

Ensuring protection for trafficking victims in Spain: the role of European and International Law in shaping the Organic Law on comprehensive protection against human trafficking and exploitation

Georgina RODRÍGUEZ MUÑOZ*

Abstract: Human trafficking is widely recognized as one of the most egregious criminal activities, inflicting profound physical and emotional harm on its victims while continuing to expand globally. In response to this issue, the European Commission launched a proposal for amending Directive 2011/36/EU, which constitutes the framework for combating trafficking within the European Union. This proposal initiated the European legislative procedure, culminating in the enactment of Directive (EU) 2024/1712 in July 2024, modifying Directive 2011/36/EU. Simultaneously, Spain has undertaken efforts to enhance its legal framework through the introduction of a Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation. However, it is important to note that the national legislative process is still in its initial stages. In light of these legal developments, this article aims to analyse the incorporation of the amended Anti-trafficking Directive into the Spanish legal framework, particularly since the Draft Organic Law was presented before the publication of Directive (EU) 2024/1712. The analysis will focus on provisions specifically related to the protection of trafficking victims, who are the individuals most affected by this egregious crime and have frequently experienced marginalization. Furthermore, it will offer recommendations aimed at aligning forthcoming Spanish legislation with both Directive 2011/36/EU and International Human Rights Law.

Keywords: European Union, Spanish Draft Organic Law, human trafficking, human rights, victims' protection.

Received: October 23, 2024 *Accepted:* December 23, 2024

(A) INTRODUCTION

Human trafficking remains one of the most harmful criminal activities, inflicting severe and long-lasting physical, emotional, and economic damage on its victims. According to the latest statistics from the European Union, the number of recorded human trafficking victims continues to rise, alongside the increasing diversity of exploitation forms¹. While sexual exploitation remains the most common form, new modalities such

* PhD in European and Public International Law, University of Girona. georgina.rodriguez@udg.edu.

¹ EUROSTAT, Trafficking in human beings statistics, 2024. The most recent available statistics on human trafficking, covering the year 2022, reveal a concerning increase in the number of registered victims within the European Union. A total of 10,093 victims were recorded, representing a 41.1% rise compared to 2021 and marking the highest figure reported during the period from 2008 to 2022. Notably, 18 out of the 27 EU Member States reported an increase in the number of registered victims in 2022. Several countries have attributed this upward trend to enhanced efforts by authorities and agencies dedicated to combating human trafficking, reflecting improved detection and reporting mechanisms. Among the Member States, Germany and Italy experienced the most significant increases in absolute terms.

as forced begging, petty crimes or surrogacy are becoming more prevalent². Spain is no exception to this trend. Recent national statistics reveal a growing number of registered victims, with exploitation manifesting in increasingly varied forms³. In a concerted effort to eradicate or at least mitigate the impact of human trafficking on society, the European Commission launched the European Union (hereinafter, EU) Strategy on Combating Trafficking in Human Beings (2021-2025)⁴. This strategy proposed the possibility of conducting a public consultation with key stakeholders involved in the fight against trafficking and the prevention of its victims, focusing on the necessity of reforming the Anti-trafficking legal framework⁵.

For over a decade, 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/JHA⁶, has governed the fight against human trafficking within the European Union. However, many stakeholders consulted during the review process expressed concerns that the current legal framework was insufficient to address contemporary forms of trafficking⁷. Additionally, there was a pressing need to enhance the system for victim protection and assistance, highlighting the importance of adopting a more comprehensive and integrated approach.

On December 2022, the European Commission introduced a proposal to amend Directive 2011/36/EU, thereby initiating the legislative process within the European Union⁸. This proposal led to extensive and prolonged negotiations throughout 2023 among the co-legislative institutions of the European Union: the European Parliament and the Council of the European Union, each of which developed its own positions on the matter. In October 2023, following the confirmation of these final positions, interinstitutional negotiations between the co-legislators commenced.

² *Ibid.*

³ *Ibid.*

⁴ European Commission, EU Strategy on Combatting Trafficking in Human Beings (2021-2025), 2021, COM/2021/171 final.

⁵ *Ibid.*

⁶ Commission Directive 2011/36, OJ 101 L 1/11.

