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The United Nations, the Council of Europe and the European Union Regarding the Protection of Victims of Trafficking

RESUME

The instruments for the prevention and fight against trafficking in human beings and the protection of victims have meant the assumption of the victim-centric paradigm in the fight against the phenomenon of trafficking in human beings. However, this article will analyze the protection measures of the United Nations, the Council of Europe, and the European Union and the protection they provide to these victims. As we shall see, in the case of victims in an irregular administrative situation, this protection is very limited.

Keywords: human trafficking, victim protection, slavery.

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I. Introduction

Trafficking in human beings involves a flagrant violation of human rights, which is why supranational organizations have made the fight against it one of their priorities¹.

Among the significant number of treaties, declarations, and recommendations on trafficking in human beings, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, which complements the United Nations Convention against Transnational Organized Crime², should be highlighted, being the reference international instrument on human trafficking for subsequent provisions³, both of the Council of Europe and the European Union.

The plurality of international instruments shows the different approaches adopted for this phenomenon, from a global or specific approach. Now, it is interesting to mention that the fight against the trafficking in human beings has historically been linked to its purpose of sexual exploitation⁴, being, for example, trafficking for labor exploitation one of the aspects that has received less attention⁵.

Trafficking in human beings is a phenomenon that not only requires an approach aimed at criminal prosecution and prosecution of the perpetrators of the crime but also requires the adoption of preventive measures and the protection of victims.

Both international and regional instruments⁶ have provided for a set of assistance and protection measures for people who have been victims of human trafficking.

¹ 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 victims. Recital No1.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. (Hereinafter referred to as the Palermo Protocol).

³ Villacampa Estiarte V. C., *Trata de seres humanos y delincuencia organizada*, Indret: Revista para el Análisis del Derecho, 1, 2012, 5; De La Cuesta Arzamendi J. L., *Tráfico y trata de seres humanos: regulación internacional y europea*, González M. R., Brun R. I., Poelemans M., *Estudio sobre la Lucha contra la Trata de Seres Humanos*, Aranzadi, Cizur Menor, 2013, 37.

⁴ Stoyanova V., *Human Trafficking and Slavery Reconsidered*, Cambridge University press, 2017, 5.

⁵ Shamir H., *A Labor Paradigm for Human Trafficking*, *UCLA Law Review*, No52, 2012, 79.

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. (Hereinafter referred to as the Palermo Protocol); The Council of Europe Convention on the fight against trafficking in human beings, known as the Warsaw Convention, signed in that city on May 1, 2005; 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 victims.

II. United Nations

1. Introduction

As a result of the evolution of a series of agreements and conventions related to trafficking in human beings, the Palermo Protocol is adopted to prevent, suppress and punish trafficking in persons, especially women and children, which has become one of the instruments related to the matter⁷. In the Preface to the United Nations Convention against Transnational Organized Crime, KOFI A. ANNAN, Secretary General of the United Nations (2002-2006) considered that “trafficking in persons, especially women and children, to subject them to labor and exploitation, including sexual exploitation, is one of the most egregious violations of human rights facing the United Nations today”⁸. Therefore, the application of measures aimed at the prevention, care and protection of the human rights of victims of human trafficking is crucial⁹.

2. The Protection of Victims of Trafficking in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations: Palermo Protocol

1.1. Introduction

The Palermo Protocol is the first international instrument on trafficking in human beings legally binding for the States Parties, which pursues three objectives:

- a) Prevent and combat trafficking in persons, paying special attention to women and children, from criminal groups and organized transnationals.
- b) Protect and help victims of trafficking.
- c) Promote cooperation among the States Parties to achieve these ends.

This document makes great progress, but it also contains certain weaknesses: specifically, the restriction of the prevention, investigation, and punishment of crime to cases of a transnational nature that involve the participation of an organized criminal group, leaving aside internal trafficking and those assumptions in which the criminal conduct is carried out individually, outside of a criminal group¹⁰.

⁷ Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings refers expressly to the UNODC Protocol in Recital No4; the Preamble of the Council of Europe Convention on Trafficking in Human Beings mentions the UN Protocol.

⁸ UNODC, *Convención contra la delincuencia organizada transnacional y sus protocolos*, 6.

⁹ OIM, *Manual de abordaje, orientación y asistencia a víctimas de trata de personas con enfoque de género y derechos*, Colombia, Bogotá, 2012, 38.

¹⁰ De La Cuesta Arzamendi J. L., *Tráfico y trata de seres humanos: regulación internacional y europea*, González M. R., Brun R. I., Poelmann M., *Estudio sobre la Lucha contra la Trata de Seres Humanos*, Aranzadi, Cizur Menor, 2013, 37-38.

Despite its shortcomings, it should be valued positively, as it is the driving force behind the victim-centric vision¹¹ – albeit timidly – included in subsequent international provisions¹².

Despite being the first instrument that dictates a protection and assistance guide for victims, it does not include obligations to recognize rights, but rather optional measures for the State's parties¹³.

1.2. Victim Protection

Prior to the Palermo Protocol, there was no measure on the matter¹⁴. Even so, its provisions are not mandatory for States: for example, article 6.1: “In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential”. Far from collecting what can be conceived as obligations imposed on the States, it establishes discretionary provisions, among them the followings¹⁵: protection and privacy of the identity of the victims, information on relevant judicial and administrative procedures, physical, psychological, and social recovery, adequate accommodation, advice and information on their legal rights, medical, psychological and material assistance, employment opportunities, education and training, physical security, compensation for the damages suffered the permanence of the victims in the territory of the State –temporarily or permanently–, facilitation of the repatriation of people taking into account their safety and issuance of travel documents or authorization so that people can re-enter their territory¹⁶.

According to the Protocol, these measures will be executed as long as the State party considers it pertinent and its internal law allows it, so that the States party may not insert said provisions in their internal legal systems and may ignore what is relat-

¹¹ Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 161.

¹² Gallagher A. T., in *the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 *European Journal of Migration and Law*, 2006, 163-164; Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 176.

¹³ Edwards A., *Trafficking in Human Beings: at the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour*, *Denver Journal of International Law & Policy*, 36.1, 2008, 17-19-20.

¹⁴ Gallagher A. T., *Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 *European Journal of Migration and Law*, 2006, 165; Stoyanova V., *Human trafficking and slavery reconsidered*, Cambridge University press, 2017, 25.

¹⁵ Palermo Protocol, Article 6-8.

¹⁶ *Ibid.*

ed to the protection of victims. In the development of the Protocol, several government delegates were not willing to commit their countries to the protection of the rights of non-nationals and, therefore, a serious debate on the subject was avoided by leaving it in the hands of internal legal systems¹⁷.

