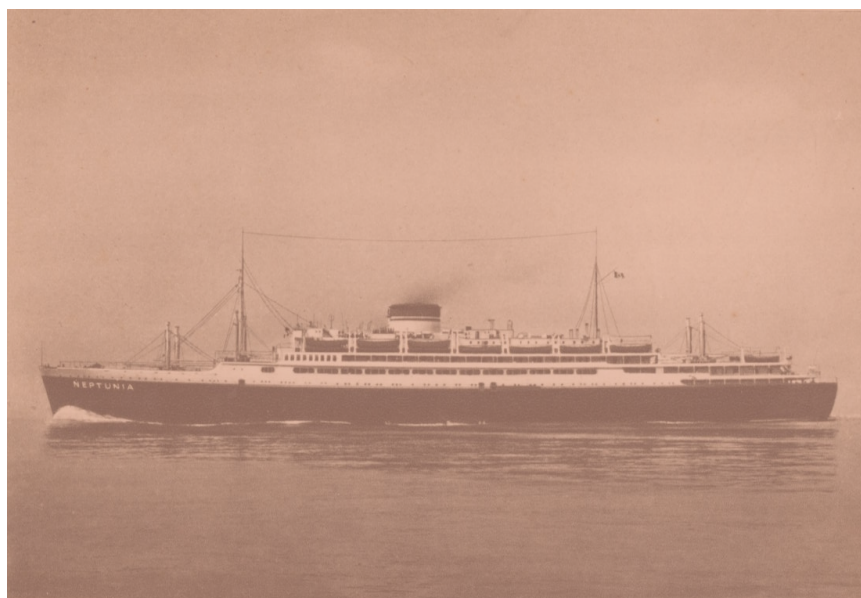


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THE EUROPEAN UNION FIGHT AGAINST TRAFFICKING OF HUMAN BEINGS: CHALLENGES OF THE VICTIM’S STATUTE

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I. INTRODUCTION - II. THE INTERNATIONAL REGULATION OF TRAFFICKING IN HUMAN BEINGS - III. THE INTERNATIONAL DELIMITATION OF THE CRIME OF TRAFFICKING IN HUMAN BEINGS - IV. THE PROTECTION OF THE VICTIM FROM A HUMAN RIGHTS PERSPECTIVE - V. FINAL REMARKS

ABSTRACT: The fight against trafficking in human beings poses several challenges. The introduction of the human rights approach in this area requires victim protection measures. Faced with this challenge, the European Union has opted for the introduction of different measures through Directive 2011/36/EU. This instrument complements the international framework provided by the Palermo Protocol on trafficking and the Warsaw Convention. The study of some of the provisions of these instruments should help to determine whether EU regulation is truly an advance in the protection of victims of trafficking.

KEY WORDS: trafficking in human beings, protection of victims, human rights, European criminal law.

LA LUCHA DE LA UNIÓN EUROPEA CONTRA LA TRATA DE SERES HUMANOS: RETOS DEL ESTATUTO DE LA VÍCTIMA

RESUMEN: La lucha contra la trata de seres humanos plantea numerosos retos. La introducción del enfoque de derechos humanos en este ámbito se traduce en medidas de protección de las víctimas. Ante este reto, la Unión Europea ha optado por la introducción de distintas medidas mediante la Directiva 2011/36/UE. Este instrumento complementa el marco internacional proporcionado por el Protocolo de Palermo sobre trata y el Convenio de Varsovia. El estudio de algunas de las

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disposiciones de estos instrumentos debería contribuir a determinar si la regulación de la UE es verdaderamente un avance en la protección de las víctimas de trata.

PALABRAS CLAVE: trata de seres humanos, protección de las víctimas, derechos humanos, derecho penal europeo

LA LUTTE DE L'UNION EUROPÉENNE CONTRE LA TRAITE DES ÊTRES HUMAINS: UN DÉFI POUR LE STATUT DE VICTIME

RÉSUMÉ : La lutte contre la traite des êtres humains pose de nombreux défis. L'introduction d'une approche des droits de l'homme dans ce domaine se traduit par des mesures de protection des victimes. Face à ce défi, l'Union européenne a opté par introduire de différentes mesures par la voie de la Directive 2011/36 / UE. Cet instrument complète le cadre international prévu par le Protocole de Palerme sur la traite des êtres humains et la Convention de Varsovie. L'étude de certaines des dispositions de ces instruments devrait aider à réfléchir jusqu'à que paut la réglementation de l'UE constitue vraiment un progrès dans la protection des victimes de la traite.

MOTS-CLÉS: traite des êtres humains, protection des victimes, droits de l'homme, droit penal européen

I. INTRODUCTION

Trafficking in human beings (THB) is a crime of extreme gravity, which involves the flagrant violation of human rights. This phenomenon exists fundamentally for two reasons: firstly, because in the States of destination there is a demand for people for exploitation (usually labour or sexual) and, secondly, because it is a highly profitable business for traffickers.

For decades, the main objective of the European Union has been to dismantle the organized crime groups involved in trafficking, although part of the effects did not occur in their territory². Proof of this was the adoption of the EU Strategy for the Eradication of Trafficking in Human Beings³, which provided for the increase of criminal prosecutions through the joint and coordinated work of the Union agencies⁴.

² *Vid.* PÉREZ ALONSO, E.J., "Política legislativa y criminal de la Unión Europea contra la trata de seres humanos", in Mercado Pacheco, P. *et al.*, *Formas contemporáneas de esclavitud y derechos humanos en clave de globalización, género y trata de personas*, Tirant lo Blanch, 2020, pp. 647-678.

³ European Commission, *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*. COM (2012) 286 final, Brussels, 19.06.2012.

⁴ *Vid.* MORENO URPI, A., "Las víctimas de la trata de seres humanos en Europa y la acción de las agencias ELSJ", in Blasi Casagran, C. and Illamola Dausà, M., *El control de las agencias del Espacio de Libertad, Seguridad y Justicia : contrapeso necesario a su autonomía*, Marcial Pons, 2017, pp. 177-190.

Even with partial data, it is estimated that thousands of people are exploited in the EU territory. According to the US State Department, in 2018 a total of 16,838 victims were identified in the European region⁵. The most recent data available to the European Commission on THB victims in the EU correspond to the two-year period 2015-2016. According to this official record, 20,532 people were registered as victims by the authorities of the Member States⁶. Also the number of victims of trafficking from third States continues to grow⁷. The unreliable data is the result of a no-common standardized registration system and the lack of availability of some Member States to share information. Differences between the legal definitions of the member States, confusion or concealment of trafficking among other crimes are also contributing to the error in data collection⁸.

Between 80% and 65% of registered victims are women, while between 20% and 35% are men. Sexual exploitation affects 95% of women, as opposed to labour exploitation, which in 71% involves male victims⁹. Of the total amount of registered victims, 17% are children between 12 and 17 years old, while almost 3% were less than 11 years old¹⁰.

These data mainly point to two facts: on the one hand, trafficking undeniably has a gender component; on the other, not only the dismantling

⁵ US Department of State, *Trafficking in Persons Report*, June 2019, p. 51. Available in <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> [checked on 15.01.2020].

⁶ In this sense, *vid.* EUROPEAN COMMISSION, *Data collection on trafficking in human beings in the EU. Final report – 2018*, Publications Office of the European Union, 2018, p.34. In the earlier three-year period 2010-2012, Eurostat indicated that a total of 30,146 people were registered as victims of trafficking in human beings by the authorities of the Member States, *vid.* EUROSTAT, *Trafficking in Human Beings. Statistical working papers*. Publications Office of the European Union, 2015, p. 15.

