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does criminal law really require the sacrifice of human
rights?**

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Abstract

The protection of human trafficking victims is an issue not only of human rights, but also of criminal prosecution and migration law: trafficked persons are victims of serious violations of human rights by criminal organizations, and they are usually illegal migrants, trafficked across national borders. The most recent international documents addressing the problem, namely the Council of Europe 2005 Convention and the European Council Directive 2004/81/EC, leave it to the States to decide whether a residence permit for trafficked persons is to be issued only if they agree to cooperate with the national investigation and judicial authorities, or also under less demanding conditions. As for the UN Additional Protocol to the Convention on Transnational Organized Crime, adopted in 2000, it contains no specific provision on the protection of victims.

Most States that have adopted measures 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 criminal trial against the trafficker has come to an end. Such an approach clearly considers the victim as a useful tool to prosecute criminal organizations, not as a person entitled to the right to be protected from the risk of being trafficked again. From this point of view, the Italian legislation on trafficking is to be considered as a model: since 1998, it grants trafficked persons the possibility of being admitted into a protection program and obtaining a residence permit in order to allow them to escape further violence and exploitation. Victims can thus be protected even if they are not ready to cooperate: their right to be free from slavery and violence is not subject to their willingness to collaborate with the national justice system. This protection model has proven to be very effective, not only from a human rights perspective, but also for the purposes of criminal law: once the victims are protected and assured that they will not be expelled to the State they came from, risking retaliations from their traffickers, they usually choose to denounce them, thus allowing their prosecution and conviction. This proves that subjecting the protection of human rights to the purposes of criminal law is not always necessary: protection and prosecution can go hand in hand, supplementing each other.

Keywords

Human trafficking; victims' protection; immigration law; transnational crime.

The protection of trafficking victims: does criminal law really require the sacrifice of human rights?

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SUMMARY: 1. Introduction. – 2. The EU 2004/81/EC Directive. – 3. The Council of Europe 2005 Convention. – 4. A national approach: the Italian law on the protection of trafficked persons. – 5. Practical application of the Italian law: problems and solutions. – 6. Conclusions.

1. Introduction.

The aim of this paper is to analyze the European approach to the protection of trafficking victims, comparing it to the Italian law on this issue; I will try to demonstrate that the protection offered by European law is too narrow, and therefore ineffective. I will also try to show that offering protection to all trafficked persons, independent of their willingness to cooperate with the justice authorities, is required not only according to human rights, but also to criminal law, which is not better implemented by limiting protection to cooperative victims.

Human trafficking is one of the most heinous crimes in contemporary world:¹ people are sold and bought, forced to work in the underground economy or in the sex industry, often subjected to brutal violence and terrifying threats. Trafficked persons are moved across national borders, often after having been deprived of their documents; they lead an invisible life, trying to escape the police for fear of being expelled, and accepting all sort of violence for fear the traffickers would retaliate on them, or on their families. Even if they manage to escape, they are exposed to serious risks: their traffickers often try to find and

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¹ According to estimates, trafficking in people represents the third-largest source of profits for organized crime after drugs and weapons: see M Orhant, 'Trafficking exposed', in (2002) 30 *Population today*, 4. According to the ILO, the global profits of trafficking are around \$ 31.6 billions a year: see P Belser, *Forced Labour and Human Trafficking: estimating the profits* (Geneva, ILO, 2005), 17.

punish them brutally in order to prevent others from trying to escape; if they do not manage to find them, they might threaten their families in their home countries through other members of the same criminal network. Moreover, if they are found by the police, they are usually expelled, as they are illegal migrants in that country: as a consequence, the crime is not prosecuted or, if it is, the prosecutor has lost the best witnesses. Concentrating on punishing the traffickers without offering any protection to their victims therefore appears to be counterproductive: not only are the victims left to face retaliations and further violence, but the trial is often bound to end in an acquittal.²

The most recent international documents on trafficking usually require the adoption of a three-pronged policy, the so called “three-Ps approach,” focusing on prevention, prosecution and protection. However, most often while the provisions on prosecution are binding, the clauses on protective and preventative measures are framed quite weakly, and impose no obligations on State parties. For instance, in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons,³ adopted in 2000, article 5 requires States to establish trafficking as a criminal offence, while article 6, which concerns victims protection, leaves it to the States to decide whether to implement the most needed protective measures, providing the victims with housing and medical assistance. Such an approach is clearly insufficient: the protection of victims is fundamental in order to prevent their re-victimization. The European approach to trafficking is, however, much broader: with the adoption of the European Council Directive 2004/81/EC and of the Council of Europe 2005 Convention, States have been required to adopt protective measures for trafficking victims.

