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LABOUR MIGRATION IN THE EUROPEAN UNION: CURRENT CHALLENGES AND WAYS FORWARD

Edited by

Giulia Ciliberto
Fulvio Maria Palombino



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3. TRAFFICKING FOR THE PURPOSE OF LABOUR EXPLOITATION: TESTING THE NEW EU STRATEGY IN THE CONTEXT OF THE POLY- CRISIS

Vittorio Cama

SUMMARY: 1. Introduction; – 2. States' Positive Obligations to Address Human Trafficking; – 2.1. The Universal Framework; – 2.1. Victim Protection and Prevention Obligations; – 2.2. The European Framework; – 3. Organized Crime: a Complex Theoretical and Legal Concept; – 3.1. International and European Instruments to Tackle Organized Crime; – 4. Human Trafficking in the Context of the Poly-crisis; – 4.1. Human Trafficking in Times of Pandemic and Climate Change; – 4.2. Human Trafficking in a Context of Armed Conflict; – 5. The EU Response to Trafficking in the Context of the Conflict in Ukraine; – 5.1. The Anti-Trafficking Plan to Protect People Fleeing the War in Ukraine; – 5.1.1. Exchange of Information and Judicial Cooperation; – 5.1.2. Information Dissemination and Prevention Measures; – 5.1.3. A First Assessment; – 5.2. The Activation of the Temporary Protection Directive: Praise and Criticisms; – 6. Conclusions.

1. INTRODUCTION

The 2022 Global Report on Trafficking in Persons¹ produced by UNODC highlights how the criminal justice response to the phenomenon is still to be considered insufficient. Not differently, Eurojust highlights how, from a European perspective,

¹ UNODC, Global Report on Trafficking in Persons 2022, United Nations publication, Sales no.: E.23.IV.1, available at: <<https://www.unodc.org/unodc/data-and-analysis/glotip.html>>.

the level of prosecutions and convictions for crimes related to human trafficking, and in particular those aimed at labour exploitation, remains far from satisfactory.²

From a structural perspective, the lack of efficiency in the response against the phenomenon is further aggravated by two factors: the exploitation of trafficking by criminal organizations and the effect of crises of various kinds.

As concerns the first factor, it bears noting that trafficking in human beings is rarely fuelled by the action of small groups, but, more often, and more violently, by large criminal organizations that have extensive territorial control.

Regarding the second aspect, it has been repeatedly emphasized how the phenomenon is further aggravated by conflict-related crises. As far as Europe is concerned, the 2022 invasion of Ukraine, adding to the vulnerabilities that have arisen since the beginning of the conflict in 2014, is likely to cause a noticeable increase in the number of victims of human trafficking, beyond a humanitarian crisis.³ In a context known as poly-crisis,⁴ further crises, such as the Covid-19 pandemic and climate change, jointly multiply the exacerbating effects of the conflict on pre-existing vulnerabilities.

This contribution aims, therefore, to offer an analysis of current international and EU law instruments related to human trafficking for the purpose of labour exploitation with a special focus on criminal justice-related responses. Firstly, it will investigate the process of consolidation of positive obligations arising in this field, from universal instruments such as the United Convention against Transnational Organized Crime of 2000 (“Palermo Convention”)⁵ and the Protocol to Prevent, Suppress and Punish

² See Eurojust, Focus group of prosecutors specialised in human trafficking meets for the first time, Press release, 14 June 2022, available at: <<https://www.eurojust.europa.eu/news/focus-group-prosecutors-specialised-human-trafficking-meets-first-time>>; More in general, see Eurojust, Report on Trafficking in Human Beings, February 2021, available at: <https://www.eurojust.europa.eu/sites/default/files/assets/2021_02_16_thb_casework_report.pdf>.

³ See, for instance, UNODC, Conflict in Ukraine: Key Evidence on Risks of Trafficking in Persons and Smuggling of Migrants, available at: <https://www.unodc.org/documents/data-and-analysis/tip/Conflict_Ukraine_TIP_2022.pdf>; See also European Solidarity Platform, A Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine, 11 May 2022, available at <https://home-affairs.ec.europa.eu/system/files/2022-05/Anti-Trafficking%20Plan_en.pdf>.

⁴ The notion of poly-crisis is due to Morin and Kern, who describe it as a set of “interwoven and overlapping crises” in a situation in which “[t]here is no single vital problem, but many vital problems, and it is this complex intersolidarity of problems, antagonisms, crises, uncontrolled processes, and the general crisis of the planet that constitutes the number one vital problem.” See MORIN and KERN, *Homeland Earth: a Manifesto for the New Millennium*. Cresskill, New Jersey, 1999, pp. 73-74.

⁵ United Nations Convention against Transnational Organized Crime, (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 190 [Palermo Convention].

Trafficking in Persons Especially Women and Children (“Palermo Protocol”),⁶ to regional instruments, such as the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (“CoE Anti-Trafficking Convention”)⁷ and the 2011 Directive on preventing and combating trafficking in human beings and protecting its victims (“Anti-Trafficking Directive”)⁸ (Section 2). Next, it will examine the difficulties encountered in identifying a notion of organized crime on a theoretical and legal level (Section 3). Subsequently, an overview of the relationship between multiple crises and human trafficking will be offered (Section 4).

The contribution will not, however, be limited to a state-of-the-art analysis but aims at testing the innovativeness and effectiveness of the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025,⁹ which promises to provide an effective response to the issues outlined through a multifaceted and not only criminal justice-based approach (Section 5).

In particular, it will investigate the ability of the newly implemented measures to respond to the two aforementioned structural elements of the phenomenon. Regarding links with conflict situations, the innovations carried out by the Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine (“Anti-Trafficking Plan”),¹⁰ prepared by the EU Anti-Trafficking Coordinator, are to be critically assessed. At the same time, as far as the influence of organized crime is concerned, the new EU Strategy to Tackle Organised Crime 2021-2025,¹¹ which well highlights the links with human trafficking, becomes a relevant object of scrutiny. The conclusions address whether these advances constitute mere *flatus vocis* or symptoms of a real change in

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 [Palermo Protocol].

⁷ Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.197 (adopted 16 May 2005, entered into force 1 February 2008) [CoE Anti-Trafficking Convention].

⁸ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJL 101/1 [Anti-Trafficking Directive].

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combating Trafficking in Human Beings 2021- 2025, COM/2021/171 final [EU Strategy on Combating Trafficking in Human Beings].

¹⁰ European Solidarity Platform, A Common Anti-Trafficking Plan to address the risks of trafficking in human beings and support potential victims among those fleeing the war in Ukraine, 11 May 2022 [Anti-Trafficking Plan], available at <https://home-affairs.ec.europa.eu/system/files/2022-05/Anti-Trafficking%20Plan_en.pdf>.

¹¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to Tackle Organised Crime 2021-2025, COM/2021/170 final [EU Strategy to Tackle Organised Crime].

European strategy to tackle human trafficking in the context of the current poly-crisis.

2. STATES' POSITIVE OBLIGATIONS TO ADDRESS HUMAN TRAFFICKING

Before entering more deeply into the subject of measures adopted by the EU to combat trafficking in human beings in the context of the Ukraine war, it is necessary to proceed to a - as far as possible - concise analysis of positive obligations incumbent on States in this regard in the context of the universal and regional framework.¹²

2.1. *The Universal Framework*

The international community's attention to trafficking bears witness to the succession of different approaches.

During the slow early stages of defining human trafficking and the refinement of instruments intended to combat it, the prevailing idea supported the thesis according to which the phenomenon essentially concerned the sexual exploitation of women.¹³

Since the 1990s, and more specifically since the 1994 World Ministerial Conference on Organized Transnational Crime in Naples, a new perspective that emphasizes the relationship between human trafficking and transnational organized crime began to emerge.¹⁴ This approach reached its landfall with the Palermo Convention and the supplementing Protocol which represented a real turning point for the international discourse on human trafficking.¹⁵ On the one hand, the new criminal justice approach to human trafficking had the merit to accentuate its connection with organized crime. On the other hand, it seems to have indissolubly and often imprecisely linked the instruments to combat the phenomenon with the instruments and methodology of transnational criminal law.¹⁶

¹² For a concise analysis, see ANNONI, "Gli obblighi internazionali in materia di tratta degli esseri umani", in FORLATI (ed.), *La lotta alla tratta di esseri umani. Fra dimensione interanzionale e ordinamento interno*, Napoli, 2013. In the same volume, see also FORLATI, "I meccanismi internazionali di controllo" and VENTUROLI, "La direttiva 2011/36/UE: uno strumento 'completo' per contrastare la tratta degli esseri umani".

¹³ STOYANOVA, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law*. Cambridge, 2018, p. 18 ff.

¹⁴ GALLAGHER, *The International Law of Human Trafficking*. New York, 2012, p. 68.