⁷ It is estimated that during the 2015-2016 period the 56% of the registered victims in the EU were a third State national, *vid.* European Commission, *Data collection on trafficking in human beings...*, *op. cit.*, p.80.

⁸ EUROPOL, *Trafficking in Human Beings in the European Union*, Den Haag, 2011, p. 3 and EUROJUST, *Strategic project on Eurojust's action against trafficking in human beings*, Den Haag, 2012, p. 27.

⁹ EUROPEAN COMMISSION, *Data collection on trafficking in human beings... cit.*, p.65.

¹⁰ EUROSTAT, *Trafficking in Human Beings... cit.*, p. 10.

of organized groups is required, but the adequate protection of victims is necessary, especially children.

The human rights approach broke into the fight against trafficking at the beginning of this century. Such appearance in the context of the United Nations has as a result its inclusion in other international instruments in the European regional sphere.

Although this regulatory framework is not particularly novel, the fight against trafficking has not ended and poses challenges especially regarding the protection of victims. Even if some references will be made, it is not the object of the present work to examine the progress in the prosecution of the crime¹¹, nor to analyze the doctrine of the ECtHR on the interpretation of Article 4 of the ECHR. This paper aims to analyse the extent to which respect the statute of the THB victim in the European Union's territory from a human rights perspective. To this end, the victim protection measures contained in the THB Palermo Protocol, the Warsaw Convention and the Directive 2011/36/EU will be compared. Such analysis will be preceded by the study of the definition of the crime, as well as the delimitation of the concept of the victim of trafficking in human beings. This will attempt to determine whether EU regulation is truly an advance in the protection of victims of trafficking from a human rights perspective.

II. THE INTERNATIONAL REGULATION OF TRAFFICKING IN HUMAN BEINGS

Trafficking in human beings has been subject to international regulation in different instruments based on a clearly criminal approach¹². Although with the main objective of the fight against crime, the 2000 UN Convention

¹¹ Regarding this issue *vid. inter alia* SANCHEZ DOMINGO, M.B. "Prevención y lucha contra la trata de seres humanos en el Derecho penal" in Jimeno Bulnes, M., *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, JM. Bosch, 2016, pp. 347-392; JORDANA SANTIAGO, M., *La lucha contra la trata en la UE: los retos de la cooperación judicial penal transfronteriza*, *Revista CIDOB d'Afers Internacionals*, 111, 2015, pp. 57-77.

¹² A detailed analysis of these instruments could be found in ALLAIN, J., *The Slavery Conventions. The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff Publishers, 2008, pp.52 *et seq.*

against Transnational Organized Crime and its Protocols¹³ incorporates timid references to the treatment that must be provided to the victims. In fact, the THB Palermo Protocol¹⁴ is considered a key step towards the introduction of the human rights perspective since it includes protection and assistance to the victims. However, its provisions are far from having mandatory content. The proposals emerged in the context of the United Nations have had an important impact on regulation at European regional level, with the adoption of instruments of a marked victim-centric character¹⁵.

Within the framework of the Council of Europe, the fight against THB is based on the Council of Europe Convention on the fight against trafficking in human beings (hereinafter the Warsaw Convention)¹⁶. But it also should be added that an extensive interpretation of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms has allowed the European Court of Human Rights (hereinafter, ECtHR) to condemn the failure of Member States to comply with trafficking victims¹⁷. Indeed, according to the ECHR, trafficking issues fit into Article 4 of the European Convention of Human Rights prohibiting slavery and servitude¹⁸.

¹³ *Vid.* Resolution A/RES/55/25 adopted by the United Nations General Assembly, 15 November 2000. Available at <https://undocs.org/en/A/RES/55/25> [checked on 15.09.2019].

¹⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, Annex II, A/RES/55/25... *cit.*

¹⁵ Despite the well-known mainstreaming approach of human rights, many international instruments in the criminal field still do take in consideration few aspects related to human rights protection, in this regard *vid.* REINA PEÑAS, M., “Análisis del fenómeno de la trata de personas desde la perspectiva de los derechos humanos”, *Revista de las Facultades de Derecho y Ciencias Económicas y Empresariales- ICADE*, 107, 2019; and MILANO, V., “Protección de las víctimas de trata con fines de explotación sexual: Estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España”, *Revista Electrónica de Estudios Internacionales*, 32, 2016, p.6 *et seq.*

¹⁶ *Convention n. 197 on Action against Trafficking in Human Beings and its Explanatory Report*. Signed in Warsaw, 16 May 2005. Known as the Warsaw Convention.

¹⁷ *Vid.* MORENO URPI, A., “La acción judicial y la modelación de la definición de la trata de seres humanos: ¿Esclavitud moderna o fenómeno con entidad propia? Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos *Rantsev v. Chipre y Rusia*”, *La creación judicial del Derecho y el diálogo entre jueces*. Universidad Autónoma de Barcelona, 2017.

¹⁸ In this sense, *vid.* *Siliadin v. France*, 26 July 2005 (73316/01); *Rantsev v. Cyprus and Russia*, 7 January 2010 (25965/04) also; *Chowdury and others v. Greece*, 20 March 2017 (21884/15). A

The Warsaw Convention proposes to “strengthen” and “develop” the protection provided by the United Nations framework¹⁹, making a clear reference to the THB Palermo Protocol²⁰. As will be shown in the next sections, the Warsaw Convention characterizes by incorporating a considerable number of provisions focused on the protection of victims²¹. This means that this instrument addresses trafficking from a double perspective: criminal law and human rights. Thus, States parties must necessarily take into account the rights of the victims in actions related to persecution, prevention and protection²².

The regulation of trafficking in human beings in the context of the EU was mainly the subject of immigration and asylum policy²³ and the fight against serious crime framework. Since the last century nineties, there was an agreement in the EU on the need to deepen the fight against trafficking, proof of this is the adoption of the Common Action 97/154/JHA²⁴. The strengthening of the Amsterdam Treaty and the impulse of Tampere contributed decisively to

critical analysis with the ECHR jurisprudence is found in GALLAGHER, A., *The International Law of Human Trafficking*, Cambridge University Press, 2010, p.187 *et seq.*; and VAN DER WILT, H., “Trafficking in Human Beings: A modern form of slavery or a transnational crime?”, *ACIL Research Paper*, 07, 2014, p.12 *et seq.*

¹⁹ Preamble, par. 12.

²⁰ *Vid.* Article 39 Warsaw Convention, which establishes a relationship of subordination and complementarity with the Palermo Protocol.

²¹ GALLAGHER, A., “Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments”, *European Journal of Migration and Law*, 8, 2006, pp.163-189, p.174.

²² *Vid.* RAFFAELLI, R., “The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive and the Italian Experience”, *German Law Journal*, 10, 3, 2009, pp.205-222, p.212.

²³ Indeed, several political programs place the fight against trafficking in the context of migratory flow management, see, for example, Chapter IV of the Tampere Council Conclusions. The link between trafficking and migration flows is not original, and follows the approach chosen in the context of the United Nations. This issue is analyzed in GEDDES, A., “Getting the best of both worlds? Britain, the EU and migration policy”, *International Affairs*, 81, 2005, pp.723-740, p.732 *et seq.*

²⁴ Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children. *Official Journal* L63, 04.03.1997, p. 2.

the production of a variety of legal acts in the area of criminal prosecution²⁵. A paradigmatic case of this trend is the Framework Decision 2002/629/JHA on trafficking in human beings²⁶.

