

The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian Experience

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A. Introduction

The aim of this article is to analyze the European approach¹ to the protection of trafficking victims and evaluate its potential for success. In light of the Italian experience, I will try to demonstrate that the protection offered by European law is too narrow, and therefore bound to be ineffective. I also endeavor to show that offering protection to all trafficked persons, independent of their willingness to cooperate with the justice authorities, is necessary in order to protect the victims' human rights, and also to ensure the full implementation of criminal law.

Human trafficking is one of the most heinous crimes in the contemporary world:² people are bought and sold, forced to work in the underground economy or sex industry, and often subjected to brutal violence and terrifying threats. Trafficked persons are moved across national borders; they lead invisible lives while trying to escape the police for fear of expulsion, and often endure violence and fear of retaliation. Even if these victims manage to escape, they are exposed to serious threats from their traffickers who try to find and punish them, or their families, in order to deter others from escaping. Moreover, if they are found by the police, they are normally expelled, as they are illegal immigrants. As a result, the crime perpetrated against them cannot be prosecuted, since the most informed witnesses are no longer available. Concentrating on punishing the traffickers, without

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¹ In particular, I make reference to the European Union instruments dealing with this issue, as well as to the Council of Europe's convention.

² According to estimates, trafficking in people represents the third-largest source of profits for organized crime after drugs and weapons. See Melanie Orhant, *Trafficking Exposed*, 30 *POPULATION TODAY* 4 (2002). According to the ILO, the global profits of trafficking are around 31.6 billion dollars per year. See Patrick Belser, *Forced Labor and Human Trafficking: Estimating the Profits*, 17 (Int'l Labor Office, Working Paper No. 57, 2005).

offering any protection to their victims, appears to be counterproductive: victims are left to face retaliation and further violence, and the trial is often bound to end in an acquittal.³

The most recent international documents on trafficking require the adoption of a three-pronged policy, the so-called “three-Ps approach,” focusing on prevention, prosecution and protection. However, while the provisions on prosecution are binding, the clauses on protective and preventative measures are often framed weakly, and impose no obligations on State parties. For instance, in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,⁴ adopted in 2000, article 5 requires States to establish trafficking as a criminal offense, while article 6, concerning victim protection, mentions measures (such as providing the victims with housing and medical assistance), but are not mandatory. The European approach to trafficking seems to be much broader: States have been obliged to adopt protective measures for trafficking victims with the adoption of the European Council Directive 2004/81/EC and of the Council of Europe 2005 Convention.

B. The Council Directive 2004/81/EC

The European Council Directive 2004/81/EC,⁵ which follows the Framework Decision on Trafficking⁶ and its definition of the crime, aims at creating a short-term residence permit for victims who cooperate with the authorities.⁷ The Directive provides a “reflection period” to any non-European citizen⁸ who is identified as a victim of trafficking, during

³ See Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUMAN RIGHTS QUARTERLY 975 (2001).

⁴ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 15 December 2000, which entered into force on 25 December 2003.

⁵ See EC Directive 2004/81/EC of 29 April 2004, O.J. 2004, L 261, 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 decide to cooperate with the competent authorities.

⁶ Framework Decision 2002/629/JHA of 19 July 2002, O.J. 2002, L 203, on combating trafficking in human beings.

⁷ It is interesting to note that although in one of the first drafts of the Directive it was suggested to create minimum standards of protection for both smuggling and trafficking victims, mandatory measures were limited to trafficking victims. On the drafting history of the Directive, see Tom Obokata, *EU action against trafficking in human beings: past, present and future*, in IMMIGRATION AND CRIMINAL LAW IN THE EU 402 (Elsbeth Guild and Paul Minderhoud eds., 2006).

⁸ It seems worthwhile to highlight that in the preamble, the Directive makes reference to the principle of non-discrimination. This is of utmost importance in the fight against human trafficking, especially with regard to gender-based discrimination. Gender equality might indeed require the adoption of measures that not only take into account the special needs of women and children, who are the majority of the victims of this crime, but also measures that better protect men and transgenders, to whom many States pay little or no attention. See *Trafficking of men – a trend less considered*, 1 GLOBAL EYE ON HUMAN TRAFFICKING 1 (2007). See also, David A. Feingold, Think Again: *Human Trafficking*, 150 FOREIGN POLICY 26-32 (2005).

which, States are obliged to grant him a minimal level of subsistence and emergency medical treatment. Afterwards, victims who are willing cooperate with justice authorities may be granted a temporary residence permit.

The first potentially problematic issue concerns the identification of victims. The Directive requires Member States to inform victims of their rights (art. 5), but it does not mention the adoption of special procedures in order to identify victims. If States do not train their police officers to distinguish between illegal immigrants and potential trafficking victims, the Directive will not be fully implemented, and compounding this problem is the fact that police officers training often focuses on identification and expulsion of illegal immigrants.⁹

Another problem that will surely arise in the application of this Directive concerns the reflection period. According to the first draft, it was supposed to last at least 30 days, but subsequent discussions led to the elimination of any specific provision regarding length, which is now left to the State's discretion.¹⁰ Consequently, a national decision to opt for a very short reflection period might render it completely useless. Many independent organizations¹¹ have stressed that a period lasting less than three months would not allow victims to recover, and thus make an independent decision on whether or not to cooperate. Moreover, the type of assistance offered during the reflection period is very poor. For instance, psychological assistance is only granted if provided by national law (article 7). Specific reference to this type of medical treatment might, of course, encourage States to take it into consideration; however, they are under no obligation to provide it to the victims, even though many need psychological treatment in order to fully recover.¹²

After the expiration of the reflection period, victims can obtain a short-term residence permit of at least six months if they agree to cooperate with national authorities, and if their stay is considered to be opportune. The permit can be renewed as long as these conditions continue to be satisfied, but will expire after a decision to terminate

⁹ On the fact that law enforcement authorities often fail in identifying trafficking victims as such, see Suzanne Tiapula and Melissa Millican, *Identifying the Victims of Human Trafficking*, 42 PROSECUTOR 34 (2008).

