assessment that shall be made on the legal and practical challenges in the identification of potential victims of human trafficking is one about policy. Despite reference is made to issues of trafficking in the foundational documents of the "hotspot approach", it is clear from both the staffing levels in the centres and reports from national and international organisations that the focus of the operations has been almost entirely placed on border control, identification, and registration. In Greece, attention to vulnerabilities is insufficient in the reception and asylum legal frameworks and the lack of specific procedural guidelines on the identification of vulnerable individuals reinforces the belief that protection is not seen as a priority. Indeed, "as greater emphasis is […] placed on meeting dire accommodation and subsistence needs for a high number of refugees as a matter of urgency, vulnerability to trafficking […] runs the risk of being overlooked or not treated by way of priority in the design of reception strategies."[144] Reports from organisations accessing the Greek hotspots have also emphasised that, despite "the obligation to investigate [cases of suspected trafficking] does not depend on a complaint by the victim [but rather that] once the matter has been brought to their attention, authorities must act",[145] too often vulnerability assessments and access to protection schemes depend on either formal complaints or cooperation with the authorities. In Italy, on the other hand, although a screening procedure has been established, practice in the hotspots differs substantially from the guidelines on the identification of potential victims, a worrying non-compliance that is indicative of the prioritisation of security-related procedures, such as fingerprinting and registration, on human rights-related assistance. Several NGOs have described disturbing shortcomings and serious abuses in the hotspots, as well as a widespread disregard for any kind of vulnerability assessment to the point that even "the EASO tool for vulnerable groups is […] not used in a systematic way and is not available in Italian".[146] It has been reported that in Lampedusa, as well as in the other hotspots and disembarkation areas, "as part of the identification process, migrants [only] receive an Italian Home Office questionnaire bearing the question, 'What is the reason for your being in Italy?' with four options to choose from: 'poverty', 'family reunification', 'work', or 'other reasons'",[147] and the issuance of a deportation order tends to depend solely on the answer given to the above-mentioned questionnaire, with no disclosure of any available rights and remedies nor individual assessments.[148]

One of the greatest hurdles in the identification of potential victims of human trafficking is indeed the distinction between trafficked people and smuggled migrants or irregular migrants. When victims of human trafficking are not identified, they are not only invisible to a protection system they cannot access, but they

[143] See: ECRE, *Study* (n.45) pp.40-46; Refugee Support Aegean (2017) 'Serious gaps in the care of refugees in Greek hotspots: Vulnerability assessment system is breaking down', http://rsaegean.org/serious-gaps-in-the-care-of-refugees-in-greek-hotspots-vulnerability-assessment-system-is-breaking-down/ (last accessed 13 August 2018); and Pro Asyl (2017) 'Serious gaps in the care of refugees in Greek hotspots', www.proasyl.de/en/news/serious-gaps-in-the-care-of-refugees-in-greek-hotspots/ (last accessed 13 August 2018).

[144] AIRE Centre and the European Council on Refugees and Exiles, 'With Greece: Recommendations for Refugee Protection' (2016) p.19.

[145] ECtHR, *Chowdury v. Greece* (n.74) §89.

[146] Greek Council for Refugees, European Council on Refugees and Exiles, Consiglio Italiano per i Rifugiati, and VluchtelingenWerk Nederland, 'Strengthening NGO Involvement and Capacities around EU Hotspots Developments: Update on the implementation of the hotspots in Greece and Italy' (2017) p.7

[147] Garelli and Tazzioli, 'EU Hotspot Approach' (n.24).

[148] See: ECRE, *Study* (n.45); Greek Council for Refugees *et al*, 'Strengthening NGO Involvement and Capacities' (n.146); and Amnesty International, 'Hotspot Italy' (n.28).

