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State-empowered entities as sites of progress for international anti-trafficking law and policy?

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Since the adoption of the Palermo Protocol in 2000, international anti-trafficking law and policy have developed significantly. While both States and non-state actors have had a role to play in such development, this article focuses on the contribution of what (Sivakumaran, 2017) labels as "state-empowered entities" (SEEs), actors that are "empowered" by states' and thus cannot be seen as "truly non-state in character." Indeed, a range of SEEs, such as UNODC, the Council of Europe's Group of Experts on Action against Trafficking in Persons to name a few engage substantively with international anti-trafficking law. Situated within a theoretical framework that recognizes "soft" law's normativity and important interactive relationship with "hard" law, this article analyses the ongoing role of SEEs in operationalizing international anti-trafficking law, highlighting the norm creation, interpretation, and enforcement functions that such entities can and do play. Ultimately, this article frames SEEs as underexplored sites of progress for international anti-trafficking law, and calls for more engagement with the work and output of relevant SEEs, within anti-trafficking research and practice.

KEYWORDS

human trafficking, soft law, state-empowered entities, international law, human rights

1 Introduction

Since the adoption of the Palermo Protocol (2000), international anti-trafficking law and policy have developed significantly. Such developments have by no means been limited to the transnational organized crime framework from which the Protocol emerged. Instead, a human rights-based approach to human trafficking has continued to gain traction in both research and practice (e.g., Obokata, 2006; Hathaway, 2008; Rijken, 2009; Stoyanova, 2017). Alongside this, focus on the intersections between human trafficking and other protection issues, such as access to asylum, labor law, and climate change, is emerging (Smith, 2021; Kane, 2022).

While both state and non-state actors continue to play a role in such development, a third category of actors, "state-empowered entities," may play a significant role in operationalising international anti-trafficking law, providing much-needed interpretative clarity and making key connections across intersecting protection challenges. Sivakumaran (2017, p. 350) uses the term "state-empowered entities" (SEEs) to describe actors that "have been empowered by states to make and shape international law." These actors, Sivakumaran (2017, p. 346) notes, are distinct from both state and non-state actors since they are "empowered" by states and cannot be seen as "truly *non-state* in character". In other words, SEEs are empowered by states to undertake particular tasks—and as will be demonstrated below, many of these tasks relate to the creation, interpretation, and oversight of international norms.

Although these entities may have a significant role to play in operationalising the role of international law in a range of contexts, analysis of this role in the anti-trafficking space is often either absent or limited to key actors. In this regard, the role of the European Court of Human Rights (ECtHR) and its jurisprudence on Article 4 of the European Convention on Human Rights has arguably received the most attention (see, e.g., Allain, 2010; Stoyanova, 2017; Trajer and Kane, 2021). Beyond this, the mandate of the UN Special Rapporteur on Trafficking in Persons, especially women and children, has received some attention in the literature, albeit less than the ECtHR. Most notable among such studies is Gallagher and Ezeilo's (2015) study reflecting on the achievements of the first decade of the mandate. Similarly, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) remains underexplored in the literature, with only a few exceptions, e.g., Sax (2020). Significantly, where these actors *are* analyzed, they are not framed as SEEs. This is unsurprising, since the concept put forth by Sivakumaran (2017) is a more recent one and its use in international law literature remains limited. Its use is apparent in some international humanitarian law analyses (Fortin, 2018; Sivakumaran, 2018). Furthermore, Goodwin-Gill (2020) refers to the concept within the analysis of the UN Refugee Agency's (UNHCR) relationship with the sources of international law.

This article aims to shine a light on this underassessed area, situating SEEs as underexplored sites of progress for international anti-trafficking law and policy. In so doing, the article analyses the ongoing role of SEEs in operationalising international anti-trafficking law, highlighting the norm creation, interpretation, and enforcement functions that such entities can and do play (see, e.g., Chetail, 2019, p. 283–292). As outlined in greater detail below, the analysis is situated within a theoretical framework that challenges the binary distinction between "hard" and "soft" law and views soft law as fulfilling "a variety of legal and paralegal functions to reinforce and supplement hard law" (Chetail, 2019, p. 283). The approach adopted in this article is broadly socio-legal, in that the focus is not only on the content of the law but also on its impact in practice. In other words, the word "socio" in socio-legal, points to "an interface with the context in which the legal" exists (Wheeler, 2020, p. 210). In particular, the attention is on the impact and normative influence of the work and outputs of SEEs—themselves creations of international law—in the anti-trafficking space. In this way, the article contributes to an understanding of the impact and influence of the international law that creates and empowers such entities.

The analysis proceeds in four main stages. First, Section 2 sets out the theoretical approach, articulating the conceptual approach to, and understanding of, soft law adopted in the article, and exploring the relationship between SEEs and soft law. Second, the attention in Section 3 turns to identifying and classifying relevant SEEs in the anti-trafficking space, demonstrates the breadth of possible powers and functions of such entities, and provides an initial indication as to the role such bodies may play. Then, Section 4, through an assessment of relevant SEE powers, functions, key activities, and challenges, provides an initial characterization of the role of SEEs in the realm of human trafficking. The assessment is carried out by analyzing primary and secondary international legal sources and selected outputs of relevant SEEs. As an initial exploration of the role of these entities *as* SEEs in the anti-trafficking space, the aim is not to undertake an exhaustive review of all relevant outputs. Instead, the examples included constitute evidence of the various functions articulated in Section 4. In line with the overall theoretical approach, this section includes an exploration of questions of the "normativity" of soft law and what the role and function of SEEs in the anti-trafficking space reveals about such normativity more generally. Fourth, and finally, Section 5 concludes, framing SEEs as underexplored sites of promise that deserve further engagement within research and practice to maximize the promise that they do hold.

2 Conceptualizing soft law and its relationship with state-empowered entities

Before turning to the role of SEEs in addressing human trafficking, this section sets out the theoretical and conceptual approach adopted in the analysis that follows. In particular, the focus is on the normativity of soft law, its relationship with hard law, and its overall role, as well as the relationship between soft law and SEEs.

Soft law is often conceptualized in comparison to hard law, reflecting its non-legally binding nature within international law. While no single definition exists, it has been defined by Shelton (2008, p. 3) as "any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior." Connectedly, a key criticism of soft law relates to its purported normative value (Weil, 1983). In the past, it has been characterized "redundant" (Klabbers, 1996). Indeed, even those with a more optimistic view concede that "firm law would be preferable" (Gold, 1983, p. 483). While, at first glance, the distinction between soft law and hard law seems more than apparent, the dichotomy has been questioned for some time, with the reality revealed as much more blurred and entangled than a binary conceptualization reflects. Chetail (2019, p. 283), speaking of the role of soft law in the context of migration governance, asserts that:

> The interactions between hard law and soft law are indeed much more complex and nuanced than the binary opposition based on their binding or non-binding nature. Their relations are not always mutually exclusive; they are frequently intermingled in an incremental process of consolidation and cross-fertilization. From this angle, soft law fulfils a variety of legal and paralegal functions to reinforce and supplement hard law.

Indeed, acknowledgment of complexity and nuance is far from new. Chinkin (1989, p. 865) recalls that:

> there has always been a blurring of law and non-law in the international arena. The labels have never been precise…the use of the treaty form does not ensure that hard legal commitments have been undertaken by the parties; treaties can be entirely soft or can include specific soft provisions. Thus even hard treaty law has soft grey areas.