¹⁰ National laws of some member States already provide for a reflection period for trafficked persons; however, its length varies from 15 days, as available in Denmark, to 90 days, as available in the Netherlands (so-called B-9 regulations). See Anne Gallagher, *Triply Exploited: female victims of trafficking networks – strategies for pursuing protection and legal status in countries of destination*, 19 GEO. IMMIGR. L.J., 99 (2004); Dutch National Rapporteur on THB, *TRAFFICKING IN HUMAN BEINGS – FIFTH REPORT OF THE DUTCH NATIONAL RAPPORTEUR* (2007). On national legislations of other States, see also Mohamed Y. Mattar, *Incorporating the five basic elements of a model anti-trafficking in persons legislation in domestic laws: from the UN Protocol to the European Convention*, 14 TUL. J. INT'L & COMP. L. 357 (2006), and see also the materials available at www.protectionproject.org.

¹¹ See Antislavery and ECPAT UK, *BRIEFING ON A PROPOSAL FOR: EUROPEAN UNION COUNCIL DIRECTIVE* (2002).

¹² On the consequences of human trafficking, and its long-term effects on the victim's health, see Cathy Zimmerman et. al., *THE HEALTH RISKS AND CONSEQUENCES OF TRAFFICKING IN WOMEN AND ADOLESCENTS. FINDINGS FROM A EUROPEAN STUDY*, LONDON SCHOOL OF HYGIENE & TROPICAL MEDICINE (LSHTM) 71 (2003).

proceedings, as explicitly stated in article 13. Moreover, the permit does not automatically grant access to the labor market or to education. States are required to define the rules under which permit holders of the permit may have such access, taking into consideration the need for third-country nationals to gain their independence (Preamble, para. 16).

The European Parliament, in approving the Commission's proposal for the Directive, had suggested introducing a new clause, in which States, when issuing a residence permit to trafficking victims, would need to consider granting to victims' family members a permit of the same length.¹³ However, this provision has not been included in the final text of the Directive, which does not address the protection of families. The lack of any provision on this subject might impinge on the effectiveness of the Directive, as trafficking victims often refuse to cooperate due to fears of retaliation against their families.¹⁴

Another issue that deserves consideration is the strong connection between the residence permit and criminal proceedings. According to article 8, the permit is issued taking into consideration the following two factors: the opportunity of prolonging the victim's stay on the territory for the investigations or the judicial proceedings, and whether the victim has shown a clear intention to cooperate. This approach has been strongly criticized. For instance, the Experts Group on Trafficking in Human Beings, set up by the European Commission,¹⁵ has suggested that a residence permit should be issued to all trafficked persons, independent of their willingness to cooperate. In its Report,¹⁶ the Expert Group stressed that trafficking victims who do not wish to testify at trial, or who are not needed as witnesses (for instance, because they possess no relevant information), require as much protection and assistance as "useful" victims. Moreover, the Report underlined the importance of providing for the conversion of the short term permits into permanent ones, either on humanitarian grounds or when the person has completed a social assistance program and found employment. However, this suggestion was also not included in the final text.

At first blush, the Directive may appear to grant reasonable standards of protection to trafficking victims. Those who are willing to cooperate will be granted a residence permit, and every person who is identified as a victim will be offered a short reflection period

¹³ See the European Parliament legislative resolution on a proposal for a Council directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM(2002) 71 - C5-0085/2002 - 2002/0043(CNS).

¹⁴ On the importance of protecting the victims' families, see Katrina L. Baker, *Don't forget the family: a proposal for expanding immediate protection to families of human trafficking survivors*, 30 *FORDHAM INT'L L.J.* 836 (2007).

¹⁵ Decision 2003/209/EC of 25 March 2003.

¹⁶ EXPERTS GROUP ON TRAFFICKING IN HUMAN BEINGS, REPORT, 100 (2004), available at http://ec.europa.eu/justice_home/doc_centre/crime/trafficking/doc/report_expert_group_1204_en.pdf.

during which he can recover, as well as minimal assistance. However, since the issuance of a residence permit depends on the victims' willingness and ability to cooperate, it is evident that the Directive merely considers them as potential witnesses. This was even clearer in the first draft of the Directive, in which the authority responsible for investigations or prosecution was to decide whether it considered the presence of the victim to be *useful*.¹⁷ Although the language of this provision has been amended, the Directive's approach to victims still appears to be an opportunistic one: they are only offered a residence permit, which allows them to recover and prevents the risk that they will be re-trafficked, only if they are deemed to be useful witnesses.¹⁸ Once the trial is over, victims lose all their rights and can be returned to their home countries, no attention being paid to the risks they might face for having testified in the criminal proceedings.¹⁹

