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Out of Sight, Out of Mind. Reassessing Positive Obligations Towards Victims of Human Trafficking

*Matilde Ventrella and Sonia Morano-Foadi**

At a glance

States bordering the Mediterranean Sea and the Channel are leaving many migrants to their fate. By doing so, they are failing in their legal obligations to identify and protect actual and potential victims of human trafficking. This article challenges the legal position of these States, providing a creative construction of EU and Council of Europe law on human trafficking and European human rights legislation. The work first focuses on how the obligations towards asylum seekers, migrants distressed at sea and victims of trafficking interrelate and overlap; and reflects on the implications of the different statuses. It then considers whether the multiple international maritime law treaties that bind State signatories in respect of rescue-at-sea missions provide protection for actual and potential victims of human trafficking. It undertakes an analysis of European anti-trafficking legal regimes, which include the Council of Europe Convention against Human Trafficking, Article 4 of European Convention on Human Rights and the EU Trafficking Directive. Finally, the article focuses on the UK as a case study. The piece argues that the international law of the sea, whilst aiming at saving lives of people stranded in the high sea, does not guarantee the identification and protection of human trafficking victims amongst those being saved. For this, we need to look to European human rights law. The article claims that a State's responsibility for the identification and protection of victims extends beyond the geographical remit of its territorial jurisdiction.

1. Introduction

Migratory pressure by sea has intensified in recent times, particularly in relation to the Southern, Eastern and Western Mediterranean external borders of the European Union (EU)[1]

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1 Although some academics might place the migratory pressures in 1990 at the extension of Schengen visas to African states, we refer to EU official documents, eg Para 3 preamble of Council Decision (EU) 2015/1601 of 22 September

and, in 2021, between the UK and France, where over 28,500 people crossed the Channel from France in small boats.[2] On multiple occasions, States bordering the Mediterranean Sea have refused to disembark asylum seekers and other migrants distressed at sea in the vicinity of their domestic waters, justifying their actions on territorial arguments, ie aliens stranded outside their territorial water are not within their jurisdiction or their responsibility.[3] By contrast, the European Court of Human Rights (ECtHR) has held that 'the obligation and necessity for the Contracting States to protect their borders, either their own borders or the external borders of the Schengen area', shall be exercised in compliance with the obligation of *non-refoulement*.[4] This means States have an obligation not to return a refugee. However, as a result of States' actions, asylum seekers and other migrants have continued to lose their lives at sea.[5] Moreover, the UK National Crime Agency (NCA) has reported that many people stranded at sea in small boats crossing the Channel are recruited by criminal organisations.[6] Amongst irregular migrants who have been smuggled there might be actual and potential victims of human trafficking. Therefore, although smuggling and trafficking are two different crimes, people who travel by sea can become victims of human trafficking through inception by criminal organisations before reaching land.

A complex legal framework applies to migrants distressed at sea, as amongst them there are refugees, and also actual and potential victims of human trafficking, as defined by anti-trafficking law. The status and juridical protection afforded within the European continent, which includes the legal framework of the Council of Europe and the EU,[7] depend on whether the individual is recognised as a refugee or a victim of human trafficking. In this article, we aim to demonstrate that smuggled migrants at sea should be treated as potential victims of human trafficking. We argue that they should be identified and protected not only when they are on the territories of EU Member States (MS) and/or of the UK, but also when they are just outside them. Thus, this article covers the law applicable to EU MS when migrants are stranded on the high sea and to the UK when migrants are stranded in the Channel between France and the UK. This article presents a *lex ferenda* argument in favour of the extraterritorial application of States' obligations. To achieve this objective, we approach the protection of

2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. OJ L 248/80, 24 September 2015, (Relocation Decision). See Hein de Hass, 'Myths of migration: Much of what we think we know is wrong', at https://heindehaas.blogspot.com/, accessed on 22 August 2019.
The recent Afghan crisis, in the summer 2021 is further increasing migration pressure in Europe.

2 See Sertan Sanderson, Home Office report confirms record number of UK migrant arrivals via the English Channel, published 25 February 2022, at https://www.infomigrants.net/en/post/38808/home-office-report-confirms-record-number-of-uk-migrant-arrivals-via-the-english-channel, accessed on 11 April 2022.

3 See, for example, 'Su e giú al limitare delle acque italiane. La rotta impazzita della Sea Watch 3'. *Huffington Post* 26 June 2019, available at https://www.huffingtonpost.it/entry/rotta-impazzita-della-sea-watch-3_it_5d10bd3ae4b0aa375f501352; 'Migranti, Sea watch 3: senza un coordinamento tra Stati UE lenorme sovranazionali non bastano'. *Il Sole 24ore* 19 June 2019, available at https://www.ilsole24ore.com/art/sea-watch3-senza-coordinamento-stati-ue-norme-sovranazionali-non-bastano-ACAmwaS.

4 *N.D. and N.T v Spain [GC]*-8675/15 and 8697/15 Judgement 13/02/2020 [GC].

5 Maria Gavouneli, 'The European Union Approach to Migration and International Standards: A Fruitful Interplay or a Dialogue of the Deaf?' (2018) *Observatory on European Migration Law, Policy Brief, available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293934.

6 See National Crime Agency, 'People smugglers use ever more dangerous boats to attempt Channel crossings as NCA issue international alert', at https://nationalcrimeagency.gov.uk/news/people-smugglers-use-ever-more-dangerous-boats-to-attempt-channel-crossings-as-nca-issue-international-alert, accessed on 11/04/2022. For a discussion around boundaries between smuggling and trafficking, see section 2 of this article.

7 Section 2 of this article.

actual and potential victims and the prosecution of criminals from both European law and human rights perspectives, whilst outlining key provisions relating to the international law of the sea. People who are likely to become victims of human trafficking may need legal protection before they reach the territory of EU MS and the UK, and before the criminals are identified, arrested and prosecuted. Therefore, this article argues that the protection of actual and potential victims should be detached from the identification, arrest, and prosecution of criminals, as established by the Directive 2011/36/EU (EU Trafficking Directive)[8] and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197)[9]; and should take place as soon as migrants are rescued from the sea. As also highlighted by the ECtHR, contracting States have a legal obligation to protect actual and potential victims of trafficking.[10] Although it is 'a long-standing feature of international law that nation states can control access to their territory […] there is also a very long-standing custom of rendering assistance at sea. The duty to do so has attained the status of customary international law'[11] as enshrined in international conventions.[12] The international law of the sea is the main legislative framework applicable to non-EU countries, such as the UK. It confers legal responsibility to search for and rescue migrants and refugees stranded at sea and amongst them, actual and potential victims of human trafficking who ought to be protected by the State which rescues them. Although the Refugee Convention does not impose any duty on States parties to rescue refugees at sea, human rights law influences the law of the sea.[13] Contrary to directly applicable or directly effective provisions contained in EU Treaties and binding secondary legislation in the UK, international conventions must be incorporated by national legislation to have effect in domestic law and create enforceable obligations.[14] However, even if there is no implementing legislation, the UK does have obligations under the Treaties it has ratified.

Regarding the Channel crossings, whilst France, as an EU MS, should abide by EU law, the European Convention on Human Rights (ECHR) and international law obligations, the UK, no longer a MS, has the international duty to search for and rescue migrants stranded at sea and should act in conformity with the ECHR and the CETS 197.[15]

Based on this contextual backdrop, this article is centred on the individual MS and UK responsibility for managing migration in situations which we define as 'ordinary', eg when the

8 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA L101/1, OJ L101 p. 1-11, 15/04/2011 (EU Trafficking Directive).

9 Council of Europe Convention on Action against Trafficking in Human Beings No.197 [2005] (CETS thereafter). For the UK's position see http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d, accessed on 27 May 2016.

10 See, for instance, Case *Rantsev v Cyprus and Russia*, judgement of 7 January2010, Application no. 25965/04, para 285; Case *Chowdury and Others v Greece*, Application no. 21884/15, judgment of 30 March 2017, para 88 *at* para 89 and Case *V.C.L. and A.N. v United Kingdom* Applications nos. 77587/12 and 74603/12, 5 July 2021, para 152.

11 Colin Yeo, 2021, Briefing: the duty of refugee sea rescue in international law, p.1, available at https://freemovement.org.uk/refugee-sea-rescue-in-international-law-and-uk-law/ (accessed on 10 May 2022).

12 United Nations Convention on the Law of the Sea 10 December 1982 (UNCLOS); International Convention on Maritime Search and Rescue (SAR) 27 April 1979; International Convention of the Safety of Life at Sea 1 November 1974; Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea 23 September 1910; International Convention on Salvage 28 April 1989.

13 C. Yeo, 2021 (n 11).

14 ibid.