2. The EU 2004/81/EC Directive.

² On this point, see for instance A Gallagher, ‘Human rights and the new UN Protocols on Trafficking and Migrant Smuggling: a preliminary analysis’, in (2001) 23 *Hum. rights quarterly*, 975.

³ See Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, which entered into force on 25 December 2003.

The EU Directive,⁴ which follows the Framework Decision on Trafficking⁵ and its definition of this crime, creates a short-term residence permit for victims who cooperate with the competent authorities. This document is only binding with regard to trafficking victims, although States are encouraged to grant the same protective measures to smuggled persons (art. 3): in one of the first drafts of the Directive, it was suggested to create minimum standards of protection for both smuggling and trafficking victims, but, as many Member States were reluctant to accept this idea, mandatory measures were limited to trafficking victims.⁶

In the preamble, the Directive makes reference to the principle of non-discrimination, which is of utmost importance in the fight against human trafficking, especially with regard to gender-based discrimination. In this field, gender equality might require the adoption of measures not only to take into account the special needs of women and children, who are the majority of the victims of this crime, but also to better protect men and transgender, whose involvement is increasing and to whom many States pay little or no attention.⁷

The Directive accords to any non-European citizen who is identified as a victim of trafficking a reflection period, during which States are obliged to grant him or her, at least, standards of living capable of ensuring his or her subsistence and access to emergency medical treatment. The first potentially problematic issue is the identification of victims: this Directive requires Member States to inform them of their rights (art. 5), but it does not mention the adoption of special procedures in order to identify them. It is clear that, if States do not train their police officers to distinguish between illegal migrants and potential trafficking victims, the Directive will not be fully implemented.⁸ Another

⁴ See Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

⁵ Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.

⁶ On the drafting history of the Directive, see for instance T Obokata, 'EU action against trafficking in human beings: past, present and future', in E Guild and P Minderhoud (ed), *Immigration and Criminal Law in the EU*, (Leiden, Nijhoff Publishers, 2006) 402.

⁷ IOM, 'Trafficking of men - a trend less considered', (2007) 1 *Global eye on human trafficking*, 1. Also see DA Feingold, 'Human Trafficking', (2005) 150 *Foreign Policy*, 26. Note that one of the first Drafts of the UN Trafficking Protocol only made reference to trafficking in women and children, no attention being paid to men; however, this approach was deemed unnecessarily restrictive, and the mandate of the Drafting Committee was extended. See G.A. Res. 54/126 (1999).

⁸ On the fact that law enforcement authorities often fail in identifying trafficking victims as such, see for instance SL Tiapula, M Millican, 'Identifying the victims of human trafficking', in (2008) 42-MAR *Prosecutor*, 34.

problem that will surely arise in the application of this Directive concerns the reflection period: according to a first draft, it should have lasted at least 30 days, but subsequent discussion between Member States led to the elimination of any specific provision on its length, which is therefore left for State's discretion.⁹ However, a national decision to opt for a very short reflection period might render it completely useless: many independent organizations have stressed that a period lasting less than three months¹⁰ would not allow victims to recover, and thus to take a free decision on whether to cooperate or not. 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, there is no obligation to provide it to victims, although it is clear that many of them will need it, and the more so if the reflection period is too short to recover completely.

After the expiry 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 it will expire after a decision to terminate the relevant proceedings has been taken, as explicitly stated in article 13. The permit does not automatically grant access to the labour market or to education, but States are required to define the rules under which holders of the permit are authorised to 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, according to which States, when issuing a residence permit to trafficking victims, should have considered

⁹ 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 (see A Gallagher, 'Triply exploited: female victims of trafficking networks - strategies for pursuing protection and legal status in countries of destination' (2004) 19 *Georgetown Immigration Law Journal*, 99) to 90 days, as in the Netherlands (so called B-9 regulations). See Dutch National Rapporteur on THB, *Trafficking in Human Beings - Fifth report of the Dutch National Rapporteur*, (The Hague, Bureau NRM, 2007). On national legislations of other States, also see MY Mattar, 'Incorporating the five basic elements', cit., and the materials available at www.protectionproject.org.