On the other hand, many government delegates did not come from the human rights field, so that, at the beginning of the negotiations, a large number of them did not even see the necessary connection between combating trafficking and protecting and assisting victims¹⁸. While countries in the global north were worried about “irregular migrants”, countries in the global south worried about the costs of assuming obligations to provide protection and assistance¹⁹. For all these reasons, the Palermo Protocol does not contain major considerations regarding the protection of victims.

For the rest, the Palermo Protocol establishes cooperation duties regarding the exchange of information between the States Parties and the competent authorities²⁰, and is focused primarily on these tasks²¹. The Protocol provides for the reinforcement of border controls, necessary to prevent and detect trafficking and its victims, imposing on carriers the obligation that passengers carry the travel documents required for their legal entry into the receiving States²². However, it is important to highlight what is contained in article 14 of the Palermo Protocol, since it reserves its first paragraph to indicate that “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

This precept not only shows the possibility of holding States accountable for the violations of human rights produced as a result of trafficking in human beings but also presupposes the possibility of recognizing certain victims of trafficking refugee status by applying to them the principle of non-refoulement. In other words,

¹⁷ UNODC, *Travaux Préparatoires for the Organized Crime Convention and Protocols*, UNODC, New York, 2006, 340. Council of Europe and United Nations, *Trafficking in organs, Tissues and cells and trafficking in human beings*, 2009, 352.

¹⁸ Ditmore M., Wijers M., *The negotiations on the UN Protocol on Trafficking in Persons*, Nemesis, 2003, 79.

¹⁹ *Ibid.*

²⁰ Palermo Protocol, Article 10.

²¹ Rittich K., *Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking*, *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, Cambridge University Press, 2017, 239.

²² Palermo Protocol, Article 11.

the protection of victims of trafficking is sought, since, in addition to the violation of their human rights, they also experience persecution, and certain cases can be included in the definition of “refugee” of the 1951 Geneva Convention and its 1967 Protocol²³. However, as has been mentioned, these measures that are included in the Protocol will be executed as long as the State party considers it pertinent, and its internal law allows it.

Despite being a determining instrument in the matter of human trafficking, the Palermo Protocol has become somewhat obsolete, in view of the resistance to recognizing a link between the prosecution of the perpetrators of the acts and the protection of victims, which now seems irrational. The States and their legislations are already heading towards the genuine path of the cooperation of the victims so that they obtain protection, far from the careful, although scarce, formulation of the Palermo Protocol. Today, few countries dispute the right of victims to receive immediate protection and support from the State in which they find themselves.²⁴

As we will see in the next section, the Warsaw Convention of the Council of Europe has overcome the gaps in the Palermo Protocol in developing detailed requirements in order to protect victims of human trafficking through rapid and accurate identification²⁵.

III. The Council of Europe: The Protection of Victims of Human Trafficking in the Convention of the Council of Europe on Combating Trafficking in Human Beings

1. Introduction

The Council of Europe Convention on the fight against trafficking in human beings, known as the Warsaw Convention, signed in that city on May 1, 2005, constitutes an important reference in the prevention and protection of victims of human trafficking.

²³ Elizondo D., La protección internacional de los refugiados: retos del alto comisionado de las naciones unidas para los refugiados en las crisis humanitarias actuales, en Mirabet C. N., El derecho internacional ante las migraciones forzadas: refugiados, desplazados y otros migrantes involuntarios, Universitat de Lleida, Lleida, 2005, p. 93; OIM, Manual de abordaje, orientación y asistencia a víctimas de trata de personas con enfoque de género y derechos, 2007, 43-44.

²⁴ Gallagher A. T., Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, 8 European Journal of Migration and Law, 2006, 165.

²⁵ Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 137.

As far as the protection of victims is concerned, the Warsaw Convention reinforces the protection offered by the Palermo Protocol²⁶ and incorporates a chapter focused on the rights of victims of trafficking²⁷.

In accordance with the aforementioned, its article 1.1 establishes the objectives it pursues, coinciding with the provisions set forth in the Palermo Protocol: “a) to prevent and combat trafficking in human beings, while guaranteeing gender equality; b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; c) to promote international cooperation on action against trafficking in human beings.”.

In contrast to the Palermo Protocol’s scant development of victim protection²⁸, the Warsaw Convention reserves its Chapter II entirely for measures aimed at the protection and promotion of women’s rights, guaranteeing equality between women and men.

2. Measures for the Protection of Victims of Human Trafficking

The Warsaw Convention focuses its attention on the protection of these victims in a previously unknown way. The protection measures are not limited to the victim’s cooperation with the administration of justice. An essential part of the Convention is that victim protection takes effect as soon as the victim’s status as a victim becomes known, irrespective of their subsequent involvement as a witness in the criminal proceedings²⁹. The Warsaw Convention contains two types of protection measures: those related to guaranteeing the victim protection as soon as he

²⁶ Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 184; De La Cuesta Arzamendi J. L., *Tráfico y trata de seres humanos: regulación internacional y europea*, González M. R., Brun R. I., Poelemans M., *Estudio sobre la Lucha contra la Trata de Seres Humanos*, Aranzadi, Cizur Menor, 2013, 47.

²⁷ Pérez Machío A. I., *Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales*, *Estudios Penales y Criminológicos*, XXXVI, 2016, 402.

²⁸ This opinion is also shared by Gallagher A. T., *Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments*, 8 *European Journal of Migration and Law*, 2006, 164; Villacampa Estiarte C., *Victimas de la trata de seres humanos: su tutela a la luz de las últimas reformas penales sustantivas y procesales proyectadas*, *Indret: Revista para el Análisis del Derecho*, 2, 2014, 5; Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 177; Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 460; Díaz Morgado C. V., *delito de Trata de Seres Humanos. Su aplicación a la luz del Derecho Internacional y Comunitario*, Universidad de Barcelona, Barcelona, 2014, 36.

²⁹ Consejo De Europa, *Informe explicativo del Convenio de Varsovia*, 2005, 29.

or she acquires such status; and measures for the protection and rights of victims with respect to criminal proceedings. These are dealt with in Chapters III and V of the Convention.

2.1. Identification of Victims

The identification of victims of trafficking in human beings is the first measure of protection set out in Chapter III of the Warsaw Convention. In the presence of a presumed victim of trafficking, the priority is to enable such identification and prevent the victim from being treated and feeling like an offender³⁰ – by the immigration regulations in most cases, or because she has committed criminal acts forced by the trafficker –, proceeding to the recognition of the rights to which they are entitled because of their status as victims. To this end, Article 10 of the Convention specifies that the Parties must verify the qualifications and training of their personnel for the identification of victims, especially in the case of children, and that the different authorities involved collaborate with each other, as well as with organizations that perform support functions.