15 For the UK ratification of Maritime Conventions see https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx, accessed on 30/05/2022. For the ratification of the ECHR see Human Rights Act 1998 which has incorporated the ECHR into the British legal system. For the ratification of CETS 197 see https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=197, accessed on 30 May 2022.

influx of migrants is not extraordinary.[16] In this case, each State has the legal responsibility to identify and protect actual and potential victims of human trafficking amongst migrants distressed at sea. This article answers the question of whether MS are under a legal duty to identify victims stranded in the vicinity of the domestic waters of a State, where ships with asylum seekers and other migrants on board are seeking permission to enter. This paper argues that States have the obligation to identify and protect migrants and asylum seekers where there is a 'reasonable-grounds indication' that they could be actual or potential victims of human trafficking.[17] It claims that such responsibility applies before alleged criminals are arrested and prosecuted, as States' priority is the identification and protection of actual and potential victims. We note that, although the ECtHR has not recognised extraterritorial jurisdiction in the prosecution of perpetrators, it has ruled that the identification of actual and potential victims should be separated from the prosecution of perpetrators. Consequently, we argue that the ECtHR has suggested that a contracting State has the legal obligation to identify actual and potential victims amongst people smuggled by sea in the territory of the State or in the vicinity of its territorial waters.[18] Yet, the main counterargument of States any time positive obligations are raised is the legal nexus that triggers *de jure* or *de facto* jurisdiction.[19] Our understanding suggests that EU MS should cooperate to identify as many actual and potential victims as possible and, arguably, this should not be limited to the territories of MS. One aspect that is particularly problematic in this respect is the position of the UK in relation to the Channel crossings of migrants, as section 68 of the newly introduced Nationality and Borders Act 2022 (NBA)[20] repeals the EU Trafficking Directive and undermines the application of the CETS 197. In fact, as analysed in s 6 of this article, section 60 and 65 of the NBA include amendments that could jeopardise the application of CETS 197. Furthermore, the UK extends the powers of immigration officers in international waters in order to expel as many migrants as possible, despite having the legal obligation to identify actual and potential victims of trafficking as required by art 4 ECHR.[21]

Border control is a highly politicised issue and, therefore, States often try to transfer their legal responsibility either to migrants distressed at sea, to smugglers or to neighbouring countries. For the same reasons, EU MS and the UK have adopted anti-migrant smuggling policies on NGOs, which on some occasions have been accused of collusion with criminal organisations perpetrating smuggling of migrants despite the fact they did not recruit asylum seekers and migrants for financial gain, but had only the humanitarian aim to save their lives.[22]

This article is structured as follows. Section 2 focuses on the personal scope of the United Nations Convention against Transnational Organized Crime (UNTOC) Trafficking Protocol, CETS 197 and the EU Trafficking Directive, which is the applicable legal framework to identify and protect actual and potential victims of human trafficking. Section 3 analyses

16 For example, an extraordinary influx of asylum seekers would be due to wars/internal conflicts. In recent years, there was a high flow of asylum seekers from Syria and Ukraine.

17 For a discussion on 'reasonable-grounds indication', see section 4.2. of the present article.

18 See *J and Others v Austria*, Application no. 58216/12, 17 April 2017, [114]. For a more detailed analysis of this issue see section 4.1 of this article.

19 See section 6 for a discussion on this point.

20 Nationality and Borders Act 2022 at https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted, accessed on 6 June 2022.

21 See section 6 of this article.

22 Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp, and Lina Vosyliute, Policing Humanitarianism. EU policies against human smuggling and their impact on civil society. Hart Publishing 2019, Part II.

the international law of the sea, which applies in search and rescue operations (SAR) in the Mediterranean Sea and in the Channel between France and the UK. Section 4 provides an overview of the scope of human trafficking legislation in Europe; and section 4.3 focuses on the territorial scope of European and EU legislation on the protection of actual and potential victims of human trafficking, arguing in favour of extraterritoriality. Section 5 focuses on the UK's recent legislation, which can be argued to contravene European and international law. To conclude, we claim that the international law of the sea does not guarantee the identification and protection of human trafficking victims stranded at sea either in territorial or international waters. These treaties need to be read in conjunction with European human rights law and EU and Council of Europe anti-trafficking legislation to identify and protect victims of human trafficking.

2. Actual and potential victims of human trafficking and their protection under international law and European law

In Europe, State legal obligations to identify and protect asylum seekers and refugees, migrants distressed at sea and victims of human trafficking are encompassed in a multitude of overlapping systems of international, human rights, EU and domestic laws. Amongst migrants distressed at sea, one will often find refugees and both actual and potential victims of trafficking. Vulnerable migrants are at risk of becoming victims of human trafficking and the 'identification and detection of victims and potential victims of trafficking in mixed migration flows remain a challenge'.[23]

There is a wealth of academic scholarship on the concept of vulnerability, which is a highly contentious issue in the literature.[24] Vulnerability in the field of migration has been analysed in relation to the concept of risk, capacity, autonomy and dependency.[25] Migrants in society are considered at a higher risk of 'discriminatory practices, violence, social disadvantage, or economic hardship than other groups within the State'.[26] In relation to capacity, it has been asserted that in the context of migration this concept can be interpreted as the limited capacity of migrants to cope, resist and recover from harm.[27] Here, vulnerability can be understood as 'a form of stigmatization and marginalization of those people deemed vulnerable'.[28] Vulnerability can 'also imply a diminished level of autonomy and thus higher dependency'.[29] To this type of vulnerability belong marginalised groups such as women, racial and ethnic minorities and migrants.[30] Yet, there is a paucity of work on the application of vulnerability theory to organised

23 Report from the Commission to the European Parliament and the Council. Third Report on the progress made in the fight against trafficking in human beings (2020) as required under art 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. COM (2020) 661 final, 20 October 2020, p. 8.

24 See Alyson Cole (2016) 'All of Us Are Vulnerable, But Some Are More Vulnerable than Others: The Political Ambiguity of Vulnerability Studies, an Ambivalent Critique', Critical Horizons, 17:2, 260-277; See also Nifosi-Sutton, Ingrid The protection of vulnerable groups under international human rights law 2017, London: Routledge; Mackenzie's Vulnerability: new essays in ethics and feminist philosophy (2014). Sonia Morano-Foadi (2016) 'Human trafficking and the position of "vulnerability" for victims in Europe' in Special Issue "Judging in the 21st Century: migration and nationality concerns" International Journal of Migration and Border Studies, 2(3): 289-307.

25 Amalia Gilodi, Isabelle Albert, Birte Nienaber, Vulnerability in the Context of Migration: a Critical Overview and a New Conceptual Model. On Hu Arenas (2022) https://doi.org/10.1007/s42087-022-00288-5 Springer Link.

26 ibid.

27 ibid. See also Glossary on migration. In *International Migration Law* (2019 Issue N° 34). https://publications.iom.int/books/international-migration-law-ndeg34-glossary-migration, accessed on 01/06/2022.

28 ibid note 25.

29 ibid note 25.

30 ibid note 25.

crime, which can be understood 'as an alternative source of resilience', both for the migrants and the smugglers.[31] Migrant vulnerabilities are 'associated with the reasons for leaving the country of origin' [which] 'could include extreme poverty, natural disasters, climate change and environmental degradation …'.[32] Other cases of vulnerability can be associated with difficulties that migrants experience during their transit and at their destination. Thus, people facing such vulnerabilities seek out the services of smugglers, becoming vulnerable to 'smugglers who turn out to be traffickers'.[33] Over 90 per cent of irregular migrants, many of whom qualify for international protection, are smuggled into the EU and, often, criminal organisations smuggle them for exploitation[34] turning smuggling into human trafficking. Although irregular migration *per se* does not automatically guarantee protection under international refugee law, safeguards provided by international human rights law might arise for example for individuals who may need protection because they have left their countries of origin for other reasons not necessarily related to war or persecution such as poverty, famine, natural disasters, climate change or other environmental factors.[35] Asylum seekers are covered by 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol.[36] Article 33 of the Convention confers a negative obligation on States parties not to return a refugee to the frontiers of territories where their life or freedom 'would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion' (the principle of 'non-refoulement'). The principle applies from the moment asylum seekers enter the territory of the State or, at sea, when rescue operations are carried out under the control of the rescue State.[37] EU law also applies to determine the MS responsible for examining an application for international protection lodged in one of the MS by a third-country national or a stateless person.[38] However, when it comes to vulnerable migrants who are actual or potential victims of human trafficking, the responsible State's duty is to apply anti-trafficking and human rights legislation to ensure protection.

We argue that the legal obligation is based on the fact that all migrants stranded at sea are at risk of trafficking because they are in a position of vulnerability of which traffickers can take advantage, despite exploitation not yet having taken place. Our argument is based on the UNTOC Trafficking Protocol, CETS 197 and the EU Trafficking Directive's definition of

31 Shahrzad Fouladvand and Tony Ward (2019) 'Human Trafficking, Vulnerability and the State' The Journal of Criminal Law 83(1), p. 48.

32 See United Nations General Assembly, Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, Report of the United Nations High Commissioner for Human Rights (A/HRC/37/34), 26 February-23 March 2018.

33 Jacqueline Berman, 'Biopolitical Management, Economic Calculation and Trafficked Women' (2010) 48(4) International Migration 84, p. 86.

34 EU action plan against migrant smuggling (2021-2025), available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12724-Fighting-migrant-smuggling-2021-2025-EU-action-plan_en, accessed on 7 June 2021.

35 United Nations General Assembly, Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, Report of the United Nations High Commissioner for Human Rights (A/HRC/37/34), 26 February-23 March 2018, [14].

36 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p.137; UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p.267.

37 *Hirsi Jamaa and Others v. Italy* App no 27765/09, judgment of 23 February 2012. We deal with this in section 4.3.

38 See 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). OJ L 180/31, 29 June 2013. (Dublin III Regulation).

human trafficking, which does not require exploitation to be met. Migrants might become victims of human trafficking when smugglers have transported them for exploitation, which migrants may not even be aware of. Therefore, States have the legal duty to protect actual and potential victims of trafficking and to rescue them when they are distressed at sea. Hence, States have a duty to take appropriate initiatives to protect these individuals from human rights abuses, as human rights 'are universal, inalienable, indivisible and interdependent'.[39]

At the international level, the Preamble of the UNTOC Trafficking Protocol establishes that States parties should adopt legal measures to prevent human trafficking and protect victims and 'their internationally recognized human rights'. Article 4 states that the scope of the Protocol is to fight against human trafficking when it involves a criminal organised group, and the crime has a transnational dimension.