¹⁰ See for instance Antislavery and ECPAT Uk, 'Briefing on a proposal for: European Union Council Directive', (2002).

granting their family members a visa of the same length;¹¹ however, this provision has not been included in the final text of the Directive, which does not address the issue of protecting families. The lack of any provision on this subject could impinge on the effectiveness of the Directive, as trafficking victims often refuse to cooperate due to their fear of retaliations against their families: traffickers are usually members of huge criminal networks, and therefore even if those who are found in the EU are arrested, they still have contacts with other members who can threaten the victim's family in order to prevent him/her from testifying at trial. 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 opportunity of prolonging the victim's stay on the territory for the investigations or the judicial proceedings and whether the person 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,¹² suggested that a residence permit should be issued to all trafficked persons, independent of their willingness to cooperate. In its Report,¹³ the Expert Group stressed that trafficking victims who do not wish to testify at trial, or who are not required as witnesses (for instance, because they possess no relevant information), need as much protection and assistance as "useful" victims. Moreover, the Report underlined the importance of providing for the conversion of the short term permit into a permanent one, either on humanitarian grounds or when the person has completed a social assistance program and found an employment.

At first blush, the Directive may appear to grant reasonable standards of protection to trafficking victims: however, as the issuance of a residence permit depends on their willingness and ability to cooperate, it is clear that the Directive merely considers victims as potential witnesses in the trial against their exploiters, granting them rights only if they decide to cooperate and possess useful information. This was even clearer in the first draft of the Directive, according to which the authority responsible for investigations or

¹¹ 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.

¹² Decision 2003/209/EC of 25 March 2003.

¹³ Report of the Experts Group on Trafficking in Human Beings (2004), Brussels, 100.

prosecution was to decide whether it considered the presence of the victim to be *useful*.¹⁴ The Directive's approach to victims therefore appears to be merely an opportunistic one: they are only offered a residence permit, which allows them to recover and prevents the risk that they will be trafficked again, if they are deemed to be useful witnesses.¹⁵ Once the trial is over, victims lose all of their rights and can be returned to their home countries, no attention being paid to the risks they might run for having testified in the criminal proceedings.¹⁶ 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 contacts with them, regardless of their reasons to do so. These conditions deserve deeper analysis: they are indeed typical measures adopted when dealing with members of criminal organizations who decide to cooperate with justice authorities, in order to ensure that such a decision is not taken in the interest of the organization but of the justice system. As 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, or when they still control the victim's children), but these ties have nothing to do with criminal law or with the reliability of the victim's testimony, and should not be considered when taking the decision on the issuance of a permit.¹⁷

Despite its faults, the Directive shows a new attention for victims and their rights, as it grants them a minimal standard of protection, which is to be implemented by all Member States but does not prevent them from adopting or maintaining more favourable provisions (art. 4); the cautious approach it adopts is quite understandable, considering that the Directive is mandatory on

¹⁴ 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*, issued on the 1st July 2002, available at <http://www.hrw.org/campaigns/migrants/docs/recidence-permit.pdf>.

¹⁵ See S Scarpa, 'La tutela dei diritti delle vittime di tratta degli esseri umani e il sistema premiale previsto dalla direttiva comunitaria 2004/81/CE' (2005) *Diritto immigrazione e cittadinanza*, 45.

¹⁶ On this point, see E Pearson, 'Half-hearted protection: what does victims protection really mean for victims of trafficking in Europe?' (2002) 10 *Gender and Development*, 56.

¹⁷ See MG Giammarinaro, 'Il testo unico sull'immigrazione', in *Stop tratta. Atti del convegno internazionale*, (Bologna, On the Road Edizioni, 2002) 37.

all member States, including those whose immigration policy is very restrictive and those who do not have the means to implement expensive protective measures.

3. The Council of Europe 2005 Convention.

The Council of Europe 2005 Convention on Action against Trafficking in Human Beings,¹⁸ which is open for ratification by non-member States, 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, whether connected to organized crime or not: this clause clearly aims to prevent 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 of all addresses the problem of their identification: States are required to provide law enforcement authorities with trained and qualified personnel and to ensure cooperation between different competent authorities and between public authorities and support organizations.¹⁹ 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 at least secure accommodation, psychological and material assistance, emergency medical treatment, interpretation services, counselling and information on their rights, assistance to enable their rights to be presented in the criminal proceedings, and, in the case of children, education. The explanatory report²⁰ clarifies that secure accommodation is particularly important for victims, and makes reference to protected shelters as being especially suitable; it also stresses that this type of assistance is not

¹⁸ Council of Europe Convention on action against trafficking in human beings, CET n. 197.

