Scientific Article

THROWING OUT THE BABY WITH THE BATHWATER

An Assessment of Dutch Policy Regarding Victims of Trafficking in Human Beings

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ABSTRACT

In August 2019, a policy change was introduced by the Dutch Secretary of State, limiting the issuance of a reflection period and residence permits to victims of trafficking in human beings (THB) who also have a Dublin status. In this research, I discuss how this is not in conformity with EU law. The provisions on the reflection period and residence permit amount to incorrect implementations of the EU Directives in the field of protection of victims of THB. I provide two important arguments in this regard: the policy rules do not fulfil the criterion of mandatory rules and the implementation is in conflict with the aim of the Directives. Subsequently, the distinction between Dublin claimants and non-Dublin claimants must be discarded. As such, changes need to be made to the current THB framework to close the gaps.

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I. Introduction

Trafficking in human beings (THB) amounts to a severe violation of individual freedom and dignity, as it is a serious form of crime and can be considered as the modern form of slavery. As such, it has been increasingly described as a form of degrading treatment under Article 3 of the European Convention of Human Rights (ECHR).[1]

However, illegal profits obtained by the THB business are still sky-high. The International Labour Organisation estimated the annual profits at €122 billion globally in 2014.[2] Meanwhile, the number of convictions and prosecutions is still limited.[3] In the latest Communication of the European Commission (Commission), it is stressed that a large number of victims still remain undetected and the total number of prosecutions are persistently low.[4] The CoMensha (coordination centre for THB in the Netherlands) annual report states that only approximately 1000 victims were registered in 2016 in the Netherlands, while the International Labour Organisation has estimated that there would be 21.000 present.[5]

To battle THB, many treaties among different international organisations and between different states have been signed. In addition, the EU in particular has taken up multiple initiatives to battle this crime. For example, the Anti-Trafficking website has been launched, there is an EU Anti-Trafficking Coordinator and it has funded several organisations and studies.[6]

Despite these measures, the low conviction rate has remained consistent. Therefore, the EU has initiated the provision of time to reflect and temporary residence permits to victims of THB. These are granted for a two-fold purpose: firstly, providing an incentive for victims to cooperate with the police, which will hopefully lead to more convictions, and secondly, providing protection and assistance to victims of THB.

Initiatives like these are to be applauded, but the effect can be undermined by the incorrect implementation by the Member States (MS(s)) of the EU. The Netherlands has even reversed its policy to some extent because of the alleged abuse by asylum seekers claiming to be victims of THB to obtain a temporary residence permit.[7] Within the EU, a system exists in which a single EU Member State is responsible for handling an application for international protection.

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[1] *Rantsev v. Cyprus and Russia*, Decision of 7 January 2010, [2013] ECHR.

[2] International Labour Organization, 'Profits and Poverty: the Economics of Forced Labour', *ILO Publications* 2014, p. 13.

[3] Commission, 'Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of the Human Trafficking Directive on preventing and combating trafficking in human beings and protecting its victims,' (2018) 777 final.

[4] Commission Staff Working Document, 'Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of the Human Trafficking Directive on preventing and combating trafficking in human beings and protecting its victim,' COM (2018) 777 final, p. 6.

[5] CoMensha, 'CoMensha Jaarbeeld in 2016', at: https://www.comensha.nl/actualiteiten/item/comensha-jaarbeeld-2016/ (accessed at 20 June 2020).

[6] European Commission, 'Together Against Trafficking in Human Beings', at: https://ec.europa.eu/anti-trafficking/node/4598_en (accesed 20 June 2020).

[7] Following Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19.

The Dublin Regulation provides for hierarchical criteria to determine the responsible Member State. Most of the time, this Member State is the country of first entrance. In consequence, victims of THB would be transferred back to the country in which they already started an asylum procedure. However, the country's responsibility to decide on the asylum application expires when another country has given out a (temporary) residence permit, as for example the residence permit for THB victims.[8] Therefore, certain applicants have an interest in obtaining victim status when they would rather have their case handled by the Netherlands.

Nonetheless, the reversal of Dutch policy has led to unjust consequences. Individuals that do not fall under the Dublin system will receive a temporary residence permit almost immediately, in contrast to Dublin claimants who will risk being sent back to their country of first application and lose the safeguards and protection under the scheme for victims of THB. Consequently, a small difference in legal qualification leads to huge differences in practice. Therefore, it needs to be determined whether this policy change is legitimate.

I.1 What Is THB?

To be able to define the exact scope of the research, it is necessary to elaborate on what THB actually is. According to the United Nations Trafficking in Persons Protocol (Palermo Protocol), THB involves three steps: firstly, there is the recruitment, transportation, transfer harbouring or receipt of persons. Secondly, force, threat, coercion, payment or some other kind of abuse of power is used to achieve control over another person. The last step involves the intent of some form of exploitation of that person, like: prostitution, sexual exploitation, forced labour, forced criminality, slavery or removal of organs.[9] This shows that THB is multifaceted: there is an act, a means and a purpose.[10]

THB accounts for a complex crime as most of the time, it involves multiple actors and those who traffic humans operate across multiple jurisdictions. Furthermore, it is a multidimensional issue: it is a crime, a violation of fundamental human rights, a transnational security concern and also a development problem.[11] Additionally, it is a hidden crime. Migrants without proper documentation are often at risk of falling victim to THB because they belong to a vulnerable group and are made dependent on their traffickers.

Victims of THB are hard to locate and protect. Habituating in a country without proper status is criminalised, and therefore, victims of THB often stay out of the authority's sight deliberately.[12] Accordingly, a person without a proper residence status is vulnerable, and therefore, more likely to become a victim of THB. But it also works the other way around; a

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[8] Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.
[9] Article 3(a) Palermo Protocol.
[10] K. Duong, 'Trafficking in Human Beings and Migration: Examining the Issues from Gender and Policy Perspectives' in J. Jones and J. Winterdyk (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham: Palgrave Macmillan 2020, p.1821.
[11] Idem, p. 1820.
[12] J. Latham-Sprinkle, et al. 'Migrants and their Vulnerability to Trafficking in Human Beings, Modern Slavery and Forced Labour', *Report International Organization for Migration* 2019, p. 61.

person that is being trafficked will have a precarious immigration status, which will foster exploitation as well.[13]

I.2 Defining the Scope of the Research

It is clear that appropriate legislation needs to be arranged to tackle this problem. However, concepts of THB differ around the globe, which can pose difficulties with regards to the right policy responses.[14] For example, states struggle to differentiate between who is a victim and who is to blame.[15]

All treaties and legislation that have been implemented to strengthen the position of victims of THB depart from a victim-centred approach. Therefore, in this research, I will take the victim as a starting point as well and will discuss how a victim's position is not safeguarded well enough within law. I will focus on Dutch policy and assess its quality using the relevant instruments affiliated with the Council of Europe (CoE) and the EU.

As such, I will focus on a novel argument based on incorrect implementation of the EU directives regarding THB, while using scholarly work and human rights considerations. Consequently, I will make recommendations on the improvements of the framework from the position of the victim.

I will start by explaining the relevant framework, embedded in international and European law. After expounding upon the international and European standards the Netherlands has to abide by, the Dutch legislation on THB victims will be dealt with. Subsequently, I will assess whether Dutch law is in conformity with the EU framework. After commenting on the current Dutch situation, I will pose solutions to fill the gaps in the protection of THB victims.

II. Trafficking in Human Beings; International and European Legislation

I will start my research by discussing the different legal frameworks that are applicable to victims of THB. In this sense, it is important to differentiate between more general fundamental human rights, enshrined in international treaties, most importantly, the ECHR, and specific provisions for victims of THB.

II.1 International Fundamental Rights

As THB is a cross-border issue, global cooperation is needed to address human rights abuses caused by exploitation. Treaties have been especially important, as they impose certain

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[13] M. van Meeteren and E. Wiering, 'Labour trafficking in Chinese restaurants in the Netherlands and the role of Dutch immigration policies. A qualitative analysis of investigative case files', *Crime, Law and Social Change* 2019-1, p. 110.
[14] G. Lodder, 'Protection of Migrants Against Labor Exploitation in the Regulation of Migration in the EU' in J. Jones and J. Winterdyk (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham: Palgrave Macmillan 2020, p. 1364.
[15] Duong 2020, supra note 10, p. 1822.

responsibilities and obligations upon states.[16] International bodies of law[17] lay down negative (the state must refrain from doing something) and positive duties (the state has the obligation to take appropriate measures) for states with regard to victims of THB. THB practices pose the risk of violating the fundamental rights of the victims thereof.[18] Therefore, the parties to these international treaties are obliged to take preventive measures protecting these individuals.[19]

This shows that mere ratification of the treaties is not enough. States have to implement effective remedies for trafficking victims, investigate crimes and issue protective legislation. However, these obligations can seem rather broad and vague. That is why it is necessary to provide for more specific obligations regarding THB. The most important global instrument in that regard is the Palermo Protocol. This was adopted by the United Nations in 2003 and contains specific provisions on the rights and obligations with regards to THB. It introduced what is often called the "3P paradigm": prevention, protection and prosecution.[20]

As such, states should put in place legislative and other measures to criminalise THB,[21] and victims have to get assistance and protection.[22] For example, the Palermo Protocol obliges parties to 'consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory' by taking into consideration 'humanitarian and compassionate factors'.[23]

II.2 Council of Europe Framework

The CoE is acknowledged to be the most victim-oriented among international legal orders,[24] and has proclaimed the ECHR. Accordingly, the European Court of Human Rights (ECtHR) rules by these standards, supplemented by the Convention on Action against Trafficking in Human Beings (Trafficking Convention). This Convention is slightly more specific on victim support than the Palermo Protocol, as the latter has been criticised for being too focused on law enforcement.[25] In contrast to the Palermo Protocol, the Trafficking Convention has set

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[16] N. Blom, 'THB: An International Response' in J. Jones and J. Winterdyk (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham: Palgrave Macmillan 2020, p. 1276.