During the last decade of the 20th century, the fight against trafficking was configured as an essential objective for the achievement of the EU Area of Freedom, Security and Justice. In this line, THB was identified as an “euro-crime”, a fact that in practice considerably facilitated its criminal prosecution in the Union²⁷.

In fact, with the Lisbon Treaty entry into force, THB was included among the crimes that due to their seriousness and cross-border nature entail “the need to combat them with common criteria” (Article 83 TFEU). In line with this idea, the Stockholm Program encouraged the Commission to begin the revision of the Framework Decision, a process that ended with the adoption of Directive 2011/36/EU on combating trafficking in human beings²⁸. These regulation establishes minimum rules on crimes, penalties and prevention of trafficking. In addition, as noted in its preamble, the Directive attempts to introduce a comprehensive and respectful approach to human rights²⁹. Before deepening into the content of the Directive from this perspective, it

²⁵ The eminently criminal approach of the instruments of that moment is highlighted in VILLACAMPA ESTIARTE, C., “La nueva directiva europea relativa a la prevención y a la lucha contra la trata de seres humanos y a la protección de las víctimas. ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?”, *Revista electrónica de Ciencia Penal y Criminología*, 14, 2011, pp.1-52. The THB phenomenon from a penal perspective is analysed in ZUÑIGA, L., “Trata de Seres Humanos y criminalidad organizada transnacional: problemas de política criminal desde los derechos humanos”, *Estudios penales y criminológicos*, 38, 2018, pp.361-408.

²⁶ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings. *Official Journal* L203, de 01.08.2002, p. 1.

²⁷ VAN SLIEDREGT, E., “The dual criminality requirement”, in KEIJZER, N., and Van Sliedregt, E. (eds.), *The European Arrest Warrant in practice*, T.M.C. Asser Press, 2009, p. 51-70, p. 52.

²⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. *Official Journal* L101, 15.04.2011, p. 1.

²⁹ *Vid.* SANTANA VEGA, D., “La Directiva 2011/36/UE, relativa a la prevención y lucha contra la trata de seres humanos y la protección de las víctimas: análisis y crítica”, *Nova et Vetera*, 20, 64, 2011, pp.211-226.

is necessary to define the THB phenomenon and also state who deserves the status of victim and the challenges that it entails for the EU members.

III. THE INTERNATIONAL DELIMITATION OF THE CRIME OF TRAFFICKING IN HUMAN BEINGS

The definition of trafficking in human beings is not a simple task - due to the complexity of the phenomenon - and sometimes it raises important academic debates³⁰. As noted, THB has been the subject of several international legal instruments³¹. The THB Palermo Protocol contains a broad definition of trafficking.

Indeed, according to Article 3 of the Protocol, trafficking in persons shall consist of “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. This shall include, at a minimum, “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. Ergo, this instrument defines trafficking based on three elements: action, means and exploitation. These elements, with some nuances, are shared by the Warsaw Convention and the Directive 2011/36/EU. In fact, both regional instruments state in their preambles the will to complete the international legal framework. This must not be surprising

³⁰ *Vid. inter alia*, SCARPA, S., *Contemporary forms of Slavery*. Study of the European Parliament, 2018; ALLAIN, J., *The Law and Slavery*. Martinus Nijhoff, 2015; VILLACAMPA ESTIARTE, C., *El delito de trata de seres humanos. Una incriminación dictada desde el derecho internacional*. Cizur Menor, Thomson-Aranzadi, 2011; SCARPA, S., *Trafficking in Human Beings: Modern Slavery*. Oxford University Press, 2008. On the historical evolution of the need to regulate the trafficking of human beings and the doctrinal discussion around the definition of this phenomenon, *vid. GALLAGHER, The International Law... cit.*, pp. 12 *et seq.*

³¹ Regarding the trafficking on human beings' international definition *vid. BADIA MARTÍ, A.*, “Noción jurídica internacional de la trata de personas, especialmente mujeres y niños”, in Vargas Gómez-Urrutia, M.; Salinas De Frías, A., (coords.), *Soberanía del Estado y derecho internacional: homenaje al profesor Juan Antonio Carrillo Salcedo*, Universidad de Córdoba - Universidad de Málaga, 2005, pp.177-197; see also ROTH, V., *Defining Human Trafficking and Identifying Its Victims*. Martinus Nijhoff, 2012.

since the THB Palermo Protocol formulates a definition of trafficking that has high international support³². Thus, the Warsaw Convention reproduces almost literally in its Article 4(a), the definition provided by the THB Palermo Protocol. However, there are few differences that should be highlighted.

Firstly, Article 4(b) adds a reference to the irrelevance of the victim's consent when any of the means stated is used. In line with the Protocol, children special protection translates into the irrelevance of the child's consent. Secondly, the Warsaw Convention does not define exploitation, but indicates that this "shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs". Thus the Convention exemplifies with a clearly list of minimums that allows other behaviours to subsume in the purpose of trafficking. It also should be added that, in the ECtHR opinion, in certain circumstances the consent of the victim is not enough to rule out a violation of their rights³³. This interpretation opens avenues for questioning the lack of consent as an essential element of trafficking. In addition, it completes the human rights approach of the Warsaw Convention.

With regard to the EU, trafficking in human beings is explicitly prohibited in the Charter of Fundamental Rights of the European Union where, according to Article 5(3), it is considered a form of slavery. In line with the THB Palermo Protocol, the Directive 2011/36/EU adopts another THB concept, pointing the idea that slavery is another form of trafficking³⁴.

In line with the provisions of Article 3 of the THB Palermo Protocol, the EU considers that trafficking consists of three distinct phases. First, the phase of capturing victims in which deception, coercion and even abductions can be used. Second, the phase of transfers that, in transnational cases, requires the

³² Nowadays the Protocol deals with 175 ratifications, including those of the EU Member States, *vid. United Nations Treaty Collection*. Available in <https://bit.ly/2I751Ea> [Checked on 11.09. 2019].

³³ *Vid. ECHR, Van der Müsselle v. Bélgica*, 23 November 1983, 8919/80.

³⁴ Differences in fit between trafficking and slavery show a lack of coherence and in the case of the Directive entails the reduction of the seriousness of the crime of trafficking, in this regard *vid. ORTEGA, M., "La trata de seres humanos en el derecho de la Unión Europea"*, in Donaire, F.J. and Olesti, A. (coords.), *Técnicas y ámbitos de coordinación en el espacio de libertad, seguridad y justicia*. Marcial Pons, 2015, pp. 181-196, p. 188.

introduction of the victims in a State other than the State of origin. Thirdly, the exploitation phase in which the victim is subjected to the lucrative activity for the organization and which different relocations of the victim can occur. Occasionally, a fourth phase is added in which the economic benefits are laundered, this includes crimes of tax evasion, or the financing of other lawful activities.

Given its nature, the Directive seeks an approximation of legal systems through the establishment of common standards. This results into the requirement to criminalize trafficking in the criminal laws of the Member States. Thus, Article 2 of the Directive suggests that Member States should take measures to ensure the punishment of trafficking. As in the Council of Europe, the definition of trafficking in the Directive reproduces almost literally the THB Palermo Protocol. However, the review carried out by the European Commission on the transposition of the Directive shows that there is still a need to improve the classification of trafficking in national laws³⁵, for example, some of the Member States do not include all means (abduction, fraud, abuse of power, etc.) in its definition of trafficking³⁶.