It is also clear that the Directive does not entirely trust trafficked persons, as it requires them to sever all relations with the criminals who trafficked them, and allows for withdrawal of the permit if they renew contact with them, regardless of their reasons for doing so. These conditions deserve deeper analysis as they are indeed typical measures adopted when dealing with members of criminal organizations who decide to cooperate with justice authorities, and are adopted in order to ensure that such a decision is not taken in the interest of the organization, but of the justice system. Although Article 8 is not directed at the criminals, but at their victims (who were never members of the criminal organization), the purpose of these provisions is unclear. There may be cases where victims maintain ties with the organization (for instance, when its members threaten them or their families), but these ties have nothing to do with criminal law or with the reliability of the victim's statements, and should not be considered when deciding on the issuance of a permit.²⁰

Despite its faults, the Directive demonstrates that attention is now being paid to victims with regard to their rights, as it mandates all Member States to grant victims a minimal standard of protection, and does not prevent them from adopting or maintaining more favorable provisions (art. 4). This cautious approach is quite understandable, considering that the Directive is mandatory on all Member States, including those whose immigration

¹⁷ See Human Rights Watch, COMMENTARY ON THE EUROPEAN COMMISSION PROPOSAL FOR A COUNCIL DIRECTIVE ON THE SHORT-TERM RESIDENCE PERMIT ISSUED TO VICTIMS OF ACTION TO FACILITATE ILLEGAL IMMIGRATION OR TRAFFICKING IN HUMAN BEINGS WHO COOPERATE WITH THE COMPETENT AUTHORITIES, 2002, available at <http://www.hrw.org/campaigns/migrants/docs/recidence-permit.pdf>.

¹⁸ See Silvia Scarpa, *La tutela dei diritti delle vittime di tratta degli esseri umani e il sistema premiale previsto dalla direttiva comunitaria 2004/81/CE*, DIRITTO IMMIGRAZIONE E CITTADINANZA 45 (2005).

¹⁹ See Elaine Pearson, *Half-hearted protection: what does victims protection really mean for victims of trafficking in Europe*, 10 GENDER AND DEVELOPMENT 56 (2002).

²⁰ See Maria Grazia Giammarinaro, *Il testo unico sull'immigrazione* in STOP TRATTA. ATTI DEL CONVEGNO INTERNAZIONALE 37 (On the Road Ed., 2002).

policies are very restrictive and those who do not have the means to implement expensive protective measures.

C. The Council of Europe 2005 Convention

The Council of Europe Convention on Action against Trafficking in Human Beings²¹ focuses on protection and prevention, as well as on prosecution and international cooperation (art. 1). As clarified in article 2, the Convention applies to all forms of trafficking, whether national or transnational, or whether connected to organized crime or not. This clause clearly aims at preventing an interpretation of the Convention in light of the UN Protocol, thus ensuring that its application will include each and every case of trafficking.

With regard to the protection of victims (articles 10 ff.), the Convention first addresses the problem of victim identification. States are required to provide law enforcement authorities with trained and qualified personnel and to ensure cooperation between different public authorities and support organizations.²² Once the victims have been identified, the treaty requires States to assist them “in their physical, psychological and social recovery.” A minimum standard of assistance is set forth, which includes: secure accommodation;²³ psychological and material assistance; emergency medical treatment; interpretation services; counseling; information on their rights; assistance to ensure their rights are presented in criminal proceedings; and in the case of children, education. These protective measures, which are not conditional upon the victim’s willingness to cooperate, are much broader than those granted by the EU Directive, and they address some of the problems typically experienced by trafficking victims, such as a lack of information on their rights, safe accommodations, and medical treatment. However, the Convention does not include some of the most important amendments that the CoE Parliamentary Assembly had proposed,²⁴ such as the right to appeal any decision refusing to grant a person victim status and the extension of protective measures to the victim’s family.

The Convention provides for a reflection period of at least thirty days, during which emergency assistance is granted to every victim. The length of this period has been determined in the Convention, upon the advice of the Parliamentary Assembly; however, it

²¹ Council of Europe Convention on action against trafficking in human beings, 16 May 2005, CETS n. 197.

²² See the COE Convention Explanatory Report, para. 127, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

²³ The Explanatory Report clarifies that secure accommodation is particularly important for victims, and makes reference to protected shelters as being especially suitable for trafficked persons. See para. 154, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

²⁴ See CoE Parliamentary Assembly, available at <http://assembly.coe.int/Documents/AdoptedText/ta05/EOP1253.htm>.

disregards the suggestion made by the Rapporteur to the Committee for Equal Opportunities for Women and Men – to grant a reflection period of at least three months in order to allow the victims to recover, and thus increase the likelihood of cooperation.²⁵

At the end of this period, State parties shall issue a renewable residence permit to victims whose stay is necessary in light of their personal situation, and/or if it is necessary for their cooperation in the investigation or criminal proceedings. No reference is made to the length of the permit, nor is there any provision suggesting its possible conversion into a permanent one.²⁶ Moreover, States can freely determine the conditions upon which the permit will be renewed and the rules under which it will grant access to the labor market or to education. The broadness of State discretion thus allows national policies to undermine some of the most useful protective measures. A particularly problematic provision is the one allowing States only to issue a residence permits to victims whose stay is useful for the trial, excluding those who are not willing to cooperate and those who do not possess any useful information, even when their personal situation suggests that they may be at risk of suffering further harm if repatriated. Although article 16, concerning repatriation and return of victims, requires States to take into account the rights, safety and dignity of victims, stating that their repatriation “shall preferably be voluntary,” it is unclear which procedure shall be adopted and what will happen to victims whose rights and safety would be endangered by their return, but who are not “useful” for the purposes of trial. Moreover, the provision could be given a restrictive interpretation. Since trafficking victims are often threatened even when they are still in the country of destination, it would be easy to argue that their rights and safety would not be at a higher risk if repatriated.²⁷ Nevertheless, the protection offered by law enforcement authorities is usually more effective in destination countries than it is in countries of origin.