Chinkin (1989, p. 866) goes on to argue that "[l]abelling these instruments as law or non-law disguises the reality that both play a major role in the development of international law and both are needed for the regulation of States' activities and for the creation of expectations". These insights speak to the complex relationship between hard and soft law, challenging the reader to consider questions of normativity in a non-binary and non-linear fashion. Similarly, Ullmann and von Staden (2020, p. 697) challenge the notion of "bindingness" as only referring to legal bindingness. Instead, they assert that "it is both theoretically correct and empirically more fruitful to view bindingness as occurring in qualitatively different degrees, with legal bindingness being only one manifestation of bindingness" (2020, p. 697).

The complexity continues when one distinguishes between the various *forms* soft law may take. Many declarations and agreements are typically concluded by states, while other soft law outputs, such as interpretative guidance, decisions, and General Comments, are often the work of SEEs. In this way, soft law can encompass instruments enumerating or restating normative commitments, as well as those that provide further clarity and guidance on existing—hard or soft—obligations. Indeed, when it comes to the relationship between soft law and SEEs, it is these latter outputs that are the most relevant. As these entities are not states *per se*, and also "not truly *non-state* in character" (Sivakumaran, 2017, p. 346), how might their outputs and decisions be characterized? Here, we find yet more diversity. Some SEEs issue decisions that can be characterized as formally legally binding; not soft law at all. For example, judgments of the European Court of Human Rights are binding (European Convention on Human Rights, art. 46).

Overall, though, the vast majority of SEE outputs would likely be characterized as soft law. This includes *quasi*-judicial decisions of Treaty Bodies, General Comments, reports, technical and interpretative guidance, and resolutions, to name a few. The key in all cases is the manner in which states empower these entities. SEEs have limited discretion regarding their work and outputs. Whereas states, with full international legal personality, can create binding norms, SEE powers are dictated by states, or in the case of "second-level" SEEs, by another SEE (Sivakumaran, 2017, p. 353). Indeed, the reason why the ECtHR can issue binding judgments and the Human Rights Committee cannot is because it has been empowered to do so by states in the European Convention on Human Rights. Similarly, the UN's Refugee Agency, UNHCR, may issue authoritative guidance on refugee law, but not on the interpretation of the ICCPR, due to its mandate (UNHCR Statute, 1950). In this way, the form and function of SEE outputs are directly related to their manner of establishment, mandate, and the powers ascribed to them by states.

Where SEE outputs do constitute soft law, many would fall into what Shelton (2008, p. 5) characterizes as "secondary soft law," which "includes the recommendations and general comments of international supervisory organs, the jurisprudence of courts and commissions, decisions of special rapporteurs and other *ad hoc* bodies, and the resolutions of political organs of international organizations applying primary norms." Shelton (2008, p. 4) distinguishes these from "primary soft law," which takes the form of "normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization." Yet, as outlined below, SEEs can also play an important role in the development of "primary soft law."

Already, the relationship between soft law and SEEs is becoming clear. To further clarify this relationship, the attention turns to those functions that SEEs can play in any context. While these functions could be characterized in a variety of ways, this article characterizes them within three main categories: (1) norm creation, (2) norm interpretation and clarification, and (3) norm oversight and accountability. Of course, the extent to which any of these functions can be performed depends on the powers ascribed to these entities by states, or, in the case of "second level" SEEs, by other such entities. Moreover, as will become clear below, the outputs and contributions of SEEs vary according to, among other things, which of these functions is engaged, as well as the powers that they possess. Significantly, these functions are not limited to only hard law or soft law process but operate across a range of mechanisms, with varying degrees of legal "bindingness" (Ullmann and von Staden, 2020, p. 697).

Regarding norm creation, at first glance, one may question whether SEEs, rather than states themselves, are the creators of international norms. True enough, when it comes to binding treaty norms, it is primarily state actors who are the "norm creators" [VCLT 1969, art 2(1)(a)]. For legal positivists, any reference to SEEs as involved in the norm-creation process may sit in tension with orthodoxy in international law. Yet, the Vienna Convention on the Law of Treaties between States and International Organizations or between Organizations (1986, art 2) reminds us that treaties may be concluded between states and international organizations, and case law from the International Court of Justice affirms, in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949 ICJ Reports 174), that international organizations can possess a "measure" of international legal personality. Not only this but SEEs can and do play an important role in treaty negotiation processes. This is observable in the anti-trafficking space. For example, during the Palermo Protocol negotiations, the *travaux preparatoires* document at least the soft influence that SEEs can have on the norm-creation process (UNODC, 2006; Gallagher, 2009, 793). In addition, SEEs can play a key role in the formation of soft law, including guidelines and, as we shall see below, gap-filling and interpretative guidance.

Moreover, Sivakumaran (2017, p. 5), referring to the broad interpretation of the notion of "publicists" in Article 38(1)(d) of the International Court of Justice Statute, asserts that the "teachings" of SEEs can fall within its scope. Indeed, he points to the example of International Law Commission draft articles forming the basis of subsequent treaties and claims that "[t]he teachings of State-empowered entities are…of a different order to the teachings of publicists without a connection to the State," and notes that the mandate of the entity is key in relation to the possible normative influence a particular entity may have (2017, p. 7). As such, while SEEs may not be norm creators *stricto sensu*, it is important to recognize that they *are* distinct from non-state actors and that to the extent that they are international organizations, they have a "measure" of international legal personality, and they can and do play a role in hard and soft norm-creation processes.

Beyond creation, when it comes to norm interpretation, the significance of SEEs becomes even more apparent. As will be outlined in Section 4, this interpretation takes place in a variety of ways. Perhaps the most obvious examples are found in court judgments and treaty body decisions. For example, the European Court of Human Rights' interpretation of Article 4 of the European Convention on Human Rights (ECHR) has been a key development in the recognition of human trafficking as falling within the scope of that Article. While this interpretative function arguably falls within the scope of hard law, it is more often than not found within "softer" outputs. For example, Treaty Bodies issue General Comments, SEEs can and do intervene in domestic court cases, and UN Special Procedures mandate-holders produce thematic reports and communications to states. As detailed in the section below, there are a variety of ways in which relevant SEEs provide authoritative interpretation and clarification on the content and scope of relevant binding norms. Already, it is apparent that the interpretative function of SEEs straddles across hard and soft law. Indeed, as will be explored in detail in the analysis that follows, hard and soft law outputs can complement one another, working together to provide clarity and momentum.

Finally, some SEEs have important supervisory and enforcement functions that can assist in enhancing the effectiveness of binding international commitments. Again, the authority these entities have in this regard is dependent upon the powers ascribed to them. For example, regional human rights courts have the power to issue binding judgments, while treaty bodies' powers are often described as *quasi*-judicial (Dinah Shelton, 2012, 535ff). Indeed, if one adopts a broad approach to accountability that looks beyond hard forms of enforcement, the ways in which SEEs can and do pursue accountability are broad and far-reaching.

This section sets out the conceptual underpinnings of the analysis that follows. Indeed, the assessment proceeds from a standpoint that views soft law's normativity as nuanced. The reality is more complex and, as the analysis in this article reveals, SEEs, as unique actors on the international plane, highlight this complexity but also shed light on the intersections between hard and soft law. As such, the analysis of SEEs in anti-trafficking law proceeds with a recognition of these "complex and nuanced interactions" and the "intermingled" nature of hard and soft law (Chetail, 2019, p. 283) when thinking about the role that these entities play, and the promise contained within them.