might also be misidentified as illegal third-country nationals or smuggled migrants, therefore running the risk of being immediately returned to unsafe third countries. While it could be argued that "the empirical line of demarcation between the crimes is not readily identifiable because the difference turns on consent",[149] the OHCHR has instead asserted that "the critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process - such deception, force or coercion being used for the purpose of exploitation",[150] which is a more complex issue. Indeed, it indirectly suggests that trafficking is a *spectrum*, as a victim may not have been under the complete control of another person for the entire journey, but rather for a part of it, and as consent may not be fully arbitrary. What is unquestionable is that Member States have a responsibility to examine the case of each individual who lands on their territory, no matter his or her legal status and migration history.[151] Nonetheless, practice has shown how police and immigration officers in transit zones and within the hotspots tend to perform summary investigations, if not collective assessments based on nationality, in order to evaluate whether an individual, or a group of individuals, has a right to claim protection,[152] in clear contrast with the judgment of the ECtHR in *Khlaifia and Others v. Italy*, in which the Court held that "collective expulsion of aliens merely on the basis of their nationality […] offends against the principle of democracy, which is one of the fundamental principles of the Convention" and that "the conduct of a personal interview is the minimum procedural guarantee required by Article 4 of Protocol No. 4 [so that] if a State, despite the conduct of personal interviews, nevertheless ignores the personal circumstances of each alien forming a group and proceeds with the simultaneous expulsions of all members of the same group merely on the basis of their nationality, religion or membership of a group […] it still violates Article 4 of Protocol No. 4, because it goes against the aim of the said provision".[153] These practices of collective assessments and discrimination based on nationality are especially disturbing given that, recalling the reasoning of the ECtHR in *Chowdury and Others v. Greece*, the high possibility of encountering victims of trafficking among certain categories of individuals in the hotspots are well-known and documented.[154] Not only the measures adopted by the Italian authorities are not sufficient for the protection of potential victims, but Nigerians are also among the top nationalities being forcibly returned without a proper individual assessment, a statistic that has grown in 2017 despite a considerable number of reports from NGOs and civil society organisations.[155]

The role of specialised NGOs and social workers in the identification process has been highlighted multiple times in previous sections. Still, the involvement of such organisations and their expert members is subject to economic and practical limitations which might jeopardise the work being done in the hotspots. Even if the average time spent within the premises exceeds the limits prescribed by law, it is still not enough to fully consider a case: most of the times, vulnerability assessments need to be carried out within 48 hours, a timeframe which does not allow for the establishment of any kind of rapport nor trust between the staff and potential victims for a number of reasons, among which the need for newly disembarked people to recovery

[149] See: Jones, 'Human Trafficking Victim Identification' (n.88), p.486.
[150] OHCHR, 'Recommended Principles and Guidelines' (n.77), Guideline 2, p.4
[151] *See Henning Becker v. Denmark*, Application no.7011/75, Council of Europe: European Commission on Human Rights, 3 October 1975; ECtHR, *Čonka v Belgium*, Application no. 51564/99, 5 February 2002; ECtHR, *Hirsi Jamaa and Others v Italy* (n.113); ECtHR, *Khlaifia v. Italy* (n.38).
[152] See: ECRE, *Study* (n.45), pp.14, 30, 31; Amnesty International, 'Hotspot Italy' (n.28), pp.41, 47; and ASGI (2016) 'Observations in Greece: The right to asylum and its application following the EU-Turkey agreement (declaration) dated 18th March 2016', p.50, https://ffm-online.org/wp-content/uploads/2016/12/Report-Greece.pdf (last accessed 13 August 2018).
[153] ECtHR, *Khlaifia v. Italy* (n.38) §§62 and 65. See also: ECtHR, *Sharifi and Others v. Italy and Greece*, Application No.16643/09, 21 October 2014.
[154] ECtHR, *Chowdury v. Greece* (n.74) §§110-115.
[155] See: Open Migration (2017) 'Perché sono i nigeriani a venire rimpatriati più spesso, e quanto costa' [in Italian] http://openmigration.org/analisi/ (last accessed 13 August 2018).

from a traumatic journey, the lack of appropriate physical space for such a delicate evaluation, and the inability or unwillingness of poorly trained operators to detect hidden or *invisible* vulnerabilities, such as being victim of human trafficking. According to Human Rights Watch, "a representative of *Médecins Sans Frontières* [informed that] MSF is providing treatment on the Greek islands of Lesbos and Samos to a high number of people who have not been identified as 'vulnerable' despite meeting the criteria" and that "the procedures used by the Greek authorities have made it increasingly difficult to register vulnerable people".[156] The dismissal of potential referrals might be considered an omission by the Greek authorities which, following the reasoning of the ECtHR in *L.E. v. Greece*, "cannot be characterised as reasonable, [especially since] such failure of the competent authorities may have had a negative impact on the [individual's] personal situation".[157] More recently, the decision not to renew the working contracts that most of the NGOs present in the Greek hotspots had signed with the Ministry of Migration Policy has worsened the already appalling conditions in the reception centres, leading to the breakdown of the fragile vulnerability assessment system on the islands.[158] In Italy, many NGOs have decided to leave the hotspots due to "shortcomings in the reception system combined with the absence of any concrete improvement and the manifested lack of political will".[159] In a context in which access is already strictly regulated and even reported vulnerabilities are overlooked, the departure of specialised personnel from the reception centres is only detrimental to those individuals who would have benefitted from their presence, among which victims of human trafficking.