¹⁹ For a comment, see the COE Convention Explanatory Report, § 127

²⁰ See Explanatory Report, § 154.

conditional upon the victim's agreement to cooperate with competent authorities. These protective measures are much broader than those granted by the EU Directive, and they address some of the problems typically experienced by trafficking victims, such as lack of information on their rights due to non-identification as a victim, of safe accommodation and medical treatment; however, the Convention has been criticized for not including some of the amendments that the CoE Parliamentary Assembly had proposed,²¹ such as the right to appeal against any decision not to consider a migrant as a trafficking victim 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 advice of the Parliamentary Assembly but disregarding 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 chances that they might cooperate.²² At the end of this period, State parties shall issue a renewable residence permit to victims whose stay is necessary owing to their personal situation, and/or if it is necessary for their cooperation in investigation or criminal proceedings; no reference is made to the length of the permit, nor is there any provision suggesting to convert it into a permanent one.²³ The decision on whether to issue a residence permit only when the victims agree to cooperate, or even when their personal situation so requires, is clearly to be taken by the States: once again, suggestions to amend this provision, broadening its scope so as to include those victims who were seeking compensation, have been rejected.²⁴ Moreover, States can freely determine the conditions upon which the permit

²¹ See CoE, Parliamentary Assembly, available at <http://assembly.coe.int/Documents/AdoptedText/ta05/EOPI253.htm>.

²² See Vermot-Mangold, *Report to the Committee on Equal Opportunities for Women and Men* (2005), Doc. 10397, on <http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10397.htm>. Also see A Amiel, 'Integrating a human rights perspective in the European approach to combating the trafficking of women for sexual exploitation', in (2006) 12 *Buffalo Human Rights Law Review*, 5.

²³ 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.

²⁴ See Vermot-Mangold, *Report to the Committee on Equal Opportunities for Women and Men* (2005), Doc. 10397.

will be renewed and the rules under which it will grant access to the labour market or to education: State's discretion is, again, very broad, and it can undermine some of the most useful protective measures. In particular, States should not have been allowed to issue a residence permit only in the case of victims whose stay is useful for the trial, excluding those who are not willing to cooperate, or do not have any useful information, even when their personal situation suggests that they might 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, who shall bear the burden of proof, and what will happen to victims whose rights and safety would be endangered by their return. Moreover, the provision could be given a restrictive interpretation: trafficking victims are often threatened even when they are still in the country of destination, and it would be easy to state that their rights and safety would not be at a higher risk if repatriated;²⁵ however, the protection offered by law enforcement authorities is usually more effective in European countries than in countries of origin.

The Council of Europe's approach, although broader than the EU's, is still too narrow: despite the fact that the Treaty was originally meant to be much more human-rights centred than the EU Directive, its mandatory measures are similar to those of the latter, and a higher standard of protection is only encouraged, but not required.

4. A national approach: the Italian law on the protection of trafficked persons.

Most States that have adopted measures 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

²⁵ On the German Immigration Law, which states that victims can be repatriated even when their life and safety would be at risk, if they run a similar risk if remaining in Germany, see D Oberlies, 'Il livello europeo', in *Stop tratta*, cit., 115.

the duration of the investigations and trial, although it can be converted, in some cases, into a permanent residence permit.²⁶ In the USA, the so-called T-Visa is only granted to victims of severe trafficking who have complied with any reasonable request 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.²⁷ In some countries, the temporary residence permit can become a permanent one, but conversion is subject to the outcome of the trial: this condition appears to be unreasonable, as the conviction of the traffickers does not depend upon the victim.²⁸

The Italian legislation on trafficking differs from all those cited above, as it offers victims a higher standard of protection: trafficked persons can be admitted into a comprehensive protection program and, if needed, obtain a residence permit which allows them to avoid further violence and exploitation. The provision on the protection of trafficking victims is also one of the oldest in the world: 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.²⁹ 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. Moreover, the 2003 law on enslavement and human trafficking,³⁰ which amended the criminal code by modifying the crimes of enslavement and trafficking, includes another provision on the protection of trafficking victims, article 13, which is also open to citizens of every nationality. A deeper analysis of these provisions is necessary in order to evaluate their advantages, but also the problems linked to their application.

Article 18 of the immigration law³¹ was adopted as a consequence of the unsuccessful application of previous laws, which only granted a residence

²⁶ See Dutch National Rapporteur on THB, cited above.

²⁷ On the Trafficking Victims Protection Act, see for instance A. Rieger, 'Missing the mark: why the trafficking victims protection act fails to protect sex trafficking victims in the United States', (2007) 30 *Harvard Journal of Law and Gender*, 231.

²⁸ See AM Gallagher, cit., 99.

²⁹ See Law Decree 300/06, converted in Law 17/07, article 6.

³⁰ Law 228/03.