3 Locating and classifying state-empowered entities in the anti-trafficking space

Having established the conceptual approach from which the analysis proceeds, the focus turns to the role of SEEs in international anti-trafficking law and policy. It is first necessary to locate SEEs in the anti-trafficking space and understand the scope and nature of their powers. In other words, what are the relevant entities that fall within the scope of Sivakumaran's (2017, p. 343) SEE definition, i.e., actors that "have been empowered by States to make and shape international law"? Of course, what distinguishes SEEs is their empowerment—either directly or indirectly—by states. Yet, the precise nature of the functions performed by SEEs will depend, in part, on the manner of their empowerment, including their structure, scope, thematic focus, and powers. This means that the role of relevant SEEs may vary quite significantly.

Against the backdrop of a range of powers and functions, across numerous SEES, at least three helpful qualifiers can assist in locating and classifying SEEs in any context, including the anti-trafficking space.[1] First, SEEs can be distinguished by their geographical scope. Some SEEs have a global geographical scope. For example, the UN Human Rights Committee and the UN Office on Drugs and Crime have a global scope, while the European Court of Human Rights is limited geographically. Second, the thematic powers or "mandate" of SEEs can vary. For example, some SEEs, such as the UN General Assembly, have a very broad thematic scope, while others, such as the UNHCR—the UN's Refugee Agency—have a clearly defined and perhaps more limited mandate [UNCHR Statute, paras 8 (c) and (b), 9 and 10]. Third, when it comes to powers, some entities, such as regional human rights courts, have full judicial powers. In this sense, their outputs are more akin to hard law. More often than not, however, SEEs have *quasi*-judicial powers or other "softer" forms of authority. This is the case for the UN treaty bodies, such as the Human Rights Committee, which reviews treaty implementation, produces interpretative guidance through General Comments, and contributes to international human rights jurisprudence through decisions within individual and inter-state communications procedures (International Covenant on Civil and Political Rights, art 28; Optional Protocol to the International Covenant on Civil and Political Rights).

3.1 SEEs with a trafficking-centric mandate

When it comes to human trafficking in particular, perhaps the most useful qualifier to start with is that relating to scope and thematic mandate. In other words, a key distinction ought to be made between those SEEs for which human trafficking is the main or central focus and those where human trafficking is one focus among several or where it plays a more peripheral role. Arguably, only two SEEs have a thematic mandate exclusively focused on human trafficking. These are (1) the United Nations Special Rapporteur on Trafficking in Persons, especially women and children, and (2) the Council of Europe's GRETA.

First, the mandate of the UN Special Rapporteur on trafficking in persons, especially women and children (UNSRT), was established in 2004 and is part of the broader Special Procedures of the UN Human Rights Council (UN Human Rights Commission Decision 2004/110). It was most recently extended in 2020 by Human Rights Council Resolution 44/4. This seemingly insignificant observation is, in fact, central to the discussion since these resolutions are the legal basis through which states establish and continue to *empower* the UNSRT mandate. As such, the UNSRT mandate's classification as an SEE stems from the manner of its establishment. As part of the UN Special Procedures

1 These qualifiers are not intended to be exhaustive. Instead, they are proposed by the author to assist with classification and understanding.

mechanisms, the mandate is global in scope. As noted by Gallagher and Ezeilo (2015), the two key aspects of the UNSRT mandate are the production of country reports and thematic reports. Regarding the nature of its powers, the outputs of the UNSRT are not binding as such, but rather may be characterized as a form of soft law, which as demonstrated in Section 4 can fulfill a number of interpretive and accountability-related functions.

Second, on the European plane, the Council of Europe's GRETA, established by the Convention against Trafficking (ECAT), is a treaty body. Established and empowered directly by its parent treaty, this SEE may be characterized as "first-level" (Sivakumaran, 2017, p. 353). A useful starting point is Article 36 ECAT, which both establishes and delineates the powers of GRETA. Indeed, that Article notes that GRETA "shall monitor the implementation of this Convention by the Parties." Furthermore, states have empowered GRETA with a reasonable degree of discretion regarding how it fulfills its role, permitting it to adopt its own rules of procedure in carrying out its task as overseer of the Convention. These rules provide more detail on the scope of GRETA's activities, including how evaluation is to be carried out, noting that states are usually evaluated every 4 years, detailing the interactive process that takes place between states and GRETA. Rule 7 also lays out the parameters for its so-called urgent procedures mechanism, permitting GRETA to initiate "an urgent request for information" where it "receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations" of ECAT. Although it is a "first-level" SEE, its outputs are not binding as such and are more akin to soft law.

Given their central focus on human trafficking, it is expected that these SEEs will play a particularly significant role in the anti-trafficking space. Indeed, as demonstrated below, the outputs of both entities are particularly useful, particularly in the provision of normative clarity on anti-trafficking obligations. Yet, it is not only trafficking-focused SEEs that may be sites of progress in the anti-trafficking space. There are a number of additional SEEs with broader thematic mandates that are relevant to the analysis.

3.2 Additional human rights SEEs

While the UNSRT and GRETA are human rights entities tasked with a central thematic focus on trafficking, a range of additional human rights SEEs, including treaty bodies and courts, can and arguably do play a significant role in the anti-trafficking space. First, like GRETA, other human rights Treaty Bodies are usually directly established by the parent treaty. In total, there are 10 UN Treaty Bodies, among them the Human Rights Committee, Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination against Women (UN, 2023). Similar to GRETA, these bodies are empowered by their respective parent treaties and are tasked with reviewing state compliance with treaty obligations, issuing normative guidance in the form of General Comments, overseeing implementation through state reporting mechanisms, and issuing *quasi*-judicial decisions in individual and inter-state communications procedures (O'Flaherty, 2002; Obette, 2018; UN, 2023). In the main, these monitoring bodies are "first-level" SEEs, created directly by treaty. While they have a global geographical scope and a wider thematic scope than human trafficking alone, the material scope is limited to the rights within the corresponding treaties. This breadth may, in fact, be useful, as these entities may offer opportunities to explore the intersections of human trafficking with related rights issues. Again, the outputs among the various UN treaty body mechanisms have the status of soft law. Yet, the "*quasi*-judicial" characterization of the jurisprudence of these bodies indicates their potential normative impact.

Alongside the work of the UN Treaty Bodies, regional human rights courts are SEEs, within Sivakumaran's definition, and play a unique role in the international human rights law (IHRL) space. At present, there are three regional human rights courts: the African Court on Human and Peoples' Rights (ACtHPR), the European Court of Human Rights (ECtHR), and the Inter-American Court on Human Rights (IACtHR). With a regional focus and a substantive jurisdictional reach that covers the full panoply of rights of their respective parent Conventions, these regional courts might not immediately spring to mind as SEEs in the anti-trafficking space. Yet, in the years since 2000, the jurisprudence on human trafficking has grown significantly, albeit mainly in the case law of the ECtHR[2] (Stoyanova, 2017; Council of Europe, 2023), although it is emerging elsewhere (Gauci and Magugliani, 2021). What sets these courts apart is their powers; they have full judicial powers, meaning their judgments are binding upon states and more akin to hard law.

3.3 Additional thematic SEEs

A third category of relevant SEEs are those that have a role to play in the anti-trafficking space but are not human rights SEEs *stricto sensu*. The aim here is not to identify an exhaustive list of relevant SEEs but to highlight some additional entities that are most relevant in the anti-trafficking space. Given the transnational organized crime context from which the anti-trafficking regime emerged in 2000, the United Nations Office on Drugs and Crime (UNODC) retains a key role in global anti-trafficking efforts. In this regard, it ought to be acknowledged that the UNODC has a wide substantive remit, which includes transnational crime more broadly. Yet, trafficking is included within its competence, and it continues to perform important functions *vis-à-vis* the Palermo Protocol in particular (UNODC, 2023).