Finally, one aspect of the Convention worth taking into consideration is the mechanism set up in order to control its implementation. Article 36 requires the creation of a Group of Experts on Action against Trafficking (GRETA), whose task is to evaluate how the Convention is applied in Member States. According to article 38, GRETA can adopt questionnaires to be addressed to State parties, but it can also require information from civil society groups or organize country visits. This should ensure that the Group of Experts receives all relevant information, even though it cannot receive individual complaints

²⁵ See Ruth-Gaby Vermot-Mangold, REPORT TO THE COMMITTEE ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN (2005), Doc. 10397, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10397.htm>. See also, Anne Amiel, *Integrating a human rights perspective in the European approach to combating the trafficking of women for sexual exploitation*, 12 BUFF. HUM. RTS. L. REV. 5 (2006).

²⁶ Article 14, para. 4 only states that if the victim applies for another kind of residence permit, the State shall take into consideration that he or she holds, or has held, the residence permit provided for in this article.

²⁷ See Dagmar Oberlies, *Il livello europeo*, in STOP TRATTA. ATTI DEL CONVEGNO INTERNAZIONALE 115 (On the Road Ed., 2002).

against single States. At the end of the evaluation process, GRETA adopts a report, taking into account the State's comments, which can contain suggestions to the State concerned. This report will subsequently be made public. The monitoring mechanism is probably one of the greatest strengths of the Convention.²⁸ Because the report will be publicly accessible, States will be strongly encouraged to act in accordance with the Convention in order to avoid being criticized for failing to comply with their duties under a human rights treaty.²⁹

The Council of Europe's approach, although broader than the EU's, is still too narrow. In spite of the fact that the Treaty was originally intended to be more human-rights centered than the EC Directive, its mandatory measures are similar to those of the latter, and a higher standard of protection is merely encouraged. The drafting history of the Convention partially explains the lack of mandatory provisions on the protection of all trafficked persons: although the mandate of the drafting committee (CAHTEH)³⁰ was to focus on human rights, many of the most relevant provisions were not adopted due to the reluctance of the European Commission representatives to approve them. In one of its recommendations, the Parliamentary Assembly harshly criticized the role of the Commission during the drafting of the Convention. In particular, it stated that its representatives, during the negotiations within CAHTEH, rejected most of the protective measures proposed by the Assembly, and that "since, within CAHTEH, there was no majority to be held against the position of the European Commission, the Council of Europe will be forced to lower its standards to the lowest common denominator of Community law."³¹

The Convention is one of the few international documents on trafficking focusing more on victims' protection than on traffickers' prosecution. The provisions on the assistance to be granted during the reflection period are much broader than those enshrined in the EU Directive, and States are encouraged to issue a residence permit to all trafficking victims whose situation so requires, not only to those who decide to cooperate. The Convention also provides for non-punishment of trafficked persons and for the protection of victims, witnesses and their families if their participation at trial endangers their lives and safety. Moreover, the creation of an efficient monitoring mechanism is unique to this Convention,

²⁸ See Amiel, (note 24), 52.

²⁹ See Anke Sembacher, *The Council of Europe Convention on action against trafficking in human beings*, 14 TUL. J. INT'L & COMP. L. 435 (2006).

³⁰ Ad Hoc Committee on Action Against Trafficking in Human Beings (CAHTEH), set up by the Committee of Ministers on 30 April 2003.

³¹ See Parliamentary Assembly, RECOMMENDATION 1695 (2005) ON THE DRAFT COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS, available at <http://assembly.coe.int/Documents/AdoptedText/TA05/EREC1695.htm>.

and should ensure its full implementation. The role of the Council of Europe in protecting and promoting human rights has always been significant, and the interactions between the rights granted by the Convention and those enshrined in the European Convention of Human Rights (ECHR), as interpreted by the Court,³² can lead to very broad protection of trafficked persons. Yet, the Convention leaves too much discretion to State parties, and an evaluation of its validity will only be possible by examining how States will decide to use their discretion in implementing it. Moreover, the Convention has been adopted by only a small number of States, notwithstanding the CoE's action directed at promoting the greatest number of signatures and ratifications.³³ At the moment, in many Member States the protection of victims' rights is only guaranteed by national law adopted according to the ECHR, the EU Directive (for those States that are members of both organizations), or simply to national standards.

D. A National Approach: The Italian Law on the Protection of Trafficked Persons

Many of the States that have adopted measures intended to protect trafficked persons require them to cooperate with national authorities in order to obtain protection, assistance, and a residence permit. Often, the permit is not renewed after the trial against the trafficker has come to an end. For instance, in the Netherlands, victims are given a temporary residence permit only if, after a three-months reflection period, they decide to report the crime. Such a permit is only valid for the duration of the investigation and trial, although it can be converted, in some cases, into a permanent residence permit.³⁴ In the United States, the so-called T-Visa is only granted to victims of severe trafficking who have complied with any reasonable requests for assistance in the investigation or prosecution of the crime, and only if the victim would suffer extreme hardship, involving unusual and severe harm, upon removal.³⁵ In some countries,³⁶ the temporary residence permit can

³² See article 3 of the ECHR, and *Siliadin v. France*, Eur. Ct. H.R., (73316/01, 26 July 2005); and Holly Cullen, *Siliadin v. France: positive obligations under article 4 of the ECHR*, 6 HUM. RTS. L.R. 585 (2006).