[17] E.g. general international community's fundamental rights have been enshrined in the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR) (1976) and the International Covenant on Civil and Political Rights (ICESCR) (1976).

[18] E.g. the right to life, right to liberty and security, right to privacy, right to physical integrity, right to not be subjected to inhumane or degrading treatment or torture, and the right to be free from all forms of discrimintation.

[19] Blom 2020, supra note 16, p. 1283.

[20] Article 4 sets out the scope of application: 'the Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in Article 5 of this Protocol, where those offences are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences.'

[21] Article 5 Palermo Protocol.

[22] Article 6 Palermo Protocol.

[23] Article 7 Palermo Protocol.

[24] M. Wade, 'Combatting Trafficking in Human Beings: A Step on the Road to Global Justice?' in J. Jones and J. Winterdyk (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham: Palgrave Macmillan 2020, p. 1186.

[25] R. Piotrowicz, 'The European legal regime on trafficking in human beings' In: R. Piotrowicz, C. Rijken and B. Uhl (eds.), *Routledge Handbook of Human Trafficking*, London: Routledge 2017, p. 41.

obligations beyond the scope of investigation and prosecution and pays more attention to the needs of trafficked persons.[26]

The most important provisions of the Trafficking Convention for this research are Article 13 and 14. Article 13 provides for a recovery and reflection period of at least 30 days which must be offered to a person as soon as there are 'reasonable grounds' to believe that the person has been trafficked. This offers the trafficked person an escape from the influence of its traffickers and some time to recover and think about the option of cooperating with the competent authorities. This period is intended to protect persons illegally present in the state from removal thereof.[27] Article 14 deals with a residence permit, to be issued when the victim's circumstances and/or a criminal investigation necessitates this. The first condition allows for a protection-based residence permit and the second aims at encouraging prosecutions.[28] In addition, the Trafficking Convention has established an independent monitoring body, called Group of Experts on Action against Trafficking in Human Beings (GRETA).

II.2.1 The European Court of Human Rights

The ECtHR is established by the ECHR and oversees the implementation and application of the human rights of the ECHR and its additional protocols. The Court has adjourned on several occasions on cases of THB. In this context, it has mostly used Article 4 ECHR, on prohibition on slavery and slave trade in all forms, establishing a test to rule on the positive obligations that states have regarding the protection of victims of THB.

The most important case is *Rantsev v Cyprus and Russia*.[29] In this case, the Court ruled that trafficking in human beings 'threatens the human dignity and fundamental freedoms of its victims'.[30] In consequence, states have the positive obligation of implementing national legislation which adequately ensures the practical and effective protection of the rights of victims. This could mean regulating businesses that are often used as a cover for THB and establishing immigration regulations that address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.[31]

Solely focusing on prosecuting and penalising prosecutors is not enough. The ECtHR has made it clear that all states, even states that merely function as transit states, carry the responsibility of identifying possible risks of THB and putting the right instruments in place to respond accordingly.[32] Consequently, failing to act, both in the short and long term, can lead to a breach of human rights.[33] Thus, this breach does not only revolve around the act of THB itself, but failure to prevent THB, or to provide effective assistance to its victims.[34]

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[26] Piotrowicz 2017, supra note 25, p. 41.
[27] Idem, p. 43.
[28] Ibid.
[29] *Rantsev v. Cyprus and Russia*, Decision of 7 January 2010, [2013] ECHR.
[30] Idem, para. 282.
[31] Idem, para. 284.
[32] Idem, para. 289.
[33] Piotrowicz 2017, supra note 25, p. 49.
[34] R. Piotrowicz and L. Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle', *Human Rights Law Review* 2016-16, p. 680; *Rantsev v. Cyprus and Russia*, Decision of 7 January 2010, [2013] ECHR, para. 9.

Furthermore, in *Chowdury and Others v. Greece*, the vulnerable status of undocumented migrant workers was highlighted. This is an extra sign of their labour being exploitive in nature.[35] Accordingly, specific vulnerabilities have to be considered with regards to how demanding the positive state obligations are, given the specific circumstances of the case.[36]

Supplementary to this, there is no specific case law on the (temporary) residence permits that states are supposed to grant victims of THB. However, states could be in breach of Article 3 ECHR (prohibition of inhuman or degrading treatment), where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.[37] As such, a positive obligation to investigate cases of THB and protect its victims not only follows from Article 4, but also Article 3 ECHR.[38]

II.3 EU Framework

The MSs of the EU have conferred powers to it to pass legislation in order to achieve the objectives of the EU. The EU acts that are referred to in this research are binding upon the MS, but they differ in the way they can be invoked by individuals before a national court.

In the field of THB, the EU has adopted several directives. On the basis of Article 288(3) of the Treaty on the Functioning of the European Union (TFEU), these are binding upon the MS 'as to the result to be achieved' while 'leaving to the national authorities the choice of form and methods'. Consequently, MSs have to transpose these provisions into national law, and MSs enjoy a certain degree of discretion to choose the most appropriate form or method in accordance with their national legal orders.[39] However, this discretion is not unlimited, which will be elaborated on in the subsequent chapters. Due to the existence of a certain leeway for the MS, an individual cannot, in principle, rely on directives before court because it first needs concrete implementation into national law.[40]

However, there is an important and highly relevant exception to this rule which arises when a MS has failed to implement a directive before the end of the transposition period or has implemented the directive incorrectly.[41] This is called the estoppel argument.[42] Subsequently, in accordance with the criteria of *direct effect*,[43] whenever a provision in the directive is sufficiently clear and precise, as well as unconditional, it is enforceable by an individual before court in order to defeat the application of the conflicting national provision(s).[44] As such, even a directive

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[35] *Chowdury and Others v. Greece*, Decision of 30 March 2017, [2017] ECHR, paras. 95-97.
[36] V. Stoyanova, 'European Court of Human Rights and the Right Not to Be Subjected to Slavery, Servitude, Forced Labor, and Human Trafficking' in J. Jones and J. Winterdyk (eds.), *The Palgrave International Handbook of Human Trafficking*, Cham: Palgrave Macmillan 2020, p. 1406.
[37] *Soering v United Kingdom*, Decision of 7 July 1989, [1989] ECHR, paras. 90-91.
[38] *M and others v Italy and Bulgaria*, Decision of 31 July 2012, [2012] ECHR.
[39] A. Brianson and R. Drachenberg, 'Policy-making in the European Union' In: M. Cini and N. Pérez-Solórzano Borragán (eds.), *European Union Politics*, Oxford: Oxford University Press 2016, p. 202.
[40] Case C-41/74, *Van Duyn,* [1974] ECR I-01337.
[41] Case C-91/92, *Faccini Dori,* [1994] ECR I-03325, para. 88.
[42] See R. Schütze, *European Constitutional Law*, Cambrigde: Cambridge University Press 2016, p. 98.
[43] As introduced in Case 26/62, *van Gend & Loos*, [1963] ECR 1.
[44] Case C-148/78, *Ratti*, [1979] ECR I-01629; K. Bradley, 'Legislating in the European Union' In: C. Barnard and S. Peers (eds.), *European Union* Law, Oxford: Oxford University Press 2017, p. 100.

can have direct effect if an understandable and justiciable rule can be extracted from the provision(s), which is in practice often the case as directives regularly regulate in great detail.[45]

Furthermore, a second type of EU law is a regulation, in this research most notably in the form of the Dublin Regulation. Regulations are directly enforceable because they do not need implementing measures on the side of the MS.[46] Compared to directives, they have a much stronger hold on the national legal systems, as they are a direct source of rights and duties.[47] However, there is no hierarchy among these legal instruments,[48] and both regulations and directives have primacy over any conflicting national provision.[49]

II.3.1 EU Legislation on THB Victims

In the human rights field, Article 5(3) of the EU Charter of Fundamental Rights specifically prohibits THB. According to Article 53 of the EU Charter, this should be interpreted similarly to Article 4 of the ECHR, including the abovementioned case law of the ECtHR. Furthermore, Directive 2011/36/EU[50] (the Human Trafficking Directive) can be seen as reinforcing and supplementing the CoE framework, consisting of inter alia the ECHR and the Trafficking Convention, given that all EU Member States are signatories to the latter conventions too.[51] This framework originated from the frustration that there were not enough criminal proceedings and victims assisted, in relation to the estimated scale and gravity of the crime,[52] resulting in detailed provisions on cross-border investigation and prosecution.[53]