Beyond UNODC, there is a range of other UN entities that may be relevant. The UN's Refugee Agency, UNHCR, is another relevant SEE. Although human trafficking is not explicitly within the UNHCR mandate (UNHCR Statute, 1956), given the intersections between human trafficking and asylum, this entity may offer the potential to provide clarity on the issue. The International Organization for Migration, a "related organization" to the UN (UNGA Res 70/296, 2016), is another relevant SEE. Although it is a "non-normative" organization, it plays an important role vis-à-vis the Global Compact for Migration and produces significant research on migration, including human trafficking (see generally, IOM, 2023). Moreover, at the regional level, more relevant entities are present. The Intergovernmental Authority on Development (Africa), the East African Community, the African

2 This is discussed in Section 4.

Union, the European Union, and the Association of South East Asian Nations are just a few SEEs that may produce guidelines, declarations, legislation, or other normative guidance relating to human trafficking.

Clearly, there is no shortage of SEEs with a mandate that could involve engagement with anti-trafficking law, policy, and practice. The aim of this section was to sketch the lay of the land, locating relevant SEEs and classifying them according to thematic scope, regional scope, and powers. This step was deemed essential, given the large number of potentially relevant SEEs. The picture that emerges is one where there are two core anti-trafficking SEEs and a range of human rights SEEs that have a potentially important role to play. Beyond this, a number of additional SEEs have the capacity to play a role due to their thematic focus on areas related to human trafficking. Each entity's scope and functions are directly linked to the manner in which it is empowered by states. In general, the powers ascribed to these entities enable them to produce soft law outputs. The exception to this is, of course, the regional human rights courts. Yet, as will be made clear in the following section, the hard and soft law functions of these SEEs in the anti-trafficking space are similar, raising the question of just how important the distinction is. With such a diversity of relevant entities, the potential is significant, but so is the risk of norm fragmentation (see, e.g., Buckley et al., 2017; Çali et al., 2020).

The question that remains to be answered is: in light of the foregoing, and given the conceptual approach to the normativity of soft law, how might the role—or potential role—of SEEs be characterized in relation to anti-trafficking law, policy, and practice? The analysis that follows explores the role—or potential role—of SEEs in the anti-trafficking space, paying attention to the similarities and differences across entities and outputs.

4 Toward an initial characterization of the functions of SEEs in the anti-trafficking space?

Through the diverse powers ascribed to them, SEEs can influence and impact the role of international law (Sivakumaran, 2017; Chetail, 2019). But, how, precisely, do these functions assist in the creation, interpretation, and enforcement of international law engaged with human trafficking? This question is explored below through the lens of four key aspects of the role and functions of SEEs in the anti-trafficking space. These are (1) contributing to normative clarity, (2) establishing essential thematic connections between intersecting protection issues, (3) enhancing the capacity of individuals and non-state actors to interact with and influence the direction of international anti-trafficking law, and (4) revealing the limitations of the hard–soft law dichotomy.

4.1 Contributing to normative and interpretative clarity

The adoption of the Palermo Protocol in 2000 marked a significant step forward in both defining human trafficking and some of the key obligations incumbent on states in relation to addressing trafficking (see Gallagher, 2010). Following this, the adoption of ECAT, with its stronger human rights focus, and the creation of the UNSRT mandate contributed significantly to the growing understanding of human trafficking as a human rights issue (Rijken, 2009; Gallagher and Ezeilo, 2015). Over two decades later, much more clarity exists as to (a) what falls within the scope of the definition of human trafficking and (b) obligations to prevent trafficking and protect trafficked persons. In this regard, the role of SEEs has been crucial.

First, regarding the pursuit of definitional clarity on the trafficking definition, it ought to be recalled that while the Palermo Protocol established what is, by now, the internationally accepted definition of human trafficking, conceptual misunderstanding on the boundaries of this definition and its individual elements accompanied such consensus for some time (Gallagher and Ezeilo, 2015, pp. 922 ff.). Indeed, despite continued progress in this regard, misunderstandings, misconceptions, and differing approaches at the boundaries of the definition persist (Stoyanova, 2017; Kane, 2021). As such, any and all moves toward interpretative clarity are to be welcomed in the anti-trafficking space. After all, clarity on the definition is essential from a criminal law perspective, which requires legal certainty. Moreover, the definition delineates the scope of protection of the applicable norms.

Among the SEEs engaged in the pursuit of clarity on the international legal definition of human trafficking is UNODC. Indeed, UNODC facilitated expert meetings between 2012 and 2014, resulting in a number of Guidance Notes and Issue Papers such as the 2012 Guidance Note on "Abuse of a Position of Vulnerability as a Means of Trafficking in Persons" and the "2018 Issue Paper on the International Legal Definition of Trafficking in Persons" (UNODC, 2018). Significantly, the Issue Papers emerged following a 2010 recommendation from the Working Group of States Parties to the Trafficking in Persons Protocol, which states that: "[t]he Secretariat should prepare, in consultation with States Parties, issue papers to assist criminal justice officers in penal proceedings" [UNCTOC, 2010, para 31(b)]. This demonstrates the ongoing significance of the mandate emanating from states for the work undertaken by SEEs in this area. These publications have helped to provide clarity and guiding principles in the face of normative confusion. For example, the 2018 Issue Paper elaborates on the meaning of core concepts of the trafficking definition, including "abuse of a position of vulnerability," the role of consent, and the meaning of exploitation (2018). Connectedly, UNODC issued Guidance Notes on "abuse of a position of vulnerability" as a means of trafficking in persons in Article 3 of the Protocol to prevent, suppress, and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime (UNCTOC). That Guidance Note contains very helpful clarification, including how vulnerability should be assessed: "[t]he existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational, or circumstantial situation of the alleged victim" (2012, para 2.3). This interpretative guidance does not claim to answer every question raised by the trafficking definition, yet it provides important clarifications, highlights remaining issues, and maps a path for the way forward in

the pursuit of further understanding. In this way, UNODC's significant role in relation to the UNCTOC and its protocols is evident.

Beyond the UNODC, a range of other SEEs play a role in the provision of interpretative clarity on international legal obligations to address trafficking. An additional example of an SEE engaged in the important work of moving toward interpretative and conceptual clarity is the UNRST mandate. The mandate's role is distinct from that undertaken by UNODC. It continues to provide normative clarity on human trafficking as a human rights issue. Indeed, Gallagher and Ezeilo (2015, p. 916) note that "[t]he central theme of the mandate…was critical. While states were prepared to acknowledge the human rights aspects of trafficking, there was a widespread perception that this issue was principally about migration, security, and public order."

As well as the work identified by these authors, and in the almost 10 years since this piece was published, this important normative interpretation and oversight work of the UNSRT mandate continues. One way in which this continues to take place is through direct communications to states. These communications do not only contribute to normative clarity regarding anti-trafficking obligations, but are also a unique form of accountability, with mandate-holders communicating directly with states on areas of concern. An example of a recent communication sent from, *inter alia*, the mandate of the UNSRT is one addressed to the UK, which raises a number of concerns over an "Illegal Migration Bill." In the communication, the rapporteurs express concern over some of the Bill's clauses, noting that "[t]hese provisions, if passed, would be in violation of the State's obligations under international law to identify, assist and protect victims of trafficking and persons at risk of trafficking" (OL GBR 09/2023). While the state has not yet replied in this case, the normative clarity provided within and the public nature of these communications should not be understated in terms of the promise within the UNSRT's mandate.