Also, there are some nuances that should be brought up in the context of the EU. First, the transnational factor is not considered as a necessary element in all the studied definitions. Victims of trafficking do not always cross borders,

³⁵ Regarding to the introduction of the EU Directive in the Spanish legislation see *inter alia* GONZÁLEZ TASCÓN, M., “La lucha de la Unión Europea contra la trata de seres humanos y sus repercusiones en la legislación penal espanyola”, in Andrés Sáenz de Santamaría, P., *Una contribución a la europeización de la ciencia jurídica: Estudios sobre la Unión Europea*, Civitas, 2019, pp. 451-484; VILLACAMPA ESTIARTE, C., “El delito de trata de seres humanos en derecho penal español tras la reforma de 2015”, in PÉREZ ALONSO, E.J. *et al.*, *El derecho ante las formas contemporáneas de esclavitud*, Tirant lo Blanch 2017, pp. 447-467; DE LA MATA BARRANCO, N. J., “Delitos de trata de seres humanos y contra la inmigración ilegal, y contra la libertad de indemnidad sexual”, in De la Cuesta Arzamendi *et al.*, *Adaptación del derecho penal español a la política criminal de la Unión Europea*, Aranzadi, 2017, pp. 183-220; and DELGADO SANCHO, C.D., “La trata de seres humanos y la inmigración clandestina tras la reforma de la Ley orgánica 1/2015”, *Revista Aranzadi Doctrinal*, 8, 2017, pp. 253-271; Gómez López, I. and Muñoz Sánchez, E., “Algunas cuestiones en torno al delito de trata de seres humanos en el ordenamiento jurídico espanyol”, *Cuadernos de política criminal*, 123, 2017, pp. 213-246.

³⁶ *Vid.* European Commission, *Report from the Commission to the European Parliament and the Council, assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combatin trafficking in human beings and protecting its victims in accordance with Article 23(1)*. Brussels, 2.12.2016, COM (2016)722final, p.3 *et seq.*

since they can be exploited in their country of origin. However, it should be noted that in the EU a considerable number of victims of trafficking cross some border. Certainly, it is not easy to find a case in which at least one internal border is not crossed, either legally or illegally. Transnationality can occur both during the recruitment phase and during the exploitation phase, in which the movement of victims through different EU countries is common.

Second, although the main purpose of trafficking is the victim's exploitation, it does not prove to be an essential element for certain facts to be classified as traffic-related infractions.

Article 2(3) of the Directive indicates that exploitation consists "at a minimum" of different forms of sexual exploitation, labour or forced services. The data collected in the EU shows that this enumeration is not accidental. In fact, about 56% (65% without the United Kingdom) of the victims suffer sexual exploitation (street prostitution, prostitution in red light districts or brothels, strip clubs and bars, pornographic industry, escorts or saunas, among others), 26% (20% without the United Kingdom) are subjected to forced labour (agriculture, construction, textile, hospitality and fishing sectors stand out) and 18% are forced to exercise other types of exploitation (begging, domestic work, criminal activities, organ removal, etc.).³⁷

A *numerus apertus* in Article 2(3) contributes to the fit of all trafficking practices in the concept of exploitation. In fact, Directive 2011/36/EU points out that there must be a certain spirit or intent to exercise exploitation of the victim. Article 3 emphasizes the extensive criminalization of all participants in the trafficking process, recognizing as criminal practice "induction, complicity or attempt". This is a strong point of the Directive since it forced its inclusion in some State regulations which have been remained silent.

Finally, the Directive addresses the issue of consent in a similar manner to the Warsaw Convention. It is based on the idea that in the cases of trafficking there is no consent of the victim or is subject to error due to the use of certain means. And, in the case of minors, only the mood to exploit is taken into account. It is true that sometimes the victim of trafficking may have shown initial consent. For example, the practice confirms that many of non-EU citizens start their itinerary by hiring the services of criminal groups without

³⁷ For the period 2015-2016, *Vid.* European Commission, *Data collection on trafficking in human beings... cit.*, p. 18, for the 2010-2012 triennium *vid.* EUROSTAT, *Trafficking in Human Beings... cit.*, p. 30.

being aware that they will become victims of trafficking when they arrive at their destination³⁸. Both in this and in other situations, the initial consent loses its full value due to coercion, deceit or abuse by traffickers.

To recapitulate, the examined regional instruments reproduce the definition of trafficking agreed in the context of the United Nations and embodied in the THB Palermo Protocol. Both the Warsaw Convention and the EU Directive introduce some nuances to the definition containing several open enumerations. This option allows to subsume very different behaviours under the phenomenon of trafficking, contributing to eliminate impunity and lack of protection of the victims. The importance of a sufficiently flexible, but at the same time, detailed definition of trafficking is crucial mainly due to the complexity of the crime.

Indeed, depending on the *modus operandi* of a criminal organization, trafficking can be hidden and not prosecuted. In fact, trafficking is not conceived as an isolated crime but as a process³⁹ or a chain crime⁴⁰ that consists of different phases that may constitute more than one crime depending on the complexity of the carried out activities. Thus, it is common for the trafficking commission to also perpetrate related crimes such as: rape or sexual abuse, injury, forced abortion, child pornography, torture, murder, kidnapping, forced marriage, retention of documentation, labour exploitation and even corruption. On certain occasions this leads to confusion with the commission of certain crimes. For instance, there are frequent confusions between trafficking and smuggling of people⁴¹. And in fact, not all EU Member States regulations clearly differentiate between these crimes when the victims are irregular immigrants⁴². As will be seen in the next section, the concealment

³⁸ FRONTEX, *Annual Risk Analysis*. Warsaw, 2012, p. 32.

³⁹ GARCÍA VÁZQUEZ, S., “Inmigración ilegal y trata de personas en la Unión Europea: la desprotección de las víctimas”, *Revista de Derecho Comunitario Europeo*, 10, 2008, pp. 231-274, p. 236.

⁴⁰ ORTEGA, M., “La trata de seres humanos...” *cit.*, p. 186.

⁴¹ DÍAZ BARRADO, C.M., “La lucha contra la trata de seres humanos en la UE: los componentes para una política propia”, *Revista de Derecho Comunitario Europeo*, 45, 2013, p. 461-498, p. 467.

⁴² GUILD, E., “Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings”, in GUILD, E. and MINDERHOUD, P. (eds.), *Immigration and criminal law in the European Union*, Martinus Nijhoff, 2006, pp. 1-7, p. 3.

of trafficking contributes to the difficulties in identifying victims, even for assistance services or criminal prosecution bodies⁴³.

IV. THE PROTECTION OF THE VICTIM FROM A HUMAN RIGHTS PERSPECTIVE

Having examined the definition of trafficking in the international instruments chosen, the study of the victim's definition and the measures proposed for their protection could be interesting. The analysis of these measures will contribute to identify the challenges of protection from a human rights perspective.

In the case of the Council of Europe Convention, the term "victim" corresponds to a "natural person subject to trafficking in human beings". That is, returning to the above, a person who is subject to exploitation due to the use of means such as threats, coercion, abduction, deceit, abuse of power or its vulnerability.

The Directive makes numerous references to the victims in its text, but does not include its definition. However, in its preamble it refers to the definition of victim contained in Framework Decision 2001/220/JHA⁴⁴ on the status of the victim in criminal proceedings, which was been replaced by Directive 2012/29/EU⁴⁵. According to these provisions, the victim will be any natural person who has suffered some damage, in special physical or emotional injuries, but also economic damage, both by action and by omission against State criminal legislation⁴⁶. Unlike the other international instruments, the EU framework explicitly recognizes as victims the relatives "of a person whose death has been directly caused by a crime and who has suffered damage or injury as a result of the death of said person"⁴⁷. The definition provided by this

⁴³ GARCÍA VÁZQUEZ, S., "Inmigración ilegal y trata..." *cit.*, p. 235.