The Human Trafficking Directive aims to provide minimum standards for the combat and prevention of THB and it has an integrated, holistic and human rights approach.[54] It mostly contains instructions for criminal proceedings and introduces certain rights for victims during these proceedings, such as the right of having access to legal representation.[55] The Human Trafficking Directive refers to Directive 2004/81/EC (the Residence Permit Directive) with regards to the reflection period and residence permits. The Residence Permit Directive was issued earlier but has been strengthened by the Human Trafficking Directive because the latter took up an even more rigorous approach and provided for more efficient measures.[56]

This reflection period of the Human Trafficking Directive corresponds with the aims established in the Trafficking Convention.[57] The duration and starting point of the period is to be

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[45] Bradley 2017, supra note 44, p. 100.
[46] Idem, p. 99.
[47] Schütze, supra note 42, p. 91.
[48] K. Lenaerts and M. Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures', *European Law Journal* 2005-6, p. 745.
[49] Case 6/64, *Costa v E.N.E.L.*, [1964] ECR 585, paras. 593-594.
[50] Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.
[51] Wade, supra note 24, p. 1187.
[52] Commission, 'Proposal for a Framework Decision on preventing and combatting trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA', COM (2009) 136 final.
[53] Articles 2-10, 19 and 20 Directive 2011/36/EU.
[54] Recital 7 Directive 2011/36/EU.
[55] Article 17 Directive 2011/36/EU.
[56] J. Milquet, 'Strengthening Victims' Rights: From Compensation to Reparation', *Report of the Special Advisor to the President of the European Commission* 2019, p. 18.
[57] Article 6(1) Directive 2004/81/EC.

determined by the MSs.[58] During the reflection period, the third-country national has access to treatment and the state is not able to take any action against it, unless the victim has sought contact with its perpetrator[59] or because of reasons concerning public order and national security.[60] Furthermore, after the reflection period, a residence permit can be issued whenever the presence of the victim is necessary for the investigations or the trial, the victim has shown clear intention to cooperate and the victim has broken off contact with the perpetrators.[61] The residence permit is valid for at least six months and may be renewed.[62]

II.3.2 Dublin Regulation

Besides these guidelines for implementing provisions on residence permits for victims of THB, there is a system in the EU for 'normal' asylum applications. Regulation 604/2013, better known as the Dublin Regulation, designates which country within the EU is responsible for examining an application for asylum. According to the Dublin Regulation, the responsibility will fall to the MS in which the asylum seeker has submitted its first application, unless some other condition leads to responsibility of the application's examination by another MS.[63] The responsibility to decide upon asylum applications has shifted to the states at the outer borders of the EU because of the introduction of the Dublin Regulation.[64] Moreover, the system operates on the assumption of mutual trust as laws among Member States ensure the same minimum standard and that solidarity exists among them.[65] This prevents asylum seekers from 'asylum shopping', moving around the EU to see whether one country will take them in.

The Dublin Regulation has only provided provisions for underage victims of THB. Nonetheless, in theory, the discretionary clause contained in Article 17 can apply to victims of age. According to this clause 'each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.' The grounds for international protection are not laid down in the Dublin Regulation but include practical, political or humanitarian grounds.[66]

II.3.3 Soft Law and EU Anti-Trafficking Initiatives

Supplementary to these protective provisions, the EU has implemented a number of initiatives to further combat THB. The Commission has issued soft law in the form of the EU Strategy

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[58] Article 6(1) Directive 2004/81/EC.
[59] Idem Article 2(b)/(c).
[60] Idem Article 6(1)-(4).
[61] Idem Article 8(1).
[62] Idem Article 8(3).
[63] Article 3 Dublin Regulation.
[64] S. Peers, 'Immigration and Asylum' In: C. Barnard and S. Peers (eds.), *European Union Law*, Oxford: Oxford University Press 2017, p. 812.
[65] Recital 22 Dublin Regulation.
[66] Commission, 'Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,' COM (2001) 447 final.

2012-2016[67] and the 2017 Communication,[68] for the purpose of stepping up EU action. The Strategy has been the main instrument for developing, coordinating and implementing this process, establishing five key priorities: prevention, prosecution, protection of victims, partnerships and improving knowledge.

Subsequently, the Communication was adopted to cope with the changing landscape on a global level, considering the global financial crisis, the migration crisis and security threats by organised criminal groups. These events had further exacerbated vulnerabilities, and therefore stronger action at the domestic and EU level was required.[69] The Communication proposes another set of priorities to step up EU's efforts: (1) stepping up the fight against organised criminal networks by disrupting the business model and untangling the trafficking chain; (2) provide better access to and realise the rights for victims of trafficking; (3) intensify a coordinated and consolidated response, both within and outside the EU.

With regard to the second point, the EU aims at identifying victims as early as possible and improving the information systems within MSs. This also includes better training for all authorities who come across these victims.[70] When looking at the third point, the EU wants to reach a coordinated and consolidated response by encouraging national authorities to address trafficking as a crime that transcends borders. The EU Anti-Trafficking coordinator, the Coordination Group on Trafficking in Human Beings and other EU mechanisms will support this.[71]

These instruments do not constitute binding rules, as they are contained in soft law. However, they provide guidance to further rulemaking by the EU and to implementation of the EU instruments by MSs. This implementation will be discussed next.

III. Protection of Victims in the Netherlands

In the Dutch legal system, victims of THB enjoy human rights-based protection, in accordance with the international treaties the Netherlands is party to. Furthermore, protection is established under immigration law, mostly laid down in the *Vreemdelingencirculaire 2000* (Aliens Act Implementation Guidelines, Vc 2000). These are policy instructions for the immigration authorities applying immigration law in the allocation of residence permits.[72] Respectively, I will elaborate on this legal framework in this chapter and discuss how the application of this framework has changed since the announcement of the Secretary of State.

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[67] Commission Communication, 'The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016,' COM (2012) 286 final.

[68] Commission Communication, 'Reporting on the follow-up to the EU Strategy towards the Eradication of trafficking in human beings and identifying further concrete actions,' COM (2017) 728 final.

[69] Idem, p. 2.

[70] Idem, p. 5.

[71] Idem, p. 6.

[72] K. Zwaan, *Nederlands migratierecht*, The Hague: Boom Juridische Uitgevers 2018, p. 38.

III.1 Vreemdelingencirculaire 2000

Chapter B8/3 of Vc 2000 lays down the provisions regarding victims who have filed a report with the police for falling victim to THB or who have cooperated with the police in some other form contributing to the investigation of THB practices. The Regulation has the same protective aims as formulated by the CoE, directed at providing the possibility to recover and to be outside the sphere of influence of the trafficker.[73] The *Immigratie and Naturalisatiedienst* (Immigration and Naturalisation Service, IND) has the responsibility of ensuring this protection under immigration law, while maintaining close contact with the public prosecutor about the status of the investigation and possible potential prosecution.[74]

Following the abovementioned international THB instruments, the Vc 2000 contains the concrete Dutch implementation regarding the reflection period and the temporary residence permit. Following these two instruments, the victim of THB obtains the right to remain within the Netherlands. The *Aanwijzing mensenhandel* (instruction THB) explains that the right of the victim to stay in the country is of utmost importance, because the most important witness will be able to remain approachable for further cooperation to the investigation. How the provisions of the Vc 2000 provide for the right to remain in the country will be dealt with in chronological order below.

III.1.1 The Reflection Period

The reflection period is available to victims who are not lawfully resident in the Netherlands and are suspected of being a victim of THB, either in the Netherlands or abroad. According to Vc 2000, when there is the slightest suspicion the reflection period will be offered.[75] It is mostly the first informative talk with the (border) police that provides information causing the suspicion that triggers the reflection period.[76] The reflection period has the duration of three months and will be granted once. Afterwards, the victim will be able to decide whether it wants to press charges, cooperate with the criminal proceedings in some other way or not. During the reflection period, the victim has the right to be taken into a reception facility, get legal assistance and obtain medical care.[77]

In practice, the reflection period is almost never granted, because the victim was urged to immediately file a report.[78] Subsequently, the following regime applied.

III.1.2 Temporary Right of Residence

After a victim has pressed charges or cooperated with criminal proceedings, the investigation authority sent a notice to the IND, called a Model M55, which triggered an application *ex officio* for temporary residence.[79] A victim cannot apply under B8/3 itself; this happens automatically

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[73] Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen, *Slachtoffermonitor mensenhandel 2014-2018*, The Hague: Nationaal Rapporteur 2019, p. 113.
[74] Ibid.
[75] Article 8(k) *Vreemdelingenwet 2000*, B8/3 Vc 2000.
[76] Nationaal Rapporteur 2019, supra note 73.
[77] Chapter B8/3 Vc 2000.
[78] Nationaal Rapporteur 2019, supra note 73, p. 116.
[79] Ibid.

when it decides to cooperate with the police.[80] The IND would decide positively upon this application within 24 hours, which means that all victims immediately received a temporary residence permit upon filing for being a victim of THB.