¹⁵ See GALLAGHER, "Human Rights and Human Trafficking", in NOLLEKAMPER and PLAKOKEFALOS (eds.), *The Practice of Shared Responsibility in International Law*, Cambridge, 2017, p.1. See also, for a detailed analysis, GALLAGHER, *cit. supra* note 14, Chapters 1 and 2.

¹⁶ McClean highlights the existence of a tension between the countries that would have preferred a specific and autonomous instrument dedicated to human trafficking in the negotiations and the countries

Indeed, as noted, although the protection of victims' rights played the role of the initial "impetus" driving the international discussion on combating human trafficking, the security concerns of States and the fight against organized criminal groups constituted the "true driving force" behind the process of "codifying" positive obligations in this field.¹⁷

Consistently with this perspective, the Palermo Convention and the Palermo Protocol provide for obligations to criminalize a number of offences, including participation in an organized criminal group and, indeed, trafficking of persons (also in the form, for example, of attempt).¹⁸ However, while some provisions touch on substantive criminal law, the main purpose of these instruments was to lay the foundations for effective cooperation based on mutual legal assistance between countries in investigations, prosecutions and judicial proceedings.¹⁹ Indeed, the relevant provisions in this area constitute to all intents and purposes a "mini-treaty".²⁰

2.1.1. Victim Protection and Prevention Obligations

Outside the realm of substantive and procedural criminal law, the Palermo Convention and the supplementing Protocol contain provisions on victim protection and prevention that are of particular relevance. These provisions are of interest because they shift the focus from the perpetrators to the victims and, more generally, to the need for a preventive approach that is not based solely on the criminal justice response. Indeed, it

that preferred to frame it in the broader context of transnational organized crime. MCCLEAN, *Transnational Organised Crime: A Commentary on the UN Convention and Its Protocols*, Oxford, 2007, p. 14. For an analysis of the concept of transnational crime, that also highlights the differences with international crimes, see STOYANOVA, *cit. supra* note 13, p. 25 ff.; MUELLER, "Transnational Crime: Definitions and Concepts", in WILLIAMS and VLASSIS (eds.), *Combating Transnational Crime: Concept, Activities, Responses*, London, 2001; JEBBERGER, "Corporate Involvement in Slavery and Criminal Responsibility under International Law", *Journal of International Criminal Justice*, 2016.

¹⁷ See GALLAGHER, *cit. supra* note 14, p. 71 and GALLAGHER, "Human Rights and Human Trafficking: Quagmire or Firm Ground?", *Virginia Journal of International Law*, 2009, pp. 833-841.

¹⁸ For an accurate analysis of criminalization obligations, see, *ex pluribus*, GALLAGHER, *cit. supra* note 14, p. 79 ff. Art. 3(a) of the Protocol defines trafficking as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

¹⁹ BOISTER, "The Cooperation Provisions of the UN Convention against Transnational Organised Crime: A 'Toolbox' Rarely Used?", *International Criminal Law Review*, 2016, p. 39.

²⁰ GALLAGHER, *cit. supra* note 14, p. 76.

is often pointed out that a response based solely on criminal law diverts attention from protecting the rights of victims, and from the need for a complex of positive social and economic actions that address the root causes of the phenomenon.²¹

With respect to the protection of victims, Article 25 of the Palermo Convention places obligations on States: i) to provide assistance and protection, especially in cases of retaliation or intimidation; ii) to establish appropriate procedures to provide access to compensation and restitution; iii) and, finally, to enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings.

The Additional Protocol also provides for obligations broader than mere criminalization and aimed at victim protection. However, as scholars pointed out,²² these additional provisions are not to be considered “obligatory”²³ in the light of the high cost that measures such as housing, counselling, medical and psychological and material assistance, employment, education and training opportunities, may have on state finances.²⁴ Therefore, States may decide to make this type of support conditional on cooperation from victims.²⁵

Regarding the prevention sphere, the provisions of Article 31 of the Palermo Convention address several aspects that may seem disparate. First of all, the need to reduce the opportunities for criminal organizations to infiltrate licit markets with the proceeds of criminal activities is emphasized. Furthermore, the information obligations to raise awareness “regarding the existence, causes and gravity of and the threat posed by transnational organized crime” are also important aspects in outlining a framework for an effective prevention.

Two more aspects (that are perhaps too often overlooked) are also taken in consideration. Firstly, Article 31(3) requires States to promote the reintegration of persons convicted of Convention offences. This is a particularly important point because it shifts the attention of States from a perspective that is completely

²¹ See ROSS, “A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol”, *Duke Journal of Gender Law & Policy*, 2014, p. 325 ff; TODRES, “The Importance of Realising ‘Other Rights’ to Prevent Sex Trafficking”, *Cardozo Journal of Law and Gender*, 2006, and PATEL, “Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking”, *Seattle Journal for Social Justice*, 2011.

²² GALLAGHER, *cit. supra* note 14, p. 81-83.

²³ *Ibid.*, p. 83 and there cited, SCARPA, *Trafficking in Human Beings: Modern Slavery*, Oxford, 2008, pp. 63-65; OBOKATA, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach*, Leiden, 2006, p. 164.

²⁴ UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 288.

²⁵ GALLAGHER, *cit. supra* note 14, p. 83. For some criticism of this approach see Note by the Office of the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children’s Fund and the International Organization for Migration on the Draft Protocols Concerning Migrant Smuggling and Trafficking in Persons, UN Doc. A/AC.254/27 (2000).

focused on criminalization and cooperation in criminal matters, to one that highlights profiles pertaining to the social function of penalty and, in particular, its necessary aim of reintegrating perpetrators.

This is all the more important considering that, in the presence of positive obligations of criminalization, there is always the risk of over-criminalization and thus a lowering of the guarantees and rights of “bad actors”, in favour of symbolic and robust responses in which prevention is achieved through deterrence.²⁶

Secondly, as a closing clause, Article 31(7) also emphasizes the need for closer cooperation between States, international and regional organizations for the implementation of preventive measures. By way of example, the need for States to work towards “alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime” is stated.

This closing provision is quite peculiar in that, while it is placed to safeguard the obligation of States to cooperate for the full realization of the provisions set forth in the preceding paragraphs, in the second part, it introduces an element of novelty that does not seem to be attributable purely to a means of implementation of this specific obligation. In particular, with the reference to the alleviation of the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime, the Convention seems to place obligations of an economic and social nature.²⁷

With regard to human trafficking, the Additional Protocol itemizes this kind of prevention obligation in Article 9. More specifically, Article 9(2) requires the adoption of information, social and economic measures stating that “States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons”.²⁸ In a provision quite similar to Article 31(7), Article 9(4) requires the adoption or the strengthening of “measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.²⁹

Notably, it has been argued that Article 31(7) of the Palermo Convention and Article 9(2) and (4) of the supplementing Protocol give substance to the prevention obligations contained in the Convention and,³⁰ read together, support the idea that States have “strong mandatory transnational prevention duties.”³¹

²⁶ In this regard, see HUSAK, *Overcriminalisation: The Limits of the Criminal Law*, New York, 2008.

²⁷ ROSS, *cit. supra* note 21, p. 339.

²⁸ Palermo Protocol, Art. 9(2).

²⁹ *Ibid.*, Art. 9(4).

³⁰ See *ibid.* and GALLAGHER, *cit. supra* note 14, p. 87.

³¹ ROSS, *cit. supra* note 21, p. 339.

This perspective is particularly fertile as it is consonant with the idea that recourse to criminal law should constitute the *extrema ratio* of state intervention in the freedoms of the individual. In fact, effective prevention can only be achieved through “a complex of normative responses”³² that give precedence to economic, social and cultural measures and other areas of law or other forms of social control.³³ Such a perspective is all the more essential in the fight against organized crime.³⁴

Interestingly, it has been argued that the complex of these obligations give support the existence of a “shared responsibility” in the context of human trafficking, i.e., a model that differentiates the traditional concept of unitary state responsibility and better reflects the “complexity of the legal relationships among actors and complexity of the interests promoted and protected by the law”.³⁵

In particular, the transnational dimension not only of the phenomenon of human trafficking, but also of the criminal groups that animate it, has driven the need for international cooperation and a coordinated response.³⁶ In this sense, therefore, positive obligations would be differentiated according to the position occupied by the State with regard to human trafficking activities.³⁷ However, it bears noting that, in the literature on the concept of shared responsibility, there is no unanimous consensus on the source of shared obligations with regard to the prevention of human trafficking. According to some authors, these obligations would derive from the interplay between human rights treaties and the 2000 Protocol.³⁸ According to others,

³² CAVALIERE, “Il diritto penale minimo in Alessandro Baratta: per un’alternativa alla ‘cultura del penale’”, *Archivio Penale*, 2018.