A third example of the important work in the pursuit of normative clarity is found in the jurisprudence of the ECtHR. It has handed down several significant judgments, each of which can be viewed as steps toward conceptual clarity on the place of human trafficking within Article 4 ECHR and the various positive obligations therein. In the now landmark case of *Rantsev v Cyprus and Russia*, the court confirmed, for the first time, that although human trafficking is not explicitly listed in Article 4 of the ECHR, it nevertheless falls within the scope of that Article. Through a teleological interpretative approach—as is required by the Vienna Convention on the Law of Treaties—the court confirmed that "trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention" (para 282). The significance of this holding cannot be understated. Pati highlights this, stating that "[f]rom now on in Europe, protection from human trafficking as defined in the Palermo Protocol and mirrored in the 2005 Council of Europe Convention on Action against Trafficking in Human Beings, is guaranteed through article 4 of the ECHR" (Pati, 2011, p. 94). In subsequent cases, further clarity was achieved. In *Chowdury and Others v Greece*, the court importantly observed that "[e]ven assuming that, at the time of their recruitment, the applicants had offered themselves for work voluntarily and believed in good faith that they would receive their wages, the situation subsequently changed as a result of their employers' conduct" (2017, para 97). Such an acknowledgment cannot be understated since it clarifies that a situation can *evolve* into one of trafficking, even where it did not begin as such.

While these developments were positively received, the court's approach also attracted criticism. Among the critics of the approach in *Rantsev* is Stoyanova (2012), who observes that the judgment does not engage in a discussion of the individual elements of the Palermo Protocol trafficking definition or an analysis of where these elements are present in the facts of the case. In 2020, the Grand Chamber took steps "in the direction of conceptual clarity," confirming that "from the perspective of Article 4 … the concept of human trafficking covers trafficking in human beings, whether national or transnational, whether or not connected with organized crime, in so far as the constituent elements of the international definition of trafficking in human beings, under the Anti-Trafficking Convention and the Palermo Protocol, are present" (para 296). Yet, it cannot be forgotten that the conceptual boundaries of the elements of the international definition remain contested. Thus, this step toward clarity is only a partial one (Kane, 2021). In addition, throughout its Article 4 jurisprudence, the ECtHR has also taken steps toward clarifying the positive obligations engaged in relation to trafficking (see inter alia *VCL & AN v UK,* 2021).

UNODC, the UNSRT mandate, and the ECtHR are certainly not the only SEEs engaged in the provision of interpretative clarity *vis-à-vis* human trafficking. Yet, these examples show that across diverse SEEs with differing geographical and thematic mandates and varying levels of "power," steps can be taken toward clarity on key aspects of anti-trafficking obligations, including the interactions between the Palermo and ECAT regimes and the IHRL framework. Indeed, these positive steps emerged from a combination of so-called hard and soft mechanisms. This is particularly important in a relatively young area of law, that is, to a large extent, still developing and maturing. Indeed, UNODC's 2018 Issue Paper draws attention to this aspect of the regime, noting that while the achievement of consensus on the trafficking definition in Palermo was an important step forward, "questions have arisen about certain aspects of the definition—most particularly, but not exclusively, those aspects that are not elsewhere defined in international law and/or not well established in national law and practice." (2018, p. 2). It goes on to note that,

> [t]he stakes for definitional clarity (and indeed definitional ambiguity) are high because to characterize certain conduct as "trafficking" has substantial and wide-ranging consequences for States, for the perpetrators of that conduct and for the victims. Persons who are victims of that conduct become "victims of trafficking," and thereby entitled to special measures of assistance and protection that may not be available to those who are not identified as having been trafficked. (2018, p. 2)

Viewed through the lens of their capacity to provide normative clarity within an area of law that is still in its relative infancy, SEEs—both trafficking-focused and those with a broader thematic scope—can act as sites of progress in the anti-trafficking space. Indeed, the continued pursuit of such clarity is arguably essential, and SEEs, with the unique space they occupy on the international

plane, appear well-placed to provide it. Indeed, coherence across a diversity of SEEs may even strengthen the normative value of such guidance. But what about when there are differing approaches? Whose interpretation is decisive? This may not be as problematic when it comes to the obligations within a particular regime, i.e., positive obligations under Article 4 of the ECHR, but if differing approaches are adopted on the conceptual boundaries of human trafficking or obligations under the Palermo Protocol, this may pose more of a challenge and could weaken the normative value of key anti-trafficking norms.

Indeed, when multiple SEEs across regimes are engaged in the pursuit of interpretation, there is a risk of fragmentation or conflicting understandings. Indeed, Çali et al. (2020) point to this risk in their study of non-refoulement provisions across the ECtHR and UN treaty bodys. In this regard, coordination and communication among and cross-referencing between SEEs may be viewed as key, and as such, it is encouraging to see some signs of such actions regarding human trafficking. For example, the ECtHR explicitly refers to the outputs of GRETA and, as noted above, defines human trafficking for Article 4 ECHR as per the Palermo Protocol definition (see, e.g., *S.M. v Croatia*). Furthermore, the existence of the UN Inter-Agency Coordination Group against Trafficking in Persons is encouraging (UNGA Res 61/180). This coordination will not eliminate the risk of norm fragmentation, particularly across judicial and *quasi*-judicial mechanisms, but it will assist in creating space for clarity and dialogue and formulating a common, authoritative understanding.

4.2 Clarifying thematic connections between human trafficking and intersecting protection issues

Already, the role of SEEs in providing normative clarity within international anti-trafficking law is apparent. While challenges remain, the steps taken to date are far from insignificant. In the provision of such clarity, SEEs have the capacity to draw attention to and elaborate upon important thematic connections between human trafficking and intersecting protection challenges. This role is a significant one, since human trafficking occurs in a range of discrete protection contexts, yet approaches to trafficking often remain legally and institutionally fragmented (Kane, 2022). Indeed, the international legal regime on human trafficking emerged in a criminal justice context and responses have remained quite siloed, even though trafficking risk is present in a range of other contexts, e.g., displacement, forced migration, and climate change (see, e.g., Nampewo, 2021; Smith, 2021; Kane, 2022). In this regard, any progress in achieving clarity at the intersections of human trafficking and connected challenges are to be welcomed. Indeed, SEEs can and do play a significant role in this area, although there is certainly scope within existing powers and mandates for this role to be enhanced.

First, the UNSRT mandate continues to make significant progress in establishing normative connections between human trafficking and intersection protection challenges. Indeed, notwithstanding the progress highlighted by Gallagher and Ezeilo (2015), it may be that, at present, the provision of clarity on important intersections may be the most important function of the mandate. The mandate's annual thematic reports have addressed a variety of significant topics, including human trafficking in conflict situations, the nexus between human trafficking and terrorism, the non-punishment principle, and the intersections between human trafficking and climate change (UNSRT, 2023; UNSRT, 2022; UNSRT, 2021). Most recently, in June 2023, current UNSRT, Siobhán Mullally, presented a thematic report on "Refugee Protection, Internal Displacement and Statelessness" to the UN Human Rights Council. The value of these reports is two-fold: (1) they draw attention to intersections that are often overlooked and (2) they provide clarity on what anti-trafficking obligations require in those particular contexts. These examples demonstrate how the mandate's focus on trafficking, combined with the capacity to undertake activities such as the compilation of thematic reports and communications to states, can result in an effective normative role for the UNSRT in the provision of authoritative guidance on and clarification of how relevant norms apply in a range of thematic contexts, where the risks of trafficking are present.