³¹ Legislative decree no. 286/98.

permit to those victims who were in danger owing to their statements at trial;³² in 1998, it was already clear that subjecting the issuance of the permit to a previous decision to cooperate with the justice authorities was not going to persuade many victims to testify.³³ 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 Seventies, the Italian law has included some sort of “reward” (in terms of mitigating circumstances) for 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. It was thus easy to criticize a provision that, while granting protection to victims of crimes, required from them the same cooperation that was usually expected from criminals.³⁴

Article 18 describes two different situations which can lead to the adoption of a protective program³⁵ and two different procedures to obtain a residence permit; particular attention should be paid to the so called “social path”, as it does neither depend upon the willingness of the victim to cooperate with national authorities, nor on the fact that a trial has begun. The conditions for the application of protective measures are that the victim finds him/herself in a situation of violence,³⁶ or of serious exploitation,³⁷ and that his/her safety is at risk, either as a consequence of his/her attempts to escape the influence of a

³² Law Decree 477/96, article 5.

³³ 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 MG Giammarinaro, ‘Aspetti positive e nodi critici della normativa contro la tratta di persone’ in *3 Questione Giustizia* (2005), 457.

³⁴ On this point, see for instance MG Giammarinaro, ‘Il testo unico sull’immigrazione...’, cit., 41.

³⁵ The link between residence permit and assistance program 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 a protection and assistance program; the permit can be withdrawn if the person ceases to participate in it.

³⁶ ‘Violence’ should be interpreted so as to include any form of coercion, whether physical or psychological; however, according to a recent research, in some provinces the permit is only issued if the victim is subjected to physical violence: see S Fachile et al., *La tratta di persone in Italia: le norme di tutela delle vittime*, (2007, Milano, Franco Angeli), 75.

³⁷ 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, for instance, in cases of debt-bondage, or when the victim is bound to her trafficker by the use of voodoo (very common among Nigerian women). See MG Giammarinaro, ‘Il permesso di soggiorno’, cit., 39. On the use of religious beliefs and signed agreements to bind victims to their traffickers, see for instance UNICRI, *Trafficking of Nigerian girls to Italy* (2003), available at <http://www.protectionproject.org/report/nigeria.doc>.

criminal organization, or as a result of the statements he/she 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. According to the law, the situation of the victim can be ascertained either by the social services or in the course of police operations; in this case, the operation must regard the commission either of a serious crime (reference is made to the list of crimes for which arrest *in flagrante delicto* is mandatory) or of a crime related to prostitution. The omission of a specific reference to trafficking can be explained, as the law on this crime has been adopted later than article 18; in 1998, the phenomenon of enslavement and trafficking was an emerging problem, and it was usually linked to forced prostitution. Indeed, the first protective programs approved by the Minister for Equal Opportunities were only applicable to victims of trafficking for sexual exploitation; it is only since 2006 that these programs have been extended to victims of all forms of trafficking.³⁸

Once a victim is identified as such, and admitted into a protection program, there are two different procedures which can lead to the issuance of a residence permit; these procedures are not clearly described in article 18, but in article 27 of the Presidential Decree no. 394/1999, which contains the regulations to implement article 18. The first 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. The second procedure, the so called “social path”, does not require any involvement of the Prosecutor; although Article 18 is ambiguous on this point,³⁹ the 1999 Presidential Decree and the following Minister of Interior’s instructions have clarified it. This procedure thus only involves the social services (including registered NGOs⁴⁰ 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 associations. Although in this case the crime may not have been reported yet, the request for a residence permit always gives rise to the opening of a criminal

³⁸ See S Fachile et al., cit., 101.

³⁹ See A Callaioli, M Cerase, ‘Il testo unico delle disposizioni sull’immigrazione e delle norme sulla condizione dello straniero’, in *Legislazione penale* (1999), 281.

⁴⁰ These NGOs must be enrolled in a special register, according to article 52 of legislative decree 286/98.

investigation: 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 a general duty to report crimes.⁴¹ Prosecution of the traffickers therefore takes place even when the victims do not report the crime because they do not intend to testify against their traffickers: offering a residence permit even to those victims who are not willing to cooperate allows the police to have knowledge of a higher number of trafficking cases. In addition, many NGOs stress that, at first, victims are often too afraid to cooperate, as they mistrust the police; however, during the process that leads to the issuance of the permit, they come to trust national authorities, they have the time to recover completely and feel safe again, and thus often decide to testify.⁴² Another advantage of not making issuance of the permit conditional upon the victims' cooperation regards the reliability of their testimony: while benefits that depend upon the person's willingness to cooperate and upon the importance of the information he/she gives might affect the trustworthiness of the testimony, as the witness might be induced to exaggerate the importance of the information he/she possesses or even to invent some in order to obtain the permit, the protection afforded by Article 18 never affects his/her reliability.⁴³ Once the residence permit is issued, it is valid for at least 6 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 labour 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 a minimum of three months to a maximum of six) for victims of trafficking and enslavement, who are offered 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 even to EU citizens, and thus the greatest difference has been cancelled. Article 13 has therefore been

⁴¹ See D Mancini, *Traffico di migranti e tratta di persone*, (Milano, Franco Angeli, 2008), 77.