³³ In this respect, see JAREBORG, “Criminalisation as Last Resort (Ultima Ratio)”, *Ohio State Journal of Criminal Law*, 2004; ASHWORTH, *Principles of Criminal Law*, Oxford, 1995, p. 33 and ASHWORTH, *Positive Obligations in Criminal Law*, Oxford, 2013. Ashworth advances the idea of a “minimum criminal law”. The idea is also present in Italian scholarship and, in particular, in Ferrajoli and Baratta; see FERRAJOLI, *Diritto e ragione: teoria del garantismo penale*, Roma, 2011; FERRAJOLI, “Cos’è il garantismo?”, *Criminalia*, 2014, pp. 129-141; BARATTA, *Il diritto penale minimo. La questione criminale tra riduzionismo e abolizionismo*, Napoli, 1986, p. 443 ff; BARATTA, “Il Corpus Juris e la cultura giuridico-penale europea”, in MOCCIA (ed.), *Ambito e prospettive di uno spazio giuridico-penale europeo*, Napoli, 2004, pp. 35-36.

³⁴ MOCCIA, *Criminalità organizzata e risposte ordinamenti: tra efficienza e garanzia*, Napoli, 1999, pp. 153 and 173.

³⁵ NOLLKAEMPER and JACOBS, “Shared Responsibility in International Law: A Conceptual Framework”, *Michigan Journal of International Law*, 2013, p. 436.

³⁶ GALLAGHER, *cit. supra* note 14, p. 2 ff.

³⁷ *Ibid.* On the notion of shared responsibility in the context of the ECHR, see HEIJER, “Shared Responsibility before the European Court of Human Rights”, *Netherlands International Law Review*, 2013. See also ID., “Procedural Aspects of Shared Responsibility in the European Court of Human Rights”, *Journal of International Dispute Settlement*, 2013.

³⁸ According to Gallagher, this approach would be positively referenced in the preamble to the Trafficking Protocol which provides that “effective action to prevent and combat trafficking in persons ... requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such

these obligations would have the Protocol as their sole source and, indeed, any confusion with the human rights framework should be avoided, with the former, together with the Convention, placing stronger obligations on States.³⁹

2.2. *The European Framework*

Within the European regional framework, the standards of the Palermo Protocol are “reinforced” by the CoE Anti-Trafficking Convention.⁴⁰

The choice of adopting a regional instrument only five years after the approval of the Protocol of 2000 is explained by the will to strengthen the protection of victims of human trafficking and to decline the obligations of States in this field according to a human rights perspective.⁴¹ In this perspective, trafficking in human beings is considered a violation of human rights,⁴² and an offense to legal goods such as human dignity and integrity, which requires attention regardless of the form it takes in practice (national, transnational, linked or not to organized crime).⁴³ Hence, the Convention constitutes “the first legal instrument concerning trafficking in human beings that frames trafficking in human beings as a matter of human rights protection”.⁴⁴

In a nutshell,⁴⁵ it is possible to measure the contribution of the Convention in the definition of “victim” of human trafficking, and by the non-conditionality of protection and assistance for trafficked persons.⁴⁶ However, some critical issues remain especially regarding the soft obligation not to criminalize trafficking victims.⁴⁷

trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights”, and, recently, enjoyed recognition by the European Court of Human Rights in the *Rantsev* case that “has led the way towards transforming the Protocol’s aspiration of shared responsibility into reality”. GALLAGHER, *cit. supra* note 14, pp. 23-24.

³⁹ ROSS, *cit. supra* note 21, p. 326.

⁴⁰ Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005 [European Trafficking Convention Explanatory Report], para. 371.

⁴¹ See PLANITZER and SAX, “Introduction”, in PLANITZER and SAX (eds.), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*, Cheltenham UK, 2020, p. 2.

⁴² For the “revolutionary” scope of this perspective, see GALLAGHER, “Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments”, *European Journal of Migration and Law*, 2006, pp. 163-190.

⁴³ European Trafficking Convention Explanatory Report, para. 36; See also GALLAGHER, *cit. supra* note 14, p. 110 ff.

⁴⁴ See PLANITZER and SAX, *cit. supra* note 41, p. 1.

⁴⁵ For a thorough analysis, please refer to *ibid.* and the section on the Convention in GALLAGHER, *cit. supra* note 14.

⁴⁶ GALLAGHER, *cit. supra* note 14, p. 116.

⁴⁷ *Ibid.*, pp. 117-118 and 285. For a comparative perspective, see DERENČINOVIĆ, “Comparative Perspectives on Non-Punishment of Victims of Trafficking in Human Beings”, *Annales de la Faculté de Droit d’Istanbul*, 2014, pp. 3-20. It bears noting that fear towards the authorities and possible criminal implications of the request for support are some of the main factors driving the non-detection of the crime of human trafficking. In this respect, see MCGAHA and EVANS, “Where Are The Victims? The Credibility

Furthermore, since the European Convention of Human Rights (“ECHR”)⁴⁸ contains no provisions directly concerning human trafficking, the European Court of Human Rights (“ECtHR”) scrutinizes cases under the lens of the prohibition of “forced labour” and thus through the flexibility of Article 4 of the Convention.⁴⁹ As part of their obligations under Article 4, States are required to implement criminalization measures to counter the practices set out in the Article,⁵⁰ in synergy with their obligations under the Palermo Protocol and the CoE Anti-Trafficking Convention, and to implement a legislative and administrative framework that is aimed at creating a comprehensive approach that covers all aspects of counter-trafficking and provides effective prevention and protection against forced labour.⁵¹

These demands of prevention, however, clash with a certain self-restraint of the Court with respect to the imposition of positive socio-economic obligations that may prove burdensome for States.⁵² The Court’s response to this particular tension does not always seem straightforward. On the one hand, there appears to be an emerging caselaw that recognizes the indissoluble link between civil and political rights stemming from the Convention and the protection of socio-economic rights; on the other hand, the Court is “requested” and seem to show a certain deference to sensitive political and budgetary choices.⁵³

These critical points are also reflected in the theorization of positive obligations

Gap in Human Trafficking Research”, *Intercultural Human Rights Law Review*, 2009, p. 244. For some other problems and obstacles linked to non-punishment, please see JOVANOVIĆ, “The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance”, *Journal of Trafficking and Human Exploitation*, 2017, pp. 41-76.

⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entry into force 3 September 1953), ETS 5 [ECHR].

⁴⁹ European Court of Human Rights, *Siliadin v. France*, Application no. 73316/01, Judgement of 26 October 2005, paras. 121-129. See also European Court of Human Rights, *Van der Mussele v. Belgium*, Application No. 8919/80, Judgement of 23 November 1983, para. 32; and European Court of Human Rights, *Guzzardi v. Italy*, Application No. 7367/76, Judgement of 6 November 1980, para. 95; European Court of Human Rights, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Judgement of 7 January 2010, paras. 272-282; European Court of Human Rights, *Chowdury and Others v. Greece*, Application no. 21884/15, Judgement of 30 March 2017, para. 93.

⁵⁰ *Siliadin*, *cit. supra* note 49. See also DALOMBA, “The ECHR and the Protection of Irregular Migrants in the Social Sphere”, *International Journal on Minority and Group Rights*, 2015, p. 39 ff, p. 56.

⁵¹ *Rantsev*, *cit. supra* note 49, para. 285. In this perspective, “perhaps more than any other provision of the Convention, article 4 is essentially about positive, rather than negative, obligation.” See SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 206.

⁵² SCHABAS, *cit. supra* note 51, p. 206. See also European Court of Human Rights, *C.N. v. The United Kingdom*, Application no. 4239/08, Judgment of 13 November 2012, para. 68; *Rantsev*, *cit. supra* note 49, para. 287.

⁵³ For a careful analysis of these aspects, see LEIJTEN, *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge, 2017, and, in particular, p. 291 ff.; see also SCHEININ, “Economic and Social Right as Legal Rights” in EIDE et al., *Economic, Social and Cultural Rights: a Textbook*, 2nd edition, The Hague, 2011.

under criminal law. In this case, an effective prevention should be associated with a certain focus on measures that address the socio-economic roots of crime (e.g., through the development of socio-economic conditions that make it less convenient to resort to crime and organized criminal networks). Notwithstanding, the ECtHR's caselaw predominantly relies on measures that are limited to the purely criminal sphere. In particular, the Court "imposes" criminalization obligations with a deterrent purpose and, from a procedural point of view, the adoption of operational mechanisms to anticipate the risk of harmful conduct (always with the limitation of the allocation of resources). However, this approach risks placing the focus solely on the moment of commission of the crime and thus on the injury to rights and, at the same time, leaves the effectiveness of preventive general policies in the socio-economic realm unexplored.⁵⁴

Finally, the last instrument in Europe to address trafficking (and that may soon be revised) is the 2011 Anti-Trafficking Directive under EU law.