⁴⁴ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. *Official Journal* L82, 22.03.2001, p. 1.

⁴⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. *Official Journal* L 315, 14.11.2012, p.57.

⁴⁶ A detailed analysis of the victim's figure is available in LLORENTE SÁNCHEZ-ARJONA, M., "Las víctimas en el espacio judicial europeo: estudio de la Directiva 2012/29/UE, de 25 de octubre de 2012", *REJ – Revista de Estudios de la Justicia*, 22, 2015, pp.119-141.

⁴⁷ *Vid.* Article 1(a) Directive 2012/29/UE.

framework is complemented by Article 2(2) of Directive 2011/36/EU, which specifies that in the case of THB victims the vulnerability is associated with the inexistence of a “real or acceptable” alternative to the abuse submission. In cases where the victim is a child (less than 18 years of age), the Directive only requires the spirit of exploitation regardless of the means used or the situation of vulnerability of the victim.

1. The identification of the victim

The correct identification of the victims is essential to ensure the respect for human rights in the fight against trafficking. In fact, the importance of victim identification stands out in both persecution and protection. From the point of view of criminal prosecution, another dimension is added to the importance of detecting the victims: in most cases these victims are witnesses of illicit actions and, therefore, are a key piece for the conviction of the traffickers. In some cases of trafficking the victim's identification is really complicated⁴⁸, since their exploitation situation can be confused or involve some criminal activity⁴⁹. On other occasions, the same exploitation consists in forcing victims to commit crimes⁵⁰.

The experience of the European Union agencies shows that there are considerable difficulties for the early identification of victims, especially before the exploitation phase begins. The identification of victims of trafficking entails an additional challenge in border control⁵¹, since the appearance of many of the trafficking indicators become effective once within the EU territory, in addition,

⁴⁸ *Vid.* MENESES FALCÓN, C., “¿Por qué se identifican tan pocas víctimas de trata de seres humanos?” *Revista de las Facultades de Derecho y Ciencias Económicas y Empresariales- ICADE*, 107, 2019; and CABRERA RODRÍGUEZ, E., “La trata de seres humanos con fines de explotación sexual. La detección e identificación de las víctimas”, *Revista de derecho y proceso penal*, 45, 2017, pp. 97-115.

⁴⁹ *Vid.* VILLACAMPA ESTIARTE, C. and TORRES ROSELL, N., “Trata de seres humanos para explotación criminal: Efectos sufridos por las víctimas a su paso por el sistema de justicia penal”, in Mercado Pacheco, P. et al., *Formas contemporáneas de esclavitud y derechos humanos en clave de globalización, género y trata de personas*, Tirant lo Blanch, 2020, pp. 731-758.

⁵⁰ These kind of practices usually occur when there are minors involved. In these cases, the most widespread behaviors are to force them to commit different crimes against property, such as robbery or theft, or to exploit them in cannabis plantations in urban flats, *vid.* EUROPOL, *Child trafficking for exploitation in forced criminal activities and forced begging*. Den Haag, 2014, p. 2.

⁵¹ In this sense it is interesting the discussion in SCHERRER, A., *Detecting and protecting victims of trafficking in hotspots. Ex-post evaluation*. European Parliamentary Research Service, 2019.

potential victims are not aware of their real situation⁵². Studies of the European Migration Network⁵³ show that the request for help from victims to the State authorities is rare. This is due to several reasons, such as the intensive control that traffickers exercise over them, the lack of self-perception as a victim even when the exploitation phase has been initiated, the lack of knowledge of the language of the country, the fear of being identified as irregular and be deported, the ignorance of their rights, among others.

Victim identification should be understood as the first step to an effective protection. The THB Palermo Protocol is silent on this matter. However, the Legislative Guide on the Protocol points to the need for States to establish a concrete process for this purpose⁵⁴. Regarding the regional framework, Article 10 of the Warsaw Convention turns out to be really detailed and points out the compulsory nature of different measures. Thus, the obligation to identify translates into adequate training in identification and support for all those civil servants who can interact with potential victims. Also, it points to the necessary coordination between authorities involved and of these with civil society organizations. In addition, the Convention explicitly prohibits the expulsion of a person during the identification process when there are suspicions of trafficking, referring to the possibility of issuing residence permits for this purpose. Finally, specific measures are established in the event that there is an unaccompanied minor susceptible to being a victim of trafficking.

The Directive 2011/36/EU points to the adoption of measures to “establish appropriate mechanisms aimed at early identification, assistance and support to victims, in cooperation with the relevant support organizations” without further details. However, the preamble of such Directive points out that these measures basically consist in the training of all those civil servants who can interact with the possible victims⁵⁵. Thus, the Directive leaves the choice and concretion of the measures to the States. In this way, there is a risk that some States only comply

⁵² FRONTEX, *Situational Overview on Trafficking in Human Beings*. Warsaw, 2011, p. 6, also FRONTEX, *Annual Risk Analysis*. Warsaw, 2012, p. 32.

⁵³ EMN, *Identification of victims of trafficking in human beings in international protection and forced return procedures (synthesis report)*. European Migration Network Study, 2014, p. 20 *et seq.*

⁵⁴ *Vid.* UNODC, *Guía legislativa para la aplicación del Protocolo para prevenir, reprimir y sancionar la trata de personas, especialmente mujeres y niños*, 2004, par. 64. Available in https://www.unodc.org/tldb/es/legislative_guides.html [Checked on 25.09.2019].

⁵⁵ *Vid.* Recital 25, Directive 2011/36/UE.

with a minimum scenario and therefore get a really lack effective system for the identification⁵⁶. As indicated above, failure to identify means not assuming the obligation to protect victims and carries out the risk of violation of their rights.

2. The adoption of protective measures

Once a victim has been identified, or when there is reasonable suspicion, the obligation of the State should be to provide protection and assistance, refrain from violating their rights and avoid the secondary victimization.

Although, Article 6 of the THB Palermo Protocol, points to the need for measures, assistance and protection in general terms, the European regional scope is more concrete. Thereby, the obligation to protect implies the adoption of certain measures for the recovery of the victim, measures linked to the criminal judicial process, together with measures for compensation⁵⁷.

According to Article 12(1) of the Warsaw Convention, the recovery of the victim requires an approach that provides physical recovery, but also psychological and social recovery. First, this translates into a set of measures such as immediate medical assistance, the assistance of an interpreter or translator, a safe place to live, the assurance of education for children, or legal advice about their rights and possible legal actions to be taken. Secondly, the measures should be aimed at access to the labor market, training and ensuring non-urgent medical assistance⁵⁸. Such measures shall apply as soon as it is suspected to be a victim of trafficking. In this regard, it should be noted that Article 13(1) of the Warsaw Convention indicates that the measures will be activated for “reasonable grounds”, while Article 11(2) of the Directive points

⁵⁶ In fact, the Commission insists that States should make more efforts to identify victims early and correctly, *vid.* European Commission, *Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims*, Brussels, 3 December 2018, COM(2018)777 final, p.9.

⁵⁷ *Vid.* TORRES ROSELL, N. and VILLACAMPA ESTIARTE, C. “Protección jurídica y asistencia para víctimas de trata de seres humanos”, *Revista General de Derecho Penal*, 27, 2017.