³³ See the Coe Campaign: Human Beings – Not for sale, which lasted from January 2006 to January 2008, available at http://www.coe.int/t/dg2/trafficking/campaign/Docs/Overview/Default_en.asp. At the moment, the Convention has been ratified by 20 States, while another 20 countries have signed the treaty, but have not yet ratified it.

³⁴ See Dutch National Rapporteur on THB (note 9).

³⁵ On the Trafficking Victims Protection Act, see April Rieger, *Missing the mark: why the trafficking victims protection act fails to protect sex trafficking victims in the United States*, 30 HARV. J.L. & GENDER 231, 241-3 (2007).

³⁶ For instance, in Belgium. On the Belgian legislation on the protection of trafficked victims see the report of the Centre pour l'égalité des chances et la lutte contre le racisme, *Les victimes sous les projecteurs* (2006), available at www.diversite.be, and Jean-Pierre Jacques, *Les étrangers victimes de la traite des êtres humains*, 145 REVUE DU DROIT DES ETRANGERS 47 (2007).

become a permanent one, but conversion is subject to the outcome of the trial. However, this appears to be an unreasonable condition, as convictions of traffickers do not depend upon the victim.³⁷

The Italian legislation on trafficking differs from those cited above, as it offers victims a higher standard of protection: trafficked persons can be admitted into a comprehensive protection program and obtain a residence permit, if necessary, which allows them to avoid further violence and exploitation. The provision on the protection of trafficking victims is also one of the oldest in Europe. The 1998 Immigration Law already included this rule (article 18), which has recently been amended in order to allow EU citizens to participate in the protection programs even though they do not need a visa.³⁸ Moreover, the 2003 law, which amended the criminal code by modifying the crimes of enslavement and trafficking,³⁹ includes another provision on the protection of trafficking victims, open to citizens of every nationality. A deeper analysis of these provisions seems worthwhile, as the Italian legislation offers a very peculiar model of victims' protection, and an evaluation of its actual application might point to some of the deficiencies of the European model.

Article 18 of the immigration law⁴⁰ was adopted as a consequence of the unsuccessful application of previous laws, which only granted a residence permit to those victims who were in danger due to their statements at trial.⁴¹ In 1998, it was already clear that conditioning the issuance of permits on a previous decision to cooperate with the justice authorities, would not persuade many victims to testify.⁴² Another successful argument against requiring cooperation from victims was the comparison between the old measures, and those traditionally adopted for highly dangerous criminals. Since the 1970's, the Italian justice system has included measures to "reward" those defendants who, having been accused of participating in dangerous criminal organizations, cooperate with law enforcement authorities contributing to the prevention of new crimes or to the prosecution of other members of the same organization (so called "repented"). It was

³⁷ See Gallagher, (note 9) 99.

³⁸ See Law Decree 300/06, converted in Law 17/07, article 6. This amendment has been supported by most NGOs working in the field of trafficking: many of the victims that they currently assist recently became EU citizens, and although they might not need a residence permit, they still need all the protection and assistance that used to be linked to it.

³⁹ Law 228/03, article 13.

⁴⁰ Legislative decree no. 286/98.

⁴¹ Law Decree 477/96, article 5.

⁴² The data confirmed this belief: in the first two years of application of article 18, the number of criminal proceedings related to facts of trafficking and enslavement rose from 200 to 2930. See Maria Grazia Giammarinaro, *Aspetti positive e nodi critici della normativa contro la tratta di persone* in 3 QUESTIONE GIUSTIZIA 457 (2005).

easy, therefore, to criticize a provision that granted protection to victims of crimes, but required from them the same cooperation that was usually expected from criminals.⁴³

Article 18 describes two different situations that may lead to the adoption of a protective program, and two different procedures to obtain a residence permit – the permit can only be issued to victims who take part in the assistance program.⁴⁴ The conditions that must be satisfied in order to be admitted into a protection and assistance program, which precedes the issuance of a residence permit, are (1) that the victim finds himself in a situation of violence⁴⁵ or of serious exploitation,⁴⁶ and (2) that his safety is at risk, either as a consequence of his attempts to escape the influence of a criminal organization, or as a result of the statements he made during the pre-trial investigations or at trial. Victims are thus granted protection if they are facing a serious risk for their lives or safety.⁴⁷ According to the law, the situation of the victim can be ascertained either by social services or in the course of police investigation. Once a victim is identified as such, he should be offered admittance into a protective program. The services offered in the course of this program may vary, as each program is tailored on the specific needs of the victim;⁴⁸ however, the Minister for Equal Opportunities has listed certain activities that every program must offer in order to obtain public funding, which include accommodation, medical and psychological treatment, legal aid, help to obtain the residence permit, education and assistance in finding a job.⁴⁹

⁴³ See Maria Grazia Giammarinaro, (note 19), 41.