The European instruments imposing protection duties on States are the CETS 197, the ECHR and ECtHR case law. Then, at EU level, different provisions of the Treaty on the Functioning of the European Union (TFEU) regulate the fight against human trafficking and protection of victims.[40]

Victims of human trafficking can apply for protection under specific legal instruments, such as the EU Trafficking Directive, and Directive 2004/81/EC,[41] which not only grants residence permits to victims of human trafficking who cooperate with police authorities but may also grant protection to people who have been the subject of an action aimed at facilitating unlawful migration. They can also apply for international protection as opposed to relying on EU trafficking legislation when they fear that, if returned to their countries of origin, they will risk serious harm.[42] However, this provision may not apply in all cases, eg if the victim's country of origin has legislation on trafficking which makes the victim ineligible to rely on this form of international protection. Yet, the victim may still demonstrate that because of his/her individual circumstances and situation they may suffer serious harm and persecution as the State is not in a position to protect them.[43] There might also be countries which have adopted anti-trafficking legislation but do not apply it in practice; in such cases they are unable to protect victims.

In relation to migrants distressed at sea, there are multiple international maritime law treaties that bind MS signatories in respect of rescue-at-sea missions. These are examined in the following section.

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39 United Nations General Assembly (n 36) [11].

40 Article 3(2), for example, states that the EU shall guarantee to its citizens an area of freedom security and justice (AFSJ) where the free movement of people 'is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'. In addition, art 67(2) TFEU sets out that the EU 'shall frame a common policy on asylum, immigration and external border controls based on solidarity between Member States'. Then, art 79(1) TFEU states that such policy should be developed ensuring 'the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. Combating trafficking in human beings and protecting victims is, thus, part of the common immigration policy, something which is further expressed in art 79(2)(d) which states that, for the purpose of developing a common policy on migration, the EU shall fight against this crime and protect victims.

41 Article 4(3) (a) of 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 (recast), OJ L337/9, 20 December 2011.

42 Serious harm is defined in art 15 of Directive 2011/95/EU (no. 41) 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 (recast), OJ L337/9, 20 December 2011.

43 Article 4(3) (a) and art 8 of Directive 2011/95/EU (no. 41).

3. Migrants distressed at sea and the international conventions on the law of the sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS),[44] the 1979 International Convention on Maritime Search and Rescue (SAR Convention)[45] and the 1974 International Convention for Safety of Life at Sea (SOLAS)[46] are the major Conventions containing obligations relating to rescue-at-sea. We argue that these Conventions require States to take preventive, early warning, and responsive measures to reduce the risk of fatalities at sea, including operating adequate search and rescue services.[47] We will briefly discuss the obligations in UNCLOS, the SAR Convention and SOLAS in turn.

Firstly, art 98(1) UNCLOS imposes a duty on all signatories to 'render assistance to any person found at sea in danger of being lost' and to 'proceed to the rescue of persons in distress, except where this duty would result in serious danger to the crew, the passengers or the ship'. Consequently, the obligation of the master of the ship to provide for assistance to persons in distress at sea, pursuant to art 98 UNCLOS, appears not to be absolute, but is instead limited to risk avoidance in rescue operations. This is further limited by the requirement that the ship is to carry out rescue operations only 'in so far as' it can do so. The obligation of the flag State to ensure that the duty of the ship master is complied with is an obligation of means to provide the monitoring duty with 'due diligence'. UNCLOS also sets out additional duties for coastal State signatories pursuant to art 98(2), which includes the obligation to ensure the promotion of 'the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'.[48] It also imposes the duty to develop and maintain adequate communication and operation infrastructures for the purpose of reporting, recording, and receiving distress signals.[49]

Secondly, the SAR Convention provides that States have a duty to rescue and give assistance to migrants distressed at sea from the moment that they receive knowledge of an individual in distress or danger. The Maritime Safety Committee, following the adoption of

44 United Nations Convention on the Law of the Sea (UNCLOS) adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397. The UNCLOS has been ratified by 167 States including all MSs and the European Union. See respectively https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed on 26 May 2021 and Council Decision (EU) 2016/455 of 22 March 2016 authorising the opening of negotiations on behalf of the European Union on the element of a draft text of an internationally legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. OJ L 79/32, 30 March 2016.

45 International Convention on Maritime Search and Rescue (SAR), adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97. The SAR Convention has been ratified by 111 States, but the EU has not acceded to this Convention. See https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d43b3, accessed on 26 May 2021. It is an IMO Convention and was amended in 2004. and related resolutions of the International Maritime Organisation (IMO), notably Resolution MSC.167(78) of 20 May 2004 entitled 'Guidelines on the Treatment of Persons Rescued At Sea', available at https://www.refworld.org/docid/432acb464.html, accessed on 26 May 2021.

46 International Convention for the Safety of Life at Sea (SOLAS) adopted 1 November 1974, entered into force 25 May 1980, 1184 UNTS 278. The SOLAS Convention, for the safety of ships at sea, which was adopted by the IMO and came into force on 25 May 1980 and amended in 2004. It has been ratified by 121 States. See https://treaties.un.org/pages/showDetails.aspx?objid=08000002800ec37f, accessed on 26 May 2021.

47 The presence of a corresponding 'right to be rescued' for migrants distressed at sea is debatable. See Efthymios Papastavridis, 'Is there a right to be rescued at sea? A skeptical view' (2014) QIL 4 17-32, p. 23.

48 UNCLOS (n 44), art 98(2).

49 The EU Approach on Migration in the Mediterranean, *Policy Department for Citizens' Rights and Constitutional Affairs* (2021) p. 73.

the Convention, divided the oceans into 13 parts and designated each country to an area for which they have responsibility.[50] In response to their designated area, the country assigned is responsible for providing trained staff capable of carrying out search and rescue missions at sea, and also enabling a system whereby reports of those identified as distressed at sea can be monitored.[51] The SAR Convention promotes cooperation among States and the obligation for all States to carry out non-discriminatory rescue operations, stating that: 'Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found'.[52]

Thirdly, the SOLAS Convention sets out the minimum safety requirements for the construction, equipment, and operation of ships on water. Other duties on States comprise cooperation and coordination of rescue operations within their Search and Rescue Zone[53] and the obligation to disembark promptly in a 'place of safety'. The term is not defined by any of the maritime conventions, but it is defined in the 2004 IMO Guidelines on the Treatment of Persons Rescued at Sea as a 'place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met'.[54]

The effectiveness of the rescue-at-sea legal regime is subject to challenge[55] as it raises numerous concerns. The *first* is that it primarily includes obligations of means and not obligations of result, ie, an obligation to guarantee that the people in distress will be saved.[56] It is clear that there might be exceptions to provide defence eg if there is an attempt to save but the rescue boat arrives too late. The *second* issue concerns the 'place of safety'[57] where to disembark persons rescued at sea, which is not clearly specified. The *third* issue is the lack of an explicit mention of the 'rights of persons in distress',[58] reiterating our assertion that these Conventions are not aimed at protecting human rights. An *additional* concern to be raised is that the only Convention which has been ratified by the EU is the UNCLOS Convention and, therefore, only States that are party to the other Conventions are responsible to adhere to them. Although all EU MS and the UK are bound by these Conventions, coordination and cooperation in SAR operations is fragmented, as it is left to national discretion which is often driven by political considerations or electoral manifestos. Conversely, on the basis of the UNCLOS, coordination and cooperation in SAR operations can in principle be undertaken more effectively because the Convention has been ratified by all EU MS, the UK and also by the EU.[59] Joint operations

50 International Convention on Maritime Search and Rescue (SAR) information on International Maritime Organisation, available at https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx.

51 ibid.

52 SAR Convention (n 45), chapter 2, [2.1.10].

53 Amendments to SOLAS chapter V, reg 33: IMO, MSC Res 153 (78), MSC Doc. 78/26.add.1, Annex 5 (20 May 2004), para 3.1.9 of the rules annexed to the Search and Rescue Convention 1979.

54 Res MSC. 167(78), adopted 20 May 2004.

55 Papastavridis (n 47), p. 17.

56 See Ago, 'Special Rappourteur, Sixth Report on State Responsibility' (1967) II-1 YB Intl L Comm 4, 20. See also Com-bacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse" in Mélanges offerts à Paul Reuter, Le droit international: unité et diversi-té (Pedone 1981) page 181.

57 Annex to the 1979 SAR Convention (as amended in 1998), paragraph 1.3.2. and chapter 3 paragraph 3.1.9 which sets out the duty regarding embarking.

58 The 1979 International Convention on Maritime Search and Rescue (SAR Convention) provides a definition of a 'distress phase' and a 'person in distress' without determining from which moment a ship or a person may find itself/himself/herself in a situation of distress. It is the responsibility of the States to determine the moment when this situation begins and finishes.

59 United Nations Treaty Collection, available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, accessed on 7 April 2022.

can be coordinated by the EU with the support of agencies such as Frontex on the basis of art 98(2) which states: 'Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose'. Hence, Frontex can provide operational and technical support to people distressed at sea in conformity with 'international law and maritime conventions which obliges all captains of vessels to provide for assistance to any persons found in distress at sea'.[60] Within the EU legal framework, Regulation no 656/2014 of 15 May 2014[61] establishes rules for the surveillance of the external sea borders of the MS and for assisting and rescuing 'persons in distress' independently of their status or their nationality.[62] This Regulation, which should be read in accordance with international law, provides a definition of 'place of safety'.[63] This includes a location where rescue operations are considered to terminate and where the survivors' safety or life is not threatened. The place of safety also means a place where their basic human needs can be met and from which transportation arrangements can be made for the survivors' next or final destination, taking into account the protection of their fundamental rights in compliance with the principle of non-refoulement.[64] However, the effectiveness of the application of this Regulation is still controversial.[65]

Our argument questioning the protection of migrants at sea within the rescue-at-sea legal regime is supported by a recent UNHCHR Report which describes the SAR operations in the central Mediterranean Sea as enabling 'a range of violations and abuses against migrants rather than ending them' and urges 'all States in the region, as well as the EU Border and Coast Guard Agency, the EU Naval Force for the Mediterranean, the European Commission and other stakeholders' to reform 'their SAR policies, practices, funding and cooperation in order to promote more principled and effective migration governance that prioritizes the protection of migrants at sea and is consistent with obligations under international law.'[66] Therefore, migration governance fails to prioritise migrants' human rights 'and for too long has been marked by lack of solidarity'.[67] Migration movements have been predominantly characterised by destination

60 Council of the European Union Annual report on the practical application of Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex, 6294/20, 25 February 2020, p. 6.