⁵⁸ When the victim is the child, a set of specific measures is established, such as the appointment of a guardian, or the access to education. Further details about this regime in GÓMEZ FERNÁNDEZ, I. and PÉREZ GONZÁLEZ, C., “La protección de los menores de edad víctimas de trata de seres humanos: derecho internacional, europeo y español”, in Alcácer Guirao, R., Martín Lorenzo, M. and Valle Mariscal De Gante, M. (Coords.), *La Trata de seres humanos: persecución penal y protección de las víctimas*, Dykinson 2015, pp. 223-263.

to “reasonable evidence”. It is feasible to suspect that the choice of these words is not accidental. In any case, having “evidence” connotes more solid probation. Be that as it may, the measures should contribute to the stability of the victim during the “period of restoration and reflection”. Although reference is made to a period unit, based on the obligation to protect the victim, a reflection should not be accepted without having achieved the restoration.

Taking into account the experiences suffered by the victims, the establishment of insufficient and, in any case, relatively short periods (of at least 30 days in the Convention and 90 days in the Directive) could be easily criticized, forcing the need for extensions. According to Article 11 of the Directive, victims of trafficking must receive support and protection before, during and after the criminal proceedings against their exploiters have been completed. Beyond being disturbing the appearance of the “assistance-criminal prosecution” tandem, the development and vagueness of some of the provisions of such Article are not without controversy⁵⁹.

First, the Directive does not specify how long after the sentence the victims should be assisted. Since reference is only made to “an adequate period of time”, the duration of the period of protection may vary considerably depending on the entity that decides and the criteria that said body uses for its determination. Secondly, the adequacy of the period of time is related to the exercise of rights intimately linked to the criminal process such as legal assistance, information on legal actions or interpretation. Therefore, after the criminal process is over, continuing to provide support to the victim is a discretionary decision of each Member State. Thirdly, Directive 2011/36/EU states that support for the victim must be unconditional, since it must be provided regardless of whether it decides to collaborate with the investigations or intends to testify at a trial. However, the explicit reference to Directive 2004/81/EC⁶⁰ poses difficulties of interpretation, since such regulation offers the possibility of obtaining residence to those victims who decide to cooperate

⁵⁹ GROMEK-BROC, K., “EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?”, *Nove et Vetera*, vol. 20, 64, 2011, pp. 227-238, p. 232.

⁶⁰ 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. *Official Journal* L26, 06.08. 2004, p. 19.

with the judicial authorities⁶¹. In this regard, the Warsaw Convention establishes that, after the restoration and reflection period is over, the victim can obtain a temporary residence permit both for reasons of cooperation with the criminal investigation, or for reasons related to their personal situation.

In this way, the Warsaw provisions point to a concrete and more favourable solution than the Directive. As Eurostat pointed out at the time⁶², there is no concrete or reliable data on how many residence permits are granted to victims of trafficking in application of the Directive 2004/81/EC. But it is confirmed that this instrument is often discarded due to the possibility of requesting asylum according the Refugees Convention, as it offers higher expectations to the victims of staying regularly in the EU territory. More recent data submitted by the Commission does not allow to be conclusive on this point. Since only information on 6 Member States is available. These data show that 15% of the victims had a period of reflection, that about 5% obtained a residence permit in application of Directive 2004/81/EC and that 1% sought international protection⁶³.

Far from obtaining a residence permit and in the absence of other adequate protection measures⁶⁴, the victims of trafficking can be finally expelled from the EU territory due to their irregular status. The victim's protection should entail the essential requirement of voluntariness for repatriation. In any case, the human rights approach means that the return of victims of trafficking in human beings should be carried out under security standards. Although with reluctance of some of the negotiating States⁶⁵, Article 8 of the THB Palermo Protocol indicates that repatriation should be voluntary and safe. Surely in many cases the repatriation of the victim is not the most advisable measure, especially because of the risk of falling again into the exploitation or for humanitarian reasons. But also due to the little rootedness in the State of origin or in which the victim has his permanent residence permit.

⁶¹ *Vid.* VILLACAMPA ESTIARTE, C., "La nueva Directiva europea..." *cit.*, pp. 13 *et seq.*

⁶² EUROSTAT, *Trafficking in Human Beings...* *cit.*, p. 45.

⁶³ *Vid.* European Commission, *Data collection on trafficking in human beings...* *cit.*, p. 47.

⁶⁴ HEINRICH, K. H., "Ten year after the Palermo Protocol: Where are protections for human trafficking victims?", *Human Rights Brief*, 18, 1, 2010, pp.2-5, p.3.

⁶⁵ *Vid.* GALLAGHER, *The International Law of...* *cit.*, p.339.

In the European context, the debate on non-voluntary repatriations is not definitively closed. The Warsaw Convention suggests that the return should be “preferably” voluntary⁶⁶ and emphasizes that returns should respect the dignity of the victim. In the case of the EU, as indicated by Article 13(2) of Directive 2008/115/EC, after the temporary residence permit has ended, victims in an irregular situation are subject to the immigration regime and therefore their expulsion is feasible⁶⁷.

Another group of measures is activated during the judicial process. On the one hand, measures related to access to information and assistance aimed to allowing their opinions and concerns to be examined at different stages of the process. On the other hand, measures to ensure the privacy and confidentiality of the identity of the victim during legal proceedings.

Whether a human rights approach is chosen, protection should necessarily precede persecution. A strong point of the European Directive is the introduction of this perspective by including a clause of non-persecution of victims who have been forced to participate in illegal activities. Although this provision represents an obvious breakthrough, its content is timid and raises some issues that should be amended if the protection of victims is really sought. In the first place, it entails the obligation of the Member States to legislate so that their authorities “can opt” not to judge or condemn the victims. Leaving a wide margin of discretion could eventually lead to remote protection regimes between the different Member States. Second, the Directive does not prohibit the detention of victims. This circumstance makes difficult for the victims to be treated as such, but it also generates distortions in the victim’s self-perception as such or reaffirms their misperception. For example, in some cases victims are perceived as immigrants who must pay a debt to their facilitators. In this context, victims often become members of the trafficker criminal group, assuming control and exploitation of other victims. In other cases, the criminal groups themselves involve the victim sharing a small part of the incomes, a fact that implies that they are self-perceived as

⁶⁶ Council Of Europe, *Informe explicativo sobre el Convenio del Consejo de Europa sobre la lucha contra la trata de seres humanos CETS 197*, 2005, p.32.

⁶⁷ ORTEGA GÓMEZ, “La trata de seres humanos (...)” *cit.*, p.191-192.

accomplices⁶⁸. All these practices increase the likelihood that victims do not want to cooperate with the authorities⁶⁹.

The Directive also contains a set of specific measures for the protection of children⁷⁰. Such measures may consist of the appointment of a guardian or legal representative, assistance to the family members of the minor residing in EU territory, the appointment of a representative in the procedures in which the parents may be involved in the exploitation, among others. The report on the transposition of the Directive shows a more than improvable scenario. Indeed, the Commission notes that only six Member States contain specific measures for the protection of minors. Other Member States limit the application of specific measures to those under 14 years of age, obviating that the definition provided by the Directive establishes the limit of 18 years and, in addition, remarks that in case of not knowing the age the minority must be presumed. The need for a good transposition of these provisions is evident, especially if one takes into account that many of the girls who suffer trafficking in the territory of the Union are between 15 and 17 years old⁷¹.

Finally, a brief reference to the measures for compensation for the damages suffered by victim should be made. The THB Palermo Protocol does not establish a specific obligation on this regard. In fact, Article 6 is limited to pointing out that certain provisions should be included in member States regulations. Without further ado, the Legislative Guide remarks that the action of the States could be translated into provisions that allow the exploration of: non-contractual liability through civil law, the imposition of compensation orders or the issuance of sentences for malicious damages linked to criminal

⁶⁸ EUROJUST, *Strategic project on Eurojust's action against trafficking in human beings*. Den Haag, 2012, p. 16.