Second, the Council of Europe's GRETA continues to make important thematic connections relating to ECAT obligations in particular contexts. For example, in GRETA's 5th and 10th General Reports, there is an included thematic section on trafficking in the context of asylum, in particular on "issues related to the identification and protection of victims of trafficking among asylum seekers, refugees and migrants" (GRETA, 2016, para 93; GRETA, 2021, p. 35–38). These reports underline the need for Article 10 ECAT—which sets out an obligation to identify trafficked persons—to be applied in the asylum context. Indeed, the reports draw attention to "important gaps in the identification and protection of victims of trafficking among asylum seekers and irregular migrants. Law enforcement efforts to combat irregular migration are too often disconnected from the legal obligation to identify victims of trafficking in human beings, with consequences for the protection of such victims and the prosecution of traffickers" (GRETA, 2016, para 99). Moreover, in its 8th General Report, GRETA records the "particular attention" it has paid to "unaccompanied or separated children who are vulnerable to trafficking" (GRETA, 2019, para 14). Furthermore, it has undertaken two urgent procedures in Hungary and Italy, both of which concerned conditions with the asylum process (GRETA, 2018, GRETA, 2017). This shows the potential for GRETA, a body with authority under the Convention, to make the much-needed connections between asylum and trafficking and provide an authoritative voice clarifying how ECAT applies in the context of asylum. Indeed, GRETA continues to monitor the situation in the asylum context. Within its recommendations to individual countries, it frequently calls for increased efforts to identify trafficked persons in the asylum context (see e.g., GRETA UK Report, 2021, para 269; GRETA Denmark Report, 2021, para 183; GRETA Turkey Report, 2019, para 73). GRETA's potential to shape the discourse through what it focuses upon through supervision is encouraging.

Clearly, SEEs with a specific focus on trafficking play a key role in highlighting the intersections between human trafficking and intersecting challenges. Beyond this, SEEs with a broader thematic mandate also have a role to play and increasingly address human trafficking; although, as outlined below, the potential is yet to be fully maximized. First, among the outputs of UN Treaty

Bodies is evidence of a focus on human trafficking. For example, in 2020, the Committee on the Elimination of Discrimination against Women (CEDAW) published its "General recommendation No. 38 on trafficking in women and girls in the context of global migration." This authoritative statement focuses on the role of Article 6 of the CEDAW Convention, which contains an obligation to "suppress all forms of traffic in women." Through a focus on global migration in particular, the Committee highlights, among other things, "the particular vulnerability of smuggled women and girls to being trafficked and underlines the conditions created by restrictive migration and asylum regimes that push migrants toward irregular pathways" (2020, para 5). Further evidence is found in the work of the UN Committee on the Rights of the Child (CRC). General comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment contains clarification of the particular risks of trafficking. For example, the General Comment states that:

> Children should be protected from all forms of exploitation prejudicial to any aspects of their welfare in relation to the digital environment. Exploitation may occur in many forms, such as economic exploitation, including child labour, sexual exploitation and abuse, the sale, trafficking and abduction of children and the recruitment of children to participate in criminal activities, including forms of cybercrime. (para 112)

It further reminds states that:

> Considering States' obligations to investigate, prosecute and punish trafficking in persons, including its component actions and related conduct, States parties should develop and update anti-trafficking legislation so that it prohibits the technology-facilitated recruitment of children by criminal groups. (para 115)

Significantly, the UNSRT provided input to the Committee during the drafting stage of the report. This input calls on the Committee to highlight the particular risks of trafficking within its General Comment. It is, therefore, encouraging to see such a focus in the final output. A third example is found in "Joint General comment No. 3 (2017) of the Committee on the Protection of All Migrant Workers and Members of Their families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration." Among the protection challenges highlighted is that of trafficking. The Committees jointly note that "[u]naccompanied and separated children may face further vulnerabilities and can be more exposed to risks, such as gender-based, sexual and other forms of violence and trafficking for sexual or labor exploitation. Children traveling with their families often also witness and experience violence" (2017, para 40).

Of course, the work of UN treaty bodys does not only involve General Comments. Important thematic connections can also be made through state reporting processes and *quasi-judicial* communications procedures. For example, the CEDAW committee's most recent review of Uganda, undertaken in 2022, highlighted that Uganda "remains a source, transit and destination country for trafficking in persons, in particular women and girls, and that there is a lack of statistical data on the extent of trafficking and its root causes, including in humanitarian settings" [para. 27(a)]. Regarding the communications procedures, while trafficking-related cases are less common than other thematic areas such as *non-refoulment* (see Çali et al., 2020), Gauci and Magugliani (2021) identified 19 individual communications related to human trafficking. One such communication is *Abdi-Osman v Switzerland* (2020), where the question of risk of trafficking upon return to Italy was in question. In its decision, the CEDAW Committee noted "with concern":

> the absence of a comprehensive gender-sensitive law on trafficking in persons; the low prosecution and conviction rates; the lack of adequate mechanisms to identify and refer victims of trafficking in need of protection; the lack of adequate resources to allow for the effective implementation of the existing protection system, in particular for women migrants, refugees and asylum seekers who are victims or at risk of being victims of trafficking; and the lack of systematic rehabilitation and reintegration measures. (para 5.11)

This example shows the potential oversight role that UN treaty bodys can play, and in so doing, these entities reiterate and clarify the (positive) obligations incumbent upon states to address trafficking. Indeed, in *Abdi-Osman,* we also see clarity regarding the intersections between trafficking and asylum.

True, the role of UN treaty bodys vis-à-vis human trafficking may be more limited, in that they "are not yet consistently engaged in human trafficking cases and—in their non-judicial role, do not consistently engage with anti-trafficking concerns during periodic reviews" (Gauci and Magugliani, 2022, p. 100). Yet, these authors caution against ignoring the "potential" within these entities regarding "the improvement of anti-trafficking efforts" (Gauci and Magugliani, 2022, p. 100). Indeed, the limited examples show the important functions that these entities can play in clarifying thematic connections and enhancing clarity. Moreover, there are important accountability functions within these mechanisms that are, as yet, underutilized in relation to human trafficking. What the examples here show is the *potential* within these bodies to make important connections, and highlight to states what their obligations under a range of IHRL instruments require vis-à-vis addressing trafficking in a range of contexts. Yet, it is important that these contributions are doctrinally sound to avoid criticism or a lack of clarity. Indeed, Briddick (2022) criticizes the approach of the CEDAW committee to migration more broadly, including its doctrinal approach to discrimination in the context of migration-related obligations. Thus, whatever promise does exist within these mechanisms and whatever progress has been made to date, it is important that scrutiny of the outputs of SEEs continues to maximize the promise that is contained within these mechanisms.

Beyond the work of UN Treaty Bodies, SEEs with a narrower thematic mandate can play an important role in highlighting the connections between trafficking and intersecting protection challenges within their mandate. Returning to the issue of asylum, UNHCR has a key function in the supervision of the 1951 Convention Relating to the Status of Refugees (Article 35). As a result, the UNCHR's Handbook on Refugee Status Determination

and its Guidelines on International Protection (2019) carry a certain authoritative weight. Indeed, a range of national courts have acknowledged this weight (Kälin, 2003). For example, a judge in the England and Wales High Court stated that "[h]aving regard to Article 35(1) of the Convention, it seems to me that such Guidelines should be accorded considerable weight" (*R v Uxbridge Magistrates' Court and Another, ex parte Adimi* [1999] Imm AR 560, Brown LJ).