⁴⁴ The link between residence permits and assistance programs is clear: the permit itself is issued, according to article 18 (1), in order to allow the person to recover, to escape the influence and violence of the criminal organization, *and* to take part in the protection and assistance program; moreover, the permit can be withdrawn, if the person ceases to participate in the program.

⁴⁵ “Violence” should be interpreted so as to include any form of coercion; however, according to a recent research, in some provinces the permit is only issued if the victim is subjected to physical violence. See SALVATORE FACHILE ET AL., *LA TRATTA DI PERSONE IN ITALIA: LE NORME DI TUTELA DELLE VITTIME* 75 (2007).

⁴⁶ Should there be a case where a person is exploited without the use of violence, article 18 would still be applicable, as long as the exploitation is “serious.” Article 18, therefore, also applies in cases of debt-bondage, for instance. See Maria Grazia Giammarinaro, *Il permesso di soggiorno per motivi di protezione sociale previsto dall’art. 18 TU immigrazione*, 4 *DIRITTO IMMIGRAZIONE E CITTADINANZA* 34, 39 (1999).

⁴⁷ The law does not make any specific reference to the crime of trafficking, as in 1998 this phenomenon was usually linked to forced prostitution. Indeed, the first protective programs approved by the Minister for Equal Opportunities were only applicable to victims of sexual exploitation; it is only since 2006 that these programs have been extended to victims of all forms of trafficking. See FACHILE ET AL., (note 43), 101.

⁴⁸ NGO’s or public social services are tasked with designing a detailed protection and reintegration program, specifically tailored for each trafficking victim. The program subsequently forms part of the dossier that the *Questore* evaluates.

⁴⁹ See Avviso n. 9, at http://www.pariopportunita.gov.it/Pari_Opportunita/UserFiles/PrimoPiano/avviso_9.pdf.

Once a victim is admitted into the protection program, there are two different procedures which can lead to the issuance of a residence permit.⁵⁰ One procedure, the so-called “judicial path,” necessarily involves justice authorities. This procedure applies when the victims are already cooperating with national authorities, and the residence permit is issued by the police superintendent (the *Questore*) at the Prosecutor’s request. On the contrary, the other procedure, the so-called “social path,” does not require any action by the Prosecutor, as it only involves the social services (including registered NGO’s⁵¹ and associations) and the police superintendent. The decision to issue a residence permit is taken by the *Questore* on the basis of a detailed request coming from the association which is taking care of the victim in the course of the protection and assistance program. Although in this case the crime may not yet have been reported, the request for a residence permit always gives rise to the opening of a criminal investigation: indeed, the police officer who receives the application has a duty to inform the judicial authorities, as he is a public officer and, as such, has the duty to report crimes.⁵²

One of the main advantages of granting a residence permit, even to victims who are not willing to act as witnesses, is that it allows prosecution of the traffickers to begin even when the victims do not report the crime. Indeed, offering a residence permit to those victims who are not willing to cooperate allows the police to have knowledge of a higher number of trafficking cases through the applications for the residence permit. In addition, many NGO’s stress that victims are often too afraid to cooperate at first, as they mistrust the police. Thus, if required to testify in order to obtain a permit, they would probably decide not to apply for it, but to either leave the country (thus reducing chances that their traffickers will ever be successfully prosecuted), or to remain in an illegal residence status (which increases their chances of re-victimization). In the Italian system, victims are encouraged to apply for the permit independent of their willingness and ability to cooperate. Later, during the process that leads to the issuance of the permit, they have the time to recover completely and learn how national authorities work, and thus often decide to testify.⁵³ Another advantage of not conditioning issuance of permits upon victim cooperation regards the reliability of their statements. Benefits that depend upon the victims’ willingness and ability to cooperate might affect the credibility of the witnesses, as

⁵⁰ These procedures are clearly described in article 27 of the Presidential Decree no. 394/1999, which contains the regulations that refer to article 18.

⁵¹ These NGO’s must be enrolled on a special register, according to article 52 of legislative decree 286/98.

⁵² See DAVID MANCINI, *TRAFFICO DI MIGRANTI E TRATTA DI PERSONE* 77 (2008). Moreover, once the trial begins, the victim can be called to testify, and in this case he/she has a duty to act as a witness, as in Italy everyone who is called as a witness in a criminal trial has the duty to testify.

⁵³ See Maria Grazia Giammarinaro, (note 19) 39.

they may be induced to exaggerate the importance of the information they possess in order to obtain the permit.⁵⁴

Once the residence permit is issued, it is valid for at least six months, and can be renewed for one year, or even longer, if justice so requires. The permit gives access to education, health care, and the labor market. Moreover, once the permit expires, it can be converted into a work or study permit.

Another protective measure that is also linked to trafficking is included in article 13 of Law no. 228/2003. This clause provides for a short-term protection (lasting from three to six months) for victims of trafficking and enslavement, and offers temporary assistance such as food, accommodation, and health care. The difference between this type of assistance and that provided for by Article 18 of the immigration law is unclear. Since 2007, both programs are applicable to EU citizens, and thus the greatest difference between them has been cancelled. Article 13 has therefore been used as an emergency measure, the application of which might lead to the later application of article 18.⁵⁵

E. Practical Application of the Italian Law: Problems and Solutions

Before drawing my conclusions, I will examine some issues related to the practical application of the Italian legislation, in order to ascertain how the legal framework described above is in fact implemented.