⁴² See MG Giammarinaro, 'Il testo unico sull'immigrazione', cit., 39.

⁴³ On this point, see M Virgilio, 'The instrumental use of article 18', in *Article 18: protection of victims of trafficking and fight against crime* (Bologna, On the Road Edizioni, 2002), 219.

considered to be an emergency measure, whose application might lead to later applying article 18.⁴⁴

5. Practical application of the Italian law: problems and solutions.

Before drawing my conclusions on the validity of the Italian model, if compared to the European one, I will examine some issues related to its practical application, in order to ascertain how the legal framework described above is 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, NGOs have underlined that, in some Italian cities, the *Questore* did not issue the permit when the victim refused to provide information on the crime, or withdrew it if he/she ceased to cooperate.⁴⁵ The Ministry of Interior has therefore given instructions on this point, stressing that the humanitarian residence permit is not dependent upon the victim's cooperation; moreover, it has highlighted the need for the police, when deciding whether to issue the permit, to consider the harm that the victim could suffer if repatriated.⁴⁶ Although the law in itself is quite clear, and notwithstanding the Minister's directives, in some provinces the police continued to require cooperation in order to issue a residence permit; in one case, the permit was even withdrawn because the trial against the victim's trafficker had ended in a dismissal. In this case, the victim appealed against the decision 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 that may have begun against the alleged trafficker.⁴⁷

⁴⁴ See F Mascellini, 'I programmi di assistenza per le vittime di tratta previsti dal DPR 237/05', in *Gli Stranieri* (2006), 15; F Prina, *La tratta di persone in Italia: il sistema degli interventi a favore delle vittime* (Milano, Franco Angeli, 2008), 203; B Brattoli, 'Lotta alla tratta dei minori: dall'articolo 18 del TU sull'immigrazione alla nuova l. 228/03', in *3 Cittadini in crescita* (2003) 11.

⁴⁵ See S Fachile et al., cit., 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* (2003), 1178.

⁴⁶ See for instance the Minister Directive n. 11050 (28 May 2007).

⁴⁷ Consiglio di Stato, Judgment no. 6023/2006, published in *Diritto Immigrazione e Cittadinanza*, 2006, p. 215.

Another problematic issue concerns the role of the Prosecutor's opinion: some police superintendents still subordinate issuance of the permit to the Prosecutor expressing his favourable opinion. The Minister of Interior, in his directives,⁴⁸ has clarified that such an opinion is only needed when the request for the permit follows the so called "judicial path", and should never be required when the request comes from the social services. Moreover, as the Central Administrative Tribunal has recently stated, even when such an opinion is necessary, it is not to be deemed binding.⁴⁹ the *Questore* must therefore re-evaluate whether the conditions for the issuance of the permit are met, even when the Prosecutor has given a negative opinion, as the final decision has to be taken by the police and not by justice authorities.

The last problematic issue to be taken into consideration concerns the conversion of the permit: as we have seen, the permit, granted on humanitarian grounds,⁵⁰ 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: as a consequence, 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 find it difficult to find a steady job, which would ensure them a permanent residence permit; they are therefore under constant threat of expulsion. Another problematic issue, which can prevent victims who had been forced to work in the sex industry from finding a different occupation, is related to the jobs (and salaries) that are usually offered to immigrants. It is well known that many trafficking victims decided to emigrate in order to help their families survive, and accepted all sort of violence and exploitation as long as this allowed them to send money back home: a low pay will clearly not allow them to continue to do so. Victims who had been sexually exploited have seen how much money they could earn

⁴⁸ See for instance 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.

⁴⁹ See Consiglio di Stato, Judgement no. 6023/2006, published in *Diritto Immigrazione e Cittadinanza* (2006), 215.