To this end, it is important to note that the UNHCR's Guidelines on International Protection address one aspect of the intersection between trafficking and asylum. Guidelines on International Protection No. 7 concerns "The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked." In these guidelines, the UNHCR acknowledges that its "involvement with the issue of trafficking is essentially twofold" (2011, para 5). First, "the office has a responsibility to ensure that refugees, asylum-seekers, internally displaced persons (IDPs)…do not fall victim to trafficking" (para. 5). Second, trafficked persons whose circumstances fall within the scope of Article 1A(2) of the Refugee Convention ought to have access to international protection. The guidelines provide important normative clarifications regarding the application of the refugee definition within Article 1(A)(2). This clarification is important and represents important progress in ensuring protection for trafficked persons. Indeed, refugee status could provide vital protection for some trafficked persons. Yet, there is much more to the intersection of trafficking and asylum than the application of Article 1A(2). Indeed, as highlighted above, the guidelines themselves acknowledge the need to ensure that refugees do not experience trafficking. Yet, no further guidance is provided on how this should be done. Moreover, no guidance exists as to how trafficking should be identified in asylum settings. Admittedly, recent UNHCR outputs appear to more frequently refer to the risk of trafficking in asylum settings. This includes a 2022 report on "Mapping the Protection Services for Vulnerable People on the Move, Including Victims of Trafficking" and statements in relation to the risk of trafficking in the context of recent large-scale population displacements from Ukraine (UNHCR, 2022). However, the promise within the UNHCR, particularly in light of the authority it has, appears to be underutilized when it comes to addressing trafficking. One way in which this promise could be further realized would be with an updated version of the existing Guidelines on International Protection No. 7 that included more detail on the identification of trafficked persons in asylum settings and the interactions between international refugee law and international anti-trafficking law.

Overall, it is clear from the examples provided that SEEs can and do clarify important normative connections in the anti-trafficking space. The evidence presented above shows the important contribution made—by both trafficking-centric SEEs and those with a broader mandate—to authoritative interpretation, along with clarification on what various frameworks require in diverse contexts. The importance of this role is particularly acute in the anti-trafficking space since responses to trafficking are often siloed. It is unsurprising that a significant proportion of the work comes from those SEEs thematically focused on human trafficking—in particular, UNSRT and GRETA. Indeed, they may be best placed to make these connections and engage and interact with actors dedicated to the thematic areas of connection. Yet, other entities have an important role to play here too. There is much promise, with some of it yet to be fully realized. As this work continues, it is important for a sound and coherent approach to be adopted across entities.

4.3 Enhancing the capacity of individuals and non-state actors to engage with international anti-trafficking law

By now, it is clear that SEEs can play a significant role in the provision of normative clarity on international anti-trafficking obligations and the intersections between human trafficking and connected protection challenges. Additionally, a key aspect of the role of relevant SEEs relates to their position as a crucial connection—or entry—point between individuals or non-state actors and international law. This is particularly significant for areas of international law that have a human rights focus since it is indeed individuals who are the rights-holders and those to whom the protections of anti-trafficking law are owed. Indeed, as a result of the powers and mandate of various relevant SEEs, individuals can engage with SEEs on anti-trafficking matters in a variety of important ways.

First, individuals can bring cases and communications relating to human trafficking before human rights courts and Treaty Bodies with communications procedures. As is clear from the previous sections, a number of individuals have brought successful claims before the ECtHR (see generally, Council of Europe, 2022). Beyond this, individuals have engaged with other regional courts on human trafficking, albeit to a lesser extent. In 2017, the Inter-American Court of Human Rights (IACtHR) handed down its first judgment addressing human trafficking in the case of *Hacienda Brasil Verde Workers v Brazil*. This case was brought by 85 persons, showing the capacity of a larger group of persons to make a complaint where all have been affected by an alleged breach. Moreover, the African Commission's first trafficking case, *J v Namibia*, is pending (Gauci and Magugliani, 2021). When it comes to *quasi*-judicial mechanisms, the jurisprudence of UN Treaty Bodies reveals that individuals have not yet utilized these mechanisms in relation to complaints about human trafficking in any significant way.

That individuals now have access to *fora* beyond the state is far from insignificant. While, as detailed above, the jurisprudence within these cases and communications enables SEEs to provide normative clarity in their interpretative function, the act of bringing a case or communication triggers oversight and accountability functions within SEEs. This means that individuals and non-state actors *themselves* can play a crucial role in triggering some of the promises of SEEs. An awareness of the various options and the potential within them may inform strategic litigation choices. While some of these mechanisms are not utilized as much in the field of human trafficking as in other related areas, i.e., *non-refoulement* (on this see, Harvey, 2015), the promise is apparent, and there may well be an increase in the use of such mechanisms as the anti-trafficking field continues to mature. Significantly, in this regard, judicial and *quasi*-judicial mechanisms perform similar

functions. In other words, "harder" and "softer" mechanisms appear to play similar roles.

While judicial and *quasi*-judicial mechanisms offer the potential for individuals to engage beyond the state and are particularly important in holding states to account, there are strict admissibility requirements. In particular, only those individuals who are victims of an alleged human rights breach may bring such a complaint. Beyond this, there are a variety of other ways in which individuals and NGOs can interact with SEEs and thereby engage with international law. Again, such engagement can assist in enhancing the potential contained within SEEs.

Among the various ways in which individuals and non-state actors can engage with SEE mechanisms is the provision of input to UN Special Procedures mechanisms. Indeed, when the UNSRT compiles reports that, as already acknowledged above, provide important normative clarity, individuals and non-state actors are invited to provide input. These "calls for input" often specify the topic(s) on which insights are sought, and evidence from practice reveals that a range of non-state actors, including NGOs, academics, and other individuals, do submit valuable input and can indeed raise issues and highlight problems in practice, as well as examples of good practice. Indeed, a recent call for input from the UNSRT, relating to "Trafficking in persons and protection of refugees, stateless persons and internally displaced persons (IDPs)" received 29 submissions, the majority of which were submitted by NGOs and individuals, among them the Rights Lab at the University of Nottingham, which presented evidence from case studies highlighting the challenges faced by persons traveling along the Central Mediterranean Route and among non-UK nationals in the United Kingdom (Lumley-Sapanksi et al., 2023; UNOHCR, 2023). This evidence provides valuable insights that can inform the approach and outputs of the Special Procedures, providing a direct link between non-state actors and these normative processes.

Alongside the opportunities to provide input to UN Special Procedures, there are further spaces for individuals and non-state actors to engage with the work of SEEs and potentially influence some of the normative guidance provided by these entities. For example, when UN Treaty Bodies compile General Comments, input is sought. The recent UNCRC General Comment (2021) on Children's Rights in Relation to the Digital Environment, which, as highlighted above, addresses human trafficking, is one such example. "Interested parties" were invited to provide input on the General Comment's concept note, and among the 136 submissions were contributions from five children and adolescent groups, along with 90 additional stakeholders (UNCRC, 2019).