Policy, strategic priorities and legal gaps are not the only hurdles to be overcome in building a solid, more efficient identification and referral mechanism. Specialised training is undoubtedly needed for personnel involved in disembarkation operations and in all stages of pre-identification, identification and registration: however, although it is clear that those in charge of dealing with victims of human trafficking should have not only the necessary knowledge and skills, but also the necessary awareness, to fully assess each case, training alone would only partially solve the issue. Structural deficiencies of the "hotspot approach" shall be addressed, particularly with respect to living conditions, purpose, and staffing. Several judgments of the ECtHR and reports from NGOs have described dreadful living conditions experienced by individuals in reception centres, where people denounced feelings of arbitrariness, inferiority, and anxiety, lack of consideration for vulnerabilities, and inadequacy of the physical structures.[160] Overcrowdings, and therefore absence of space, confidentiality, and privacy, are of particular relevance and raise concerns. According to the OHCHR Recommended Principles and Guidelines, "there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected",[161] a concept which is reaffirmed in the CoE Trafficking Convention.[162] However, areas of disembarkation and hotspots as they are currently set up are not adequate places for proper counselling and for interviews with a view to assess vulnerabilities, due both to the prevalence of law enforcement officers among the stakeholders and to the lack of a

[156] Human Rights Watch (2017) 'EU/Greece: Pressure to Minimize Numbers of Migrants Identified As Vulnerable', www.hrw.org/news/2017/06/01/eu/greece-pressure-minimize-numbers-migrants-identified-vulnerable (last accessed 13 August 2018).
[157] ECtHR, *L.E. v. Greece* (n.104) §77.
[158] Refugee Support Aegean, 'Serious gaps' (n.143).
[159] MSF (2015) 'Pozzallo: MSF annuncia l'uscita dal CPSA' [in Italian] http://dirittiefrontiere.blogspot.com/2015/12/msf-esce-dal-cpsa-di-pozzallo-adesso.html?m=1 (last accessed 13 August 2018).
[160] See: ECtHR, *M.S.S. v. Belgium and Greece* (n.45); ECtHR, *Tarakhel v. Switzerland* (n.73); Administrative Court of Cologne, Case No.16 K 2829/14.A, judgment of 02 June 2015; Human Rights Watch (2017) 'Greece: Dire Refugee Conditions on Islands', www.hrw.org/news/2017/01/23/greece-dire-refugee-conditions-islands (last accessed 13 August 2018); and European Court of Auditors, (2017) 'EU Response to the Refugee Crisis: The Hotspot Approach', Special Report 06/2017, pp.27-28 www.eca.europa.eu/en/Pages/DocItem.aspx?did=41222 (last accessed 13 August 2018).
[161] OHCHR, 'Recommended Principles and Guidelines' (n.77), Guideline 6.
[162] CoE, *Trafficking Convention* (n.9) Article 11.

dedicated, private space in which to conduct individual interviews. Often times identification is hindered because victims are afraid to expose themselves or to risk exposing others, particularly when there is scarce awareness of the availability of protection systems. In this regard, the lack of legal aid and cultural mediators remains a major issue, as well as the shortage of interpreters – particularly in the medical sector. In addition, although the timely removal of potential victims from the hotspots is crucial in guaranteeing their safety and chances of collaboration with the authorities, a challenge that was encountered is the shortage of available spots in *safe houses* places to which individuals that present indicators of trafficking upon disembarkation should be transferred in order to distance them from potential traffickers and, in the Greek case, inland reception centres. Despite the Reception Conditions Directive stipulates that "material reception conditions" shall "provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health" [163] and the Court of Justice of the European Union has clarified that reception must adequately satisfy health and other material needs in order to guarantee a dignified standard of living,[164] the Asylum Information Database has documented how several countries, among which Italy and Greece, systematically fail common standards.[165]