⁵⁰ Until 2004, the permit was issued making reference to "social protection"; however, as this made it possible to identify trafficked persons and did not ensure the protection of their privacy, article 27 has been amended and the permit is now issued making reference merely to "humanitarian grounds" (exactly like any permit granted to persons who are entitled to subsidiary protection). Also see the decree of the administrative authority on the right to privacy, adopted on 23 November 2000, which required the Minister of Interior to issue the permits making reference merely to humanitarian grounds.

by prostituting themselves, if they had no pimps or exploiters, and it is therefore difficult to accept a much lower pay for jobs that can be as exhausting. In these circumstances, going back to prostitution can represent the only reasonable choice; however, as the Italian law on immigration does not provide for residence permits for prostitutes,⁵¹ these women will find themselves in an irregular residence status, and therefore much more vulnerable to the action of criminal organizations.

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,⁵² from 2000 to 2007 54559 persons have been contacted by social services and NGOs and offered medical, psychological and legal assistance. 13571 victims have been accepted into protection programs (619 of them were minors⁵³) and 5653 residence permits have been granted,⁵⁴ while there have been 6662 requests; the percentage of successful applications for a permit is therefore around 84%. According to the same source, 9663 persons have received professional training or education, and 6435 have started working.

It is also interesting to take into examination the nationalities of the persons that have been assisted, considering that most of them were working as prostitutes, as until 2006 participation into the protection programs was only granted to persons trafficked for sexual exploitation; according to the report cited above, victims included mainly women and girls from Nigeria and from Eastern Europe (initially, mostly Albanian, and later on Romanian, Moldavian

⁵¹ On this point, see Consiglio di Stato, Judgement no. 2231 (10 May 2007), according to which a residence permit cannot be issued to a woman who prostitutes herself, as she does not have sufficient means of subsistence deriving from lawful activities: she can therefore not be admitted into the Italian territory or can later be expelled. See this decision at <http://www.altalex.com/index.php?idnot=37144>. On the same point, also see Consiglio di Stato, Judgement no. 4599 (20 July 2006), available at <http://www.altalex.com/index.php?idnot=1613>.

⁵² See the report available at http://www.dirittiepariopportunita.it/Pari_Opportunita/UserFiles/Il_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 NGOs and of the IOM, and the persons are offered help in the organization of the journey and to reintegrate into the society. See Osservatorio sulla prostituzione, cit., 74.

⁵³ On child prostitution, and its characteristics in Italy, see for instance F Carchedi, 'Il traffico di minori a scopo di grave sfruttamento in Italia, caratteristiche del fenomeno e interventi di servizio sociale' in *1 Cittadini in crescita* (2005), 31.

⁵⁴ This number includes both the residence permits that have been issued and those that have been merely renewed.

and Ukrainian), although Chinese and South American women have also been assisted.⁵⁵ The main difference between these groups is that, while Nigerian women usually prostitute themselves on the streets, and are therefore easier to contact, the other groups recently begun to work indoor, what renders the victims much more vulnerable to their traffickers. According to some associations, the increase in indoor prostitution has coincided with the amendments to the immigration law adopted in 2002: the police has been required to perform more controls on immigrants, and the organizations who exploited prostitutes were therefore induced to move them indoor, so as to render them more difficult to find and expel.⁵⁶

It is also important to understand which type of exploitation assisted victims suffered from. According to the report mentioned above, in 2006 859 of the cases concerned sexual exploitation, while only 76 regarded labor exploitation; 2 of the persons assisted had been forced to beg. Labor exploitation usually happens in the agriculture sector, in the building trade, in the textile industry (mainly with regard to Chinese victims) or in the field of domestic help (in this case, most victims are, again, women);⁵⁷ however, the data mentioned above seem to point to the fact that the attention paid to forced labor is still too low, and that many victims of exploitation still find no help or assistance.

With regard to the criminal proceedings against the traffickers, the data⁵⁸ show that there has been an increase in the number of trials, although there are still many investigations that do not lead to a criminal prosecution; moreover, traffickers are sometimes accused of crimes other than trafficking itself, such as smuggling of migrants or exploitation of prostitution, if the evidence of the crime of enslavement is considered to be insufficient.

⁵⁵ Data derived from criminal proceedings on the crimes of exploitation and favouring of prostitution, however, need also to be taken into account: according to these, the majority of the victims is made of Italian women (in 2006, there were around 175 Italian victims, while the second most represented group, Romanian women, was around 120 victims). It is therefore important to stress that not all victims of exploitation of prostitution have been trafficked into Italy, as many are Italian nationals. See Osservatorio prostituzione, cit., 78.

⁵⁶ See for instance Aa.Vv., *Il sommerso. Una ricerca sperimentale su prostituzione al chiuso, sfruttamento, trafficking* (Quaderni di strada, 2004), 71.