⁶⁹ EUROPOL, *Trafficking in Human Beings in the European Union*. Den Haag, 2011, p. 11.

⁷⁰ *Vid.* Inter alia GÓMEZ FERNÁNDEZ, I. and PÉREZ GONZÁLEZ, C., “La protección de los menores de edad víctimas de trata de seres humanos: Derecho internacional, europeo y español”. In Alcácer Guirao, R., Martín Lorenzo, M. and Valle Mariscal de Gante, M. (Coords.), *La trata de seres humanos: persecución penal y protección de las víctimas... cit*, pp. 223-263; and PÉREZ GONZÁLEZ, C., “La protección de los menores víctimas de la trata de seres humanos: algunas precisiones en torno al principio de diligencia debida”, *LEX*, 12, 2014, pp.69-88.

⁷¹ COM (2016) 722final, p. 13.

proceedings; as well as the establishment of funds or special plans of State funds⁷².

Within the framework of the Council of Europe, the compensation of victims for damages is regulated in more detail in Article 15 of the Warsaw Convention. The obligation to introduce the victim's right to financial compensation is established, either within the criminal process or before the civil jurisdiction. Unfortunately, the Convention only exemplifies with the creation of a State fund for the compensation of the victims, keeping them away from the regime that applies to victims of other crimes, such as terrorism. Regarding to the establishment of procedural rights, it should be added that Article 15 emphasizes the obligation to inform the victims of judicial and administrative procedures at their disposal in an intelligible language. In turn, it provides for measures aimed at ensuring access to free legal aid according to domestic law. These provisions are as important as the establishment of resources, since ignorance or poor advice entail the lack of claim. In the case of the Directive, Article 17 points to the duty of States to guarantee victims' access to "existing compensation regimes for victims of intentionally committed violent crimes". Thus, is not revolutionary at all. This can result in the victim's lack of compensation for the damages suffered, especially since some Member States may not have such regimes.

The evaluation of the transposition of the Directive regarding to all the measures points to divergences - without further ado - and it is inconclusive as to whether Member States have included in their national legislation measures to attend to victims with special needs arising from psychological, physical violence or sexually suffered⁷³. Unfortunately, the Commission's report must be read as an imperative need to improve national laws on this point.

V. FINAL REMARKS

Trafficking in human beings is a complex crime that involves organized criminal groups whose main objective is the exploitation of their victims. Practice shows that there is an infinity of *modus operandi*. Thus, sometimes the distinction between trafficking and other crimes may not be an easy task.

⁷² UNODC, *Guía legislativa... cit.*, p.289.

⁷³ COM (2016) 722 final, p. 10.

Until the beginning of XXI century, the prevailing approach in the fight against trafficking has been criminal with an obvious lack of results and clear deficiencies in the treatment of victims. Therefore, the complexity of the phenomenon required to incorporate other perspectives including the protection of human rights.

The analysis of some of the instruments applicable in the territory of the European Union regarding the victims reveals that their effective protection still presents numerous deficiencies.

From the protection point of view, the relevance of the THB Palermo Protocol is justified by the introduction of a victim-centred approach in some of its provisions. However, this instrument basically provides generic formulas and contains very few references to specific protection measures. Thus, from the point of view of the victims at the European regional level, the relevance of the THB Palermo Protocol will lie in the influence on the legal instruments to be negotiated after its adoption. Proof of this are the Warsaw Convention and Directive 2011/36/EU adopted respectively within the framework of the Council of Europe and the European Union.

The Warsaw Convention goes one step further than the Protocol on the protection of victims, since it points to specific obligations for the States parties. Standing out regulation in the EU is based on the idea that the protection of victims must be one of the central objectives of the Union's actions against the phenomenon of trafficking. Certainly, the introduction of the rights of the victim in the framework provided by Directive 2011/36/EU must be a source of satisfaction. However, there are still risks of not offering a really effective protection for victims that is to be respectful of their rights. This could be a corollary of the wide margin of discretion left to the Member States in the regulation of protection regimes and measures.

Acting as a priority to the defence of human rights, should involve supporting victims in a truly unconditional manner. On the one hand, this means providing really effective procedures in the early identification of victims to avoid expulsions in the case of irregular migrants. On the other hand, there is a need to modify the residence permit system to be an effective tool for the real recovery of the victim. Finally, new provisions should be introduced to eradicate the wide margin of discretion that Member States currently have regarding the assistance and protection of THB victims. And in any case, the

introduction of a human rights approach in the fight against trafficking should mean the protection of victims as one of the central objectives of action in the European Union.

BIBLIOGRAPICAL REFERENCES

- ALLAIN, J., *The Law and Slavery*. Martinus Nijhoff, 2015.
- ALLAIN, J., *The Slavery Conventions. The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, Martinus Nijhoff Publishers, 2008.
- BADIA MARTÍ, A., “Noción jurídica internacional de la trata de personas, especialmente mujeres y niños”, in Vargas Gómez-Urrutia, M.; Salinas De Frías, A., (coords.), *Soberanía del Estado y derecho internacional: homenaje al profesor Juan Antonio Carrillo Salcedo*, Universidad de Córdoba - Universidad de Málaga, 2005.
- DE LA MATA BARRANCO, N. J., “Delitos de trata de seres humanos y contra la inmigración ilegal, y contra la libertad de indemnidad sexual”, in De La Cuesta Arzamendi *et al.*, *Adaptación del derecho penal español a la política criminal de la Unión Europea*, Aranzadi 2017.
- CABRERA RODRÍGUEZ, E., “La trata de seres humanos con fines de explotación sexual. La detección e identificación de las víctimas”, *Revista de derecho y proceso penal*, 45, 2017, pp. 97-115.
- COUNCIL OF EUROPE, *Informe explicativo sobre el Convenio del Consejo de Europa sobre la lucha contra la trata de seres humanos CETS 197*, 2005.
- DELGADO SANCHO, C.D., “La trata de seres humanos y la inmigración clandestina tras la reforma de la Ley orgánica 1/2015”, *Revista Aranzadi Doctrinal*, 8, 2017, pp. 253-271.
- DÍAZ BARRADO, C.M., “La lucha contra la trata de seres humanos en la UE: los componentes para una política propia”, *Revista de Derecho Comunitario Europeo*, 45, 2013, pp. 461-498.
- EMN, *Identification of victims of traffcking in human beings in international protection and forced return procedures (synthesis report)*. European Migration Network Study, 2014.