In this regard, in order to facilitate the identification of victims, States should adopt legal or other measures so that if it is verified that there are reasonable grounds to believe that a person has been a victim of human trafficking, he or she is not allowed to leave the territory of the State Party until the identification process is completed.

This provision, which is not included in the Palermo Protocol, is essential because if a victim of trafficking is not properly identified, there is no possibility of protecting him or her, nor of collaborating in the clarification of the facts by providing information on the traffickers, etc.³¹

As far as Spain is concerned, for example, it is carried out in this way in order to correctly identify the victim. They are offered a 90-day recovery and reflection period (extendable for another 90 days) so that during that time the victim can recover, as well as decide whether or not to collaborate with the police and legal authorities to clarify the facts.

2.2. Protection of Privacy and Victim Assistance

The next measure envisaged, after identification, is the protection of the privacy and identity of all victims³². Special protection is granted when the victim is a minor:

³⁰ Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 189.

³¹ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 149.

³² Warsaw Convention, Article 11.

to ensure his or her well-being and protection, certain measures must be adopted, such as the preservation of the minor's identity³³.

With regard to victim assistance, Article 12 of the instrument in question provides that the Parties shall adopt the necessary legislative measures to ensure such actions aimed at the physical, psychological, and social recovery of the victims³⁴. The Convention, in Article 12. 1, establishes the minimum assistance they should receive: (a) living conditions that can guarantee their subsistence, through access to adequate and safe housing, and psychological and material assistance; (b) access to emergency medical assistance; (c) help with translation and interpretation whenever necessary; (d) advice and information concerning the rights accorded to them by law; (e) assistance so that their rights and interests can be present and taken into account at appropriate times in criminal proceedings brought against the perpetrators; and, finally, (f) access to education for children.

According to the Explanatory Report to the Warsaw Convention, victims who are not legally resident in the country are also entitled to medical assistance, among other assistance measures, when they do not have adequate resources to do so, as well as to authorization to enter the labor market. However, as this instrument clarifies, the Convention does not establish an actual right of access to the labor market, and this decision is left to the Parties³⁵.

In accordance with the Warsaw Convention, the provisions of the article may in no case be made conditional on the victim's willingness to cooperate with the judicial authorities in the clarification of the case, or on his or her acting as a witness in criminal proceedings. In this sense, the sixth paragraph establishes an important clarification regarding victim assistance: "the parties shall adopt the necessary legislative or other measures to ensure that assistance to a victim is not subordinated to his or her willingness to act as a witness". In other words, according to this provision, States must structure the implementation of protection measures for such persons independently of their willingness to cooperate with the competent administration of justice. This reflects the reasonableness of the instrument, taking into account that the victims of trafficking are both nationals of a State party and foreign nationals in an irregular administrative situation³⁶.

³³ OIT, UNICEF, UN. GIFT, Manual de información para combatir la trata infantil con fines de explotación sexual, laboral y de otros tipos, ILO, 2009, 28.

³⁴ Warsaw Convention, Article 12.

³⁵ Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005, 166.

³⁶ Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, *Estudios Penales y Criminológicos*, XXXVI, 2016, 404; Corrêa Da Silva W., ¡Que se rompan los grilletes! La cooperación internacional para la protección de los derechos de las víctimas de trata de personas desde el Consejo de Europa, *Revista de la Facultad de Derecho y Ciencias Políticas*, 120, 2014, 249.

However, all of this is apparently conditioned by the content of Article 13 of the Warsaw Convention, which refers to the “recovery and reflection period”, as we will see below.

2.3. Recovery and Reflection Period

Article 13 of the Convention establishes a recovery and reflection period, the objective of which is the restoration of the victim³⁷. Its duration is at least 30 days, time aimed at the recovery of the victim, as well as to keep her away from the influence of the traffickers; during this time the victim, if she is in an irregular administrative situation, cannot be repatriated. This period is also intended to allow the victim to make a decision on whether or not to cooperate with the competent authorities.

The reinstatement period is granted to all victims, regardless of their willingness to cooperate, whether they are in an irregular administrative situation or have legal residence in the country³⁸. As mentioned above, during this period, victims may not be expelled from the territory of the State Party, unless there are grounds of public order, or it is proven that the status of the victim has not been duly invoked (paragraph 3).

2.4. Residence Permit

Once the reflection period has elapsed, States Parties may issue a renewable residence permit. Such a permit may be granted either because the competent authorities deem it necessary because of your personal situation, or because they consider that your stay is necessary due to your cooperation with the competent authorities in connection with the investigation.

Despite appearing to be an innovative instrument with a predisposition to offer assistance to victims of trafficking regardless of their administrative situation, the States shall issue a renewable residence permit, this being temporary in the following cases (art. 14): when the competent authority considers that the victim’s stay in the State is necessary due to his or her personal situation, or when it is considered necessary for his or her cooperation with the competent authorities in the investigation and clarification of the facts. As we can see, this provision does not oblige the States to offer a temporary residence permit, but leaves it up to them to grant it; neither does it specify the minimum period of duration of this permit, nor does it establish any

³⁷ Follmar-Otto P., Rabe H., *Human trafficking in Germany. Strengthening Victim’s Human Rights*, German Institute for Human Rights, Berlin, 2009, 37.

³⁸ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 151.

clause regarding the renewal of the temporary residence permit granted, leaving it up to the Parties to decide whether or not to renew it³⁹, thus avoiding the situation that the victims may suffer⁴⁰.

From this, we deduce that, once the granted permit has expired, if an ordinary residence permit is not obtained, or the victim has not been granted asylum, repatriation is appropriate⁴¹. According to Article 16, this must be done with due regard to the rights and safety of the victims, but even so, it is a removal from the territory of the State, which will not be carried out in the case of minors if it is considered that the return is not in the best interests of the minor.

In addition, Art. 17 establishes that States Parties must promote gender equality and that they must incorporate a gender perspective in the development, implementation, and evaluation of measures related to the protection of victims.

Finally, the Convention's recognition of the non-criminalization of victims of trafficking in human beings deserves special mention: Parties shall not, in accordance with the fundamental principles of their legal system, impose penalties on victims for their participation in illegal activities, to the extent that they have been forced to do so⁴².

2.5. The Protection of the Victim in Criminal Proceedings

The protection measures set forth in Chapter V of the Convention are aimed not only at crime victims involved in legal proceedings, but also at persons who provide information or cooperate with the authorities responsible for investigations or legal proceedings, witnesses and, where necessary, their families⁴³.