⁷ For instance, in the follow-up reports of the Directive presented by the European Commission in 2018, 2020 and 2022 these questions were raised, see: European Commission, Report from the Commission to the European Parliament and the Council. Second report on the progress made in combating human trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims, of 3 December 2018, COM(2018) 777 final at 7, 12 and 14; European Commission, Report from the Commission to the European Parliament and the Council. Third report on the progress made in combating human trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims, of 20 October 2020, COM(2020) 661 final at 15-17; European Commission, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Report on the progress made in combating human trafficking (Fourth Report), of 19 December 2022, COM(2022) 736 final, at 14-15.

⁸ European Commission, Communication from the Commission to the European Parliament and the Council, Proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, of 19 December 2022, COM(2022) 732 final.

Following the conclusion of these negotiations, the agreed text received approval in committee on February 15, 2024, during the first reading. However, the interinstitutional agreement was not debated and formally approved in the first reading until the final plenary session of the European Parliament for the 2019-2024 legislative term, which took place on April 23, 2024. Similarly, the Council of the European Union endorsed the text in its first reading on May 27, 2024. Therefore, Directive (EU) 2024/1712, amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims was published in the Official Journal of the European Union on June 24, 2024, and came into force on July 14, 2024⁹.

In parallel with the European legislative process, Spain – one of the European Union Member States most affected by human trafficking¹⁰ – sought to advance its legal framework to address the issue. Despite being a major destination country for trafficking victims within the European Union, Spain lacks specific legislation targeting human trafficking. Currently, Spain relies on the application of Protocols and other frameworks that, while applicable, are not specifically designed to address the complexities of human trafficking¹¹. A matter that the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter, CEDAW) Committee, the body responsible for overseeing the implementation of the CEDAW in its State parties, has emphasized to the Spanish government in its most recent periodic report¹².

Among other considerations, these factors prompted the Spanish government to introduce a Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation in 2022¹³. Nonetheless, due to primarily political reasons, it shelved during the 16th legislative term of the Spanish Parliament¹⁴. With the start of the 17th term, the new government reintroduced a revised Draft of the Organic Law on Comprehensive Action Against Human Trafficking and Exploitation in the first quarter of 2024 (Hereinafter, Draft Organic Law)¹⁵. Notably, the new text closely resembled the 2022 Draft, with many provisions remaining virtually unchanged. That said, minimal modifications were introduced, as will be examined in detail throughout this study.

The Draft Organic Law comprises seventy-three Articles, organized into a preliminary title and six subsequent titles. It also includes seven additional provisions, a single transitional provision, a single repealing provision, and twelve final provisions. As outlined in the preamble of the Draft Organic Law, which remains in the early stages of the legislative process, the norm aims to fully transpose Directive 2011/36/EU into Spanish law, addressing previous partial transposition efforts. Furthermore, it seeks to align the Spanish legal framework with international regulations aimed at combating human trafficking.

⁹ Commission Directive 2024/1712 OJ 2024 L.

¹⁰ EUROSTAT, *supra* n. 1.

¹¹ All the regulations can be consulted on the website of the Delegación del Gobierno contra la Violencia de Género.

¹² CEDAW Concluding observations on the ninth periodic report of Spain, CEDAW/C/ESP/CO/9, 31 May 2023.

¹³ Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation, 2022.

¹⁴ For a detailed analysis of the 2022 Draft Organic Law: C. Villacampa, 'Acerca del Anteproyecto de Ley Orgánica Integral contra la Trata y la Explotación de Seres Humanos' 20267 *Diario La Ley* (2023).

¹⁵ Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation, 2024.

At the global level, this includes the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, commonly known as the Palermo Protocol¹⁶. Regionally, it seeks alignment with the Council of Europe Convention on Action against Trafficking in Human Beings, also known as the Warsaw Convention¹⁷. Indeed, the Group of Experts on Action against Trafficking in Human Beings (hereinafter, GRETA), which is tasked with monitoring the implementation of obligations under the Warsaw Convention by Member States¹⁸, has consistently underscored the necessity for a comprehensive and holistic national legal framework specifically aimed at addressing human trafficking in its reports concerning Spain¹⁹.