One of the first problematic issues concerns the very essence of the residence permit. Although it is clearly not to be used as a reward for victims who cooperate with the police, NGO's have noted that in some areas, the permit is not issued when the victim refuses to provide information on the crime, or withdrawn if he ceases to cooperate or when the trial ends in a dismissal.⁵⁶ In one case, the victim appealed against the decision to withdraw the permit and the Central Administrative Tribunal admitted her claim, reaffirming that the residence permit is not to be considered as a reward for the victim's testimony, and that it is therefore not linked to the outcome of the trial.⁵⁷ Moreover, the Minister of the Interior

⁵⁴ See Maria Virgilio, *The instrumental use of article 18*, in ARTICLE 18: PROTECTION OF VICTIMS OF TRAFFICKING AND FIGHT AGAINST CRIME 219 (2002).

⁵⁵ See Francesca Mascellini, *I programmi di assistenza per le vittime di tratta previsti dal DPR 237/05*, in GLI STRANIERI (2006), 15; FRANCO PRINA, *LA TRATTA DI PERSONE IN ITALIA: IL SISTEMA DEGLI INTERVENTI A FAVORE DELLE VITTIME* 203 (2008); Bruno Brattoli, *Lotta alla tratta dei minori: dall'articolo 18 del TU sull'immigrazione alla nuova l. 228/03*, in 3 CITTADINI IN CRESCITA 11 (2003).

⁵⁶ See FACHILE et al., (note 43), 101. For an example of this application of the law, see the Judgment of the TAR Trentino Alto Adige, no. 128 (2 April 2003), in which the Tribunal confirmed the decision to withdraw the permit issued to a victim who had ceased to cooperate, and retracted her statements at trial. Judgment published in 2 FORO AMMINISTRATIVO TAR 1178 (2003).

⁵⁷ Consiglio di Stato, Judgement no. 6023/2006, published in DIRITTO IMMIGRAZIONE E CITTADINANZA, 2006, p. 215.

has also given instructions on this point, stressing that the humanitarian residence permit is not dependent upon the victim's cooperation and that the police, when deciding whether to issue the permit, should also consider the harm that the victim could suffer if repatriated.⁵⁸

Another problematic issue concerns the role of the Prosecutor's opinion. Some police superintendents still subordinate issuance of the permit to the Prosecutor's approval. In his directives,⁵⁹ the Minister of the Interior has clarified that the Prosecutor's opinion is only needed when the request for the permit follows the so-called "judicial path," and should never be required when it comes from the social services. Moreover, even when such an opinion is necessary, it is not to be deemed binding,⁶⁰ as the final decision is to be made by the police, not the justice authorities.

The last problematic issue to be taken into consideration concerns the conversion of the permit. The residence permit, which is granted on humanitarian grounds,⁶¹ might at some point need to be converted into either a work or a study permit. Unfortunately, many non-EU workers in Italy are employed in the underground economy. Consequently, they are not entitled to a work permit, as in the eyes of the law, they are unemployed. Moreover, even those who are working legally rarely find a steady job that would secure them a permanent residence permit. As a result, they are under constant threat of expulsion, as their residence permit is only renewed as long as they are employed.

It is also important to examine the data on the victims who have been accepted in protection programs or issued a residence permit, in order to determine whether the protective measures are being fully implemented. According to a report of the Ministry for Equal Opportunities,⁶² between 2000 and 2007, 54,559 persons were contacted by social services and NGO's and offered medical, psychological, and legal assistance. 13,571 victims

⁵⁸ See the Minister Directive n. 11050 (28 May 2007).

⁵⁹ See Circolare Ministero degli Interni, n. 300/C/2000/526/P112.214.18/1^div, adopted on 4 August 2000; n. n. 11050/M(8), adopted on 28 May 2007.

⁶⁰ See Consiglio di Stato, Judgement no. 6023/2006, published in DIRITTO IMMIGRAZIONE E CITTADINANZA 215 (2006).

⁶¹ Until 2004, the permit was issued making reference to "social protection." However, this permit did not ensure the protection of trafficked persons' privacy and made it possible to identify them. Therefore, article 27 has been amended and the permit is now issued making reference merely to "humanitarian grounds" (like any other permit granted to persons who are entitled to subsidiary protection).

⁶² See Report, available at http://www.dirittiepariopportunita.it/Pari_Opportunita/UserFiles/II_Dipartimento/Relazione_ex_Art18.pdf. It is important to note that every year, around 80 persons voluntarily decide to return in their home country: in this case, repatriation takes place with the help of NGO's and of the IOM, and the persons are offered help in the organization of the journey and the reintegration into society. See *Osservatorio sulla prostituzione e sui fenomeni delittuosi ad essa connessi*, RELAZIONE SULLE ATTIVITÀ SVOLTE, PRIMO SEMESTRE 2007 74 (2007).

were accepted into protection programs, and 5,653 residence permits were granted,⁶³ although there were 6,662 requests. The percentage of successful applications for a permit, therefore, is around 84 percent. According to the same source, 9,663 persons received professional training or education, and 6,435 started working.

With regard to the criminal proceedings against traffickers, the data⁶⁴ show that there has been an increase in the number of trials, although there are still many investigations that do not lead to criminal prosecution.⁶⁵ Law enforcement authorities themselves have highlighted the importance of the assistance and protection programs and the residence permit, as measures that facilitate reporting of crime to the police. As the former Anti-mafia Prosecutor said,⁶⁶ “Trafficked persons need to recover from the harm they suffered before they can be expected to cooperate; moreover, they often mistrust the police, as they have seen law enforcement authorities in their countries of origin being bribed by their traffickers, or cooperating with them in exploiting their victims. It is only once they have completely recovered, feel safe, and understand how the Italian police are working that they can start to collaborate.” The residence permit, therefore, not only offers the victims a good opportunity to recover, but also ensures a higher number of successful criminal trials against the traffickers.