⁵⁷ See F Carchedi, I Orfano, *La tratta di persone in Italia. Evoluzione del fenomeno e ambiti di sfruttamento* (Milano, Franco Angeli, 2007), 126.

⁵⁸ According to the Ministry of Justice's statistics, between 2004 and 2005 the police registered reports against 2217 persons, who had allegedly committed the crime of enslavement, while 1051 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 the data at http://www.osservatoriotratta.it/download/LIBRO%20FENOMENO_DEF2%20-%20tab4%20-%20dati.pdf.

It seems noteworthy to underline that law enforcement authorities have highlighted the importance of the assistance and protection programs and of the residence permit, as these measures are a means to report the crime to the police. As the former Antimafia Prosecutor said,⁵⁹ trafficked persons often need to recover from the harm they suffered before they can be expected to cooperate; they often mistrust the police, as they have seen law enforcement authorities in their countries of origin being bribed by their traffickers, or even cooperating with them in exploiting their victims. It is only once they have completely recovered, feel safe and understand how the Italian police is working, that they can be expected to collaborate; the residence permit therefore not only offers the victims a good opportunity to recover, but it 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; moreover, it seems that, by offering victims unconditional help and assistance, they manage to obtain much more cooperation than could be expected if these measures were conceived as a reward for cooperative victims: indeed, the number of permits issued according to article 18 has immediately been much higher than that deriving from application of law decree 477/96, but at the same time the number of victims who, after receiving assistance, decide to cooperate, has also grown.⁶⁰

6. Conclusions

The most important argument 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 has been noted above, the Italian experience seems to demonstrate that the European approach is too narrow: according to the Antimafia Bureau, victims often decide to cooperate only after being

⁵⁹ See the hearing of Piero Luigi Vigna at the Parliamentary Antimafia Commission on the 25th of February 2004, on http://www.camera.it/_dati/leg14/lavori/stenbic/30/2004/0225/s020.htm.

⁶⁰ See MG Giammarinaro, 'L'innovazione, le prospettive e i limiti dell'art. 18 del D. Lgs. n. 286/98', in Associazione On the Road, *Prostituzione e tratta. Manuale di intervento sociale* (Milano, Franco Angeli, 2002), 60.

granted a visa 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 we only offer victims a short-term permit, which does not grant any right to remain in the country once the trial is over, in return for the evidence they give, then we are offering them an unattractive deal. Trafficked persons are not the victims of an isolated person, who can be imprisoned leaving them free from fear; on the contrary, they have usually fallen into the hands of huge criminal organizations that have contacts in their home country. Even if victims overcome their fear of the traffickers (who often managed 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 against those who can be identified and prosecuted is over, they will have to leave the country and go back to their State of origin, where other members of the same organization are waiting to punish and kill them. It is true that many States offer different, and more comprehensive, protective measures to crime witnesses, which might include their families and last forever; but those measures are not designed explicitly for trafficking victims, whose special needs might not be satisfied simply by applying them. Moreover, this kind of measures tend to be very expensive, they are rarely used and, in any case, will not be offered to trafficking victims at the moment when they have to take the final decision on whether to cooperate. The same holds true for any other measure that might be applicable to trafficking victims, but is not explicitly designed for that purpose and therefore does not come into consideration at the moment of the decision: the chances of obtaining refugee status, for instance, will not be very clear at that time, while the risk of being killed is very high.⁶¹ 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, sufficiently persuasive measures should include high chances of obtaining a permanent visa and of being reunited with the family members who remained in their home country and therefore could face the consequences of the victim's decision to testify.

⁶¹ See R Piotrowickz, 'European initiatives in the protection of victims of trafficking who give evidence against their traffickers' (2002) 14 *International Journal of Refugee Law*, 263.

The European approach to the protection of trafficking victims is too narrow; it grants too little to trafficked persons, for fear that many immigrants will claim to have been trafficked in order to obtain a residence permit. 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 the victims are finally found and freed, then action against trafficking is bound to fail. The field of trafficking is one where human rights, immigration and criminal law meet, and where they should be able to merge; after all, the main aim of criminal law, and the reason for its existence, is the protection of important legal values (what Germans call *Rechtsgüterschutz*), first of all human rights.⁶² There can be no conflict between criminal law and human rights, as criminal law only exists to protect human rights and other important values: if such a clash exists, 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: but by letting the latter prevail on the former, we are protecting more traffickers and sacrificing more victims.

⁶² T Padovani, 'Prostituzione e tratta', in *Stop tratta. Atti del convegno internazionale* (Bologna, On the Road Edizioni, 2002) 46.