Temporary residence has the duration of one year and can be renewed each time for one year.[81] The IND will withdraw the permit when the investigation or prosecution of the act of THB as stopped.[82] In the event that a victim does not want to or is not able to provide assistance in proceedings or to file a report, it can still obtain a right to residence because of a serious threat, medical or mental restraints, or minority.[83] Additionally, victims have the right of accommodation, legal assistance and medical care.[84]

III.1.3 Continued Residence and Asylum

Continued residence can be granted on the basis of Chapter B9/12 of Vc 2000. The victims who have received a residence permit under B8/3 can obtain five more years of continued residence. This is possible when the public prosecutor decides to prosecute the facts on the basis of which the victim received its temporary residence permit, or the case is still pending and the victim has been residing in the Netherlands for three years.[85] Additionally, the IND can allow for continued residence because of exceptional circumstances related to THB and with the consequence of the victim not being able to leave the country.

III.2 Dublin Regulation

By obtaining a right of temporary residence following from B8/3, the responsibility of the country where the first asylum application was lodged falls away. As such, according to the Dublin Regulation, the country that issues a right of residence will become responsible for the asylum application.[86]

This system contained a high chance of being misused. This is due to the fact that immigrants falling under the Dublin Regulation would obtain a residence permit almost immediately when the possibility of them being a victim of THB was present. Consequently, the Netherlands would become responsible for their asylum claim. All the while, the prosecutor would conclude most of the time within weeks that no criminal investigation is possible in the Netherlands because the prospects of convictions are low within Dutch borders. Consequently, the residence permit will be withdrawn retroactively, but the possibility to transfer the person under the Dublin Regulation does not revive. Furthermore, there is the additional negative aspect of the high burden upon the police to handle all these cases and take a large number of reports in, of which

[80] Court of The Hague, Decision of 21 May 2019, ECLI:NLRBDHA:2019:5480, para. 6.2.
[81] Article 3(2) Vc 2000.
[82] Ibid.
[83] Idem, Article 3(1).
[84] Idem, Article 3(4).
[85] Idem, Article 3(51).
[86] Article 19 Dublin Regulation.

a huge amount turn out to be unfounded. Therefore, since August 2019, the policy concerning victims with a Dublin status has been changed.[87]

III.3 Policy Change by the Secretary of State

After August 2019, a victim of THB that falls within the Dublin scheme can still file a report at the police, and the reflection period and intake will still be upheld. Furthermore, the M55 notification will still mean that there has been an application for residence *ex officio.* However, the IND now has four weeks to decide upon the application. In most of the cases, the police will conclude within those four weeks that there is a low prospect of conviction within the Netherlands, leading to a negative decision upon the application for a residence permit. This means that the applicant has never received a residence permit and the Dublin claim of another MS still remains.[88]

In addition, the IND can refuse an application without waiting for the notification of the public prosecutor that there is a prosecutable case. The victim is urged to apply for residence and this application will be denied on the grounds that another country is responsible in terms of the Dublin Regulation. All the while the victim still had the opportunity to file a report, since the three month time limit has not passed yet, but they were prevented from doing so. As such, the transfer to the victim's Dublin country will still go through, even if the victim had the wish to press charges but has not been able to do so yet.[89] Nothing changes for non-Dublin claimants; providing cooperation towards prosecution is sufficient for a temporary residence permit, together with the right to shelter, legal assistance and medical care.

IV. Conformity of Dutch Practice

In this chapter, I will assess whether Dutch practice is in compliance with European law. More specifically, I will analyse whether the Netherlands has implemented the EU directives relating to victims of THB correctly. In this assessment, I will look at what reports and scholars have said about the legality of the current position of the MSs towards victims of THB. Consequently, a clearer picture can be drawn as to how the assistance towards victims of THB should be provided.

IV.1 Transposition Directive 2004/81/EC

The most important source of law with regard to this research on the issuance of the reflection period and residence permits to victims of THB is the Residence Permit Directive. In March 2020, the Court of The Hague ruled that the Netherlands implemented this directive incorrectly into national law.[90] The applicant in this case was a THB victim but had already applied for asylum in France. Therefore, France had the responsibility of handling the case under the Dublin Regulation. The Court focused on Article 6 of the Directive, regarding the reflection

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[87] Letter of the Secretrary of State (28 June 2019), at: https://www.rijksoverheid.nl/documenten/kamerstukken/2019/06/28/tk-mensenhandel (accessed on 24 April 2020).
[88] Ibid.
[89] Nationaal Rapporteur 2019, supra note 73, p. 117.
[90] Court of The Hague, Decision of 10 March 2020, ECLI:NL:RBDHA:2020:2085.

period. According to the Directive, national legislation is supposed to determine the duration and start of this period. However, this provision is not implemented in Dutch law. Even though Vc 2000 has provided for a reflection period of at least three months, the Court ruled that this cannot be regarded as a correct implementation as such, as no starting point has been specified.

As described in Chapter 2, the previous case must be regarded as an estoppel case; the Netherlands has failed to implement the Directive correctly before the end of the implementation period. In consequence, this resulted in the direct enforceability of Article 6 of the Directive, because this provision was unconditional and sufficiently clear and precise.

Even though the Court has only ruled on Article 6, I will argue that, after the introduction of the policy change by the Secretary of State, the Netherlands has further interfered with the correct implementation of the Directive. The Netherlands has provided insufficient guarantees by adopting the transposition in policy rules and has rendered the aim of the system of protection towards victims of THB useless, especially when taking into account the victim-centred approach that has been proclaimed throughout the THB instruments. This should lead to the introduction of the reflection period and the removal of the distinction in the application of the Dublin Regulation because of the abovementioned two cumulative reasons.

IV.1.1 Policy Rules as Incorrect Legal Basis

As explained above, there is a certain margin of discretion for MSs in the implementation of directives for the realisation of the result prescribed by a directive.[91] However, this margin is not endless. The Court of Justice (CJEU) assesses on a case-by-case basis whether the MS has upheld the limits of discretion and whether it has executed implementation in a correct manner. In this regard, the amount of discretion will depend on factors such as whether the directive has regulated the matter exclusively, which harmonisation technique has been used or whether the directive provides for any safeguard clauses or justification grounds.[92] Furthermore, the MS should keep the general rules of the EU framework in mind, such as the rule of reason and the proportionality check.[93] In essence, directives aim at reaching a certain level of harmonisation and it would be detrimental to the uniform application of the directive if MSs implemented them too differently. Nevertheless, it can be hard to determine where the MS's sphere of influence ends.

Thus, firstly, the correct implementation can be jeopardised by the transposition of the provisions by using the wrong type of legal instrument. Vc 2000 contains policy rules (*beleidsregels*), which must be distinguished from generally binding regulations (*algemeen verbindende voorschriften*). According to Article 4:81 of the Dutch Administrative Law, policy rules are general laws that lay down certain rules for the execution of an administrative authority's powers, passed by the authority itself.[94] The Court ruled that even though each MS is free to delegate powers to its domestic authorities when implementing directives, 'mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from that directive'.[95] Especially

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[91] S. Prechal, *Directives in EC Law,* Oxford: Oxford University Press 2005, p. 13.
[92] C. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford: Oxford University Press 2013, p. 101.
[93] Idem, p. 89.
[94] In contrast to a law issued by Government.
[95] Case 96/81, *Commission v the Netherlands,* [1982] ECR 1791, para. 12.

when the directive is intended to invoke rights or obligations for individuals, these individuals 'should be able to rely on mandatory rules in order to enforce their rights'.[96] The rules complied with must be binding as to make sure that the addressees know precisely which obligations apply to them.[97]

Thus, there are policy rules, which can be changed by the administrative authority itself, and mandatory rules, which cannot be changed and are binding. As such, the latter provides more legal certainty. Nonetheless, policy rules cannot be ruled out in advance as forming an incorrect implementation of a directive; it depends on the specific case.[98] It is normal, and also desirable, that administrative authorities sometimes have a certain latitude to change the rules they operate by. However, whether this still counts as correct implementation of a directive is subject to two conditions: firstly, the following national practice leads to actual and concrete implementation of the directive, and secondly, the authority's power to issue policy following up on a directive's norm is based on a delegation clause in national law.[99]

In this sense, depending on the content of the directive, it is sufficient to have a broad national regulation in combination with a policy rule corresponding the directive, provided that this guarantees the full application of the directive in a sufficiently clear and precise manner.[100] Therefore, complying with the condition of 'mandatory rules' by providing safeguards and control on a higher legislative level will ensure that persons can ascertain the full extent of their rights, established by the directive.[101]

The reflection period does not have a legal basis in legislation of higher hierarchy. The residence permit does - in Article 3.48 of the Aliens Decree 2000. The latter provision is a ministerial decree, which in turn has its basis in the Aliens Act, an Act of Parliament. However, I would argue that this does not fulfil the requirement of the provisions of the directive being laid down in mandatory rules.

It can be said that the criteria from the CJEU regarding the mandatory character of the instrument used for transposition of a directive can be regarded as a gliding scale, in which the 'bindingness' of the legal instrument depends on the content of the directive:[102] the more stringent the rights for individuals established by the directive, the stronger the legal instrument must be. Hence, this is precisely what is lacking in the current situation; the Secretary of State only needed to send a letter to change a policy from which THB victims can derive rights that are of great significance to them. Rijken states that distance from the trafficker and placement in a shelter are often the only way to disconnect from the trafficker. In addition, victims are in need of a permit, connected to practical support.[103] Thus, this practice cannot be apt to pass the test drawn in the abovementioned cases of the CJEU.