Protective measures may include physical protection, allocation of a new place of residence, change of identity, and assistance in obtaining a job. The same precept indicates that minors will enjoy special protection measures that will take into account their best interests but do not specify which ones.

Regarding the judicial process, article 30 refers to the exclusive protection of the victim, establishing that legislative or other measures must be adopted for the pro-

³⁹ Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, of May 16, 2005, known as Warsaw Convention, as will be cited below, Article 14.5.

⁴⁰ Lara Palacios M. A., La trata de seres humanos con fines de explotación sexual, *Revista internacional de pensamiento político*, 9, 2014, 414; Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, *Estudios Penales y Criminológicos*, XXXVI, 2016, 405.

⁴¹ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 153-154.

⁴² Warsaw Convention, Article 26.

⁴³ *Ibid*, Article 28.

tection of the privacy of the victims and, where necessary, their identity, as well as to ensure their safety and protection against intimidation. According to the explanatory report, specific measures for such protection include private hearings, the use of closed-circuit television or video to give testimony, the recording of the victim's first statement and its playback at the trial without the victim attending the trial, and even anonymous testimony⁴⁴.

Article 15 of the Convention states that the victim must be informed about judicial and administrative proceedings in a language he or she can understand and shall have the right to the assistance of legal counsel and free legal aid, although this depends on the legal provisions of the States.

Finally, Article 15.4 provides that Parties shall take the necessary legislative or other measures to ensure that compensation for victims is guaranteed under the conditions provided for in their domestic legislation: for example, by creating a fund for the compensation of victims through other measures or programs aimed at the social assistance and integration of victims, which could be financed from the financial penalties imposed on the offenders.

IV. Protection of Victims: Comparison Between the United Nations Instrument and That of the Council of Europe

Compared to the UN Palermo Protocol, the Council of Europe's Warsaw Convention is a complex instrument that seeks to address trafficking in its various forms. Indeed, the Warsaw Convention contains measures designed to protect the human rights of victims, prevent the phenomenon, as well as promote international cooperation between States Parties.

Unlike the United Nations Protocol, we agree with SCARPA when it points out that the Warsaw Convention represents an added value and can be considered the most complete international instrument on the subject⁴⁵. Its added value lies in the fact that trafficking in human beings is a serious violation of the human rights of its victims and that, therefore, greater protection is needed for them. It is also necessary to emphasize that the Council of Europe instrument covers all forms of trafficking, both domestic and transnational, whether or not linked to organized crime, and is not limited to the purpose of sexual exploitation.

The most notable advances of the Convention compared to the Palermo Protocol are the following: the application to all forms of trafficking in human beings;

⁴⁴ Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005, 29.

⁴⁵ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 163.

the adoption of the human rights-based approach and the protection of victims; the introduction of a provision that specifically covers the identification of the victim -art. 10 of the Convention-, in order to avoid the possibility of confusing victims of trafficking with others -such as human smuggling-; the binding nature of the obligations of the States parties to adopt measures to protect and assist victims of trafficking -arts. 11-17-; the obligation of States Parties to grant victims of trafficking a recovery and reflection period of at least 30 days and a renewable residence permit that is not, in principle, conditional on the willingness to cooperate as a witness or in the clarification of the facts; as well as the Convention's recognition of the work done by NGOs or other relevant civil society organizations in protecting and assisting victims of trafficking over the decades.

In our opinion, the Convention includes positive contributions to the protection and assistance of victims of trafficking in human beings, highlighting, above all, the period of restoration and reflection that it proposes, which aims at the recovery of the victim and the possibility of obtaining a residence permit, albeit temporary, without this being conditioned to their collaboration with the competent authorities in the specific case, being able to be issued for their personal situation. However, as has been mentioned, the Warsaw Convention does not oblige the States Parties to grant such a residence permit, so it remains a discretionary provision for the Parties, which may or may not grant it according to their interests.

For all these reasons, the Warsaw Convention does not turn out to be an instrument that comprehensively protects victims of trafficking in human beings, taking into account the non-enforceability of applying these measures to States. Despite “good intentions”, it remains, in practice, only, as mentioned, a declaration of protective measures that, unless States have an interest in its application, have the option not to do so.

In addition, as we will see below, the change that is taking place in the European Union regarding victims of trafficking in human beings is very important, with Directive 2011/36/EU, binding on all States parties.

V. The European Union

As far as the European Union is concerned, it seems a priori that it has made an effort to dissociate itself from the punitive perspective of trafficking in human beings, focusing on the protection of the human rights of the victims⁴⁶.

The instruments adopted within the European Union are closely linked to the instruments mentioned above. Thus, initially, the European Union had focused on

⁴⁶ Díaz Morgado C. V., *El delito de Trata de Seres Humanos. Su aplicación a la luz del Derecho Internacional y Comunitario*, Universidad de Barcelona, Barcelona, 2014, 47.

issues of prosecution and criminalization of trafficking; according to VILLACAMPA ESTIARTE, the European Union had been approaching this phenomenon from a criminal - centric perspective⁴⁷. However, with the adoption of Directive 2011/36/EU on preventing and combating trafficking in human beings and the protection of victims, it moves away, to a certain extent, from this perspective, placing the victims “at the epicenter of the treatment of this problem”⁴⁸. Nevertheless, as STOYANOVA points out, the European Union’s inclination towards immigration control continues to be notorious for the phenomenon⁴⁹.

1. Directive 2011/36/EU: Protection of Victims of Trafficking in Human Beings

Directive 2011/36/EU contains an integral and comprehensive approach, which is not limited to the prosecution of traffickers but extends to the prevention and protection of the victims⁵⁰. However, it attaches great importance to cooperation between law enforcement authorities in different countries to strengthen the fight against trafficking in human beings, and to the need for States to collaborate with civil society organizations⁵¹.

1.1. Content of Directive 2011/36/UE

Directive 2011/36/EU presents a more victim-centered perspective on victims, their assistance, and protection, with a holistic and comprehensive approach based on human rights. Its structure is reminiscent of the Warsaw Convention⁵². However, unlike the Convention, Directive 2011/36/EU, in Art. 1, determines that its purpose is not only the prosecution and criminalization of trafficking in human beings, but

⁴⁷ Villacampa Estiarte C., *El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional*, Aranzadi, Cizur Menor, 2011, 203.

⁴⁸ Villacampa Estiarte C., *La nueva directiva europea relativa a la prevención y 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*, 13-14, 2011, 14:02.

⁴⁹ Stoyanova V., *Human Trafficking and Slavery Reconsidered*, Cambridge University Press, 2017, 29.