The Directive which was adopted in implementation of Article 83(1) TFEU⁵⁵ is based on the paradigm of the three Ps: Prosecution, Protection and Prevention. Not unlike the other international instruments on the subject, prevention is entrusted to the provisions of a single article.⁵⁶ In fact, this perspective is in keeping with the nature of a harmonization instrument in criminal matters and thus with the necessary emphasis on prosecution rather than prevention (albeit entrusted with obligations to raise awareness and disseminate information).⁵⁷

Coherently with the CoE instruments, the Anti-Trafficking Directive explicitly espouses a human rights-based approach based on protection, support and

⁵⁴ The comparison between the apparent casualness with which the Court imposes criminalization obligations and its deference in establishing the existence of socio-economic obligations may lead to a paradoxical outcome. Considering that the latter stems from the need to preserve the sovereignty of States in this sphere, it seems strange that such a consideration does not also arise also in regard with the imposition of positive obligations in the sphere of criminal law which constitutes the subject matter that is perhaps most closely linked to state sovereignty.

⁵⁵ Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012. It is worth noting that Article 83 TFEU provides for the possibility of adopting through the ordinary legislative procedure minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Among these areas where harmonization measures are legitimized, trafficking in human beings and sexual exploitation of women and children and, to close the list contained in the second part of Article 83(1), organized crime are prominent.

⁵⁶ For a thorough analysis of the implementation of the Directive within some national legal systems, see MILITELLO, "Traffico di migranti e tratta di esseri umani: studio comparato sull'implementazione degli strumenti dell'Unione Europea", 2018.

⁵⁷ BOSMA and RIJKEN, "Key Challenges in the Combat of Human Trafficking: Evaluating the Eu Trafficking Strategy and Eu Trafficking Directive", *New Journal of European Criminal Law*, 2016, pp. 315-330 and 317.

assistance to victims.⁵⁸

3. ORGANIZED CRIME: A COMPLEX THEORETICAL AND LEGAL CONCEPT

Given the constant reference to the phenomenon of organized crime, attempting to frame this notion is necessary before proceeding further.

The term organized crime is used to refer to a multiplicity of criminal phenomena. From a technical point of view, this notion is presented as “a fuzzy and contested umbrella concept”.⁵⁹ In particular, the notion has developed in parallel to identify also profoundly different concepts. On the one hand, it is customary to use the term to refer to criminal organizations of a certain size and stability, often organized in a hierarchical sense (with some exceptions, for instance, in Northern Europe where organizations are structured in network);⁶⁰ on the other hand, the term is used to refer to a series of activities organized on a large scale for monetary gains.⁶¹ In the context of armed conflicts, then, the complexity of the notion of organized crime is aggravated by the existence of a “very complex web of financial relationships between militias, organized crime groups and terrorist groups”.⁶²

In Europe, the focus on organized crime has been developing since the 1990s. However, with the exceptions of Italy and Spain, organized crime was studied from the perspective of activities within illegal market dynamics, without any reference to the existence of criminal organizations with a specific structure, pattern or model.⁶³

On the one hand, the “illegal enterprise paradigm” left the reference to criminal organizations unexplored, on the other hand, it allowed the term to be placed at the centre of the debate in Europe, even for those countries that had no experience with

⁵⁸ Anti-Trafficking Directive, Recital 7. See *Ibid.*

⁵⁹ PAOLI, “Introduction”, in PAOLI (ed.), *The Oxford Handbook of Organised Crime*, Oxford, 2018, p. 2.

⁶⁰ See MILITELLO, “La rilevanza della nozione di organizzazione criminale nell’Unione europea: percorsi di armonizzazione”, 2015, p. 5 and, cited there, KLEEMMANS, “Organised Crime, Transit Crime, and Racketeering”, *Crime & Justice*, 2007, p. 163 ff. Militello emphasises how the debate on the subject was ongoing in America even earlier. See SPAPENS, “Macro networks, collectives, and business processes: An integrated approach to organised crime”, *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, pp.185-215.

⁶¹ PAOLI, *cit. supra* note 59, p. 13 ff.

⁶² KOTCHA, “Human Trafficking, Conflict and Money Flows”, in MURASZKIEWICZ et al. (eds.), *Human Trafficking in Conflict, Crime Prevention and Security Management*, Cham, 2020, p. 66.

⁶³ For a historical analysis on the evolution of this debate, see PAOLI and VANDER BEKEN, “Organised Crime. A Contested Concept”, in PAOLI (ed.), *The Oxford Handbook of Organised Crime*, Oxford, 2018, p. 20 ff.

organized crime phenomena such as the Mafia.⁶⁴

In the context of trafficking in human beings, the EU Serious and Organised Crime Assessment (SOCTA) of 2021 highlighted that trafficking in human beings not only is a “core activity of serious and organised crime in the EU”,⁶⁵ but is also destined to remain a “threat” in the future. Indeed, the sector will continue to be sustained by the continuous demand for cheap labour, especially in manual jobs. In this regard, trafficking for labour exploitation purposes is increasing markedly compared to other forms.⁶⁶

In this context, organized criminal groups take care of all aspects of the crime, from the online recruitment of victims, through the forging of identity documents and work permits, to the care of the final outputs, from sexual exploitation to forced labour, not forgetting other critical aspects such as forced crime or begging.⁶⁷

These aspects are well highlighted by the EU Strategy to Tackle Organised Crime for 2021-2025. However, taking note of the “specificities” of trafficking in human beings,⁶⁸ the Commission proposed a parallel EU Strategy on Combating Trafficking in Human Beings with dedicated actions and recommendations.

3.1. International and European Instruments to Tackle Organized Crime

Despite the complexity and multifaceted nature of the organized crime phenomenon, the adoption of international instruments aimed at providing a legal definition and, consequently, at establishing common ground for combating it has not been hindered.

The main reference can only be to the aforementioned 2000 Palermo Convention. In particular, Article 2(1) of the Convention defines an organized criminal group as “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit”. This is one of the three essential elements for the Convention to apply, whilst the other two are the “transnational” dimension of the offence and the need for it to constitute a “serious crime”.

⁶⁴ *Ibid.*, p. 21. For a complete analysis of the notion and its declinations in various legal systems in Europe, see FIJNAUT and PAOLI. *Organised Crime in Europe : Concepts Patterns and Control Policies in the European Union and Beyond*. Dordrecht, 2006.

⁶⁵ EU SOCTA, Serious and Organised Crime Assessment, 2021, available at: < <https://www.europol.europa.eu/publications-events/main-reports/socta-report>>, p. 70.

⁶⁶ *Ibid.*

⁶⁷ EU Strategy to Tackle Organised Crime, p. 13.

⁶⁸ *Ibid.*

These notions have been criticized for their vagueness and over-inclusiveness, and for the wide discretion left to States in defining them.⁶⁹ With some realism, however, it is also admitted that these criticisms are partly due to the need to find a common lowest denominator that would potentially fit the legal systems of all States of the international community.⁷⁰ At the same time, the breadth of the provisions allows States to address a broad spectrum of criminal activities, including human trafficking for labour exploitation, without the need to ratify the specific Protocol.⁷¹

As concerns the regional framework, it is worth noting the European Union's commitment in the fight against organized crime⁷² developed in "synergy" with the United Nations, but soon took on characteristics of its own both with reference to its ability to influence national choices and to the panoply of harmonization instruments implemented.⁷³

In this regard, a pivotal role was played by the 1997 Action Plan against Organised Crime. This instrument constituted the first real "manifesto of European criminal policy on the difficult terrain of organised crime".⁷⁴ To this day, the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime ("Framework Decision") and a 2013 European Parliament

⁶⁹ In this sense, for instance, see MITSILEGAS, "From National to Global, From Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime," in BEARE (ed.), *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption*, Toronto, 2003. Or the introduction to the same volume by BEARE. See also ORLOVA and MOORE, "'Umbrellas' or 'building blocks': defining international terrorism and transnational organised crime in international law", *Houston Journal of International Law*, 2005, pp. 282-287; FINCKENAUER, "Problems of definition: what is organised crime?", *Trends in Organised Crime*, 2005, p. 75. HAUCK and PETERKE, "Organised crime and gang violence in national and international law", *International Review of the Red Cross*, 2010, p. 421 ff.

⁷⁰ HAUCK and PETERKE, *cit. supra* note 69.

⁷¹ GALLAGHER, *cit. supra* note 14, p. 75.