Upon careful examination of the timelines associated with both legislative processes, an important inquiry emerges: why did the Spanish government, cognizant of the ongoing development of a legal framework intended to specifically amend the trafficking Directive, proceed to initiate its own legislative process without awaiting the official publication of the amended Directive? This decision has resulted in the inability of the Draft Law to fully align with certain modifications – albeit minimal – in the amended Directive 2011/36/EU.

Considering the above, this investigation aims to analyse the transposition of the 2024 amended Anti-trafficking Directive in the Spanish legal system, which was published months after the Spanish Draft Organic Law. However, this study will concentrate exclusively on the provisions that affect the protection of trafficking victims, as they are the individuals ultimately intended to be safeguarded and have frequently been abandoned. Additionally, the research will offer recommendations and suggestions for adapting the forthcoming Spanish legislation on victim protection to ensure alignment not only with the revised Directive 2011/36/EU but also with the broader framework of International Human Rights Law.

(B) CONCEPTUALIZING HUMAN TRAFFICKING: INTERNATIONAL DEFINITIONS AND THEIR APPLICATION IN THE SPANISH LEGAL FRAMEWORK

Before proceeding with a detailed examination of the measures aimed at protecting victims of trafficking as outlined in the Spanish Draft Organic Law, as well as their alignment with the new framework of the European Union and International Human Rights Law, it is essential to clarify what is meant by human trafficking. This clarification is crucial for understanding the context and significance of the legislative provisions in question, as well as their impact on the effective protection of victims. Consequently; the

¹⁶ 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 24 January 2004) 2237 *UNTS* 319.

¹⁷ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 16 May 2005) 167 *ETS*.

¹⁸ Article 1(2) Warsaw Convention.

¹⁹ GRETA Evaluation Report on Spain, 2023 (GRETA(2023)10), at 17-32.

broader the definition of human trafficking, the greater the number of victims who will be able to benefit from and hold the rights conferred by the norm.

At the global level, the first instrument to establish a consensual international definition of human trafficking was the Palermo Protocol²⁰. The Protocol introduced a definition comprising three cumulative elements: the action, the means, and the end, which refers specifically to the intention to exploit the victim²¹. Building on the framework established by the Palermo Protocol, the European Union initiated its own measures to address human trafficking. The initial instrument guiding the efforts of the European Union efforts in combating trafficking was Council Framework Decision 2002/629/JAI of July 19, 2002, on the fight against human trafficking²². Nevertheless, this instrument faced significant criticism due to its restrictive definition of the crime, which did not align with the minimum standards set forth in the Palermo Protocol²³.

Subsequently, nearly a decade later, Directive 2011/36/EU was adopted, which expanded upon the definition established by the Palermo Protocol. This broadened definition became one of the most notable features of the trafficking Directive, marking the beginning of a holistic approach to combating trafficking and protecting its victims. Expanding upon this broader definition of the crime, Directive (EU) 2024/1712 has led to substantial modifications in the definition of human trafficking within the European Union. Consequently, according to the reformulated Article 2 of Directive 2011/36/EU, the following will be considered as human trafficking: “The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those 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”. Adding: “Exploitation shall include, as a minimum, the exploitation of the prostitution of others

²⁰ Under Article 3(a) of the Palermo Protocol, it will be considered trafficking in human beings: “[...] 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”.

²¹ The final element of the definition of human trafficking is the intention to exploit the individual. Characterized as *dolus specialis*, this intention aims to achieve significant economic gain. Importantly, exploitation does not need to be actualized for the crime to be considered complete; the offense is perpetrated at an early stage, requiring only the intent to exploit the victim. UNODC, *Legislative Guide for the Palermo Protocol*, 2020, at 118.

²² Council Framework Decision 2002/629 OJ 2002 203/1.