⁵⁰ Díaz Barrado C. M., *La lucha contra la trata de seres humanos en la Unión Europea: los componentes para una política propia*, *Revista de Derecho Comunitario Europeo*, 2013, 462; Sánchez Domingo M. B., *Trata de seres humanos y trabajos forzados*, *Revista Penal*, 45, 2020, 176.

⁵¹ Recitals 5 and 6 of 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. (Hereinafter referred to as Directive 2011/36/UE)

⁵² Gromek-Broc K., *EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective?* *Nova et Vetera*, 64, 2011, 227-238.

also measures of assistance, support and protection for victims, as well as prevention, cooperation and coordination in the fight against this phenomenon⁵³.

Despite the references to a comprehensive and global approach, Article 1 already reveals that the prosecution and criminalization of trafficking in human beings is the fundamental objective pursued by Directive 2011/36/EU. Thus, even though it contains prevention and protection measures for victims, the criminal-centric approach takes precedence over the victim-centric one.

The prevention measures provided for are minimal and are contained in a single provision: Article 18. Member States are expected to adopt measures to discourage and reduce the demand for trafficking in human beings through education, training, information, and awareness campaigns, including through the Internet, in cooperation with civil society organizations, with the aim of reducing the risk of minors, in particular, becoming victims of trafficking in human beings. In our view, prevention should have been specified according to the form of exploitation and taking into account the special characteristics of each category of victims.

In the same provision, the Directive requires Parties to regularly train officials who may come into contact with actual and potential victims of trafficking in human beings to identify them. Recital 25 of the Directive lists the type of officials targeted by this training requirement, such as police, border guards, immigration officials, prosecutors and lawyers, members of the judiciary and court officials, labor inspectors, personnel dealing with social affairs and children's health, as well as consular staff.

In any case, the provisions aimed at the harmonization of national laws for the prosecution of the crime of trafficking in human beings constitute the main object of Directive⁵⁴, with Articles 2 to 10 being devoted to this end.

Finally, with regard to the measures aimed at cooperation and monitoring the implementation of the Directive, it could be said that they are given more prominence in the preamble than in the articles themselves⁵⁵. Even so, Article 20 provides that the Member States should facilitate the work of a European Union coordinator for combating trafficking in human beings, to whom the statistical information referred to in Article 19 should be forwarded⁵⁶.

⁵³ Ibid, 229.

⁵⁴ Alcácer Guirao R., La protección de las víctimas en el proceso penal y los derechos de defensa del acusado, en Alcácer Guirao R., Martín Lorenzo M., Valle Mariscal De Gante M., La trata de seres humanos: persecución penal y protección de las víctimas, Edisofer, Madrid, 2015, 191.

⁵⁵ Especially in recitals number 5 - related to the cooperation between States-, 6 - related to the collaboration with civil society organizations-, 27 - related to the implementation of national monitoring systems-, 28 -development of data collection systems- and 29 -related to the appointment of the coordinator for the fight against trafficking in human beings at the Union level.

⁵⁶ Directive 2011/36/EU "Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The task of such mechanisms shall include the assessment of trends in

1.2. Assistance and Protection of Victims of Trafficking in Directive 2011/36/EU

If the measures dedicated to prevention are somewhat scarce, the measures for protection and assistance to victims are no more extensive.

The preamble of the Directive already devotes recitals 17-24 to protection and assistance. These recitals state that the Directive does not deal with the conditions of residence of victims, and that Directive 2004/81/EC is to be referred to. However, assistance and support shall be provided to them before, during and after the criminal proceedings, regardless of their willingness to intervene as a witness, and must be provided unconditionally at least during the reflection period, when the victim is not in a regular situation in the country. It is also recalled that such assistance and support will be offered whenever the victim so desires and, therefore, the refusal must be respected. On the other hand, the preamble of the Directive devotes special attention to child victims, considering them as vulnerable victims in need of additional protection measures, especially in cases of unaccompanied minors.

The preamble also provides for the protection of victims in criminal proceedings, recalling that Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, is applicable to them, establishing minimum standards on the rights, support and protection of victims of crime, and indicating that they are recognized as having the right to protection and compensation and to have immediate access to legal advice and, if necessary, legal representation in order to avoid secondary victimization.

1.2.1. Assistance and Protection Measures for Victims of Trafficking in Human

As regards general assistance and support measures, Article 11 of the Directive provides that the Member States will have to provide assistance and support before, during, and after the criminal proceedings, for an appropriate period of time. In comparison to the above-mentioned Council of Europe Convention, the Directive does not define the “adequate period of time”, leaving it to the State, whereas the Warsaw Convention specified in Article 13 that the reflection period should be at least 30 days. The Directive thus allows the Parties to shorten this period, which is somewhat

trafficking in human beings, the quantification of the results of anti-trafficking actions, including the collection of statistics in close cooperation with relevant civil society organizations active in this field, and reporting”, Article 19.

worrying⁵⁷ given that, depending on the interest or lack of interest of each State, the protection of victims can change a lot.

The same article establishes that States must take the necessary measures to guarantee victims the rights set out in Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings as replaced by Directive 2012/29/EU today. It clarifies that, once there are reasonable grounds to believe that the person may have been a victim of trafficking in human beings, the Parties shall take the necessary measures to ensure that the necessary assistance and support is provided, which cannot be conditional on the victim's cooperation in the investigation, investigation or trial.

The assistance and support measures must at least ensure the victim's subsistence through, for example, the provision of appropriate and safe accommodation and material assistance, necessary medical treatment, including psychological assistance, counseling and information, and translation and interpretation services, where appropriate. However, such assistance and support, as can be deduced from paragraph 5 of the same article, shall be provided during the reflection period, without the Directive establishing a minimum period for this purpose.

Before concluding with the section on assistance and support, we should mention that Articles 13-15 establish special protection measures for minor victims. In these cases, the best interests of the minor will be paramount, specifying that, if the age of the victim is uncertain, if there are reasons to believe that he or she is a minor, he or she will be considered a minor and special assistance and support will be provided. Article 14 of the Directive establishes assistance and support for minor victims, setting out a strategy for assistance and support not only in the short term but also with a view to its continuity⁵⁸. This strategy will be aimed at physical and psychosocial recovery and will be carried out after an individual assessment of the specific circumstances of this type of victim, where their views, needs, and interests will be considered. In the case of minors, in addition to the measures provided for in Article 11 for other victims, it is added that the Member States must provide them

⁵⁷ Gromek-Broc K., *EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective?* *Nova et Vetera*, 64, 2011, 230; Villacampa Estiarte C., *La nueva directiva europea relativa a la prevención y 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*, 13-14, 2011, 7; 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, 20.