These processes are replicated across a range of Treaty Bodies, special procedures, and other SEEs. Indeed, while a focus on their role in relation to human trafficking is particularly insightful, these mechanisms reveal valuable insights into international (human rights) processes and their iterative nature. In this regard, de Búrca's account of IHRL and advocacy is particularly resonant. That account:

> understands human rights…as the product of ongoing iteration and contestation between an array of actors, institutions, and norms: between the claims and demands of people affected and confirmed, the international norms and institutions which elaborate and monitor their implementation, and the domestic institutions and actors which reinforce and support those claims. (de Búrca, 2021, p. 7)

The preliminary analysis of SEE's anti-trafficking role here indicates that this dynamic, interactive, and iterative role is indeed observable. The interaction of individuals, states, and SEEs across domestic, regional, and international planes is apparent in both directions through a range of processes. This dynamism is in line with the assertions of Benhabib (2009), who frames IHRL in the context of democratic iterations and jurisgenerative politics. Benhabib's reflections on the normative quality of law, outlined above, is also relevant to the work undertaken here. Furthermore, Benhabib's framing of normativity and "new vocabularies for public claim making" is particularly helpful. She claims that:

> Law's normativity does not consist in its grounds of formal validity, that is its legality alone, though this is crucial. Law can also structure an extra-legal normative universe by developing new vocabularies for public claim-making by encouraging new forms of subjectivity to engage with the public sphere and by interjecting existing relations of power with anticipations of justice to come. (2009, p. 696)

Perhaps this dynamism and "jurisgenerativity" is in fact more apparent—or certainly more needed—when it comes to the role of SEEs, especially in the anti-trafficking space. As noted above, the anti-trafficking framework is relatively new and continuously adapting to more nuanced and arguably more mature understandings of the nature and processes of conduct amounting to trafficking. The space for individuals and non-state actors to engage with and influence these processes should not be overlooked. Instead, an understanding of the opportunities to engage with a range of mechanisms related to human trafficking ought to be promoted among individuals, NGOs, and litigators alike.

4.4 Revealing the limitations of a hard–soft law dichotomy

Across the diversity of SEEs relevant to anti-trafficking law and policy is significant promise, particularly regarding their capacity to provide normative clarity, highlight key thematic connections on intersecting protection challenges, monitor and supervise implementation, and enhance the capacity of individuals to engage with international law mechanisms. The analysis proceeded from a theoretical standpoint that viewed the relationship between hard and soft law as more nuanced than a binary distinction can capture.

Indeed, the analysis that followed shows that an assessment of the role of SEEs in the anti-trafficking space can not only reveal insightsinto their role in relation to the development of anti-trafficking law but also into the functions of SEEs more broadly—and what both their form and function reveal about the relationship between hard and soft law. Indeed, the assessment presented in this article demonstrates a range of interactions between hard and soft law. The reality that emerges is one that is much more nuanced, in line with the picture painted by Chetail and others. There are

at least three aspects of SEEs' form and functions that highlight this nuance.

First, as has been highlighted above, SEEs are unique actors in the international legal system. As Sivakumaran (2017, p. 346) reminds us, while they are not state actors, they are also not "truly" non-state actors since they are, in fact, empowered by states. This means that SEEs are themselves—either directly or indirectly—*creations* of hard law. This is highlighted throughout the analysis. For example, the Council of Europe's GRETA is created and empowered by the ECAT treaty, while the UN Treaty Bodies are creations of the UN International Human Rights Treaties. Even where SEEs are created by other SEEs, there is typically a link back to hard law. These links demonstrate points of intersection between hard and soft law and reveal something of the intertwined relationship between the two.

Second, much of the work of SEEs involves interpreting hard law. Many—perhaps the majority—of SEEs are involved in influencing, interpreting, and shaping the direction of international (anti-trafficking) law through a range of functions outlined above. While this differs across the diversity of SEEs, outputs are often soft law and include guidelines and authoritative interpretations of hard law. In this way, SEEs function as what Chetail (2019, p. 283) describes as a "support" to hard law. In this way, the interconnections between hard and soft become even more apparent. Indeed, many of the examples of the work of SEEs presented in this article demonstrate the way in which SEE outputs—many of them soft law—provide clarity on what key treaty provisions, in the Palermo Protocol and elsewhere, require. In this way, it might be argued that the promise contained within SEEs, when it comes to the anti-trafficking space, is to enhance the potential of the existing hard law. Indeed, the unique role SEEs play in this regard highlights the nuance of normativity in practice that is arguably not always easily captured by the hard–soft law binary.

Third, the analysis of SEE functions in the anti-trafficking space revealed that similar functions are performed by entities with both hard and soft powers. All three of the main functions of SEEs identified in this article are performed by entities with hard law powers, i.e., human rights courts, as well as a diverse range of SEEs empowered to produce softer outputs. Indeed, normative clarity comes from courts, treaty bodies, UN Special Procedures, and more. Key thematic connections between trafficking and intersecting protection challenges may be elucidated in hard law or judgments, but they are also—often, in fact—made within softer mechanisms. Similarly, individuals may engage with international law mechanisms via a court, but there are indeed many opportunities for them to engage with the diversity of other SEEs in the anti-trafficking space.

Indeed, it is clear from the preliminary analysis presented in this article that SEEs' form and function reveal the "frequently intermingled" relationships between hard and soft law that Chetail speaks of. The normative role and influence of soft law is indeed observable in the functions of the SEEs assessed above. While it is important not to overstate the influence of soft law mechanisms more generally, or in this area, it is equally important not to understate this influence. To simply dismiss soft law as inferior to hard law is to dismiss the promise contained within it.

5 Conclusion

In view of the foregoing, what conclusions may be drawn regarding the role of SEEs in the anti-trafficking space? While it was beyond the scope of the current article to analyse the work of each of the assessed SEEs in-depth, the initial observations on these entities, in particular, provide important insights into their functions and normative impact within the international legal framework pertaining to human trafficking.

The article began by articulating the nuanced approach to soft law adopted in the analysis, clarifying the relationship between SEEs and soft law. Then, relevant SEEs were located and classified, with some of their key functions identified. These functions, namely norm creation, norm interpretation, and norm oversight and accountability, were observable to varying degrees in the work of the entities under analysis. Moreover, there appear to be important additional functions, such as the capacity to make connections across typically siloed areas, which is important in a cross-cutting issue such as human trafficking. The analysis that followed provided preliminary findings about the role of SEEs in the anti-trafficking space. The assessment pointed to four key elements of that role, namely: (1) contributing to normative clarity, (2) establishing essential thematic connections between intersecting protection issues, (3) enhancing the capacity of individuals and non-state actors to interact with and influence the direction of international anti-trafficking law, and (4) revealing the limitations of the hard–soft law dichotomy. Across these four aspects of SEE functions were important observations relating to the nuances of normativity in international law. Indeed, these nuances are perhaps nowhere more obvious than in the work of SEEs. The dynamism of international law, too, was on display.

Ultimately, this article serves as a springboard for further research. The initial findings certainly indicate that SEEs are indeed potential sites of progress in the anti-trafficking space. Yet, this potential ought to be approached with an awareness that SEEs cannot do everything. Indeed, Gauci and Magugliani (2022, p. 100) note some of the limitations of SEE mechanisms regarding their potential and actual impact on human trafficking. Moreover, there are risks that with ever more SEEs engaged in the work of interpretation and clarification, confusion and fragmentation may emerge as challenges to address. At the same time, Gauci and Magugliani (2022, p. 100) also claim that "the potential of their [quasi-judicial mechanisms] impact on the improvement of anti-trafficking efforts should not be ignored". Indeed, these concerns and risks in many ways strengthen the need for a greater understanding of the functions of SEEs, their interactions with one another, and their potential or actual impact in practice.

Moving forward, a greater understanding of the precise role, functions, and impact of the individual entities analyzed in this article could be achieved through a more in-depth assessment of their activities and outputs. A useful starting point in this regard would be the UNSRT mandate and GRETA, as these are the two mechanisms dedicated entirely to the thematic focus of human trafficking. A deeper and more thorough interrogation would enable the initial findings to be tested and refined, ultimately arriving at a more complete understanding of how SEEs can impact anti-trafficking law, policy, and practice in the ever-evolving normative landscape. Given the initial indications of promise, this

work is certainly worth undertaking, in order to understand how this promise and progress may indeed be maximized to ensure greater protection of those who most need it.

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Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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