61 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 189/93, 27.6.2014.

62 A new Regulation has been adopted by the Council on the European Border and Coast Guard which does not affect Regulation (EU) No 656/2014. It is Regulation (EU) No 2018/0330 A of the European Parliament and of the Council of 23/10/2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

63 The UK was not part of it. See Recital 25 'This Regulation constitutes a development of the provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC (1); the United Kingdom is therefore not taking part in its adoption and is not bound by it or subject to its application'.

64 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189, 27.6.2014, p. 93).

65 See Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm', Journal of Common Market Studies, 2018. Lisa Heschl Protecting the Rights of Refugees Beyond European Borders: Establishing Extraterritorial Legal Responsibilities, Intersentia, Cambridge, 2018.

66 Office of the United Nations High Commissioner for Human Rights "Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea (2021) p. 35, available at https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf, accessed on 2 June 2021.

67 ibid.

states' 'self-serving interpretation of sovereignty and national interest'.[68] Furthermore, since the Covid-19 pandemic, practices have emerged which do not comply with the SAR Convention standards, including 'unresponsiveness to distress calls, port closures, "privatised pushbacks", "aerial refoulement", "floating" detention centres, and the suspension of the right to asylum'.[69]

We argue, however, that the obligation to save lives is of fundamental character and cannot be circumvented under any circumstances, including for considerations of external border controls. We are not convinced that the abovementioned maritime Conventions offer human rights protection or any legal basis for an individual's right to be rescued. Instead, our attention is captured by the sophisticated allocation of competences amongst signatories in relation to operation of ships on water.[70] Moreover, the duty of rescue as provided by the international law of the sea needs to be implemented at a domestic level, as it does not have direct effect, unlike directly effective EU legislation. The EU Fundamental Rights Agency[71] has attempted to strengthen the duty to save lives at sea,[72] which rests primarily on EU MS responsibility.[73] It is, indeed, European human rights law that requires States 'to fulfil positive duties with regard to safeguarding the lives of those within their jurisdiction and to take preventive measures to forestall real and immediate risks to human life'.[74] Moreover, as highlighted above, actual and potential victims of human trafficking might be present amongst migrants distressed at sea. Thus, trafficking can occur when the migrant is still travelling to reach their final destination and becomes a victim of sexual exploitation, forced labour, or forced criminality.[75]

To conclude, the international law of the sea alone does not provide protection for potential and actual victims of human trafficking. Its scope is to rescue people to save their lives and, consequently, the identification of victims is outside of its remit. Instead, in Europe, actual and potential victims of human trafficking can be entitled to legal protection by EU and Council of Europe legislation as outlined in the next section.

4. Protection of human trafficking victims in Europe

In theory, the standard of protection of human trafficking victims is high in Europe, but the practical functioning of the European overlapping of legal norms often offers MS the opportunities to escape their legal responsibility.

68 Violeta Moreno-Lax, and Mariagiulia Giuffré 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder Singh Juss, *Research Handbook on International Refugee Law* Edward Elgar, 2019, p. 82.

69 The EU Approach on Migration in the Mediterranean *Policy Department for Citizens' Rights and Constitutional* Affairs (2021) page 70. See also Hathaway, O., Stevens, M. and Lim, P., Covid-19 and International Law-The Principle of Non-Refoulement, November 2020 on https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/, accessed on 20 April 2022.

70 Papastavridis (n 47), page 23.

71 Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations (2018) available at https://fra.europa.eu/en/publication/2018/ngos-sar-activities, accessed on 26 May 2021.

72 Enshrined in multiple maritime law treaties, such as the 1974 SOLAS Convention, the 1979 SAR Convention and the 1982 UNCLOS.

73 Article 2 of the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

74 European Parliament, Juan Fernando López Aguilar, Motion for a Resolution, further to Questions for Oral Answer B9-0052/2019 and B9-0053/2019 pursuant to Rule 136(5) of the Rules of Procedure on search and rescue in the Mediterranean (2019/2755(RSP)), p. 4.

75 See Anna Triandafyllidou and Thanos Maroukis, *Migrant Smuggling. Irregular Migration from Asia and Africa to Europe* (Palgrave Macmillian), 2012, page 192.

To provide clarity on State obligations towards victims of trafficking, we proceed with an examination of the European legal regime, which includes the CETS 197, ECHR and EU Trafficking Directive. The analysis of the trafficking legislation in Europe is based on the following three propositions:

1. The investigation of the perpetrators and identification/protection of victims are two separate obligations for the MS/contracting State.
We argue that these two obligations can be de-coupled and, therefore, if the investigation of the perpetrators is limited to crimes committed within the territory of the State, the protection of victims could be interpreted in favour of extraterritoriality.

2. There is the legal obligation to identify and protect actual and potential victims of human trafficking amongst smuggled migrants.
This argument is based on the fact that people smuggled at sea and stranded in vessels could all be potential victims of human trafficking. Therefore, EU MS and the UK have the legal obligation to identify victims and potential victims as soon as they are intercepted in vessels.

3. Once identified, actual and potential victims of trafficking stranded just outside the territorial water of a MS / contracting State ought to be protected.
Unlike the CETS 197, the ECHR and the Trafficking Directive do not explicitly impose territorial jurisdiction for the identification of victims and consider the identification, protection and assistance of victims at a very early stage as a priority. Thus, we question whether the ECHR and the Trafficking Directive provide extraterritorial application in relation to the identification and protection of victims within the EU. Yet, the CETS 197 is often used together with the ECHR to provide additional interpretation of the obligations towards victims of human trafficking, especially positive obligations.

4.1. The investigation of the perpetrators and identification/protection of victims as separate obligations for the MSs/contracting States

In Europe, the CETS 197 aims 'to prevent and combat trafficking in human beings' and 'to protect the human rights of the victims of trafficking'.[76] In order to achieve this aim, the CETS 197 has introduced effective measures which separate the two legal obligations of protecting victims and criminalising human traffickers. Several provisions of the Convention (namely arts 1(1)(b), 10, 12, 13 and 14)[77] highlight that the protection of victims is a priority in the fight

76 Specific reference to this Convention, available at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d, accessed on 27 May 2016.

77 Article 1(1)(b) CETS 197 states that the purpose of the Convention is to protect the human rights of human trafficking victims and to adopt 'a comprehensive framework for the protection and assistance of victims and witnesses'. Article 12(1) states that states parties shall adopt 'legislative or other measures as may be necessary to assist victims in their physical, psychological, and social recovery'; para (2) provides that that each state party shall guarantee 'victim's safety and protection needs'; then para 5 of the same Article reads that states parties shall cooperate with 'non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims'. Moreover para 6 states that victims should receive assistance, which should not be conditional 'on his or her willingness to act as a witness'. Article 13 recognises to victims of human trafficking a recovery and a reflection period of at least thirty days 'when there are reasonable grounds to believe that the person concerned is a victim'. Obviously, this short period of thirty days can be increased at States' discretion. Article 14(1) states that victims are entitled to a residence permit either when 'the competent authority considers that their stay is necessary owing to their personal situation' or when the competent authority considers the stay necessary for the cooperation of victims in investigations or criminal proceedings. It is sufficient that only one of the two conditions apply to issue a residence permit.

against human trafficking and that the recovery period and residence permit are not linked to the decision of the victims to cooperate in investigations. Victims receive protection from perpetrators when they act as witnesses against them and cooperate with competent authorities (art 28 CET 197). The latter provision is a further recognition of victims' protection beyond investigations with a reflection period of at least thirty days or longer if extended by contracting States.[78] Moreover, the protection of victims does not cease when victims are returned to their countries of nationality or permanent residence (arts 16(2), 18-22, 23 CET 197).

Furthermore, human trafficking falls within the scope of art 4 ECHR,[79] which prohibits slavery and forced labour.[80] However, case law on art 4 ECHR is not exclusively on cross-border trafficking, as the crime does not require this element in the first place. Victims of human trafficking may be subject to actions contrary to this provision, but not all violations will be trafficking and not all trafficking will be a violation of art 4 ECHR. In interpreting cases based on this provision, the ECtHR has expressly recognised that States have the positive obligation to protect victims of trafficking, criminalise trafficking and prosecute traffickers.[81] The difference between investigations and identification/protection was raised by the ECtHR in *J. and Others v. Austria*. The ECtHR stated that '(potential) victims need support even before the offence of human trafficking is formally established; otherwise, this would run counter to the whole purpose of victim protection in trafficking cases'.[82] The two obligations of the identification/protection of victims and the investigations to prosecute perpetrators do not necessarily go in tandem. For example, *M and Others v Italy and Bulgaria*[83] and *J and Others v Austria*[84] raised the question of whether the authorities fulfilled their positive obligation to identify and protect victims. The procedural obligations to investigate human trafficking, when there is a 'credible suspicion' that an individual's rights under art 4 ECHR have been violated,[85] does not depend on a report made by the victim or by a next of kin[86] who is involved in the procedure to the extent necessary to safeguard their legitimate interests.[87] States have the obligation to adopt 'a legislative and administrative framework to prohibit and

78 It has been argued that this time should be extended to permit the full recovery of victims and eventually their cooperation with investigative authorities or at least the prevention of their re-victimisation if returned to their countries of origin. See empirical study conducted by Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy* (Routledge, 2010) chapter 5. See also Human Trafficking Foundation, "Day 46. Is there a life after the safe House for Survivors of Modern Slavery?" (2016), available at https://www.antislaverycommissioner.co.uk/media/1259/day-46.pdf, accessed on 23 August 2019. In this report it is argued that victims should be followed after the reflection period to prevent their re-victimisation.