4. Concluding Remarks

An evaluation of the international, European, and national frameworks suggests that the degree of protection afforded to victims of human trafficking follows a descending curve: the more the analysis reaches the practical level, the less protection is given to vulnerabilities. While legal obligations deriving from international and European law widely protect victims, national legislation, and even more the realisation of the "hotspot approach", dilute international standards and fail to comply with them, in spite of the adoption of a human rights-based narrative. Despite trafficking is criminalised in both Italy and Greece and, although with considerable differences, both jurisdictions have put in place mechanisms to protect victims of human trafficking, their accessibility is still incoherent, fragmented and overall insufficient. The challenges in implementing protection schemes are rooted not only in policy and in law, but also and foremost in practice. While vulnerability assessment requires time, adequate space, trained professionals, and functional mechanisms, most of these factors are missing in the hotspots. Although there are substantial dissimilarities between Italy and Greece both in the objectives and implementation of the approach and in the impact of human trafficking among incoming migrants, it is possible to draw some parallels and to identify common hurdles in the establishment of a human rights based early identification mechanism for victims of trafficking in first reception centres. Exceptional circumstances cannot justify the current disregard for human rights obligations, especially in contexts in which authorities are aware of the presence of significant vulnerabilities. A pronounced prioritisation of security concerns – and the consequent attention to identification, fingerprinting, and registration rather than to the needs and protection of vulnerable people – has resulted in the formation of a system in which due diligence and the legal obligations to identify and assist victims of trafficking, as well as people with other vulnerabilities, have been given a marginal role.

[163] Directive 2013/33/EU, Article 17.
[164] *See* CJEU, *Saciri and Others*, Case C-79/13, judgment of 27 February 2014.
[165] Asylum Information Database, 'Wrong Counts and Closing Doors: The Reception of Refugees and Asylum Seekers in Europe' (2016) www.asylumineurope.org/sites/default/files/shadow-reports/aida_wrong_counts_and_closing_doors.pdf (last accessed 13 August 2018).

E. CONCLUSION

The purpose on this research was to assess whether the "hotspot approach", adopted by the European Union and implemented by individual Member States on the basis of an understanding of the movement of people across borders as a non-military threat to State security, is the most appropriate tool to deal with the current migration phenomenon and whether such policy can be implemented having full regard to the protection of the rights of the individual, particularly the most vulnerable. In a framework in which "policy developments in the field of migration and asylum created a highly diverse and far-reaching legislative framework [that] established migration as a phenomenon that poses risks and needs to be regulated and controlled even more tightly",[166] the approach proposed by the European Commission appears to be not only in line with the historical development of immigration policy, but also to be the only politically feasible response to the current challenges faced by Member States in the context of the European migration *crisis*. Nonetheless, just because an approach follows a security-based reasoning, it cannot automatically be argued that it dismisses human rights-based concerns: Instead, a comprehensive assessment is needed – one that takes into account the political framework, on the one hand, and the degree of protection for the most vulnerable, on the other hand.

In the light of the main findings related to this research, it appears that the concept of primacy of human rights on security concerns in cases of human trafficking – which has been supported by and enshrined in international instruments such as the UNODC Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking and Directive 2011/36/EU – is not reflected in the conceptual design nor in the practical implementation of the "hotspot approach". Indeed, although the fight against smugglers and traffickers is one of the four pillars to better manage migration in the European agenda,[167] identification mechanisms within the hotspots, when functioning, are largely overlooking the phenomenon. This suggests that the "action to fight criminal networks of smugglers and traffickers [foreseen in the European Agenda on Migration on which the "hotspot approach" is based is not] first and foremost a way to prevent the exploitation of migrants by criminal networks",[168] but rather a way to prevent their arrival. In a context in which the migration *crisis*, combined with the lack of safe and legal access to the EU's territory and the consequent rise of people smuggling, has been a major catalyst of human trafficking, the failure to establish appropriate screening and protection mechanisms for (potential) victims of trafficking represents a major step back from a human rights perspective.