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[96] Case C-58/89 *Commission v Germany* [1991] ECR I-04983, para. 14.
[97] Ibid.
[98] Case 236/85, *Commission v the Netherlands,* [1987] ECR 03989.
[99] B. Steunenberg, 'Turning Swift Policy-making into Deadlock and Delay', *European Union Politics* 2006-3, p. 297.
[100] Case C-190/90, *Commission v the Netherlands*, [1992] ECR I-03265, para. 17.
[101] Steunenberg 2006, supra note 99, p. 298.
[102] See Steunenberg 2006, supra note 99.
[103] C. Rijken, 'Trafficking in persons – a victim's perspective' In: R. Piotrowicz, C. Rijken and B. Uhl (eds.), *Routledge Handbook of Human Trafficking*, London: Routledge 2017, p. 245.

This is not the first time the Court has ruled on the Vc 2000 being problematic with regards to the legal nature of its norms. In 2012, it ruled that the part on residence permits for students formed an incorrect implementation of the Directive because the rules on the withdrawal of the right of residence did not have a mandatory character.[104] The Court here held that these rules do not reach the threshold of 'compulsoriness' because they can be changed without following a procedure containing the necessary safeguards, which does not do justice to the principles of legal certainty and legal protection.[105]

Normally, the underlying idea is that Parliament must always contribute to legislation when the directive is concerned with substantial rights for individuals.[106] However, this is not the case with regards to the rights introduced by the Residence Permit Directive. Therefore, even though the policy is eventually traceable to a generally binding regulation, this is too far down the line, which makes this course of action problematic still.

On the other hand, one can argue that the choice for policy rules still falls within the margin of discretion, provided for by the Directive. Sometimes the institution at a level closer to the people is better suited to fill in the guidelines drawn at EU level.[107] Moreover, as long as there is a clear and precise legal position for the individual, the fact that its rights are merely laid down in policy rules, should not lead to discarding the policy rules in general and directly applying the Directive itself. In this sense, the CJEU takes up a pragmatic approach,[108] which could lead to the express avoidance of direct effect of the Directive.

As such, one can contend that the administrative practice would satisfy the criterion of legal clarity, as the Vc 2000 is public and individuals can become acquainted with their legal position. Furthermore, cases like *Almos Agrárkülkereskedelmi* could also point to the CJEU attaching more importance to the aspect of ascertaining the full extent of rights because they are known to the public and where appropriate, can be safeguarded before court.[109] I will bring back these judicial safeguards when discussing the effective implementation of the Directive's objective, but this may point to the fact that the legal nature of the rules is of lesser gravity.

However, the CJEU has categorically rejected administrative practices and circulars as a means of adequate implementation[110] and is not easily satisfied in this respect.[111] This must be concluded similarly since the Residence Permit Directive deals with far-reaching rights. Full binding force is essential for the application of the rules by the administration and the position of those subjected to them. This is also required for derogations, or conditions for granting, refusing or withdrawing permits, regardless of whether the main rule is laid down in a national legal provision.[112]

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[104] Court of The Hague, Decision of 27 November 2012, ECLI:NL:RBSGR:2012:BY6973.
[105] Idem, para. 14.
[106] B. Steunenberg and W. Voermans, *The transposition of EC directives: A Comparative Study of Instruments, Techniques and Processes in Six Member States,* The Hague: Wetenschappelijk Onderzoek- en Documentatiecentrum 2005, p. 26.
[107] Steunenberg 2006, supra note 99, p. 312.
[108] Prechal 2005, supra note 91, p. 243.
[109] Case C-337/13, *Almos Agrárkülkereskedelmi,* [2014] EU:C:2014:328, para. 21.
[110] See list of cases Prechal 2005, supra note 91, p. 83.
[111] Case C-58/89 *Commission v Germany,* [1991] ECR I-04983.
[112] Prechal 2005, supra note 91, p. 84.

Therefore, it is unjustified for the Secretary of State to change its policy without going through a procedure supported by the necessary safeguards. The considerable level of discretion left after transposition for the Secretary raises normative questions of accountability and legal certainty.[113] However, this aspect should be seen together with the ineffective implementation of the aim of the Directive, as was highlighted by the Court of The Hague as well.[114] In this regard, the second argument is important in the disposal of the Secretary's change in policy.

IV.1.2 Effective Implementation of the Directives

The second objection the Court of The Hague had with regards to Article 6 of Vc 2000 was its lack of specificity about the starting point and duration of the reflection period. This amounts to a second reason why the Directive is implemented incorrectly, and brings up the matter of effective implementation of the Directive. Another aspect of the margin of discretion in implementing a directive is the choice of method. This is also up to the MSs, as long as it is fully effective in accordance with the objective it pursues,[115] the form is suitable for achieving the aim of the directive,[116] and, as mentioned above, this must be done in a sufficiently clear and precise manner.[117] For example, the question of effective implementation deals with whether the effect of the directive is guaranteed by literally copying the wording of the directive, or whether it is better to reformulate it in national law. Furthermore, choices in terms of deviation and making use of reservations are relevant in this sense.[118]

I would argue that the policy chosen by the Secretary of State is at odds with the objective of the Directives, therefore stretching the margin of discretion too far and not establishing 'the result to be achieved'.[119] The fact that both Directives claim to be victim-centred is reflected through the aim of providing high level protection to THB victims. This is evident, for example, in Preamble 4 of the Human Trafficking Directive and provisions like 'Member States shall take due account of the safety and protection needs of the third-country nationals concerned when applying this Directive', as laid down in Article 7 of the Residence Permit Directive. Furthermore, Article 11(4) of the Human Trafficking Directive stipulates that MSs have to adopt the 'appropriate mechanisms' for early identification of victims. However, regarding the current Dutch scheme, the victimhood of Dublin claimants is not being effectively acknowledged at all, even though the Human Trafficking Directive is binding upon all MSs.

Therefore, the outcome of the policy interferes with the objective of the Directives because it leads to a very unjust difference in treatment based on unjust grounds. This is best illustrated with two examples from Dutch case law:

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[113] N. Dörrenbächer and E. Mastenbroek, 'Passing the buck? Analyzing the delegation of discretion after transposition of European Union law', *Regulation & Governance* 2019-13, p. 81.
[114] Court of The Hague, Decision of 10 March 2020, ECLI:NL:RBDHA:2020:2085.
[115] Case 48/75, *Belgium v Royer* [1976] ECR 497, para. 73; Case C-194/01, *Commission v Austria,* [2004] ECR I-4579, paras. 38-39.
[116] See*, inter alia* Case C-194-01, *Commission v Austria,* [2004] ECR I-04579.
[117] Case C-281/11, *Commission v Poland,* [2013] EU:C:2013:855, paras. 60.
[118] See for an overview R. Král, 'On the choice of methods of transposition of EU Directives', *European Law Review* 2016-2, p. 220.
[119] I include both Directives here because they are intertwined, considering they are part of the same framework.

1. A Ugandan man has applied for asylum in the Netherlands. However, the IND decided to transfer him to Spain, following the Dublin Regulation. The man has stated that he was a victim of THB, confinement and rape. He has expressed the wish to file a report, yet he only went through an intake procedure with the police. While referring to *Rantsev* and following the Human Trafficking Directive, the victim stated that the IND has the positive obligation of protecting victims of THB. The Court follows this argumentation, stating that the slow handling by the Dutch authorities is at odds with the instructions from the EU and the Human Trafficking Directive, making it impossible for victims to effectuate their rights. Furthermore, the offences would have happened within the Netherlands, but the IND had failed to motivate why the transfer to Spain would not amount to disproportional harshness. Consequently, the Court quashed the transfer decision.[120]
2. A young man with the Nigerian nationality arrived in the Netherlands after being subject to THB in Italy. He made it known that he wanted to press charges, but he could not accomplish this due to long waiting times at the police. Regardless, the judge held that Italy would be responsible for his asylum claim and he/she did not see any reason to suspend his transfer under the Dublin Regulation, since the report would make no difference under the Dublin system. Furthermore, the IND cannot be held responsible for the long waiting lists. The fact that the victim had stated he had reached out to the Italian authorities for help, but they were not able to provide assistance, did not change the outcome because he could not substantiate this with objective documents. Consequently, there was no disproportional harshness in this case by not making use of Article 17 of the Dublin Regulation because one is suspected of being able to obtain protection as a victim of THB following from the principle of mutual trust and his personal circumstances did not necessitate an alternative conclusion.[121]

Both victims were suspected victims of THB, but they received very different treatment because of the Dublin system. In the first example, the mistakes of the national authorities are not held against the victim. While in the second example, the Dublin system is applied rigidly, even though the victim is not able to effectuate its rights due to failures attributable to the national authority. Furthermore, a victim without Dublin status would fall under an even more preferential regime,[122] receiving a residence permit as soon as it could press charges, therefore, receiving aid and protection, without even having to prove that there are clues of the victim being exploited within the Netherlands. This will lead to disproportional differences in treatment, when compared to the facts justifying this distinction.