79 The Court considers trafficking within the meaning of art 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime and art 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings. See European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights Prohibition of slavery and forced labour, 30 April 2019, p. 6, available at https://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.

80 See Case *Rantsev v Cyprus and Russia*, Application no. 25965/04, judgment of 7 January 2010, [280] at [282]; Case *M and Others v Italy and Bulgaria* Application no. 40020/03, judgment of 17 December 2012, [151].

81 See for example Case *Rantsev v Cyprus and Russia* (n 80), [282] at [283]. See Case *Siliadin v France*, Application no. 73316/01, Judgment of 26 July 2005, para 112.

82 See *J and Others v Austria* (n 18) para 115.

83 See Case *M. and Others v Italy and Bulgaria* Application no. 40020/03, judgment of 17 December 2012.

84 See *J and Others v Austria* (n 18).

85 See *C.N. v the United Kingdom*, Application no. 4239/08, judgment of 13 November 2012 para 69; *Rantsev v Cyprus and Russia* (n 80) para 288.

86 ibid.

87 See Case *L.E. v. Greece*, Application no. 71545/12, judgment of 21 January 2016, para 68.

punish trafficking'[88] and have 'to penalise and prosecute any act aimed at maintaining a person in a situation of slavery'.[89]

In line with both the CETS 197 and the ECtHR interpretation of art 4 ECHR, the EU Trafficking Directive also requires MS to investigate and prosecute perpetrators, identify victims and potential victims, and give legal protection and assistance to victims of human trafficking. It states that MS must 'establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organizations'.[90] They shall ensure that assistance and support are provided: (a) to victims *before* (emphasis added), during and after the conclusions of criminal proceedings (as per art 11(1)); (b) *as soon as* (emphasis added) they have 'a reasonable ground indication for believing' that a person might have been a victim of human trafficking (as per art 11(2)). Article 11(2) refers to arts 2 and 3 of the same Directive. Article 2 gives the definition of the offence of human trafficking and requires that all MS make punishable the perpetration of this offence when the action of 'recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons' is committed 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'.[91]

Article 3 punishes 'incitement, aiding and abetting and attempt' to commit human trafficking. This means that those who are going to commit this offence or make any other act of incitement or cooperation which could encourage the perpetration of this offence, can be punished. Therefore, art 11(2), by referring to art 3, requires that actual and potential victims are identified and protected even when there is an attempt or incitement to commit the crime or aiding or abetting. Article 11(2) is very wide in scope as it requires MS to protect people who might be in danger of being recruited, although the recruitment and other actions of trafficking might have not yet been perpetrated. The intention to exploit the individual concerned underpins the entire process.

4.2. The legal obligation to identify and protect actual and potential victims of human trafficking amongst smuggled migrants

The pivotal question is how to identify victims of trafficking from amongst smuggled migrants stranded at sea and how to protect them. The European Commission identifies a coordinated and consolidated global action in the EU and externally against criminal organisations in this field as a priority.[92] Europol supports MS in tackling international types of organised crime, as the vast majority of irregular migrants travel with the support of smugglers networks and, so, some of them may become victims of human trafficking.[93] Certainly, not all smuggled migrants are actual victims of human trafficking,[94] but, as already discussed, they can be potential victims

88 See Case *Rantsev v. Cyprus and Russia* (no. 80) para 285.
89 See Case *Siliadin v France* (n 81) paras 89 and 112.
90 Article 11(4) EU Trafficking Directive.
91 Article 2 EU Trafficking Directive.
92 See COM (2017) 728 final, 4 December 2017, p. 3.
93 See Europol, Migrants Smuggling in the EU, available at https://www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu, accessed on 7 March 2019. See A. Triandafyllidou and T. Maroukis above note 75, p. 191.
94 See Luigi Achilli, 'The smugglers: hero or felon?' (2015) Migration Policy Centre, European University Institute, 4. Available at http://cadmus.eui.eu/bitstream/handle/1814/36296/MPC_2015_10_PB.pdf?sequence=1, accessed on 31 May 2022. See Matilde Ventrella, 'Identifying Victims of Human Trafficking at Hotspots, by Focusing on People Smuggled to Europe', Social Inclusion, Vol 5 Issue 2, 2017, pp. 69-80.

of human trafficking because of their vulnerability. Thus, the question of how to identify potential or actual victims of human trafficking amongst smuggled migrants is crucial. For the identification of victims, the ECtHR uses the legal terminology of 'credible suspicion that a person has been trafficked',[95] whilst the EU Trafficking Directive, in line with the CETS 197, refers to the 'reasonable grounds indication' criterion to believe that a person might have been trafficked.[96] We are of the opinion that 'reasonable grounds indication' criterion can be considered synonymous with the concept of 'credible suspicion'. Although neither the Directive nor CETS 197 define the criterion, the Joint UN Commentary on the Directive refers to the presence of indicators to evaluate a 'reasonable grounds indication'.[97] It states that the authorities have 'reasonable grounds to suspect that a person might be a (potential) victim of trafficking or at risk of trafficking, when the presence of indicators of trafficking in persons is found.[98] Although the presence or absence of indicators in itself 'neither proves nor disproves that human trafficking is taking place or may take place, their presence should always lead to further investigation'.[99] Thus, national authorities have discretion to assess the concrete risk of trafficking, the likelihood of its occurrence, the list of vulnerability factors and the evidence required. They should evaluate on a case-by-case basis whether a person is likely to have been trafficked or whether key indicators or vulnerability factors suggest she/he is a potential victim. Yet, national authorities' discretion must take into consideration the ECtHR case law and cannot breach this requirement. It must be pointed out, however, that there is not an express legislative requirement to identify potential and actual victims of human trafficking amongst smuggled migrants. We argue that such a legal obligation is implicitly included in art 4 ECHR as interpreted by the ECtHR, the CETS 197 and EU Trafficking Directive.

The ECtHR interpretation of the personal scope of art 4 ECHR is wide and includes actual and potential victims who might be found amongst smuggled migrants. The Court has highlighted that irregular migrants should not be neglected by States, as their position of 'vulnerability' can lead them to become victims of human trafficking.[100] In *Chowdury and Others v Greece*[101] the applicants were irregular migrants recruited in Greece on various occasions to pick strawberries.[102] Although the Court in this case did not specifically focus on whether they were potential trafficking victims or subject to servitude, it noted that the applicants were in a situation of 'vulnerability' being irregular migrants without resources and risking arrest, detention and deportation by law enforcement authorities in Greece.[103] The link between control of border/movement and forced labour needs to be established to have a nexus for trafficking. However, the ECtHR stated that irregular migrants can become victims of human

95 *V.C.L. and A.N. v United Kingdom* (n 10).
96 Recital 18 EU Trafficking Directive.
97 The Joint UN Commentary on the EU Directive – A Human Rights-Based Approach, November 2011, available at https://www.unodc.org/documents/human-trafficking/2011/UN_Commentary_EU_Trafficking_Directive_2011.pdf, accessed on 6 June 2022.
98 ibid. For a list of indicators see UNODC, Anti-human trafficking manual for criminal justice practitioners, Module 2: Indicators of trafficking in Persons, 2009, and ILO and European Commission, Operational indicators of trafficking in human beings, Results from a Delphi survey implemented by the ILO and the European Commission, Revised version of September 2009. Available on https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_105023.pdf, accessed on 6 June 2022. This document sets indicators of trafficking of adults and children for sexual exploitation and labour exploitation.
99 (n 97) p. 45.
100 See *Chowdury and Others v Greece*, Application No. 21884/15, judgment of 30 March 2017, paras 86–128.
101 ibid para 119.
102 ibid paras 94 and 99.
103 ibid para 97.

trafficking when unscrupulous individuals and criminal organisations take advantage. In cases such as this, domestic authorities are required to act as a matter of urgency to remove irregular migrants from the imminent risk of becoming human trafficking victims.[104]

Article 10 (1) CETS 197 states that competent authorities of States Parties should identify victims of human trafficking and protect them; and para (2) specifies that the competent authorities should not remove individuals from their territories when they have a 'reasonable grounds indication' to believe that they have been victims of human trafficking and the crime has been committed partly on their territories or by their nationals as established by art 31. These people may include individuals smuggled at sea, as they are in a position of vulnerability which may be exploited. The CETS 197 does not use the 'credible suspicion' concept, but adopts the 'reasonable grounds indication' criterion. In *V.C.L. and A.N. v United Kingdom*, the ECtHR recalls that the CETS 197 is a legal instrument on the basis of which states must assess whether an individual is an actual or potential victim of human trafficking.[105] This means that even if contracting States have discretion in interpreting this concept, they have to take into consideration that the protection of actual and potential victims, as per art 4 ECHR, takes priority over everything else even if perpetrators have not been identified, arrested and prosecuted as yet. Situations of exploitation as indicated by art 3 UNTOC Trafficking Protocol and art 4 CETS 197 must be identified by states by using the 'reasonable grounds indication'. For example, in relation to migrants working for criminal organisations, States should be able to distinguish between people who are working for criminals under a contract and criminal organisations where individuals do not have a contract and might either be trafficked or be at risk of being trafficked in the future because they do not have a visa or their visa is going to expire soon.