⁷² On this topic, we recommend reading MILITELLO, *cit. supra* note 60. The report, albeit in Italian, traces the path of European interventions to harmonize the notion of criminal organization and related conducts, questions the indirect relevance of the notion of criminal organizations in secondary law, categorizes three models of normative relevance of criminal organization in EU States and, finally, assesses the effects of harmonization measures. For some updated considerations, please see MILITELLO, "L'armonizzazione dei reati in Europa fra 'parabola' e 'piano inclinato': il caso dell'incriminazione dell'organizzazione criminale, in GRANDI (ed.), *I volti attuali del diritto penale europeo. Atti della giornata di studi per Alessandro Bernardi*, Pisa, 2021. For a recent overview of the effects of the Framework Decision on national legal systems, *cum grano salis*, see Report from the Commission to the European Parliament and the Council based on Article 10 of Council Framework Decision 2008/841/JHA of October 2008 on the fight against crime, COM/2016/448 final.

⁷³ MILITELLO, *cit. supra* note 60, p. 3.

⁷⁴ *Ibid.*, p. 5. See also MILITELLO, "Agli albori di un diritto penale comune in Europa: il contrasto al crimine organizzato", in MILITELLO, PAOLI and ARNOLD (eds.), *Il crimine organizzato come fenomeno transnazionale. Forme di manifestazione, prevenzione e repressione in Italia, Germania e Spagna*, Milano-Freiburg, 2000.

Resolution⁷⁵ constitute the last landing places of this path.⁷⁶

The Framework Decision, although not producing the same effects of a directive, remains today an essential instrument with reference to the phenomenon of trafficking in human beings. In fact, Article 4 of Directive 2011/36/EU makes direct reference to it, requiring Member States to take

“the necessary measures to ensure that the offences referred to in Article 2 are punishable by a maximum term of imprisonment of at least ten years where that offence: [...] (b) has been committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime”.⁷⁷

However, the definition of “criminal organization” offered by the Framework Decision does not add clarity to the debate since it almost slavishly reproduces the notion of “organized criminal group”. As some scholars have noted, the only differences concern the number of offences covered and the prediction of possible target offences.⁷⁸

Further perplexities concerning the definition are raised with specific regard to the clarity of the naturalistic and normative elements, as well as to its harmonization

⁷⁵ European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering: recommendations on action and initiatives to be taken (final report) (2013/2107(INI)).

⁷⁶ Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime OJ L 300/42 [Framework Decision]. For the importance of the Joint Action and the subsequent Framework Decision, see CALDERONI, *Organised Crime Legislation in the European Union. Harmonisation and Approximation of Criminal Law National Legislations and the Eu Framework Decision on the Fight against Organised Crime*. Berlin Heidelberg, 2010, p. 21 ff.

⁷⁷ Anti-Trafficking Directive, Art. 4. For a closer review of the Directive at the time it was issued, see SICURELLA, “Prosegue l’azione dell’Unione Europea nella lotta alla tratta di esseri umani”, *Diritto Penale Contemporaneo*, 2011. For a critical review of the European instruments, see SANTORO, “La Tratta di esseri umani”, in CAVALIERE and MASARONE (eds.), *L’incidenza di decisioni quadro, direttive e convenzioni europee sul diritto penale italiano*, Napoli, 2018.

⁷⁸ MILITELLO, *cit. supra* note 60, p. 8. It should be noted, however, that the use of such a general notion as “organized criminal group” by the Palermo Convention, has contributed to a “second youth” of the instrument and the definition, allowing them to be adapted to a rapidly changing reality, in contrast to the definition contained in the Framework Decision. On this point see MILITELLO, *cit. supra* note 72, p. 93 ff; See also ACCILLI, SABBATINI, and ROMANO, “Verso un nuovo ruolo della Convenzione di Palermo nel contrasto alla criminalità transnazionale. Dopo l’approvazione del Meccanismo di Riesame ad opera della Conferenza delle Parti”, *Diritto penale contemporaneo*, 2018, p. 114. On the vagueness of the Framework Decision’s provisions, see MITSILEGAS, *EU Criminal Law*, Oxford, 2009, p. 96 ff; FICHERA, *Organised crime: developments and challenges for an enlarged European Union*, in ECKES and CONSTANTIDINES (eds.), *Crime within the Area of Freedom, Security and Justice; A European Public Order*, Cambridge, 2011, p. 173 ff.

with Article 83 TFEU.⁷⁹ Moreover, although some authors emphasize its positive impact, other authors underline, from a practical viewpoint, its minimal effects on national legal systems.⁸⁰ Some authors also criticize the provision, which is the result of a political compromise, which offers national legislators the option of choosing between, on the one side, the “associative” model of criminalizing participation in an criminal organization and, on the other, the common law model of conspiracy.⁸¹ Finally, scholars have emphasized the failure to take into account certain elements such as the relevance of the concept of mafia-type organization and method, which are essential for domestic law and the European Parliament.⁸²

However, as was the case for the Palermo Convention, here too it is essential to assess the critical issues in the light of the difficulties of harmonizing the understanding of the phenomenon and its declinations in the Member States’ legal systems.

Nevertheless, the critical issues highlighted at the theoretical level in the identification of a common understanding and those at the technical level concerning the definitions offered by the Palermo Convention and the Framework Decision now lead to the statement that “one can barely speak of a clear understanding of the meaning of organised crime at the level of international law”.⁸³

⁷⁹ According to some authors, the concept of organized crime in Art. 83 should assume conceptual autonomy; according to others, it would perform the function of a “closing clause” with “criminological” content. For the first, see MILITELLO, *cit. supra* note 60, p. 21. For the second GRANDI, *Riserva di legge e legalità penale europea*, Milano, 2011; on the point see also, CALDERONI, “La Decisione Quadro dell’Unione Europea sul contrasto alla criminalità organizzata e il suo impatto sulla legislazione degli Stati membri”, in ALFANO and VARRICA (eds.) *Per un contrasto europeo al crimine organizzato e alle mafie*, Milano, 2012, p. 38. See also ID., *Organized crime legislation in the European Union*, Heidelberg, 2010.

⁸⁰ Some authors have defined the effects of the Framework Decision as “apparent harmonization” or “*trompe l’oeil*”, see FLORE, “Une Justice pénale européenne après Amsterdam”, *Journal des Tribunaux*, Droit Européen, 1999, p. 122; MILITELLO, *cit. supra* note 60, p. 21; BALSAMO and MATTARELLA, “Organised crime: the new perspectives of European legislation”, *Criminal Magazine*, 2021, p. 38 ff.

⁸¹ On this point, BALSAMO, “The delocalisation of mafia organisations and the construction of a European law against organised crime”, *Global Crime*, 2016, p. 40; MILITELLO, “Partecipazione all’organizzazione criminale e standard internazionali d’incriminazione”, *Rivista Italiana di Diritto e Procedura Penale*, 2003; CALDERONI, “A definition that Could not Work!”, *European Journal of Crime Criminal Law & Criminal Justice*, 2008. For further criticisms, see MASARONE, “Il ‘diritto penale europeo’ al vaglio dell’offensività: fondamento ed esiti”, *Archivio penale*, 2019; D’ANELLO, “Il contrasto della criminalità organizzata”, in MASARONE and CAVALIERE (eds.), *L’incidenza di decisioni quadro, direttive e convenzioni europee sul diritto penale italiano*, Napoli, 2018; and MASARONE, *Politica criminale e diritto penale nel contrasto al terrorismo internazionale*, Napoli, 2013.

⁸² See MILITELLO, *cit. supra* note 60. See also European Parliament Resolution of 23 October 2013 on organised crime, corruption and money laundering.

⁸³ STOYANOVA, *cit. supra* note 13, p. 24 and there cited BOISTER, *Introduction to Transnational Criminal Law*, Oxford, 2012, p. 79; BAKER, “The Legal Nature of Transnational Organized Crime: Opportunities and Limitation”, in EDWARDS and GILL (eds.), *Transnational Organized Crime: Perspectives on Global Security*, New York, 2003, p. 83.

4. HUMAN TRAFFICKING IN THE CONTEXT OF THE POLY-CRISIS

Although the concept of poly-crisis had already been theorized since the 1990s,⁸⁴ it can be said to have taken on new life since Jean Claude Juncker's presidency of the European Commission. Juncker used it to define a situation in which multiple emergency situations, such as the financial crisis, mass migration, Brexit, terrorist threats, converge at the same time and "feed each other, creating a sense of doubt and uncertainty".⁸⁵

For a long time, the relationship between human trafficking and crises was ignored based on the erroneous assumption that trafficking was not a direct consequence of a crisis.⁸⁶ This conclusion risks jeopardizing an effective response to trafficking cases "not only in terms of documentation, reporting, identification and assistance to victims, but also in subsequent criminal investigations".⁸⁷

Recently, however, the United Nations started recognizing the relationship between trafficking and crisis situations. In Resolution 63/156 of 2008, the UN General Assembly emphasized the heightened vulnerability of women and girls to trafficking and exploitation during conflict and post-conflict, disaster and other emergency situations and the possible role that military, peacekeeping and humanitarian personnel deployed may play in this context.⁸⁸ Since then, general opinion has evolved and today, it is possible to affirm that there is a broad consensus on the relationship between crises of various kinds and human trafficking.