The data just examined show that the protection and assistance programs have been fully implemented, and by offering victims unconditional help and assistance, the authorities obtain more cooperation than could be expected if these measures were viewed as a rewards for “cooperative” victims. Indeed, the number of permits issued according to article 18 has immediately increased in comparison to the permits issued according to law decree 477/96, and the number of victims who have decided to cooperate has grown.⁶⁷

⁶³ This number includes both the residence permits that have been issued and those that have been merely renewed.

⁶⁴ According to the Ministry of Justice’s statistics, between 2004 and 2005 the police registered reports against 2,217 persons, who had allegedly committed the crime of enslavement, while 1,051 persons were reported for exploiting child prostitution. In the same years, 648 persons were arrested for these crimes, but charges were brought only against 355 of them. See data, available at http://www.osservatoriotratta.it/download/LIBRO%20FENOMENO_DEF2%20-%20tab4%20-%20dati.pdf.

⁶⁵ Moreover, traffickers are sometimes accused of crimes other than trafficking itself, such as migrant smuggling or exploitation of prostitution, if there is insufficient evidence of the crime of enslavement.

⁶⁶ See the hearing of Piero Luigi Vigna at the Parliamentary Anti-mafia Commission on the 25 February 2004, available at http://www.camera.it/_dati/leg14/lavori/stenbic/30/2004/0225/s020.htm, 9-10.

⁶⁷ See Maria Grazia Giammarinaro, *L’innovazione, le prospettive e i limiti dell’art. 18 del D. Lgs. n. 286/98*, in *PROSTITUZIONE E TRATTA. MANUALE DI INTERVENTO SOCIALE 60* (On the Road ed., 2002).

F. Conclusions

The most important issue that we need to consider when comparing the European model of short-term residence permits to the Italian Law is which one is more likely to succeed. As noted above, the Italian experience seems to demonstrate that the European approach is too narrow: victims often decide to cooperate only after being granted a permit and a recovery period, which is usually much longer than the 30 days granted by the CoE Convention. Another problematic issue is the length of the permit. If States only offer victims short-term permits, which do not grant any right to remain in the country after testifying at trial, then the so-called “deal” will hardly be attractive to the victims whose testimony is much needed. Even if trafficked persons overcome their fear of the traffickers (who often manage to subdue them completely by means of violence, deception and threats), they will not decide to report them if they know that once the trial is over, they will have to go back to their State of origin, where members of the same criminal organization may be waiting to punish them. It is true that many States offer different, more comprehensive protective measures to crime witnesses, and possibly their families; but those measures are not designed explicitly for trafficking victims, whose special needs may not be satisfied simply by applying them. Moreover, these types of measures tend to be very expensive (and thus rarely used⁶⁸) and, in any case, they will usually not be offered to trafficking victims when they have to make the final decision on whether or not to cooperate. The same holds true for other measures that might be applicable to trafficking victims, but not explicitly designed for that them, and so not taken into account at the moment of their decision to cooperate. The chances of obtaining refugee status, for instance, will not be very clear at that time, while the risk of being found and punished is very high.⁶⁹ Offering a short-term residence permit in return for the victim’s testimony at trial is clearly not enough to induce victims to cooperate: from this point of view, persuasive measures should include high chances of obtaining a permanent residence permit for the victims and their relatives, who will face the consequences of the victims’ decision to testify.

The European approach to the protection of trafficking victims appears to be inadequate; it grants too little to trafficked persons, mainly for fear that too many immigrants will claim to have been trafficked in order to obtain a residence permit. However, a restrictive approach to immigration tends to increase the number of persons who are trafficked, as they have no way to migrate legally. If such an approach extends to the moment when victims are finally found and freed, then action against trafficking is bound to fail. The field

⁶⁸ See Shivaun Scanlan, *Problems with the implementation of the due diligence standard from the perspective of countries of origin in the OSCE Region*, in *DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE*, 203 209 (Carin Benninger-Budel ed., 2008).

⁶⁹ See Ryszard Piotrowicz, *European initiatives in the protection of victims of trafficking who give evidence against their traffickers* 14 INT’L J. REFUGEE L. 263 (2002).

of trafficking is one where human rights, immigration and criminal law intersect, and where they should be able to merge. Indeed, the aim of criminal law, and the reason for its existence, is the protection of important legal values (so-called *Rechtsgüterschutz*), including human rights.⁷⁰ No conflict should exist between criminal law and human rights, as the former mainly aims at protecting human rights and other legal values. If such a clash does exist, it is only because both human rights and criminal law have been subjected to restrictive immigration policies, thus perverting the hierarchy between laws and values. International and constitutional law require that all European countries protect human rights, amongst others, by means of criminal law, while restrictive immigration policies have no basis but in national law and political decisions. Letting the latter prevail over the former, States are actually protecting traffickers from prosecution and sacrificing victims' rights.

⁷⁰ Tullio Padovani, *Prostituzione e tratta*, in STOP TRATTA. ATTI DEL CONVEGNO INTERNAZIONALE 46 (On the Road Ed., 2002).