- EUROJUST, *Strategic project on Eurojust's action against trafficking in human beings*, Den Haag, 2012.
- EUROPEAN COMMISSION, *Data collection on trafficking in human beings in the EU. Final report – 2018*, Publications Office of the European Union, 2018.
- EUROPOL, *Child trafficking for exploitation in forced criminal activities and forced begging*. Den Haag, 2014.
- EUROPOL, *Trafficking in Human Beings in the European Union*, Den Haag, 2011.
- EUROSTAT, *Trafficking in Human Beings. Statistical working papers*. Publications Office of the European Union, 2015.
- FRONTEX, *Annual Risk Analysis*. Warsaw, 2012.
- FRONTEX, *Situational Overview on Trafficking in Human Beings*. Warsaw, 2011.
- GALLAGHER, A., *The International Law of Human Trafficking*, Cambridge University Press, 2010.
- GALLAGHER, A., “Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments”, *European Journal of Migration and Law*, 8, 2006, pp.163-189.
- GARCÍA VÁZQUEZ, S., “Inmigración ilegal y trata de personas en la Unión Europea: la desprotección de las víctimas”, *Revista de Derecho Comunitario Europeo*, 10, 2008, pp. 231-274.
- GEDDES, A., “Getting the best of both worlds? Britain, the EU and migration policy”, *International Affairs*, 81, 2005, pp.723-740.
- GÓMEZ FERNÁNDEZ, I; PÉREZ GONZÁLEZ, C., “La protección de los menores de edad víctimas de trata de seres humanos: derecho internacional, europeo y español”, in Alcácer Guirao, R., Martín Lorenzo, M. and Valle Mariscal De Gante, M. (Coords.), *La Trata de seres humanos: persecución penal y protección de las víctimas*, Dykinson, 2015, pp. 223-263.
- GÓMEZ LÓPEZ, I; MUÑOZ SÁNCHEZ, E., “Algunas cuestiones en torno al delito de trata de seres humanos en el ordenamiento jurídico espanyol”, *Cuadernos de política criminal*, 123, 2017, pp. 213-246.
- GONZÁLEZ TASCÓN, M., “La lucha de la Unión Europea contra la trata de seres humanos y sus repercusiones en la legislación penal espanyola”, in Andrés Sáenz de Santamaría, P., *Una contribución a la europeización de la ciencia jurídica: Estudios sobre la Unión Europea*, 2019, pp. 451-484.

- GROMEK-BROC, K., “EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?”, *Nove et Vetera*, vol. 20, 64, 2011, pp. 227-238.
- GUILD, E., “Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings”, in Guild, E. and Minderhoud, P. (eds.), *Immigration and criminal law in the European Union*, Martinus Nijhoff, 2006, pp. 1-7.
- HEINRICH, K. H., “Ten year after the Palermo Protocol: Where are protections for human trafficking victims?”, *Human Rights Brief*, 18, 1, 2010, pp.2-5.
- JORDANA SANTIAGO, M., La lucha contra la trata en la UE: los retos de la cooperación judicial penal transfronteriza, *Revista CIDOB d’Afers Internacionals*, 111, 2015, pp. 57-77.
- LLORENTE SÁNCHEZ-ARJONA, M., “Las víctimas en el espacio judicial europeo: estudio de la Directiva 2012/29/UE, de 25 de octubre de 2012”, *REJ – Revista de Estudios de la Justicia*, 22, 2015, pp.119-141.
- MENESES FALCÓN, C., “¿Por qué se identifican tan pocas víctimas de trata de seres humanos?” *Revista de las Facultades de Derecho y Ciencias Económicas y Empresariales- ICADE*, 107, 2019.
- MILANO, V., “Protección de las víctimas de trata con fines de explotación sexual: Estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España”, *Revista Electrónica de Estudios Internacionales*, 32, 2016.
- MORENO URPI, A., “La acción judicial y la modelación de la definición de la trata de seres humanos: ¿Esclavitud moderna o fenómeno con entidad propia? Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos Rantsev v. Chipre y Rusia”, *La creación judicial del Derecho y el diálogo entre jueces*. Universidad Autónoma de Barcelona, 2017.
- MORENO URPI, A., “Las víctimas de la trata de seres humanos en Europa y la acción de las agencias ELSJ”, in BLASI CASAGRAN, C. y ILLAMOLA DAUSÀ, M., *El control de las agencias del Espacio de Libertad, Seguridad y Justicia : contrapeso necesario a su autonomía*, Marcial Pons, 2017, pp. 177-190.
- ORTEGA, M., “La trata de seres humanos en el derecho de la Unión Europea”, in DONAIRE, F.J. y OLESTI, A. (coords.), *Técnicas y ámbitos de coordinación en el espacio de libertad, seguridad y justicia*. Marcial Pons, 2015, pp. 181-196.

- PÉREZ ALONSO, E.J., “Política legislativa y criminal de la Unión Europea contra la trata de seres humanos”, in MERCADO PACHECO, P. *et al.*, *Formas contemporáneas de esclavitud y derechos humanos en clave de globalización, género y trata de personas*, Tirant lo Blanch, 2020, pp. 647-678.
- PÉREZ GONZÁLEZ, C., “La protección de los menores víctimas de la trata de seres humanos: algunas precisiones en torno al principio de diligencia debida”, *LEX*, 12, 2014, pp.69-88.
- RAFFAELLI, R., “The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive and the Italian Experience”, *German Law Journal*, 10, 3, 2009, pp.205-222.
- REINA PEÑAS, M., “Análisis del fenómeno de la trata de personas desde la perspectiva de los derechos humanos”, *Revista de las Facultades de Derecho y Ciencias Económicas y Empresariales- ICADE*, 107, 2019.
- ROTH, V., *Defining Human Trafficking and Identifying Its Victims*. Martinus Nijhoff, 2012.
- SANCHEZ DOMINGO, MB. “Prevención y lucha contra la trata de seres humanos en el Derecho penal” in Jimeno Bulnes, M., *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar*, JM. Bosch, 2016, pp. 347-392.
- SCARPA, S., *Contemporary forms of Slavery*. Study of the European Parliament, 2018.
- SCARPA, S., *Trafficking in Human Beings: Modern Slavery*. Oxford University Press, 2008.
- SCHERRER, A., *Detecting and protecting victims of trafficking in hotspots. Ex-post evaluation*. European Parliamentary Research Service, 2019.
- TORRES ROSELL, N. y VILLACAMPA ESTIARTE, C. “Protección jurídica y asistencia para víctimas de trata de seres humanos”, *Revista General de Derecho Penal*, 27, 2017.
- UNODC, *Guía legislativa para la aplicación del Protocolo para prevenir, reprimir y sancionar la trata de personas, especialmente mujeres y niños*, 2004.
- VAN DER WILT, H., “Trafficking in Human Beings: A modern form of slavery or a transnational crime?”, *ACIL Research Paper*, 07, 2014.

- VAN SLIEDREGT, E., “The dual criminality requirement”, in Keijzer, N., and Van Sliedregt, E. (eds.), *The European Arrest Warrant in practice*, T.M.C. Asser Press, 2009, p. 51-70.
- VILLACAMPA ESTIARTE, C. y TORRES ROSELL, N., “Trata de seres humanos para explotación criminal: Efectos sufridos por las víctimas a su paso por el sistema de justicia penal”, in Mercado Pacheco, P. *et al.*, *Formas contemporáneas de esclavitud y derechos humanos en clave de globalización, género y trata de personas*, Tirant lo Blanch, 2020, pp. 731-758.
- VILLACAMPA ESTIARTE, C., “El delito de trata de seres humanos en derecho penal español tras la reforma de 2015”, in Pérez Alonso, E.J. *et al.*, *El derecho ante las formas contemporáneas de esclavitud*, Tirant lo Blanch 2017, pp. 447-467.
- VILLACAMPA ESTIARTE, C., “La nueva directiva europea relativa a la prevención y a la lucha contra la trata de seres humanos y a la protección de las víctimas. ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?”, *Revista electrónica de Ciencia Penal y Criminología*, 14, 2011, pp.1-52.
- VILLACAMPA ESTIARTE, C., *El delito de trata de seres humanos. Una incriminación dictada desde el derecho internacional*. Cizur Menor, Thomson-Aranzadi, 2011
- ZUÑIGA, L., “Trata de Seres Humanos y criminalidad organizada transnacional: problemas de política criminal desde los derechos humanos”, *Estudios penales y criminológicos*, 38, 2018, pp.361-408.

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