The EU's response has once again put more emphasis on the securitisation of borders, on the one hand, and on the interception of traffickers, on the other, rather than on the identification and protection of victims. Taking into consideration international and national legal obligations, and given that one of the aims of the approach is to disrupt the network of smugglers and traffickers, victims of trafficking should be primarily considered as right holders. Still, the denial of their rights begins with the failure in their identification and continues with their consequential inability to access protection. While "it is widely acknowledged that lack of or inadequate support and coordination between different [national actors] is one of the major obstacles

[166] L. Karamanidou, 'The Securitisation of European Migration Policies: Perceptions of Threat and Management of Risk', in G. Lazaridis and K. Wadia (eds), *The Securitisation of Migration in the EU. Debates Since 9/11* (Palgrave MacMillan, 2015) p.38.
[167] European Commission, *European Agenda on Migration* (n.16) p.6.
[168] Ibid., p.8.

to the effective […] response to trafficking",[169] the "coordination [that should have been] ensured on the ground […] between all different actors involved in the screening, fingerprinting, identification and registration of third country nationals [in the hotspots] in order to swiftly identify and refer victims of trafficking and provide appropriate levels of care and protection"[170] is minimum, if not non-existent. Once within the premises, individuals claiming asylum should be channelled into the asylum procedure while those who are considered not to be in need of protection should be repatriated with the assistance of Frontex: However, cases of exclusion from both the asylum system and other protection mechanisms, together with the absence of legal aid and the implementation of measures of forced returns without prior individual assessments, are amongst the most common practices both in Italy and in Greece.

The limits associated with the "hotspot approach" are rooted in law, policy, and practice. The timely identification of potential victims of trafficking is an obligation which lies with the State, as emphasised in the CoE Trafficking Convention and in the ECtHR case-law. The approach, which is deeply entrenched in the so-called Dublin system, falls short of taking such responsibility into account leaving protection behind. Although a reform of the Dublin III Regulation has been and is still being discussed, a change is not likely to happen in the short term. On the one hand, Greece and the so-called Visegrad nations have pushed back against a proposal on the reform of the Dublin regulation that had been formulated by Bulgaria during EU presidency during an EU-28 interior ministers meeting in Luxembourg, while, on the other hand, the conclusions, positively welcomed by the Italian government as a step forward in the reform debate, of the recent meeting of the European Council held on 28th June 2018, state that

> "On EU territory, those who are saved, according to international law, should be taken charge of, on the basis of a shared effort, through the transfer in controlled centres set up in Member States, only on a *voluntary basis*, where rapid and secure processing would allow, with full EU support, to distinguish between irregular migrants, who will be returned, and those in need of international protection, for whom the principle of solidarity would apply. All the measures in the context of these controlled centres, including relocation and resettlement, will be on a *voluntary basis*, without prejudice to the Dublin reform (emphasis added)".[171]

On the Dublin regulation, the European Council further concluded that "[a] consensus needs to be found […] to reform it based on a balance of responsibility and solidarity, taking into account the persons disembarked following Search And Rescue operations",[172] all aspects which have been deeply problematic and on which previous efforts have run ashore. The only advancement contained in the conclusions is one based on voluntariness, which can hardly be seen as an agreement having concrete effects. At the same time, while the discourse on the smuggling of migrants and the epithet "irregular migrants" have found resonance in the conclusions of the European Council, the attention to the phenomenon of trafficking in human beings, and more generally to access to protection, has been scarce. Against this background, a new presidency has just begun in the Council of the European Union as of 1st July 2018. During a press briefing in March 2018, the Austrian government outlined its priorities for the presidency, among which security in the form of the fight against illegal immigration by securing external borders. Should an agreement not be reached, the Dublin

[169] A. Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor' (2007) 36(1) *Denver Journal of International Law & Policy* 9-54, p.11.
[170] European Commission, Report from the Commission to the European Parliament and the Council, 'Report on the progress made in the fight against trafficking in human beings", COM(2016)267 final, p.9.
[171] European Council Conclusions, 28 June 2018, www.consilium.europa.eu/en/press/press-releases/ (last accessed 13 August 2018).
[172] Ibid.

regulation will continue to divide Member States and to be a weakness, arguably the main weakness, in the European project. If a reform is to be adopted, and with it a new framework in which the "hotspot approach" would operate, the concern would then revolve around the paradigm which could be adopted, namely one which would fail to shift paradigms from the securitisation of migration, which tolerates breaches of human rights obligations in the name of a traditionally conceived notion of security, to its humanisation, which instead conceives the former as one of the main threats to the latter.