²³ The approval of Framework Decision 2002/629/JHA not only aligned the European Union system with recent international regulatory developments but also reflected a predominantly criminal approach. As stated in its own recitals, the enactment aimed to harmonize the criminal laws of Member States with the goal of achieving greater effectiveness in the fight against human trafficking. To this end, a comprehensive approach was established that included a consensus on the definition of the constitutive elements of the criminal offense and its legal consequences, introducing effective, proportionate, and deterrent sanctions. For a critique of the criminal perspective adopted by Framework Decision 2002/629/JHA, see C. Villacampa, ‘The New European Directive on the Prevention and Combating of Human Trafficking and the Protection of Victims: A Change of Direction in the Union’s Policy on Human Trafficking?’, 13 *Revista Electrónica de Ciencia Penal y Criminología* (2011) 1-52 at 18.

or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs, or the exploitation of surrogacy, of forced marriage, or of illegal adoption”.

Regarding the first two elements the action and the means Directive (EU) 2024/1712 does not introduce substantial changes to the definition of the crime of human trafficking. However, the third and final cumulative element, which pertains to the forms of exploitation that victims may endure, represents one of the most significant innovations of Directive (EU) 2024/1712. In this context, in addition to the established forms of exploitation including sexual exploitation, forced labour, and various services such as begging, slavery, servitude, exploitation for criminal activities, and organ trafficking three new forms of exploitation have been incorporated into the definition of the crime. This expansion reflects a comprehensive approach to addressing the evolving nature of exploitation, ensuring that all manifestations are recognized and addressed within the legal framework.

Firstly, the inclusion of illegal adoption as one of the potential manifestations of human trafficking is noteworthy. While trafficking for the purpose of illegal adoptions was acknowledged as a form of exploitation in Recital (11) of Directive 2011/36/EU, it was not explicitly incorporated into the binding provisions that Member States were required to transpose into their national legal frameworks. Secondly, the exploitation of forced marriages has been added as another of the various forms that human trafficking can take. Like the previous case, trafficking for the purpose of exploiting forced marriages was also identified among the forms of exploitation mentioned in Recital (11) of Directive 2011/36/EU, despite not being explicitly addressed in the legislative text. Consequently, the significant alteration introduced by Directive (EU) 2024/1712 is the incorporation of both forms of exploitation into the substantive provisions of Directive 2011/36/EU itself. This implies that Member States are now obligated to include these forms of exploitation in their legal systems and to criminalize them accordingly.

Thirdly, the definition of human trafficking has been broadened to encompass a contentious form of exploitation: surrogacy. Unlike the previous two forms of exploitation, surrogacy was not mentioned in the preamble of Directive 2011/36/EU, rendering its inclusion a subject of considerable debate. Notably, this form of exploitation was absent from the initial legislative proposal of the European Commission. It was, in fact, the European Parliament that championed its inclusion in the definition of trafficking, ultimately achieving this outcome following complex and protracted negotiations²⁴. Having reviewed the approach established by the European Directive in the fight against trafficking, the subsequent step is to evaluate the degree to which the definition of the

²⁴ It is important to note that, as stated in Recital (6) of Directive (EU) 2024/1712, the exploitation of surrogacy, forced marriage, or illegal adoption could already fall within the scope of offenses related to human trafficking as defined in Directive 2011/36/EU, provided that all the criteria constituting such offenses were met. However, as indicated in Recital (6), due to the severity of these practices and to address the ongoing increase in the number and significance of human trafficking offenses for purposes other than sexual or labour exploitation, surrogacy exploitation, forced marriage, and illegal adoption should be included as forms of exploitation in the amended Directive, provided they fulfil the constitutive elements of human trafficking.

crime articulated in the Spanish Draft Organic Law aligns with the framework of the European Union.

In Spain, while there is no comprehensive legislation specifically designed to regulate all aspects of combating human trafficking and protecting its victims, the crime of human trafficking is defined and recognized within the legal framework. The crime of human trafficking was established by Organic Law 5/2010, enacted on June 22, which amended Organic Law 10/1995 of November 23 concerning the Penal Code²⁵. This definition was subsequently reformed in 2015 by Organic Law 1/2015 of March 30, which further modified Organic Law 10/1995²⁶. On the one hand, this legislative development represented a significant initial step in distinguishing the crime of human trafficking from the prosecution of involvement in illegal or clandestine immigration²⁷. On the other hand, technical improvements were necessary to align the definition of the crime with International Human Rights Law.