Although the crises may be due to very different situations such as armed conflicts or natural disasters, it has been observed that some similarities can be identified in relation to trafficking in human beings, such as: the erosion of the rule of law and the flourishing of criminal activities; a generalized absence of economic opportunities leading to an increase in the population at risk and its reliance on risky and illicit survival choices; the ability of criminal networks to adapt to new situations and find new opportunities in targeting refugees and internally displaced persons; the absence of protection and immediate solutions; and the persistence of gender, ethnic, social and religious discrimination.⁸⁹

⁸⁴ See *supra* note 4.

⁸⁵ Speech by President Jean-Claude Juncker at the Annual General Meeting of the Hellenic Federation of Enterprises (SEV), 21 June 2016. Available at <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_2293>.

⁸⁶ IOM, *Addressing Human Trafficking and Exploitation in times of Crisis, Evidence and Recommendations for Further Action to Protect Vulnerable and Mobile Populations*, 2015, p. 3 ff.

⁸⁷ *Ibid.*, p. 3.

⁸⁸ UN, General Assembly, Resolution adopted by the General Assembly on 18 December 2008 [on the report of the Third Committee (A/63/425)] 63/156. Trafficking in women and girls, paras. 4 and 24.

⁸⁹ IOM, *cit. supra* note 86.

4.1. *Human Trafficking in Times of Pandemic and Climate Change*

With reference to the 2020 pandemic, it was argued that Covid-19 not only revealed pre-existing vulnerabilities, but further exacerbated them, e.g., due to the economic effects of the associated crisis on poverty and unemployment,⁹⁰ thus increasing the demand for trafficking⁹¹ and moving such illicit practices to the shadows.⁹²

According to the Special Rapporteur on trafficking in persons, especially women and children, the risks encountered by migrants during the Pandemic also include all vulnerabilities related to migration status, e.g., the loss of work for seasonal workers and thus the absence of regular permits or the impossibility to return home; the restrictive migration policies that have led to the total or partial closure of borders; the reduction if not total absence of services to protect and support trafficking victims; and the possible re-victimization that is associated with these policies.⁹³

In the current poly-crisis scenario, the role of climate change and other forms of environmental degradation cannot be ignored either. As noted,⁹⁴ various are the ways in which climate change can affect the flourishing of human trafficking. Environmental disasters, in addition to conflict, contribute to the displacement of people, to increased violence between groups for the exploitation of resources, and, in a two-way relationship, to enhanced resource exploitation through cheap labour and environmentally damaging activities.⁹⁵ At the same time, climate change has been shown to affect especially the most vulnerable parts of the population,⁹⁶ aggravating economic hardship, inequalities between rich and poor⁹⁷ and causing situations of

⁹⁰ See GIAMMARINARO, COVID-19 Position paper. The impact and consequences of the COVID-19 pandemic on trafficked and exploited persons, 2020. See also TODRES and DIAZ, “COVID-19 and Human Trafficking-the Amplified Impact on Vulnerable Populations”, JAMA Pediatric, 2021, pp. 123-124.

⁹¹ EU SOCTA, *cit. supra* note 65, p. 34.

⁹² UNODC, *cit. supra* note 1.

⁹³ For an analysis, with some recommendations, see GIAMMARINARO, *cit. supra* note 90.

⁹⁴ See GERRARD, “Climate Change and Human Trafficking after the Paris Agreement”, University of Miami Law Review, 2018, pp. 345-368.

⁹⁵ GERRARD, “Climate Change and Human Trafficking after the Paris Agreement”, University of Miami Law Review, 2018, pp. 356-360. On the topic, see also BALES, *Blood and Earth: Modern Slavery, Ecocide, and the Secret to Saving the World*, New York, 2016; United States Department of State, “The intersection between environmental degradation and human trafficking”, in 2014 Trafficking in Persons Report, pp. 52-56. See also HILL, “Human Trafficking and Climate Change”, Fletcher Security Review, 2018, pp. 72-78.

⁹⁶ SHEU et al., “Potential Impact of Climate Change on Human Trafficking: A Narrative Review”, The Journal of Nervous and Mental Disease, 2021, pp. 324-329.

⁹⁷ STOTT, “Climate change, poverty and war”, Journal of the Royal Society of Medicine, 2007, pp. 399-402.

conflict and instability.⁹⁸ All these factors can lead to desperate solutions or situations of social unrest, constituting vulnerabilities and thus opportunities for traffickers.⁹⁹

Despite this evidence, the IOM reports that the impact of climate change on trafficking in human beings remains a “relatively underexplored” field.¹⁰⁰

4.2. *Human Trafficking in a Context of Armed Conflict*

In the context of an armed conflict, such as the one affecting Ukraine since February 2022,¹⁰¹ human trafficking becomes a tactic of war¹⁰² and an opportunity, not only for criminal organizations, but also for military personnel and state actors.¹⁰³

Furthermore, certain key locations constitute a fertile and ideal place for illicit practices. For instance, border areas, may be characterized by the difficulties in coordination between jurisdictions and law enforcement, especially in the case of humanitarian emergencies.¹⁰⁴ In fact, in conflict zones, local populations encounter precarious situations and a “perpetual state of fear”, while opportunities to work and thus earn money and access to basic necessities diminish. Risk factors related to the breakdown of the rule of law and law enforcement, as well as of the “traditional methods of deterrence and redress such as investigation, arrest and prosecution under domestic law”, are also magnified.¹⁰⁵

Consequently, it is reasonable to expect that the conflict in Ukraine could generate an accelerating effect on human trafficking.

In this regard, on the one hand, it has been noted that research on possible risks

⁹⁸ IOM, *The Climate Change-Human Trafficking Nexus*, 2016.

⁹⁹ See BALES, *Disposable People: New Slavery in the Global Economy*, 3rd edition, Berkeley, 2012.

¹⁰⁰ IOM, *The Climate Change-Human Trafficking Nexus*, 2016, p. 3. For a recent analysis see STEPHENS, “Climate Change and Human Trafficking”, Master Thesis Series in Environmental Studies and Sustainability Science, 2019.

¹⁰¹ For an analysis of the relationship between armed conflict and human trafficking, please refer to Part 1 of MURASZKIEWICZ, FENTON and WATSON, *Human Trafficking in Conflict : Context Causes and the Military*, Cham, 2020.

¹⁰² See MURASZKIEWICZ, FENTON and WATSON, “Introduction”, in MURASZKIEWICZ, FENTON and WATSON (eds.), *Human Trafficking in Conflict : Context Causes and the Military*, Cham, 2020, p. 5.

¹⁰³ Murasziewicz, Fenton and Watson describe human trafficking in times of conflict as a means of facilitating “the recruitment and retention of fighters, including child soldiers”, providing “rewards to combatants in the form of sex slaves”, generating “illicit revenues that can support conflict financing”, and contributing “to the social, psychological and economic breakdown of entire communities”. See *Ibid.* As far as armed groups are concerned, human trafficking serves as a “means to raise funds to advance their activities and/or as a tool to maintain control over the areas they occupy”. According to Kotecha, “[g]iven their income generating capacity it was no surprise when the first links were made between human trafficking and armed conflict, both profitable enterprises.” See KOTECHA, *cit. supra* note 62, pp. 62-63.

¹⁰⁴ EU SOCTA, *cit. supra* note 65, p. 34.

¹⁰⁵ KOTECHA, *cit. supra* note 62.

related to human trafficking in the Ukraine war is “understandably limited” and related either to the prevention of conflict-related sexual violence or to the analysis of the issue as a “public health concern”.¹⁰⁶ Despite this, on the other, both the EU, with the EU Anti-Trafficking Plan to respond to the crisis of 6 May 2022, and the UNODC, through the report “Conflict in Ukraine: Key Evidence on Risks of Trafficking in Persons and Smuggling of Migrants”, have acknowledged the trafficking risks related to the war in Ukraine.

In particular, UNODC argued that the risks are greater for certain groups, such as

“unaccompanied and separated children and children travelling with adults whose relationship with the children cannot be verified; people who were previously internally displaced within Ukraine; people who are unable to access temporary protection, because they are not eligible, or due to lack of information or incorrect information; non-Ukrainians, including undocumented and stateless people; Ukrainian Roma people; LGBTQI+ people; elderly people; and people with mental and physical disabilities.”¹⁰⁷

UNODC also placed a crucial emphasis on the possible role of criminal networks operating between Ukraine, Europe and Asia and the possibility that they take advantage of the separation of people from their support networks.¹⁰⁸

The problems posed by modern poly-crisis, therefore, combine with those arising from poly-crime. This term refers to those criminal groups that, starting from specialization in a certain criminal market, use the profits of a certain activity to finance the expansion of other crime sectors.¹⁰⁹ The additional problem posed by this particularly advanced criminality is that specific forms of crime require a specific response in all respects, from the legislative to the operational ones.¹¹⁰

¹⁰⁶ COCKBAIN and SIDEBOTTOM, “War, Displacement, and Human Trafficking and Exploitation: Findings from an evidence-gathering Roundtable in Response to the War in Ukraine”, *Journal of Human Trafficking*, 2022, p. 2 ff. See also, there cited, STARK et al., “Prevention of conflict-related sexual violence in Ukraine and globally”, *The Lancet*, 2022, pp. 2173-2175; KUMAR et al., “Meeting the health needs of displaced people fleeing Ukraine: Drawing on existing technical guidance and evidence”, *The Lancet Regional Health-Europe*, 2022.