It is a system of all or nothing, while the threshold is very high for a victim to prove it either has sufficient clues within the Netherlands or he/she would not be able to obtain help in the responsible Dublin country. For example, the fact that an appointment has been made with a mental care institution, does not substantiate the need for medical care,[123] and the fact that the people who have abused the person are still in Italy, does not hold back a transfer to this country.[124]

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[120] Court of The Hague, Decision of 7 October 2019, ECLI:NL:RBDHA:2019:10421.
[121] Court of The Hague, Decision of 13 September 2019, ECLI:NL:RBDHA:2019:9540.
[122] There are no cases on this situation since the introduction of the policy change.
[123] Court of The Hague, Decision of 5 September 2019, ECLI:NL:RBDHA:2019:9047.
[124] Court of The Hague, Decision of 27 September 2019, ECLI:NL:RBDHA:2019:10101.

The police have reported that in the first half of 2019, 80% of the victims of THB have a Dublin status, with most of them without prospects of conviction within the Netherlands.[125] Consequently, almost all victims will fall outside of the scope of the protective system that was established especially for them, and therefore, this will hamper the exact aim of the Directives.

However, the Dutch courts avoid the question whether this result would take away the useful effect of the Directives.[126] Therefore, it can be argued that the courts have failed to uphold the demand of providing sufficient procedural safeguards. The CJEU has ruled that national courts must determine whether the competent national authorities have observed the limits of their discretion as set out in the relevant directives when adopting the disputed measures, but the courts have failed thus far to do so.[127]

Meanwhile, several parties have expressed their discontent towards this policy change. The National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children criticises this new practice and points to the large degree of inequality between Dublin and non-Dublin claimants. Furthermore, he points out that the test of 'sufficient prospects of convictions' is problematic. The absence of aforementioned clues does not mean that a person is not a victim of THB. Several researchers have pointed out that victims are not always open about their experiences because of trauma, fear, mistrust directed at authorities and their cultural background.[128] Moreover, both GRETA, belonging to the CoE, and Experts Group on Trafficking in Human Beings, affiliated with the Commission, find the linkage of the protection of victims to criminal investigations undesirable.[129] They stress that victims who do not wish to testify or who are not needed as witnesses require as much protection and assistance as 'useful' victims.

Therefore, the distinction can be seen as disproportionate because, even though it is apt to relieve the overburdening of the police and prevent misuse by Dublin claimants, it goes too far by deterring far too many victims from using the protection that was put in place exactly for them. The National Rapporteur points to several negative consequences: firstly, investigative authorities will play a crucial part in the assignment of protection to victims of THB, a task of which they are not designed and trained to fulfil. Secondly, there is no sound insight in the exact reason for the growth of applications by Dublin claimants, so there is an inefficient focus on the symptoms, rather than the cause. Thirdly, cooperation between MS is lacking at the moment, leading to victims being back where they started when they have been transferred back to their Dublin country. They have to tell their story again and wait to file a report, which may result in a huge gap in their assistance for recovery. Lastly, fear exists of this new policy being too high of a threshold for victims with a Dublin status, leading to them disappearing from the scene. Every single case is relevant to the broader story behind structural exploitation and the management of migration flows. Therefore, not only will the crucial protection of a sensitive group stop, but also the important clues for the investigation of perpetrators.[130]

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[125] Letter of the Secretary of State 2019, supra note 87.
[126] See e.g. Court of The Hague, Decision of 10 June 2020, ECLI:NL:RBDHA:2020:5254.
[127] Case 21/78, *Oberkreisdirektor des Kreises, Borken and Vertreter des öffentlichen Interesses beim Oberverwaltungsgericht für das Land Nordrhein-Westfalen v Handelsonderneming Moormann BV*, [1978] ECR 2327; Prechal 2005, supra note 91, p. 235.
[128] Nationaal Rapporteur 2019, supra note 73, p. 37.
[129] GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands', (2018); Experts Group on Trafficking in Human Beings, 'Report of the Experts Group on Trafficking in Human Beings', (2004), p. 100.
[130] Nationaal Rapporteur 2019, supra note 73, p. 37.

In addition to the latter concern, the whole reason of reverting abuse could end up futile as CoMensha expects that the affected group will disappear for 18 months, going underground, until the Dublin claim expires. Consequently, the problem will only be postponed, and victims will be subject to continuing risks of exploitation.[131]

Furthermore, as is apparent from the research conducted by *Wetenschappelijk Onderzoek- en Documentatiecentrum* (Research and Documentation Centre, WODC), by comparing the legislation regarding the right of residence in Belgium, Italy and United Kingdom, these countries do not experience the improper use of the THB system as a structural or pressing problem. They have other mechanisms in place that should, to a large extent, sufficiently prevent such misuse.[132] Thus, it must be concluded that there are less intrusive ways of finding a solution to the problem of improper use of the THB scheme in the Netherlands. I will elaborate on these alternatives in the next chapter.

IV.1.3 Public Policy Exception and Policy Freedom

MSs do have the option of limiting the use of reflection periods and residence permits on the basis of public policy.[133] In the assessment of whether the considerations of misuse would suffice for applying a derogation in the name of public policy, one must bear in mind that this public policy must be fundamental in nature.[134] Furthermore, the CJEU has stated in *Van Duyn* that this justification for derogation must be interpreted strictly, so that its scope cannot be determined unilaterally by each MS without being subject to control by the institutions of the EU.[135] Nevertheless, the particular circumstances justifying a derogation based on public policy may vary from one country to another. Therefore, it is necessary to leave the competent national authorities an area of discretion within the limits imposed by the Treaty.

Nevertheless, when assessing the Secretary's policy choices in terms of proportionality, weighing the sufficiently serious threat to public policy against the rights of the victim of THB,[136] I would argue that the Secretary has overstepped the limits of discretion. The Secretary's solution towards improper use of the system can be regarded as being disproportionate since too many people are held back from effectuating their rights and the Netherlands did not put sufficient effort into finding alternatives, as set out above.

IV.1.4 Human Rights Considerations

Lastly, when discussing conformity of Dutch practice, its compliance with the human rights instruments is another important aspect, all the more because of its explicit reference in the Directives. In this regard, it must firstly be noted that the Dutch practice is in conflict with

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[131] Letter CoMensha of 13 May 2019, at: https://www.comensha.nl/actualiteiten/item/brandbrief-som-en-zoco-aan-tweede-kamer-over-invoering-tijdelijke-werkwijze-dublin-overdrachten/ (accessed at 21 May 2020).

[132] D. Lettinga, S. Keulemans and M. Smit, *Verblijfsregeling voor slachtoffers van mensenhandel en oneigenlijk gebruik*, The Hague: Wetenschappelijk Onderzoeks- en Documentatiecentrum 2013.

[133] Article 6(4) and 8(2) Directive 2004/81/EC.

[134] Case 30/77, *Regina v. Bouchereau,* [1977] ECR 1999, paras. 29-30.

[135] Case C-41/74, *Van Duyn,* [1974] ECR I-01337.

[136] C. Kessedjian, 'Public Order in European Law', *Erasmus Law Review* 2007-1, p. 34.

Article 14 of the Trafficking Convention. According to GRETA, the Netherlands applies an excessively strict regime as the personal situation of the victim should be a supplementary, separate ground for issuing a residence permit, next to cooperation with the investigation.[137]

As such, focusing on the usefulness of the victim in criminal proceedings can be questioned from a human rights perspective. The primary focus on the victim's contribution to the investigation is an obstacle to recovery and can lead to big differences in protection among victims.[138] Therefore, a transfer could violate Article 13(1) of the Trafficking Convention as it would not lead to the recovery from and escape of the influence of the traffickers.

But one can also doubt whether this practice fulfils the positive obligation of states to adequately ensure the practical and effective protection of the rights of victims.[139] Doubt is cast with regards to whether human rights obligations are upheld, as victims who are sent back to their country are also sent back to awaiting traffickers and limited resources in reception centres. The recent case of *Tarakhel v Switzerland* sheds new light on the demand of considering the vulnerabilities of each applicant when deciding on a Dublin transfer and guarantees to be made by the Dublin country.[140] In this regard, the new Dutch practice can be disputed according to, for example, whether due regard is given to an individual's personal situation and how the Netherlands motivates its decisions. As such, the fact that the transferred person is a THB victim influences the threshold of degrading treatment,[141] and the question arises whether the Netherlands sufficiently acknowledges this with its new policy.

Thus, the discretion in policy does touch upon important human rights considerations, which justifies judicial evaluation of the policy. Because of the scope of the research, I will limit the considerations on human rights to the above.

IV.2 Direct Effect

When judicial evaluation leads to the conclusion that the Dutch policy constitutes an incorrect implementation of the directives, this can lead to the direct effect of the directive. In such 'estoppel cases', provisions can only be applied when they are unconditional, sufficiently clear and precise. The Court of The Hague has stated that Article 6 of the Residence Permit Directive fulfils these criteria. The right of receiving time to reflect can be clearly deducted from the Article, although I wonder how this will continue to be effectuated since there is no clear duration stipulated in the Article.

On the other hand, the issuance of residence permits is of paramount importance in this respect, as it is under increased tension because of the policy change by the Secretary of State and had not been applied directly yet. Preamble 10 states that the right to stay under the Directive is subject to conditions and is provisional in nature. Therefore, it can be stated that it is not apt to have direct effect.