⁵⁸ However, it is not specified what such a durable solution may be; recital 23 of the preamble indicates that return and reintegration in the country of origin or the country of return, integration into the host society, connection of international protection status or the granting of another status under the national law of the Member State are possible durable solutions.

with access to education, in accordance with their national law. It also provides for support and assistance to the family of minor victims, when they are in the territory of a Member State, providing them with the necessary information, where possible and appropriate, under the terms set out in Article 3 of Directive 2012/29/EU.

In the latter case, it is also possible to appoint a guardian or legal representative, as soon as they have been identified as such, to defend the best interests of the child or represent them if there is a conflict of interest, in accordance with national law.

1.2.2. Special Mention of the Residence Permit for Foreign Victims of Trafficking in Human Beings

Although the Directive contains measures on assistance and support to victims, it does not establish the conditions of residence of foreign victims in the territory of the Member States, having to refer to Directive 2004/81/EC⁵⁹. 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 and who cooperate with the competent authorities provides for the possibility of issuing a residence permit for a fixed period to third-country nationals⁶⁰.

Article 6 of the Directive in question stipulates that the Member States shall grant victims a reflection period to enable them to recover and free themselves from the influence of the perpetrators, so that they can make an informed decision on whether to cooperate with the competent authorities, without specifying the duration of the reflection period. Thus, the condition for issuing such permission lies in the fact that the victim cooperates with the competent authorities. At the end of the reflection period or even before its expiration, this residence permit, which has a minimum duration of six months, may be granted on condition that the person has shown a clear willingness to cooperate and has severed his relations with the perpetrators of the offenses of aiding illegal immigration and trafficking in human beings⁶¹. During the term of the program, financial assistance is guaranteed to those who do not have sufficient resources, medical assistance, as well as psychological assistance for those with special needs⁶².

⁵⁹ The same is stated in recital 17 of Directive 2011/36/EU itself.

⁶⁰ Directive 2004/81/EC, “third-country national means any person who is not a citizen of the Union within the meaning of paragraph 1 of the Treaty”, Article 2.

⁶¹ Directive 2011/36/UE, Article 8.

⁶² *Ibid*, Article 9. In addition, Article 11 provides for those who enjoy the special residence permit, access to the labor market, vocational training, and education during the period of validity of the permit, as well as access to special plans that can be articulated by non-governmental organizations for them to regain a normal social life. In the case of minors, Article 10 establishes the possibility of extending the reflection period if deemed appropriate to comply with the best interests of the

However, if the victim ceases to comply with the conditions set forth in Article 8, i.e., if he/she ceases to collaborate with the competent authorities or the person has not severed his/her relationship with the perpetrators, the special residence permit will not be renewed. That is, the victim will keep the residence permit if he/she collaborates, but if he/she stops collaborating or his/her collaboration is not necessary because the criminal proceedings have been concluded, his/her protection will cease. In this sense, Article 13 provides that the permit will not be renewed when a resolution of the competent authority puts an end to the proceedings, and, from that moment, ordinary legislation on aliens will be applied. In addition, Article 14 lists the cases in which the permit may be withdrawn: when the victim actively resumes relations with the alleged perpetrators or in the event that the competent authorities foresee that the victim's collaboration is fraudulent⁶³, as well as “for reasons related to public order and the protection of national security, or when the victim ceases to cooperate, or when the competent authorities decide to discontinue the action”⁶⁴.

The European Union Expert Group on Trafficking in Human Beings has criticized this Directive, since effective collaboration is the condition for granting a residence permit and assistance to the victim⁶⁵, since, if the purpose of granting such permission is for the victims to cooperate effectively or to act as witnesses, it is necessary for them to know in advance that they can rely on the State to provide them with assistance and protection⁶⁶. If States are not willing to provide assistance and protection as a right and not as a consideration, it is not a comprehensive protection measure, since the victim is used as a mere instrument of investigation and judicial process⁶⁷. We agree with the EU Expert Group on Trafficking in Human Beings that protection should include the possibility of a permanent or long-term residence permit.

Even though *a priori*, Directive 2011/36/EU seems to articulate a comprehensive protection system for all victims of trafficking in human beings, we understand that

minor, in making it possible for minors from third states to have access to the education system under the same conditions as nationals and, finally, in identifying unaccompanied minors and determining the reasons why they are not accompanied, locating their families and appointing a legal representative if appropriate.

⁶³ Directive 2004/81/CE, 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. (Hereinafter referred to as 2004/81/CE), Article 14 (a, b).

⁶⁴ Directive 2004/81/CE, Article 14 (c, d, e).

⁶⁵ Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y 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, 2011, 22.

⁶⁶ Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004, 105. <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/report_22_dec_en_1.pdf> [25.11.2022].

⁶⁷ Ibid.

the European Union, in the face of the most vulnerable victims, prioritizes the situation of irregularity over the situation of the victim, so that the humanitarian approach and the defense of human rights are left without effect. The Directive does not set up a real and effective protection system for these victims who are in a situation of administrative irregularity, who are the ones who need the most assistance and support⁶⁸.

1.2.3. Measures for the Protection of Victims of Trafficking in Human Beings in the Framework of the Corresponding Criminal Proceedings

The measures dedicated to the protection of the victims of the crime of trafficking in human beings within the framework of the procedure are provided for in Article 12 of the Directive. Recital 20 of the preamble states that the purpose of these measures is to prevent both secondary victimization and the occurrence of any traumatic experience during the proceedings. Provision is made for the victim to have immediate access to legal advice and legal representation, including for the purpose of claiming compensation, in accordance with Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime (replacing Council Framework Decision 2001/220/JHA). The Directive highlights the need to provide assistance and support to victims of trafficking before, during, and after criminal proceedings in order to enable them to exercise their rights effectively⁶⁹. However, legal representation is not guaranteed to be free of charge and is limited to cases in which the victim does not have sufficient financial resources⁷⁰.

Article 12.3 states that victims should receive appropriate protection, based on an individual risk assessment, such as, for example, by giving them access, where appropriate, to witness protection programs or other similar measures, in accordance with criteria defined by national legislation or procedures.

⁶⁸ Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y 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*, 13-14, 2011, 40; Pérez Machío A. I., *Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales*, *Estudios Penales y Criminológicos*, XXXVI, 2016, 410.