¹⁰⁷ UNODC, *cit. supra* note 1, p. 5. See also HOFF and DE VOLDER, Preventing human trafficking of refugees from Ukraine: A rapid assessment of risks and gaps in the anti-trafficking response, La Strada International & Freedom Fund, 2022.

¹⁰⁸ UNODC, *cit. supra* note 1, p. 5.

¹⁰⁹ EU Strategy to Tackle Organised Crime, p. 12.

¹¹⁰ *Ibid.*

5. THE EU RESPONSE TO TRAFFICKING IN THE CONTEXT OF THE CONFLICT IN UKRAINE

Having examined the legal and theoretical background of the main topic of this contribution, it is finally possible to assess the European strategy against human trafficking in the context of the poly-crisis.

The Anti-Trafficking Plan constitutes the immediate response to the rapidly unfolding events in Ukraine as of February 2022. Prior to these events, however, the European Commission had already proceeded with the adoption of two other important instruments: the EU Strategy to Tackle Organised Crime 2021-2025 and the EU Strategy on Combating Trafficking in Human Beings 2021-2025. These are non-binding instruments through which the Commission explains its lines of action in various areas from a policy perspective.

In particular, as noted with regard to the previous EU Strategy on human trafficking,

“rather than providing a legally binding set of rules or state obligations, the goal of the strategy is to coordinate and tune the various policies, pieces of legislation and initiatives taken at EU level in different policy areas that are not necessarily, or primarily, adopted to combat human trafficking, but which do have an impact on or are part of the fight against human trafficking”.¹¹¹

Despite the recognition of the specificities of crimes such as migrant smuggling, and trafficking in human beings, the EU Strategy to Tackle Organised Crime does not contain specific provisions aimed at combating these phenomena. More appropriately, the Strategy refers to the dedicated EU Strategy on Combating Trafficking in Human Beings 2021-2025. This plan of action, adopted on 14 April 2021, aims at an all-encompassing response. Indeed, taking up the approach of the Anti-trafficking Directive, the EU Strategy on Combating Trafficking in Human Beings is based on the 3-p model and, in particular, on four areas of intervention: (i) reducing the demand that fosters trafficking in human beings, (ii) breaking the criminal business model to halt victims’ exploitation, (iii) protecting, supporting and empowering the victims, especially women and children, and (iv) the international dimension, which aims to advance international cooperation in relation to the three other strands.

¹¹¹ BOSMA and RIJKEN, *cit. supra* note 57, p. 318.

5.1. *The Anti-Trafficking Plan to Protect People Fleeing the War in Ukraine*

In close connection with the goals set out in the Strategy and the 10-Point Plan for stronger European coordination on welcoming people fleeing the war against Ukraine of 28 March,¹¹² the European Commission adopted a specific plan entitled Anti-Trafficking Plan to protect people fleeing the war in Ukraine.

The Anti-Trafficking Plan, which is to be implemented in cooperation with the National Rapporteurs and Equivalent Mechanisms of EU countries, EU Agencies and Civil society, in particular the EU Civil Society Platform against trafficking in human beings, is developed in five points concerning: i) strengthening awareness regarding risks of trafficking in human beings and setting up dedicated helplines; ii) reinforcing prevention against trafficking in human beings; iii) enhancing law enforcement and judicial response to trafficking in human beings; iv) improving early identification, support and protection of human trafficking victims; v) and addressing the risks of trafficking in human beings in non-EU countries, especially Ukraine and Moldova.¹¹³

5.1.1. *Exchange of Information and Judicial Cooperation*

The actions proposed in the Anti-Trafficking Plan focus on a plurality of spheres of action that appear to be fully consonant with the obligations arising from the international framework.

For example, a predominant role is played by actions aimed at ensuring an effective exchange of information between Member States, the European Commission, Europol, agencies such as the European Labour Authority, the EU Fundamental Rights Agency, and the EU Agency for Asylum in areas such as: the threat assessment of human trafficking in the conflict area;¹¹⁴ the risks, challenges and relevant policy tools for preventing undeclared work and labour exploitation among potential victims, through the cooperation of labour inspectorates or comparable authorities;¹¹⁵ the collection of information regarding the exploitation of victims; and the risks related to the use of the internet and other online platforms.¹¹⁶

Cooperation in the field of law enforcement and judicial response is also ensured

¹¹² Home Affairs Council, 10-Point Plan on stronger European coordination on welcoming people fleeing the war against Ukraine, 28 March 2022, available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2152>.

¹¹³ Anti-Trafficking Plan, p. 4 ff.

¹¹⁴ *Ibid.*, p. 7.

¹¹⁵ *Ibid.*, p. 8.

¹¹⁶ *Ibid.*

by the role of European Multidisciplinary Platform Against Criminal Threats (EMPACT) and the necessary strengthening of the Trafficking in Human Beings Operation Action Plan.¹¹⁷ Officers are then called upon to collect and assess information in order to detect crime in border countries, also through the use of all international and national databases, including the Schengen Information System (SIS) and those of Interpol and Europol.¹¹⁸

Overall, what emerges is a “multi-disciplinary, multi-agency approach of enforcement actions enabling the efficient detection, reporting and fight against trafficking in human beings for all forms of exploitation”.¹¹⁹

5.1.2. Information Dissemination and Prevention Measures

Similarly, in line with the information obligations and prevention measures mentioned above, the Anti-Trafficking Plan focuses on the need to strengthen awareness of the risk of trafficking, also through dedicated helplines and a website,¹²⁰ and on the implementation of security controls, through, for instance, the registration of entities and individuals wishing to provide accommodation, transport and other types of assistance.¹²¹

With regard to more general prevention obligations in economic and social matters, albeit in a more general manner, the Commission emphasizes the need to support the long-term needs of possible trafficking victims through their recovery and re-integration with health, psychological or legal specialized services, and a facilitated access to education and economic opportunities, including through the Asylum, Migration and Integration Fund and Internal Security Fund.¹²²

To find more marked references to organized crime, it is necessary to turn to the EU Strategy on Combating Trafficking in Human Beings 2021-2025. The role of organized crime is well highlighted in Point 4, where it is recognized that “[o]rganised crime groups that traffic people are well-structured and professional criminal networks, also operating internationally”.¹²³ Some emphasis is placed on the need to directly address the criminal business model, since specialized trafficking groups often

¹¹⁷ *Ibid.*, p. 9.

¹¹⁸ *Ibid.*, p. 10.

¹¹⁹ *Ibid.*, p. 11.

¹²⁰ *Ibid.*, pp. 4-5.

¹²¹ *Ibid.*, p. 6 ff.

¹²² *Ibid.*, p. 12 ff.

¹²³ EU Strategy on Combating Trafficking in Human Beings 2021-2025, point 4.

use legal markets in their operations.¹²⁴ Hence, the need to strengthen financial investigations and develop a framework to identify and confiscate criminal assets.¹²⁵ In the perspective of a robust criminal justice response, the strategy dovetails with the organized crime strategy in proposing appropriate training that takes place in a multi-stakeholder environment, including, among others, law enforcement, judicial authorities, civil society, social workers, child protection practitioners, education and health care providers, labour inspectors, police, etc.¹²⁶

5.1.3. *A First Assessment*

Clearly, any judgement on the Plan would be premature given the continuing hostilities at the time of writing. However, scholars have already pointed out certain criticalities in the implementation of the Anti-Trafficking Plan. In particular, the sub-optimal response in some countries due to a lack of pre-war capabilities or resources is highlighted.¹²⁷ Similarly, there seems to be a contrast between what the Plan and Strategy envisage, *in abstracto*, regarding dissemination of information and allocation of financial means for support and assistance to migrants and what is implemented in practice. La Strada's report highlights how migrants may encounter too much information, misinformation, or contradictory and fragmented information.¹²⁸ Similar problems are also reported with regard to helplines and hotlines. Furthermore, the registration of volunteers, on which emphasis was rightly placed, still seems to be too much left to the goodwill of organizations and not to state measures.¹²⁹ Finally, the absence of National Referral Mechanisms for all types of victims in some countries seems to hinder mechanisms for early identification, assistance and support for victims.¹³⁰ This specific obstacle is part of a broader problem related to the lack of resources for anti-trafficking action.¹³¹ At the same time, it is clear that the effectiveness of the EU response can only be assessed over the long term.¹³²

Currently, consensus on measures to protect the population fleeing Ukraine is

¹²⁴ *Ibid.*, point 4.1.