The EU Trafficking Directive (in line with the CETS 197) permits the identification of potential and actual victims amongst smuggled migrants. Certainly, it leaves a margin of discretion to national authorities in the identification of victims of trafficking, using the expression 'reasonable-grounds indication for believing that he or she might have been trafficked' (Recital 18).[106] This suggests that the manner in which EU MS and contracting States interpret victimhood and the 'reasonable-grounds indication' is 'very much decisive for the level of protection granted to the victim'.[107] As mentioned above, MS are given wide discretion in this interpretation. However, they have certain limits to respect and the discretion cannot go beyond these limits. EU MS have to follow the ECtHR case law which obliges them to identify actual and potential victims. Their discretion in the interpretation of 'reasonable grounds indication' finds its limits within the requirements of the ECtHR's case law. Therefore, while the expression 'reasonable grounds indication' leaves discretion to MS, they cannot ignore and breach the requirements imposed by the ECtHR's case-law. The ECtHR has clearly asserted that contracting States have the legal obligation to identify actual and potential victims of human trafficking on the basis of 'credible suspicion' and that the identification is a priority above any other, or else they would be in breach of art 4 ECHR. In the aforementioned *V.C.L. and A.N. v United Kingdom*, for instance, the Court was called to determine whether punishment of victims of human trafficking in the UK was executed with respect for art 4 ECHR. The case concerned two minors who were prosecuted for criminal

104 ibid para 89.

105 *V.C.L. and A.N. v United Kingdom* (n 10) para 102.

106 Recital 18 EU Trafficking Directive.

107 See Alice Bosma and Conny Rijken, 'Key Challenges in the Combat of Human Trafficking. Evaluating the EU Trafficking Strategy and EU Trafficking Directive' [2016] *New Journal of European Criminal Law*, Vol. 7, Issue 3 p. 323.

offences connected to their work as gardeners in cannabis factories. The ECtHR held that, although 'no general prohibition on the prosecution of victims of trafficking can be construed from the Anti-Trafficking Convention or any other international instrument',[108] States have to adopt protective measures when there is 'the credible suspicion that an individual has been trafficked'.[109] The Court added that the early identification of actual and potential victims of human trafficking is an absolute priority.[110] Therefore, as soon as the State's authorities 'are aware or ought to be aware of circumstances giving rise to a credible suspicion'[111] that a person suspected of having committed a crime may have become a victim of human trafficking, 'he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking'.[112] People should be assessed on the basis of the criteria indicated by art 3 UNTOC Trafficking Protocol and art 4 CETS 197[113] 'having specific regard to the fact that the threat of force and/or coercion is not required where the individual is a child.'[114] These criteria apply not only to actual victims, but also to potential victims who cannot be prosecuted for crimes until an assessment undertaken by a qualified person has taken place.[115] Hence, the ECtHR held that the UK had breached arts 4 and 6(1) because two minors had been prosecuted, despite the fact that they were discovered in circumstances which gave rise to a 'credible suspicion' that they were victims of trafficking.[116]

The fact that the criterion 'reasonable grounds indication' is not included in an exhaustive list shows the spirit of the EU Trafficking Directive, in line with the CETS 197 and with the ECHR and ECtHR case law, to prioritise identification of as many actual and potential victims as possible, lending the measure a victim-centred approach. This is confirmed by Recital 7, which states that a human rights approach in the fight against human trafficking is embraced. Recital 18 then states that assistance and support will be provided by the MS concerned as soon as the 'reasonable-grounds indication' has been determined. Protection will be provided beyond the willingness of the victim to act as witness against perpetrators. Moreover, the Directive needs to be applied in conjunction with art 5 of the Charter of Fundamental Rights (CFR) which expressly prohibits the trafficking of human beings.[117]

In consideration of the above analysis, we argue that EU and Council of Europe legislation has imposed on MS and contracting States the legal obligation to identify actual and potential victims of trafficking amongst smuggled migrants particularly in the context of people smuggled at sea. The responsibility to identify and protect, and the duty to prosecute, are two separate obligations that States have to fulfil. The ECtHR stated that '(potential) victims need support even *before* [emphasis added] the offence of human trafficking is formally established; otherwise, this would run counter to the whole purpose of victim protection in trafficking cases'.[118] In line with the ECtHR interpretation of art 4 ECHR, the duty to identify extends

108 *V.C.L. and A.N. v United Kingdom* (n 10) para 158.
109 ibid para 159.
110 ibid para 160.
111 *V.C.L. and A.N. v United Kingdom*.
112 ibid.
113 ibid.
114 ibid.
115 ibid para 161.
116 ibid paras 174, 183 and 210.
117 The scope of application of art 5, as for all rights and freedoms contained in the CFR, is defined by the criterion of connection with EU law, which means that the Charter can be invoked only in conjunction with binding provisions of EU law and in this case the Directive.
118 *J and Others v Austria* (n 18) para 115.

not only to actual, but also potential victims of human trafficking.[119] Therefore, all migrants at sea should be treated as potential victims of trafficking. The different European instruments contain different rules in relation to jurisdiction and closer scrutiny is necessary to answer the question of whether identification and protection of victims could extend extraterritorially.

4.3. The territorial scope of European and EU legislation on the protection of victims and potential victims of human trafficking stranded at sea

The question of whether victims of trafficking stranded just outside the territorial water of a State ought to be protected once identified raises the issue of whether 'extraterritoriality' can be adopted as the litmus test for the effective assistance and support of human trafficking victims. We argue that protection should extend beyond the territory of the MS/contracting States in the vicinity of territorial waters, as otherwise actual and potential victims of trafficking can be hidden amongst smuggled migrants. MS/contracting States seek to discharge their responsibilities toward victims advocating territorial jurisdiction. Scholars have argued in favour of extraterritorial human rights protection, but it is still debatable whether it is legally permissible.[120] Allowing *de jure* or *de facto* extraterritorial jurisdiction sets into motion positive obligations for protection of victims of trafficking outside MS territorial waters.

The territorial scope of art 4 ECHR, as interpreted by the ECtHR, focuses on jurisdiction that can only be established *when there is a link with the territory* of the state party, ie a *legal nexus*. The scope of art 4 is therefore limited by its territorial application.[121] The ECtHR has attributed jurisdiction to certain States outside their territory when there is a *legal nexus*. Such examples include the cases of *Ilascu and Others v Moldova and Russia, Isaak v Turkey* and *Jaloud v the Netherlands*.[122] The Court has accepted that the ECHR can apply extraterritorially, but only in very exceptional circumstances as 'States should always do their best to secure the rights guaranteed by the Convention'.[123] When it comes to asylum seekers and other migrants rescued in the extraterritorial sea and embarked in one of the boats flying a national flag, the ECtHR has stated that they are under the control of the rescuing State, which is exercising its jurisdiction[124] and, thus, collective expulsion is prohibited. In *Hirsi v Italy*,[125] a leading case

119 The European Commission states that Member States have the obligation to identify not only victims but also potential victims of human trafficking. See COM (2015) 240 final, 13/5/2015, p. 6.

120 Violeta Moreno-Lax and Cathryn Costello, "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model" in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward The EU Charter of Fundamental Rights (Hart Publishing, 2014) p. 1661; Samantha Besson (2012) The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. Leiden, *Journal of International Law*, 25 (4), p. 857–884.

121 The ECtHR has ruled that in exceptional circumstances the scope of the ECHR can extend extraterritorially but this analysis goes beyond our aims. The ECtHR refers to art 1 ECHR which limits territorial scope of application of the Convention.

122 See Case of *Ilascu and Others v Moldova and Russia* Application no. 48787/99, judgment of 8 July 2004; Case *Isaak v Turkey*, application no. 44587/98, judgement of 24 June 2008; *Jaloud v the Netherlands* App no 47708/08, judgement of 20 November 2014.

123 See Maarten Den Heijer, *Europe and Extraterritorial Asylum*. (Hart Publishing, 2012) p. 47.

124 See *Hirsi Jamaa and Others v Italy* (n 37) para 79.

125 For an in-depth analysis of the case see Maarten Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the Hirsi Case' (2013) *International Journal of Refugee Law*, 25/2, p. 265-290. See Maria Giulia Giuffrè 'State Responsibility Beyond Borders: What legal basis for Italy's Push-Back to Libya?' (2012) *International Journal of Refugee Law,* 24/4, p. 692-734.

concerning Italian ships that rescued migrants distressed in international waters, the Italian authorities were condemned by the Court, as they handed the rescued individuals over to the Libyan authorities. Italy had jurisdiction, as the migrants had been under the continuous and exclusive control of the Italian authorities since they boarded the ships and until they were handed over to Libyan authorities.

The CETS 197 is a very advanced legal instrument for the protection of victims of human trafficking. In the Preamble, it considers human trafficking as 'a violation of human rights and an offence to the dignity and the integrity of the human being' and 'respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives'.[126] Yet, 'extraterritoriality' is applied in limited situations, despite scholars arguing that trafficking in human beings is such a serious crime and that universal jurisdiction should apply against perpetrators.[127] Article 1(1)(b) CETS 197 states that the purpose of the Convention is to protect the human rights of human trafficking victims and to adopt 'a comprehensive framework for the protection and assistance of victims and witnesses'. Article 10(1) states that competent authorities of States parties should identify victims of human trafficking and protect them; and at para (2) it specifies that the competent authorities should not remove people from their territories when they have a 'reasonable grounds indication' to believe that people have been victims of human trafficking. Thus, the text of the CETS 197 appears to exclude jurisdiction, for example, when actual or potential victims of trafficking are in the high sea or outside the territorial waters. However, when it comes to determining jurisdiction in relation to the trafficking offence, art 31 states that contracting States shall establish their jurisdiction when the crime is committed on their territory or when a *legal nexus* exists, ie, when the offence is committed 'on board a ship flying the flag of that Party; or on board an aircraft registered under the laws of that Party' or when the crime is committed 'against one of its nationals; or by a stateless person who has his or her habitual residence in its territory'. Jurisdiction should be established if the 'offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State'.[128]

Consequently, the question is whether States have a responsibility to go beyond their SAR zone and how such responsibility is determined. Cooperation among states in SARs operations as established by the international law of the sea is not adequate to identify and protect actual and potential victims. The CETS 197 limits the identification and protection of victims stranded at sea to the territory of contracting States. Therefore, we argue that protection outside the SAR zones can be guaranteed by EU anti-trafficking secondary legislation and European human rights law.