Thus, before addressing the three specific elements of the crime, it is important to emphasize that references to “Spanish territory” and “national or foreign victim” in the definition of the crime have been removed in the Draft Organic Law, which is a welcome step. These terms do not align with the nature of human trafficking and conflict directly with the recognized principle of non-discrimination²⁸. Therefore, it remains to be seen how they will ultimately be presented in the final text, which should maintain language that allows for the inclusion of the maximum number of victims in the definition of the crime.

Regarding the three elements inherent in the definition of human trafficking namely, the action, the means, and the end – the Draft Organic Law largely adheres to an identical definition of the crime as set forth in the trafficking Directive. Concerning the action and the means, there are no significant elements to highlight, as these follow precisely the provisions outlined in European legislation.

Nevertheless, regarding the third and final element, there are several noteworthy issues to highlight. According to Article 3.2 of the Draft Organic Law, exploitation is understood as the imposition of any work, service, or activity – whether regulated or unregulated, lawful or unlawful – required of a person in a situation of domination or lack of freedom of choice to perform it. This definition encompasses: slavery, servitude,

²⁵ Organic Law 5/2010, of June 22, which amends Organic Law 10/1995, of November 23, of the Penal Code.

²⁶ Article 117 bis Spanish Penal Code: “The following will be punished with a sentence of five to eight years in prison as a perpetrator of human trafficking: anyone who, whether within Spanish territory, from Spain, in transit to or destined for it, uses violence, intimidation, or deception, or abuses a position of superiority, necessity, or vulnerability of the victim, whether national or foreign, or through the delivery or receipt of payments or benefits to obtain the consent of the person who holds control over the victim, captures, transports, transfers, accommodates, or receives the victim, including the exchange or transfer of control over those individuals, for any of the following purposes: a) The imposition of forced labour or services, slavery or practices similar to slavery, servitude, or begging; b) Sexual exploitation, including pornography; c) Exploitation for the purpose of committing criminal activities; d) The extraction of their bodily organs; e) The celebration of forced marriages”.

²⁷ C. Villacampa and C. Torres, ‘Aproximación institucional a la trata de seres humanos en España valoración crítica’, 41, *Estudios penales y criminológicos* (2021) 189–232 [10.15304/epc.41.6718].

²⁸ V. Milano, ‘Protección de las víctimas de trata con fines de explotación sexual: estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España’, 32 *Revista Electrónica De Estudios Internacionales* (2016) 1–54, at 24 [doi: 10.17103/reei.32.05].

and forced labour or services; begging; the commission of criminal activities; the provision of sexual services, including pornography; the extraction of organs or parts or bodily tissues; and the celebration of forced marriages or unions, irrespective of the ritual followed.

The forms of exploitation remain substantially the same as in Directive 2011/36/EU, although they have been reorganized and specified: the commission of criminal activities and begging are now encompassed within the provision of forced labour or services (a); pornography has been included in the section addressing sexual exploitation (b); the phrase “or part of bodily tissues” has been added to the section on organ trafficking (c); and forced unions are now included alongside marriages, irrespective of the ritual followed (d).

Among the forms of exploitation outlined in the Spanish legislation, there are two purposes of exploitation stipulated in the reformulated European Directive that are notably absent: the exploitation of surrogacy and illegal adoption. It is necessary that the legislative process culminating in the adoption of comprehensive legislation includes these new forms of exploitation. Firstly, this inclusion is essential to align the Spanish law with European standards in the fight against trafficking. Secondly, it ensures that victims of these egregious forms of exploitation do not find themselves unsupported when seeking assistance and protection.

Consequently, it is the responsibility of all parties involved in the legislative process to advocate for the incorporation of these forms of exploitation and to contribute to their visibility. In fact, GRETA has repeatedly alerted Spain about the fact that its legislation is primarily focused on sexual exploitation, thereby neglecting victims of trafficking in other forms of exploitation, which are increasingly numerous and prevalent²⁹. In conclusion, a broader definition not only ensures greater protection but also facilitates a more effective response from the competent authorities in combating this serious crime.