¹²⁵ *Ibid.*, see also Council conclusions on enhancing financial investigations to fight serious and organised crime, 17 June 2020.

¹²⁶ EU Strategy on Combating Trafficking in Human Beings 2021-2025, point 4.2.

¹²⁷ HOFF and DE VOLDER, *cit. supra* note 107.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, p. 18.

¹³⁰ *Ibid.*, pp. 16-17.

¹³¹ *Ibid.*, p. 3 ff.

¹³² See GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANISED CRIME, *The Vulnerable Millions. Organised Crime Risks in Ukraine's Mass Displacement*, pp. 27-30.

still high. However, the effective prevention of human trafficking attempts will be measured by the ability of the EU and States to maintain a high level of social and economic support primarily in the long term. This is all the more essential in the perspective that the Conflict may be destined to be prolonged and exceed the maximum duration of temporary protection measures of three years.¹³³ In this sense, there are several risks associated with an excessive reliance on humanitarian aid organizations over state actors and with the assumption that the current political predisposition towards reception can be maintained over time.¹³⁴

As attention to the issue wanes, what once served as a unifying factor of political may soon become a cause for confrontation, resulting in an increase in both material and “moral” uncertainties for refugees, and thus in the risks of being attracted by illicit prospects.

5.2. *The Activation of the Temporary Protection Directive: Praise and Criticisms*

As acknowledged by the Plan itself, the activation in March, for the first time, of the Temporary Protection Directive¹³⁵ has played an essential role in reducing migrants’ vulnerabilities to trafficking.

The Directive guarantees a series of rights for beneficiaries of temporary protection, including: a residence permit for the entire duration of protection (which can last from one year to three years);¹³⁶ information on protection; access to employment and suitable accommodation or housing; access to social welfare measures and medical care; access to education for minors; and the right to move to another EU country.

The extension of the protection offered by the activation of the Directive may indeed represent an important breakthrough. The benefits deriving from the acquisition of the status of beneficiaries of temporary protection constitute, perhaps, the most effective instrument to prevent them from falling into the “clutches” of

¹³³ *Ibid.*

¹³⁴ COCKBAIN and SIDEBOTTOM, *cit. supra* note 106, p. 41. And there cited AHMAD, “Europe’s Hospitality for Refugees Won’t Last Forever”, *Foreign Policy*, 2022.

¹³⁵ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212. The activation of the Directive was proposed by the Commission on 2 March 2022, and unanimously approved on 4 March by the Council.

¹³⁶ At the moment, temporary protection is likely to be extended until, at least March 2024. The extension is automatic and does not require any specific act.

organized crime, alongside supporting their essential needs.

The swift activation of temporary protection for the first time since 2001, in contrast to the “political blockage” by EU Member States over proposals for reforming the EU asylum system,¹³⁷ nevertheless opened the door to some misgivings raised especially by those who had proposed its activation for the 2015-2016 migration crisis.¹³⁸ In this perspective, the EU’s “double standard” was critically highlighted.¹³⁹

Reasons for this differentiation certainly include *realpolitik* considerations, and above all the circumstance that the conflict in Ukraine is taking place in the heart of Europe. Without necessarily looking for an explanation in the fact that the Ukrainians are considered “European”,¹⁴⁰ one must consider that, in activating temporary protection, the EU is first and foremost protecting its own interests in the face of Russia’s expansion into Europe and the destabilization of European and global security and stability.¹⁴¹ This is also made clear by the preamble of the Council Implementing Decision 2022/382.¹⁴²

Beyond these more general considerations on “unequal solidarity” in the activation of the Directive, the most pressing critical issue remains the option, contained in the decision, for States not to apply the Directive’s guarantees to all third-country nationals and asylum seekers residing in Ukraine.¹⁴³ Despite the fact that the original proposal of the European Commission gave room for the extension of the protection to all “third-country nationals legally residing in Ukraine who have

¹³⁷ CARRERA et al., *The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy*, 2022, p. 1.

¹³⁸ INELI-CIGER, “Time to Activate the Temporary Protection Directive”, *European Journal of Migration and Law*, 2016, pp 1-33. The proposal was put forward also by the MEP Elisabetta Gardini in February 2015.

¹³⁹ INELI-CIGER, “Reasons for the activation of the temporary protection directive in 2022: A tale of double standards”, in CARRERA and INELI-CIGER (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, 2023, p. 59. In some cases, the criticisms have even gone so far as to speak of “racism” on the part of the European institutions. See ENAR, “Racist double-standards persist at EU/Ukraine borders and beyond”, Blog Post, 30 March 2022, available at: < <https://www.enar-eu.org/racism-borders-eu-ukraine/> >.

¹⁴⁰ *Ibid.*

¹⁴¹ SKORDAS, “Temporary Protection and European Racism”, in CARRERA and INELI-CIGER (eds.), *EU Responses to the Large-Scale Refugee Displacement from Ukraine: An Analysis on the Temporary Protection Directive and Its Implications for the Future EU Asylum Policy*, 2023, pp. 428-429.

¹⁴² Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L 71/1.

¹⁴³ CARRERA et al., *cit. supra* note 137, p. 3 ff. For an updated analysis of the specific challenges and application of the Temporary Protection Directive in EU Member States, see ECRE, Information Sheet – Measures in response to the arrival of displaced people fleeing the war in Ukraine, 31 March 2023, available at: <<https://ecre.org/wp-content/uploads/2022/12/ECRE-Update-November-2022-Implementation-of-the-TPD.pdf>>.

been displaced as of 24 February 2022 and who are unable to return to their country or region of origin in safe and durable conditions because of the situation prevailing in that country”,¹⁴⁴ the extension was eliminated by the final decision. This amendment, in turn, introduced further and critical differentiations.¹⁴⁵

6. CONCLUSIONS

This contribution investigated the international framework on countering human trafficking and the risks associated with the poly-crisis and the current conflict in Ukraine. The Anti-Trafficking Plan adopted by the European Union certainly attempts to take a multifaceted approach to the problem. However, there are several issues that may have a counterproductive effect.

Firstly, organized crime plays a decisive role in the exploitation of human trafficking. In this sense, it seems that combating the phenomenon discounts a certain degree of uncertainty, both at a definitional and thus abstract level, given the uncertainties that emerge in the international framework, and, as a necessary reflection of this, at a concrete level, from an operational point of view.

The European Commission’s Strategies acknowledge the possible role of organized crime, but rely on greater coordination between authorities and agencies, without addressing the elephant in the room constituted by uncertainty at the definitional level. In this perspective, the invitation to follow, rather than organized crime, the money flows generated by these activities could be fertile.¹⁴⁶ The call for financial investigations would seem promising in this sense.

A second problem with the Anti-Trafficking Plan belongs to the sphere of general prevention measures. While the Plan appears to be fully in line with general prevention obligations, such as information and victim support and assistance, in practice, the lack of resources could hinder the effectiveness of these intentions.

At the same time, only time will tell whether, in the long term, the European Union will be able to guarantee continued support for the Ukrainian people, both in the case of a prolonged continuation of hostilities and in the case of the necessary reconstruction

¹⁴⁴ Proposal for a Council Implementing Decision, establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Council Directive 2001/55/EC of 20 July 2001, and having the effect of introducing temporary protection, Recital 11.

¹⁴⁵ For an in-depth analysis of the critical aspects of the activation of the Directive, see VITIELLO, “The Nansen Passport and the Eu Temporary Protection Directive: Reflections on Solidarity, Mobility Rights and the Future of Asylum in Europe”, *European Papers*, 2022, pp. 15-30.

¹⁴⁶ KOTECHA, *cit. supra* note 62, p. 62 ff.

that will have to take place in Ukraine after the conflict. In the long term, in fact, it will be necessary to act with the aim of preventing the vulnerabilities that States are called upon to address with social and economic measures (Article 31 of Palermo Convention and Article 9(2) and (4) Palermo Protocol) from re-emerging or becoming stronger.

In the same perspective, if the greatest risks for human trafficking are nested in vulnerabilities and obstacles of economic and social nature, applying the protection measures aimed at combating them, only to certain subjects or groups risks creating dangerous gaps. In this perspective, it would be advisable to review the critical aspects of the implementation of the Temporary Protection Directive. In fact, the “cracks” created by the absence of support and assistance from state actors and too often exploited by organized crime, provide fertile ground for the development of illicit opportunities and criminal practices in relation to human trafficking.