The EU Trafficking Directive imposes territorial jurisdiction for the prosecution of offences unless there is a *legal nexus*, but it is silent when it comes to the identification and protection of victims. Considering that the issue is highly politicised, it is likely to be a deliberate omission to avoid having to bring every migrant in every boat into the MS territory. However, art 10(1) expressly provides that MS have jurisdiction to investigate and punish human trafficking when the crime has been committed 'in part or entirely on State territory'

126 Preamble of the CETS 197 (n 9).

127 See John Reynolds, 'Universal Jurisdiction to Prosecute Human Trafficking: Analyzing the Practical Impact of a Jurisdictional Change in Federal law' (2011) *Hasting International and Comparative Law Review* p. 387. See also Tom Obokata *Trafficking of Human Beings from a Human Rights Perspective. Towards a Holistic Approach* (Martinus Nijhoff Publishers, 2006) p. 133-144.

128 Article 31 CETS 197 (n 9).

or when 'the offender is one of their nationals'. Then, art 10(2) extends the legal nexus if 'the offence is committed against one of its nationals or a person who is an habitual resident in its territory; the offence is committed for the benefit of a legal person established in its territory; or the offender is an habitual resident in its territory', but it requires that the MS informs the Commission.[129] Yet, art 11(2) of the Directive is silent in relation to the jurisdiction for protecting actual or potential victims, as it does not link assistance and support for victims to the fact that the person needs to be on MS territory. We argue in favour of a better reading of the Directive, by extending protection to migrants distressed at sea in the vicinity of states' territorial waters. This interpretative construction is based on the reading of art 11(2) of the Directive in conjunction with Recital 18. The latter states that if the victim does not reside legally on the territory of the MS concerned, 'assistance and support should be provided unconditionally at least during the reflection period'. It continues: 'if, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue assisting and supporting the person on the basis of this Directive'. Consequently, the expression 'in cases where the victim does not reside lawfully in the Member State concerned,' leads us to conclude that actual and potential victims of human trafficking could be identified when they are in the vicinity of domestic waters. In this case, the State has to grant temporary residence to identify victims and provide them shelter and a reflection period. The pre-identification and/or reasonable grounds assessment is personalised in nature. We argue that such procedures can be undertaken on vessels within the domestic waters and in international waters. However, this intersects with the right to claim asylum, which an individual might be entitled to, under the *de facto* or *de jure*, jurisdiction of a State. People who are not identified as victims can apply for asylum if they meet the conditions indicated by asylum law. Certainly, the authorities cannot prosecute the traffickers due to territorial or jurisdictional limitations. Moreover, the ECtHR case law strongly emphasises that the identification and protection of actual and potential victims and the prosecution of perpetrators are two distinct obligations.[130] Consequently, we argue that a combined reading of the EU Trafficking Directive and the ECtHR case law opens the possibility of protecting actual and potential victims of human trafficking extraterritorially. The UK, which has transposed the Trafficking Directive via the Modern Slavery Act 2015, permits (as we will highlight in the following section) investigations to be undertaken in international waters when there is suspicion that the crime of human trafficking has been perpetrated, eg when migrants are stranded at sea.

A final important remark that needs to be clarified is the issue of overlapping legislation and how to solve potential conflicts between the CETS 197 and the Directive. A disconnecting clause has been introduced to safeguard the application of EU law between EU MS against potentially diverging provisions of an international treaty.[131] Conflict clauses are added to treaties with a view to regulating potential conflicts between EU law and the treaties in question. Thus, in case of conflict, the EU Trafficking Directive will prevail over the CETS 197 within the EU. So far, all EU initiatives against human trafficking have been taken in compliance with

129 See EU Trafficking Directive (n 16) arts 14(1) and (2).

130 Section 4.1 of this article.

131 Article 40(3) CETS 197 (n 9) states: 'Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.'

CETS requirements. It must be pointed out that the CETS 197 has been ratified by all MS and the UK, but not by the EU itself.[132] The CETS 197 is recalled in the EU Trafficking Directive as an essential legal instrument 'in the process of enhancing international cooperation against trafficking in human beings'.[133] The EU refers to the CETS 197 in its initiatives on the fight against human trafficking; for example, in the European Parliament's resolutions on the implementation of the EU Trafficking Directive[134] and the fight against trafficking in human beings in the EU's external relations.[135] However, if the Union participates in a Convention alongside its MS, the need for a disconnection clause may be unnecessary. To conclude, as long as the EU Trafficking Directive and the CETS 197 are in line there are no conflicting standards; but in case of conflict, the Directive will prevail within the EU.

5. Case study: post-Brexit UK human trafficking approach

The UK left the EU on 31 January 2020 and reached an agreement on law enforcement and judicial cooperation in criminal matters.[136] Cooperation on asylum and immigration, however, was outside the scope of law enforcement agreement.[137] The Trafficking Directive was saved in domestic law under s 4 of the Withdrawal Act 2018 (referred to in s 68(1)), but s 63 provides a wide power to disapply the Directive. The British government has reformed the relevant law by adding Part 5 to the Nationality and Borders Act (NBA). The NBA states that 'rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from the Trafficking Directive' will cease to apply if they are incompatible with the provisions introduced by the new Act.[138] The Explanatory Notes[139] to the NBA stress that the British government will continue to cooperate with European partners to dismantle criminal organisations behind people smuggling.[140] However, identification of actual and potential victims amongst smuggled migrants at sea can be particularly problematic as cooperation, when they are stranded in extraterritorial waters, can be very difficult. Schedule 5 of the NBA amends provisions on maritime enforcement in Part 3A of Immigration Act 1971, conferring new extraterritorial powers on immigration officers in international waters, but the question is whether this power includes the legal obligation to identify actual and potential victims. We argue that the new Schedule 5 shall be applied in conjunction with the Modern Slavery Act 2015 (MSA), which

132 State of ratification available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197/signatures, accessed on 24 May 2021.

133 Recital 9 of the EU Trafficking Directive.

134 Preventing and combating trafficking in human beings European Parliament resolution of 12 May 2016 on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective (2015/2118(INI)), P8_TA (2016) 0227.

135 The fight against trafficking in human beings in the EU's external relations European Parliament resolution of 5 July 2016 on the fight against trafficking in human beings in the EU's external relations (2015/2340(INI)), P8_TA (2016) 0300.

136 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948119/EU-UK_Trade_and_Cooperation_Agreement_24.12.2020.pdf, accessed on 20 April 2022.

137 House of Lords European union Committee 25th Report Session 2019-21 Beyond Brexit: policing, law enforcement and security. HL Paper 250, 26 March 2021, para. 7.

138 Section 68 of the Nationality and Border Act 2022.

139 Nationality and Borders Bill Explanatory Notes (HL Bill 82 Explanatory Notes), 9 December 2021, available at: https://bills.parliament.uk/bills/3023/publications, accessed on 15 March 2022.

140 See the Explanatory Notes (n 139) [38] at [39].

is one of the legal instruments that transposed the Trafficking Directive in the UK,[141] and the Human Rights Act which has implemented the ECHR. By reading them in conjunction with each other, it will be possible to prioritise the identification of actual and potential victims stranded in the high sea. Conversely, strengthening the powers of investigation of the crime without giving the precedence to the identification of actual and potential victims stranded at sea, will leave many vulnerable people unprotected.

The amendments widen the current maritime enforcement by permitting the British authorities to undertake 'maritime enforcement outside of UK waters',[142] with the aim 'to detect, prevent, investigate and prosecute the illegal entry of migrants as well as its facilitation'.[143] British authorities can require migrant boats to leave UK waters, as well as impose 'forcible disembarkation of non-compliant passengers in all likely circumstances subject to agreement by relevant receiving states'.[144] This is a new power introduced by the NBA as, previously, enforcement powers of immigration officer could not extend to international waters or foreign ships.[145] Indeed, maritime enforcement could be carried out under the Immigration Act 1971 for the purpose of detecting, preventing, investigating and prosecuting perpetrators of immigration offences within domestic waters and domestic vessels.[146] Instead, under the Policing and Crime Act 2017, law enforcement authorities and not immigration officers, had the power to intercept boats in UK waters and international waters for the purpose of detecting, preventing and prosecuting criminal offences.[147]

In relation to slavery and human trafficking, maritime enforcement can be undertaken by Customs Officers under the MSA.[148] Section 35 MSA states that enforcement powers may be exercised only to detect, prevent, investigate and prosecute the offences of slavery and human trafficking[149] and it allows law enforcement authorities to undertake investigations in territorial and international waters.[150] The Explanatory Notes of the MSA clarified that the power of law enforcement authorities, as per s 35, extends outside the UK territory and in international

141 Initially, the United Kingdom decided not to take part in the adoption of Directive 2011/36/EU on preventing and combating trafficking in human beings. Therefore, it had not been bound by the Directive or subject to its application. The Home Office spokesman had argued that the opt-out was appropriate as the Directive would not benefit the UK; opting in would reduce the scope for professional discretion and flexibility diverting the already limited resources (see Home Office Statement, 31 August 2012, available at: http://www.homeoffice.gov.uk/media-centre/news/trafficking-directive). However, the Government was open to review its position at a later stage. Subsequently, the Government announced the intention to accept the Directive and in accordance with art 4 of the Protocol annexed to the EU Treaties, notified the Commission by letter of 14 July 2011. The Commission with Decision 2011/692/EU6 addressed to the UK extended the application of the measure to the UK. The date on which the Directive entered into force in the UK was 18 October 2011 and this instrument needed to be transposed into UK law by 6 April 2013 (Commission Decision of 14 October 2011, OJ L 101, 15.4.2011, p.1 and art 22 of Directive 2011/36/EU).