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[137] GRETA 2018, supra note 129.
[138] Rijken 2017, supa note 103, p. 248.
[139] *Rantsev v. Cyprus and Russia*, Decision of 7 January 2010, [2013] ECHR.
[140] *Tarakhel v Switzerland*, Decision of 4 November 2014, [2017] ECHR.
[141] Article 3 EHCR and Article 4 EU Charter.

However, the review on legality can be seen as a form of direct effect, which enables the national court to simply declare the national measure as inapplicable.[142] As the FNV case points out, the disapplication of a national measure can also consist of a disapplication of a derogation to the main rule.[143] Because the disapplication of the rule would not result in a gap, the Directive itself does not need to be applied.[144]

Even if the violation could not lead to direct effect of the Directives, the need for the Secretary of State to change its policy still remains. This means that either the policy will be laid down in mandatory rules, providing for the necessary safeguards and Parliamentary review, or the derogation will be discarded.

IV.3 European Commission

Another institution in charge of evaluating the Dutch regime is the Commission. The Commission oversees the correct implementation of directives and reports this to the Parliament and the MSs. Thus, why has the Commission not stepped in?

The Commission has published several compliance reports regarding the implementation of both Directives. These reports have the function of providing an overview of the ways in which the MS have transposed the norms of the Directives into national law and reviewing whether this was done correctly.

The Commission stated in the second compliance report on the Residence Permit Directive that, contrary to the Dutch transposition, the national transposition should state the start and duration of the reflection period.[145] Furthermore, it had formulated that some countries, including the Netherlands, transposed grounds for termination of the residence permit that go beyond the criteria laid down in the Directive and that these criteria may be excessively broad.[146] Considering this compliance report came out in 2014, this will unequivocally still apply to the ground of having no trafficking indications within the Netherlands and being an applicant under the Dublin system.

Moreover, the Commission has expressed its discontent about the additional conditions that some MSs have implemented with regards to the issuance of residence permits, on top of those specified in the Directive. This discretion on formulating other conditions than those specified in the Directive was not provided for and might unjustifiably prevent access to permits, therefore, raising concerns on the correct implementation of the directive.[147] The additional requirements mentioned by the Commission were proof of accommodation or payment of a fee. However, it must follow from the nature of the requirement of the victim being a non-Dublin claimant that this could be regarded as incorrect implementation of the Directive as well; just as the distinction between a victim with or without proof of accommodation would be

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[142] Prechal 2005, supra note 91, p. 232.
[143] Case 71/85 *FNV* [1986] ECR 3855.
[144] Prechal 2005, supra note 91, p. 234.
[145] Commission Communication, 'On the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,' COM (2014) 635 final, p. 5.
[146] Idem, p. 6.
[147] Idem, p. 8.

unjustified, the same could apply with regards to the distinction between having applied for a residence permit under the Dublin system or not.

The Compliance report concludes by stating that temporary residence should constitute an incentive to cooperate with law enforcement and judicial authorities. However, this incentive will lose its value when this permit is conditional upon strict criteria, such as full cooperation. This scheme gives rise to ambiguity, and therefore, uncertainty, which is detrimental to the victims in need of recovery from a traumatic experience before they can actually contribute to the investigation. The Commission calls for less strict criteria of conditionality upon cooperation and insists on other more favourable conditions, such as the dissociation of a permit's validity from the duration of the proceedings or a longer minimum duration.[148] The additional requirement in the Netherlands to have investigation indications within Dutch borders would be a step back from the plea of the Commission to contribute to assisting recovery and thus fostering victim's cooperation.

Unfortunately, the Commission notes in the second report on the Human Trafficking Directive how limited progression has been made in relevant legislative initiatives since the first report.[149] Following the corresponding Staff Working Document, civil society reports as well that the obligation to proceed to an identification based on reasonable grounds is not respected.[150] It highlights that there are inadequate measures on the issuance of residence permits and reflection periods. This is in part caused by the return procedures or the application of the Dublin Regulation, that conflicts with the legal provisions on victim protection.[151]

However, the discontent of the Commission did not lead to infringement proceedings or amendments of the Residence Permit Directive. The idea that dialogue with MSs would be sufficient to address failures in implementation should be refused when comparing the implementation reports which show continued breaches in the MSs.[152] This can be explained by the discretion the Commission has in pursuing possible infringements. It has to make choices in terms of necessity and priority when acting against a MS.[153] The MSs often transpose directives incorrectly,[154] thus the Commission is not able to act upon every wrongdoing. Furthermore, the sensitivity of the topic and the fact that is dependent on the self-notification by the MSs can explain why the Commission has not acted. That does not mean that the Netherlands has implemented the Directives correctly. The Commission could have easily overseen the specifics of the consequences following from the legal character of policy rules, also given the fact that the peculiarities of the Dutch system may not have been looked into with great detail.

However, it is important for the Commission to step up its game as the current situation leaves some gaps in human rights protection and the effectuation of adequate policy. Subsequently, in

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148 Commission 2014, supra note 145, p. 11.
149 Commission 2018, supra note 3.
150 Based on contributions by civil society organisations participating in the EU Civil Society Platform and the e-Platform against Trafficking in Human Beings.
151 Commission 2018, supra note 3, p. 53.
152 S. Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law,* Oxford: Oxford University Press 2016, p. 499.
153 B. Steunenberg, 'Is big brother watching? Commission oversight of the national implementation of EU directives', *European Union Politics* 2010-3, p. 360.
154 G. Falkner, 'Implementation across countries and Directives' In: Gerda Falkner et al. (eds.) *Complying with Europe: Harmonisation and Soft Law in the Member States*, Cambridge: Cambridge University Press 2005, p. 276.

the next chapter, I will explain how these gaps can potentially be filled, both at an EU level and domestic level.

V. How to Fill the Gaps in the Existing Framework

After commenting on how the Dutch policy must be regarded as an incorrect transposition of the EU's envisioned THB framework, I will provide some alternatives and solutions in this chapter. It is an illusion that the incorrect transposition has an easy fix. Hence, when the Dutch policy will be transformed into binding legislation or when the distinction between Dublin claimants and non-Dublin claimants is resolved, again some large issues will still remain. Indeed, its wrong implementation is part of a broader flawed regime. There is a migration crisis to begin with, but also insufficient capacity within the police, conflicting legal systems and inadequate cooperation between MSs.

It is important to change legislation and attitudes to better align with the current instruments providing rights to victims of THB in order to establish the coherent and holistic system of THB protection the EU had in mind.[155] Consequently, this will further prevent the need of making policy choices like the Secretary of State has made.

V.1 Dublin vs THB

It is clear that the Netherlands cannot escape the mandatory Dublin system, but also that this system is not functioning, especially when looking at its disregard of vulnerable people like victims of THB. The Dublin system puts pressure on the countries that happen to be at the borders of the EU, meaning that also victims requiring special attention are sent back to countries with limited sources, which makes them vulnerable to falling back into their exploiters' hands.[156]

According to a comparative report from the organisation Identification of Trafficked Asylum Seekers' Special Needs (TRACKS),[157] in all countries, the Dublin procedure is actually carried out on a regular basis, even though the asylum seeker could have been a victim of THB. Furthermore, the TRACKS research indicates that the individual review foreseen by the Dublin Regulation is not conducted in an appropriate environment for detection of self-identification of victims of trafficking. The author points at a lack of time and confidentiality, and a failure to provide interpretation services. Following the case of Italy, it has been reported that victims of trafficking are rarely detected in the procedure.[158]

It is surely strange that the Dublin Regulation makes no mention of victims of THB, given that they are such a big group in need of the appropriate approach. In theory, there is a discretionary clause in Article 17, but following the abovementioned report, countries do not apply this.[159] Until the Dublin system is altogether revised, these two instruments need to be better aligned to provide for the practical and effective protection of victims, as drawn up in the Trafficking

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[155] E.g. Preamble 7 Directive 2011/36/EU.
[156] N. Cappellazzo, 'Don't Ask Me about My Business: The Mafia's Exploitation of the European Migration Crisis', *BC International & Comparative Law Review* 2017-40, p. 284.
[157] B. Joannon, 'Identification and response to the needs of Trafficked Asylum Seekers', *TRACKS* 2017.
[158] Idem, p. 36.
[159] Ibid.

Convention and proclaimed by the ECtHR, enabling the EU to adopt its integrated, holistic and human rights approach.