⁶⁹ Pérez Machío A. I., *Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales*, *Estudios Penales y Criminológicos*, XXXVI, 2016, 402; Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y 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*, 13-14, 2011, 14:40; De La Cuesta Arzamendi J. L., *Tráfico y trata de seres humanos: regulación internacional y europea*, González M. R., Brun R. I., Poelemans M., *Estudio sobre la Lucha contra la Trata de Seres Humanos*, Aranzadi, Cizur Menor, 2013, 59.

⁷⁰ Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y 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*, 13-14, 2011, 40.

In this sense, the Directive seems to show concern for avoiding secondary victimization of these victims, urging States to ensure the prevention of this type of victimization, without affecting national law and rules relating to the discretion, practice, or guidance of the courts. In this regard, Article 12.4 provides, as far as possible, to avoid the following practices:

- a. *unnecessary repetition of interviews during an investigation, prosecution, or trial;*
- b. *visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;*
- c. *the giving of evidence in open court; and*
- d. *unnecessary questioning concerning the victim's private life.*

On the other hand, as was established in the Warsaw Convention, Directive 2011/36/EU also includes the possibility of not prosecuting or sentencing the victim (Article 8). This provision is more extensive than that offered by the Warsaw Convention because, in addition to contemplating the possibility of providing an excuse for acquittal or personal grounds for lifting the penalty, it admits the possibility that the victim may not be prosecuted. However, although it recognizes a broader operational scope, it also specifies, in greater detail, the cases of application, requiring that the victim has been “compelled” to commit the criminal acts “as a direct consequence of having been subjected to any of the acts referred to in Article 2”.

For minors, Article 15 provides for how interviews should be conducted, such as the possibility, where appropriate, that all interviews of minor victims or witnesses may be videotaped and that these recordings may be admitted as evidence in criminal proceedings, in accordance with the rules of their national law. Likewise, it is foreseen that in criminal proceedings for crimes of trafficking in human beings, interrogations should be held without undue delay, that they should take place in places assigned or adapted for this purpose, and that they should be conducted, whenever necessary, by or through professionals with appropriate training for this purpose. According to this article, the number of interrogations should be as few as possible and they should be held only when strictly necessary and, finally, the minor should be accompanied by his or her representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been taken to exclude that person. Article 15 also calls for the hearing to be held in-camera and for the minor victim to be heard without being present in the courtroom through the use of communication technologies.

In conclusion, the aim is to ensure that the minor victim suffers as little as possible when testifying, using enforcement mechanisms adapted to his or her special characteristics. This is extremely necessary to avoid the secondary victimization of

minors. In fact, in Spain it is carried out even with adults so that the victim does not share the same room with the offender.

2. The European Union and the Criminalization of Immigration

Although Directive 2011/36/EU initially seems to focus its attention on the protection and assistance to victims of trafficking, it actually reflects a criminal-centric approach to the phenomenon and, moreover, from the perspective of actuarial and security criminology, it reflects a victim-victim policy of lack of protection, which tends to criminalize irregular victimization⁷¹ in order to control migration flows⁷². The victim-centric approach is maintained for those legally residing in Europe, but will not grant the same protection to those persons who are in an irregular administrative situation, since their protection is conditional on their collaboration with the relevant authorities in the clarification of the facts⁷³.

Reserving protection to those who cooperate with the competent authorities creates a system of unequal protection⁷⁴. It is the result of the economic logic that presides over the era of globalization⁷⁵, resulting in the criminalization of poverty⁷⁶, or as “cimmigration”, or criminalization of immigration⁷⁷. Protection and assistance should be unconditional and offered to all trafficking victims regardless of their administrative irregularity.

Furthermore, if the victim decides to collaborate, once the recovery and reflection period is over, the Directive does not clarify what may happen to victims who are from a third country outside the European Union. Art. 14 of the Council of Europe

⁷¹ Pérez Machío A. I., *Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales*, *Estudios Penales y Criminológicos*, XXXVI, 2016, 388.

⁷² Stoyanova V., *Human trafficking and slavery reconsidered*, Cambridge University press, 2017, 29.

⁷³ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 204.

⁷⁴ Gromek-Broc K., *EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective?* *Nova et Vetera*, 64, 2011, 233.

⁷⁵ Pérez Machío A. I., *Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales*, *Estudios Penales y Criminológicos*, XXXVI, 2016, 389.

⁷⁶ Muñagorri Lagua I., *Derecho Penal intercultural y crisis del principio de soberanía*, en Contreras P., *Mutaciones del leviatán. Legitimación de los nuevos modelos penales*, Akal, Madrid, 2005, 197.

⁷⁷ Van Der Leun J., Van Shijndel A., *Emerging from the shadows or pushed into the dark? The relation between the combat against trafficking in human beings and migration control*, *International Journal of Law, Crime and Justice*, 44, 2016, 28; Huysmans J., *The European Union and the securitization of migration*, *Journal of Common Market Studies*, 5, 2000, 753; Miller T. A., *Blurring the boundaries between immigration and crime control after September 11th*, *Boston College Third World Law Journal*, 25, 2005, 90.

Convention imposes on the States the obligation to renew the residence permit, even if it is not definitive. However, the Directive does not oblige the Member States to do so. Even so, Art. 11.6 provides some help in resolving this problem by offering the possibility of granting international protection in accordance with international standards or national laws, on the understanding that stateless persons and asylum seekers are protected against refoulement; however, not all victims of trafficking are eligible for such protection.

In our view, despite the focus on assistance and protection, Directive 2011/36/EU reflects the interest of protecting persons residing in the European Union and criminalizes victims who are in an irregular situation, having to collaborate effectively with the competent authorities to obtain a residence permit that allows them a regular administrative situation, even if temporary, completely diluting the victim-centric perspective proclaimed at the beginning of the rule.

Unfortunately, taking into account the obligation to include the Directive in the legal systems of the Member States of the European Union, the protection of victims of trafficking in human beings is a means of lack of protection. In the Spanish legal system, for example, the restrictive immigration policy has prevailed in the protection of the human rights of victims of human trafficking.

The protection of these victims is conditioned on their collaboration and this reflects the instrumentalization of victims of human trafficking and, consequently, there is a reduction in the recognition of their rights.

Taking into account the global nature of the crime of trafficking and its own instrumentalization to satisfy the consumer demands of the citizenry, foreign victims of human trafficking represent that group of human beings that is inferior to that of workers, who they completely lack any rights and are reduced to the category of merchandise within the illegal economy.

The value of the person reduced to merchandise resides in their work capacity and their response to the labor needs that the system demands. Thus, a protection system for victims of trafficking like the current one leaves out the people who require the most assistance: responding to the neoliberal capitalist economic system, the economic model that prevails today, excludes certain subjects to guarantee the subsistence of the this.