It is the primary responsibility of the State to ensure the transposition of the Directive into domestic legal order. In this regard, if Spain was to omit the two forms of exploitation mentioned in the final text of the Organic Law, it would be necessary to assess whether, despite such an omission, their application would still be possible, considering the potential direct effect of Article 2.3 of the amended Directive 2011/36/EU. In such a case, the victim could invoke this provision to be recognized as a victim of the crime of human trafficking, which would allow them to access the rights provided in the Directive for persons affected by the crime.

In this context, it is necessary to first examine whether the article can be invoked and, secondly, whether it is applicable, which will depend on whether it concerns a horizontal or vertical relationship. Regarding the first question – whether the article can be invoked – the answer is affirmative, as it constitutes a clear, precise, and unconditional provision, thus meeting the requirements established by the well-established case law of the Court of Justice of the European Union (hereinafter, CJEU)³⁰. Secondly, concerning

²⁹ GRETA, *supra* n. 17 at 66.

³⁰ For example, in the *Van Gend & Loos* case, the Court of Justice, now the Court of Justice of the European Union (CJEU), established the essential characteristics of the legal system of the European Union that

the type of relationship in which the article is to be applied, it is configured as a provision applicable within the framework of a vertical relationship between the State and the individual – in this case, the victim³¹.

In summary, given that it is the State's responsibility to directly transpose the Directive into its domestic legal framework, and considering that, in this hypothetical scenario, such transposition would not have been carried out, the direct application of Article 2.3 of the amended Directive 2011/36/EU is possible. This is justified by the fact that it concerns a vertical relationship, where the State's failure to fulfill its duty of transposition, as required by European legal standards, necessitates the direct invocation of the European provision to ensure the protection intended, which would otherwise be covered by domestic legislation.

Nonetheless, extrapolating the situation to a context involving a horizontal relationship between private parties, where the direct application of Article 2.3 of the amended Directive 2011/36/EU would not be possible – for instance, in a dispute between the victim and their exploiter where the victim seeks to assert their rights under the Directive – the domestic jurisdictional organ handling the case could resort to an interpretation of the national law consistent with the spirit of the Directive. If such an interpretation were not feasible, the principle of State liability could then be applied, as established by consistent CJEU case law³². Simultaneously, either the European Commission or another Member State could bring an infringement proceeding against Spain, arguing the incorrect or incomplete transposition of the amendments to Directive 2011/36/EU³³.

In any case, Spain has a maximum period of two years to transpose Directive 2011/36/EU following the entry into force of its amendment. In this regard, Spanish legislation should not only cover the new forms of exploitation included in the 2024 Directive on trafficking in persons, but it should also go further by ensuring an open-ended enumeration similar to that of Directive 2011/36/EU. This approach would allow for a

allow for the invocation and applicability of its provisions by individuals: they must be clear and precise – or sufficiently precise – and unconditional, meaning they should leave no room for discretion by the Member States. Furthermore, it is crucial that the beneficiary and the right to be protected are clearly identified and defined. In the *Costa v. ENEL* case, the CJEU further developed these principles and clarified the necessary requirements for a provision to have direct effect, building on previous case law and specifically applying it to the provisions of the treaties. Judgment of February 5, 1963, *Van Gend & Loos*, C-26/62, EU:C:1963:1; Judgment of July 15, 1964, *Costa v. ENEL*, C-6/64, EU:C:1964:66.

³¹ In the *Becker* case, the CJEU established that a Directive that has not been correctly transposed can still be applicable, provided that the provision in question meets the previously defined characteristics, such as clarity, precision, and unconditionality. Judgment of January 19, 1982, *Becker*, C-8/81, EU:C:1982:10. Similarly, in its ruling in the *Costanzo* case, Luxembourg determined that all state authorities are obliged to apply the provisions of a Directive, even if it has not been correctly transposed or has been transposed incorrectly. Judgment of June 22, 1989, *Costanzo*, C-103/88, EU:C:1989:256.

³² In the *Faccini Dori* case, the CJEU denied the application of horizontal direct effect, meaning the possibility for an individual to invoke a provision of European Union law against another individual. However, it provided subsequent solutions, such as the interpretation of national provisions in conformity with Union law and the liability of Member States in case of failure to fulfill their EU obligations. Judgment of July 14, 1994, *Faccini Dori*, C-91/92, EU:C:1994:292.