142 See the Explanatory Notes (n 139) para 449 and Schedule 5, s.2 (1) (b), (c) and (d) of Immigration and Borders Act 2022.

143 Explanatory Notes above (n 139) para 449 and Schedule 5, s.2 (2) (a) of Immigration and Borders Act 2022.

144 ibid.

145 See the Explanatory Notes (n 139) [453].

146 See the Explanatory Notes (n 139) [452] at [453].

147 ibid.

148 See the Explanatory Notes (n139) [452]

149 Modern Slavery Act 2015, s 35 (1) (b).

150 Section 35 (1) states: An English and Welsh constable or an enforcement officer may exercise the powers set out in Part 1 of Schedule 2 ("Part 1 powers") in relation to – (a)a United Kingdom ship in England and Wales waters, foreign waters or international waters, (b)a ship without nationality in England and Wales waters or international waters, (c)a foreign ship in England and Wales waters, or (d)a ship, registered under the law of a relevant territory, in England and Wales waters.

waters when it is suspected that the crime of human trafficking has been perpetrated.[151] The Explanatory Notes highlight that 'the only exception to this is in the case of a UK vessel or stateless vessel in the territorial waters of another state or relevant territory, where UK court jurisdiction only applies where the offender is a British citizen. However, as the nationality of a suspected offender may not be apparent prior to investigation, the power is provided for all UK vessels in this scenario'.[152]

In terms of investigations and prosecution, the MSA complies with the EU Trafficking Directive and the CETS 197 which only permits jurisdiction on arrest and prosecution when the crime is perpetrated by a national of the State which is investigating human trafficking. The MSA facilitated cooperation between different States when a vessel is in international waters and there is the suspicion that the offence of human trafficking may be perpetrated. The fact that British law enforcement authorities can undertake investigations on vessels in international waters when there is the suspicion that human trafficking may have taken place should include the legal obligation to identify victims and potential victims stranded at sea, not only in domestic waters but also in international waters. Unfortunately, the NBA risks jeopardising the scope of the MSA which prioritises the investigation and identification of actual and potential victims amongst smuggled migrants at sea because by externalising migration, the identification of victims and potential victims will be more difficult as it will not be considered a priority anymore. In fact, the aim of the new Act is to prevent migrants from entering UK territory. This is because in the last two years, migrants have crossed the English Channel in small boats and have been intercepted by Border Force, and then taken to the UK to have their asylum request processed as per the Immigration Act 1971. The new Act has made amendments to prevent migrants on boats reaching UK territory and claiming asylum.[153] Thus, Schedule 5 of the new NBA allows the relevant authorities to 'divert migrant vessels in international waters away from UK shores'.[154] The new power permits the competent authority to take control of the vessels and those on board and return them to a safe country'.[155] Moreover, the Act states that immigration officials during the maritime enforcement, are not 'liable in any criminal or civil proceedings for anything done in the purported performance of functions if the court is satisfied that— (a) the act was done in good faith, and (b) there were reasonable grounds for doing it.[156] This provision has been criticised for seeking 'to provide them [immigration officials] with a defence, although it is not clear that it really does'.[157] We argue that by seeking to shield immigration officers from liability, actual and potential victims of human trafficking might be left stranded at sea. Indeed, the British government aims to reduce the number of migrants who cross the border by sea through the English Channel and dismantle smuggling of migrants perpetrated by criminal organisations.[158] We argue that, in the rush to return as many migrants as possible, it will not be possible to investigate human trafficking as required by s 35 MSA. The externalisation of migration contributes to the neglect of actual and potential

151 Modern Slavery Act 2015 Explanatory Notes, Section 35/Part 1/Schedule 2.
152 See the Explanatory Notes of the Modern Slavery Act, Subsection 121 at https://www.legislation.gov.uk/ukpga/2015/30/notes/division/5/3/1, accessed on 23 March 2022.
153 See the Explanatory Notes above (n 139) [450].
154 See the Explanatory Notes above (n 139) [454].
155 ibid.
156 See Schedule 5, Part A1, paragraph J1 of the Nationality and Borders Act 2022.
157 Colin Yeo, 2021, Briefing: sea rescue of refugees in UK law and proposals for change, available at https://freemovement.org.uk/refugee-pushbacks-english-channel-borders-bill-briefing/ (accessed on 10 May 2022).
158 See the Explanatory Notes (n 139) [455].

victims of human trafficking, despite the fact that art 4 ECHR, the case law of the ECtHR, the EU Trafficking Directive and CETS 197 all provide that the priority is the identification and protection of victims and potential victims. Certainly, the UK has not yet ratified Protocol 4 ECHR as amended by Protocol 11 ECHR, which covers prohibition of individual and collective expulsion of nationals and freedom of movement.[159] However, this fact does not exempt it from the requirement to identify and protect victims and potential victims of human trafficking as the UK is bound by art 4 ECHR and CETS 197.

To conclude, the UK aims at preventing the entrance of these vessels in their territorial waters by push-back operations ie escorting vessels back to France. The fact that the new Act is limiting the scope of the EU Trafficking Directive raises concerns in relation to the identification of actual and potential victims by shifting this responsibility to EU MS or other States outside the UK. The situation is likely to become more difficult for many migrants stranded at sea when they try to cross the English Channel, as it seems the UK's approach is also departing from human rights requirements and from the CETS 197. The NBA states 'the UK is and will remain a signatory of the Council of Europe Convention on Action against Trafficking in Human Beings which sets out signatory states' international obligations to identify and support victims of modern slavery'.[160] Yet, some provisions aim to clarify the meaning of CETS 197, eg section 60 which according to the Explanatory Notes, 'clarifies the thresholds applied in determining whether a person should be considered a potential victim of trafficking'.[161] This new provision alters the wording of the test for identification, placing the standard of proof as the 'balance of probabilities', which currently is problematic in the context of refugee status determination, as this kind of burden requires positive evidence where there is often none in existence. As a result, this would be inconsistent with art 10 CETS 197 and art 11(2) (read with Recital 18) Trafficking Directive. Although the UK can depart from the EU Trafficking Directive, it still has to comply with the obligations imposed by the CETS 197, the ECHR and the ECtHR case law. To regulate Channel crossings, a mutual agreement is required between the UK and the EU on managing migration and asylum which includes sharing of information and data, cooperation in rescue operations and protection of individuals when there is the 'reasonable grounds indication' that people stranded at sea can be actual or potential victims. Section 35 of the MSA aims to reinforce cooperation between different States, whilst the new Act will risk destroying any efforts made by the MSA, European law and EU law on human trafficking.

6. Conclusions

This article has focused on the identification and protection of actual and potential victims of human trafficking in Europe. It has analysed the international law of the sea which establishes States' obligations to fulfil SAR operations. It has argued that European human rights law and EU law set the legal duty for MS and contracting States to identify actual and potential victims of human trafficking amongst people smuggled and stranded at sea. The article has highlighted that the ECtHR has separated the legal obligation to identify actual and potential victims from the duty to detect, arrest and prosecute perpetrators. Therefore, the obligation to identify can

159 Council of Europe, Chart of signatures and ratifications of Treaty 046, available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=046, accessed on 30 April 2022.

160 See the Explanatory Notes (n 139) [33].

161 See the Explanatory Notes (n 139) [533].

be exercised even before perpetrators are arrested and prosecuted. Since identification is an absolute priority, this can be done even when actual or potential victims are stranded in a boat in international waters. Indeed, the Trafficking Directive does not require that the actual or potential victims are within the territory of a MS. Moreover, the ECtHR has emphasised that States ought to identify victims when there is the 'credible suspicion' or 'reasonable grounds indication' that a person could be an actual or potential victim. This Court does not state that this operation must be done when the person is on the territory of State, thus it does not require the territorial scope in relation to identification. By contrast, it holds that the crime of human trafficking cannot be prosecuted extraterritorially. In addition, art 11(2) EU Trafficking Directive does not assert that the actual or potential victim must be on the territory of a MS for the 'reasonable grounds indication' to be applied. Hence the identification of actual and potential victims is a legal duty as stated by consolidated ECtHR case law which also extends to international waters. When there is a 'reasonable grounds indication' that a person could be an actual or potential victim, contracting States have the legal obligation to identify victims during SAR operations. Therefore, we have argued that the international law of the sea alone does not guarantee the identification and protection of human trafficking victims stranded at sea and hence needs to be read in conjunction with European human rights law and EU law which impose positive obligations for protection of actual and potential victims of trafficking outside states' territorial waters. Thus, EU MS or the UK breach international obligations if they fail to identify and protect victims and this is based on European human rights law and EU law read in conjunction with international conventions of the sea.

The EU Directive is currently under consideration for review.[162] This piece of EU secondary legislation is not exempt from limitations, as it does not extend protection outside the territory of the MS after the reflection and recovery periods have passed. We recommend amendments to offer protection outside the territory of the MS after the reflection and recovery periods and to explicitly state that investigation and prosecution can occur in boats outside the territory of MS. This is because if perpetrators are not prosecuted whenever they commit the offence, there will always be vulnerable people who are trafficked. The proposed amendments will further enhance the standard of protection of victims and introduce a higher benchmark in the fight against perpetrators.

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162 For more information see public consultation at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13106-Fighting-human-trafficking-review-of-EU-rules/public-consultation_en, accessed on 10/04/2022.