In the protection system, the irregular administrative situation is prioritized over the status of victim by demanding collaboration to grant the status of victim. This is due to the European guidelines that seek to control migratory flows and place the protection of these victims in a second priority position. Thus, the lack of protection that the protection system for victims of human trafficking implies is highlighted, given that they are facing a process of criminalization due to their irregular administrative situation.

VI. Reflections on International and European Instruments

In view of the most relevant instruments on trafficking in human beings, the Palermo Protocol, the Warsaw Convention, and Directive 2011/36/EU, which also refers to Directive 2004/81/EC, we understand that efforts have been made to protect victims. The Palermo Protocol was the first instrument that conceived the need to provide comprehensive protection to victims, without departing from the criminal-centric vision, but it deepened the idea that the fight against trafficking in human beings does not only involve prosecution and investigation, serving as a reference for subsequent instruments.

The Warsaw Convention was the evolved successor to the Palermo Protocol, which deepened the victim-centric perspective of the fight against trafficking in human beings, bringing major innovations such as the proposal of the recovery and reflection period. This instrument has been the basis for the real protection of victims of trafficking in human beings, it contains measures of assistance, both physical and psychological, the recovery period, the residence permit for cases in which the victim is in an irregular administrative situation, and, most importantly, that it can be granted without any condition, such as collaboration.

The advent of Directive 2011/36/EU together with Directive 2004/81/EC has broken with the victim-centric approach that had built the Warsaw Convention, disguising the political-economic interests and restrictive migration policies of the European Union, in the protection of victims of trafficking⁷⁸. What the Warsaw Convention proposed as aid measures for this group of victims - period of reinstatement and reflection, assistance and aid, residence permit - has also been adopted by the European Union in its Directives, but always in its own interests, creating a form of aid that requires the collaboration of the victim, a perspective incorporated into the Spanish legal system, as we will see below. In the event that the victim is in an irregular administrative situation, protection is reserved for those who cooperate with the competent authorities, thus creating a system of unequal protection⁷⁹ which criminalizes poverty⁸⁰. The difference is made between individuals and immigrants in an irregular administrative situation: these are considered “non-citizens” and undeserving of protection⁸¹.

⁷⁸ Scarpa S., *Trafficking in Human Beings. Modern Slavery*, Oxford University Press, New York, 2008, 204.

⁷⁹ Gromek-Broc K., *EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective? Nova et Vetera*, 64, 2011, 233.

⁸⁰ Muñagorri Laguía I., *Derecho Penal intercultural y crisis del principio de soberanía*, en Contreras P., *Mutaciones del leviatán. Legitimación de los nuevos modelos penales*, Akal, Madrid, 2005, 197.

⁸¹ De Lucas J., Torres F., *Inmigrantes: ¿cómo los tenemos?*, Algunos desafíos y (malas) respuestas, Talasa Ediciones. Madrid, 2002, 11 -19; Maqueda Abreu M. L., *Hacia una nueva interpretación de los delitos*

The three aforementioned instruments contain a mandate to articulate a comprehensive protection system to respond to all the needs that this group of victims may have: for example, a system for the recognition of rights in the procedural sphere, from a welfare, personal, and health perspective, as well as guaranteeing measures to compensate them and restore the rights of which they have been deprived.

As regards the most vulnerable victims, i.e., undocumented migrants, the Warsaw Convention, unlike the Directive, does not make the granting of a residence permit conditional on the effective cooperation of the victim. Consequently, as far as the European Union is concerned, when the victim does not cooperate or the conditions of the State's domestic law for obtaining a residence permit are not met, he or she will be at risk of being deported to his or her country of origin⁸².

Indeed, taking into account the link between trafficking in human beings and irregular immigration, the aforementioned instruments, and especially Directive 2011/36/EU, focus their efforts on providing protection to those legally residing in the Member States, criminalizing poverty, on the understanding that they are not necessary for the profitability of the system when priority should be given to the defense of the human rights of the victims⁸³. Concurring with DE LA CUESTA ARZAMENDI, victims should have their rights recognized, so they need assistance and support for their recovery without this being conditioned to their possible collaboration or witness status, taking into account that the return to the country of origin will rarely be compatible with respect for their dignity and human rights⁸⁴.

As has been mentioned, the control of migratory flows is pursued, and the protection of these victims is left in a second priority position. It is decided to criminalize the irregular administrative situation before the protection of these victims.

All this does not seem to affect the European Union, although in the practical perspective the States are encountering serious problems of lack of protection for the victims. For this reason, the Spanish State has just approved the Draft Comprehensive Organic Law against Trafficking and Exploitation of Human Beings, which comprehensively addresses the fight against all forms of trafficking and exploitation, from sexual and labor to organ trafficking. Among other issues, it contemplates the creation of the National Referral Mechanism, a body that will make an initial identifi-

relacionados con la explotación sexual, *La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía*, 1, 2006, 1501.

⁸² Lara Aguado A., *Protección de extranjeros especialmente vulnerables*, Actas del I Congreso internacional sobre migraciones en Andalucía, Instituto de Migraciones, Granada, 2011, 889.

⁸³ *Ibid*, 883.

⁸⁴ De La Cuesta Arzamendi J. L., *Tráfico y trata de seres humanos: regulación internacional y europea*, González M. R., Brun R. I., Poelémans M., *Estudio sobre la Lucha contra la Trata de Seres Humanos*, Aranzadi, Cizur Menor, 2013, 107.

cation of the victims and will refer them for their assistance and protection, depending on the different types of trafficking (for purposes of sexual exploitation, labor or related to bodies), with the guarantee of the specialization of all the actors involved in the process of detection, identification, assistance and protection, as well as the coordination and cooperation between them.

One of the most important points regarding protection resides in dispensing with the active collaboration of the victim in the criminal investigation to guarantee the necessary measures to assist the victim (guaranteeing the right not to be expelled and expelled in those cases in which the victim of human trafficking is in an irregular administrative situation), and, likewise, that the detection and identification process is not conditioned to the filing of a complaint —as is the case with victims of sexist violence. It is expected that, in the cases in which the identification is definitive, the victims will have labor rights, housing benefits, comprehensive reparation and financial compensation.

A phenomenon as complex as trafficking in human beings must be addressed through a strategy focused on the human rights of the victims, which contains a multidisciplinary and complete treatment to guarantee the protection of all the victims and not only of a group, avoiding that the guardianship of those who are in a situation of administrative irregularity is conditional on collaboration with the Justice Administration. For this reason, at least in the Spanish case, the premises included in the draft of the trafficking law that aims to correct all those issues that caused greater victimization in the victims, as well as their lack of protection, are encouraging.

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