V.2 Research into Other Systems

As long as there is no strong evidence of large-scale abuse of the THB system by Dublin claimants, the Netherlands should not stop protecting all of them. Right now, there is only suspected abuse, while the lack of indications of a criminal offence is equated with lack of victimhood.[160] However, the impression holds that only a small portion deliberately abuse the procedure, and other countries do not experience the same kind of abuse of the THB system.[161]

Therefore, the Netherlands should not throw the baby out with the bathwater but must only discard the policy aspects that are prone to abuse, and reform the asylum procedure. The most important improvement that can be made is uniting the two distinct existing procedures, the asylum procedure and the THB framework. GRETA has already highlighted that the Netherlands especially has problems with its dual system on residence permits while a victim's chances to obtain a permanent residence permit are considered to be better in the asylum track.[162]

The problem with the dual system is that both legs have a very different stance. On the one hand, there is migration control, with its much more punitive stance.[163] On the other hand, there is the protective aspect of the THB system. Van der Leun and Schijndel found that the division of perspectives foster inequalities in practice, while it appears in their researched cases that for no systemic reasons, some irregular migrants end up in the protective system and others are seen as violators.[164] Therefore, the relationship between the two routes needs to be reassessed and realigned into a more comprehensible system. The right for asylum has become a right on its own,[165] and also when looking at the Trafficking Convention, victims can never be put in the position where they must choose between the asylum or THB procedure. But that does not mean that the two systems cannot be combined better, so that victims' rights are clear and understandable, as are their obligations in rendering assistance to law-enforcement.[166]

For example, in the UK, even though victims' special needs are not met in practice and the professional opinions of service providers are not always given due weight by the competent authorities, on paper, TRACKS reports that the two routes are combined well.168 The THB identification system and the asylum procedure can be conducted in parallel, without harming the victim's right to be formally identified next to obtaining international protection.[167]

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[160] Rijken 2017, supa note 103, p. 239.
[161] Ibid.
[162] GRETA 2018, supra note 129, p. 35.
[163] J. van der Leun and A. van Schijndel, 'Emerging from the shadows or pushed into the dark? The relation between the combat against trafficking in human beings and migration control', *International Journal of Law, Crime and Justice* 2016-44, p. 39.
[164] Ibid.
[165] Article 18 EU Charter.
[166] This is also reflected in Directive 2011/36/EU under Section VII.
[167] Joannon 2017, supra note 157, p. 40.

Another good example of a different system regarding protection of THB victims comes from Norway.[168] The Norwegian model is described as 'a hybrid between socially oriented systems and those focusing on prosecution'.[169] The initial reflection period is 6 months and has a very low threshold. This gives the victim the opportunity to break ties with the traffickers. Additionally, it is very focused on the recovery of the victim and does not have the requirement of providing information to the police. When the victim wants to obtain a right of temporary residence, it does need to report and cooperate with the police, but there is a clear promise of permanent residence when the victim takes upon the dangerous decision to testify against the trafficker, and victims are guided through an understandable framework.[170]

Furthermore, TRACKS has found France to have the most advanced framework for identifying applicants with special needs because it conducts a vulnerability assessment with all asylum seekers.[171] Similarly, Finland has a promising system with a distinct condition on social vulnerability for receiving a residence permit, which is part of one framework in the Aliens Act.[172] Even though the Finnish practice often turns out to be unpredictable because of the Immigration Service's inconsistent decisions, several authors point to the fact that this system of triggering the THB protective system on the ground of merely being a victim is to be applauded.[173] This way, trust of victims can be gained, which can further enhance cooperation.

Thus, there must be one route to follow, with clear-cut terms and assistance, irrespective of the contribution to the perpetrators' conviction.[174] If there is at least some aim of securing recovery of the victim, the mechanism of giving more extensive rights to the ones having more valuable information is unfair towards those who are not able to do so but simultaneously have the pressing need of these rights.[175]

However, having too permissive a system will not take away the Secretary of State's fears of abuse. Europol has also showed that human traffickers are more prone to purposefully abusing the countries with the most lenient legislation.[176] But the current focus of the Dutch government on migration control should be replaced with a more balanced position towards victim protection. In this sense, I would agree with Stoyanova that the best solution would be to conduct the identification procedure under the THB framework and the assessment procedure under the asylum framework.[177] The IND could grant applicants for international protection the status of victims of human trafficking independent from the public prosecutor or police, on the basis of clear conditions. Consequently, all positive obligations from the Trafficking Convention, the THB Directives and human rights instruments will be triggered.[178] This way, the victim can benefit simultaneously from both legal frameworks and authorities will be able to cooperate better. In turn, this better functioning system will be more apt to have a clear

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[168] Although bound by the CoE instruments, Norway is not by the Directives.
[169] A. Brunovskis, *Balancing protection and prosecution in anti-trafficking policies,* Copenhagen: TemaNord 2012, p. 35.
[170] Ibid.
[171] Joannon 2017, supra note 157, p. 34.
[172] V. Stoyanova, 'Victims of Human Trafficking: A Legal Analysis of the Guarantees for 'Vulnerable Persons' under the Second Phase of the EU Asylum Legislation' In: Céline Bauloz et al. (eds.), *Seeking Asylum in the European Union*, Leiden: Brill Nijhoff 2015, p. 56.
[173] Idem, p. 53.
[174] Idem, p. 53.
[175] Idem, p. 54.
[176] Europol, 'Situation Report Trafficking in human beings in the EU', *Europol* 2016, p. 12.
[177] Stoyanova 2015, supra note 172, p. 80.
[178] Ibid.

picture of the crime of THB and what possible abuse of the system entails. Still, I would propose further research into this suggestion and how to better combine migration control and victim protection.

V.3 Improving Cooperation

Admittedly, transferring a victim back to its Dublin country for reasons of jurisdiction is not legally unjustified. Therefore, in order to effectively fill the gaps in the THB system, the EU MSs should improve cooperation. The National Rapporteur states that MSs need to organise a cooperative system, making use of instruments like Eurojust and Europol, to fight THB and protect its victims at a better capacity.[179] Furthermore, the fact that there is a considerable difference in numbers between assumed victims in destination countries and the number of victims who receive assistance when they are returned points towards a challenge in cross-border assistance provision.[180] The justification for transferring victims while referring to the assistance framework in the Dublin country is not sufficient if the victim will not be able to access this framework upon arrival. Therefore, access needs to be safeguarded within THB policies to make sure that victims are not left alone when sent back.

Moreover, national authorities need to find a way to exchange evidence and information about the victim to make sure these individuals do not have to tell their story repeatedly and will continue to receive protection when transferred to another (legal) system. This will then also result in compliance with Article 32 of the Trafficking Convention which requires States to cooperate to the wides extent possible.

Thus, the issues that I put forward in my analysis will largely be relieved if states put more effort into cooperation and actively pursue a 'warm transfer' with every Dublin claimant who is also a victim of THB. This way, the protection objective of the Directives can be pursued and the MSs can pay sufficient attention to the vulnerable status of THB victims, as highlighted by the human rights treaties.

VI. Conclusion

In conclusion, all instruments plea for more protection and a more sophisticated collaborative system for the eradication of THB. However, the Netherlands is taking a step back with its new policy, putting restrictions on the assistance of the group that has been prioritised as a vulnerable group, in need of even more protection than less. In this context, I have provided a new look on the current research of the THB frameworks by pleading that the Netherlands has not implemented the EU Directives correctly into national law.

The EU MSs enjoy a certain margin of discretion when implementing directives, but the Netherlands has exceeded the limits of this discretion. Firstly, the Netherlands did not make use of a sufficiently strong legal basis which provides enough safeguards for the protection of the rights of THB victims. Secondly, the Secretary has hindered effective implementation by making a disproportionate decision, tipping the balance in favour of the deterrence of abuse instead of the Directives' objective of protecting THB victims. The victims' rights are not the

[179] Nationaal Rapporteur 2019, supra note 73.
[180] Brunovskis 2012, supra note 169, p. 58.

only priority, and the Secretary can still weigh in concerns on abuse and police capacity when making policy choices. However, too much importance has been placed on investigative clues instead of the victim's recovery, while insufficiently exploring policy alternatives. The posed solution risks becoming useless since it is expected that victims will go underground to await the expiration of its Dublin country's responsibility for handling the asylum application. Therefore, both Dublin claimants and non-Dublin claimants need to receive the same protection and the policy change needs to be reversed.

Throwing away the baby with the bathwater is not the solution, and is also in violation of EU law. Instead, I have suggested enhancing cooperation between MSs and abolishing the distinct dual system, as the two separate frameworks in Dutch law seem to pose difficulties in coming up with good policy responses to the current problem with victims of THB. Thus, the two frameworks need to be brought together in order to better align their separate perspectives, namely the punitive and the protective. Constant tweaking of the system until abuse is minimised is key in this regard, in combination with more research into the effects of policy choices and possible misuse.

However, providing more safeguards in the realm of victim protection is a political question as well. From the perspective of the state, there are also considerations of jurisdiction, the principle of mutual trust and alleged misuse. Furthermore, the state is cautious of attracting too many applicants and creating a system which is prone to abuse. However, by making the effort to create a more sophisticated legal framework, instead of simply blocking a large group from its much-needed protection, the Netherlands can reach the victim-centred objectives of the EU and prevent incorrect transposition of the Directives. In this context, revision of the Dublin system is vital as well, as the risk of asylum-shopping must be reconsidered looking at the vital interests of THB victims.

In this research, I mostly focused on the technical argument of incorrect implementation. However, more research is required in the context of human rights. For example, whether the Netherlands still keeps up with its positive obligations under Article 3 ECHR, assessing the quality of motivation for transfers and how the vulnerability of the victim is taken into account. I have only touched upon the aspect of human rights as a more in-depth analysis would exceed the scope of this research.

Thus, it is clear that something needs to change, and it will not happen by rigidifying the THB system.