³³ Regarding the liability of Member States for violations of Union law, see the *Brasserie du Pêcheur* case, where the CJEU established the requirements for applying the principle of Member State liability. Judgment of March 5, 1996, *Brasserie du Pêcheur*, C-46/93 and C-48/93, EU:C:1996:79.

comprehensive and adaptable definition that encompasses all possible manifestations of the crime of human trafficking.

(C) PROTECTING VICTIMS OF HUMAN TRAFFICKING: GENERAL MEASURES

As noted in the introductory section, the aim of this work is to examine the Draft Organic Law against human trafficking and assess its alignment with the requirements set forth by Directive 2011/36/EU, as amended in 2024. Nonetheless, it has been emphasized that this study focuses specifically on the protection of victims, who are the most affected by this crime, suffering blatant violations of their Human Rights. The protection of victims is crucial for several reasons. Firstly, human trafficking is inherently a violation of fundamental Human Rights, including the right to liberty, dignity, and security. Victims often endure physical and psychological trauma, exploitation, and dehumanization, which can have long-lasting effects on their well-being and reintegration into society. Secondly, effective victim protection measures are essential for encouraging reporting and cooperation with law enforcement authorities. When victims feel safe and supported, they are more likely to come forward, providing vital information that can aid in the prosecution of traffickers and the dismantling of trafficking networks. Furthermore, a robust framework for victim protection contributes to the overall effectiveness of Anti-trafficking efforts. By prioritizing the needs and rights of victims, legislation can promote a victim-centred approach, ensuring that policies are designed not only to combat trafficking but also to restore the dignity and rights of those affected by the phenomenon.

Therefore, before delving into the specific measures designed for the protection of victims of human trafficking, it is essential to consider the Human Rights approach within a broader context. This examination will allow for an assessment of whether the concrete measures for the protection and assistance of victims of human trafficking align with the comprehensive framework that both instruments aim to implement.

In the context of the European Union, victim protection has emerged as a crucial issue, highlighting the need to enhance the legal framework established by Directive 2011/36/EU in combating human trafficking³⁴. The original proposal of the European Commission consistently stressed the importance of strengthening protection and assistance systems for trafficking victims. Nonetheless, a closer examination of the proposal of the European Commission reveals that significant advancements in Human Rights protections were either minimal or entirely absent. Furthermore, the positions of both the European Parliament and the Council – particularly the latter – did not demonstrate significant advancement in victim protection, revealing considerable discrepancies and even contradictions between both European institutions. Consequently, the amended Directive 2011/36/EU does not implement significant changes in the protection of

³⁴ M. Jordana ‘The European Union fight against trafficking of human beings: challenges of the victim’s statute’, 8 *Peace & Security – Paix et Sécurité Internationales* (2020), 467-493 [doi: 10.25267/Paix_secur_int.2020.i8.16]; L. Palumbo, S. Marchetti, ‘10 years after the Directive 2011/36/EU: Lights and shadows addressing the vulnerability of trafficked and exploited migrants’ 33 *Population Europe* (2022).

trafficking victims, and the number of specific measures aimed at enhancing their protection remains limited. Nonetheless, the overall legal framework demonstrates a general improvement in adopting a more holistic approach, as will be analysed in the following lines.

(1) Tailored approaches in the protection of trafficking victims

The protection of trafficking victims based on their specific needs constitutes a significant aspect of the amended anti-trafficking Directive, as recognized throughout its provisions. Recital (5) acknowledges that one of the deficiencies of the previous legal framework in the fight against trafficking was the necessity of providing a more targeted assistance to the victims of this egregious crime, as identified by the EU Strategy to Combat Trafficking in Human Beings. In response to this shortcoming, Directive 2011/36/EU incorporates various measures. One of the most notable changes introduced in the reformed Directive 2011/36/EU can be found in Article 11, addressing the protection of trafficking victims. Article 11(1) specifies that Member States must implement measures to ensure that victims receive specialized assistance and support, employing a victim-centered approach that considers gender, disability, and age considerations.

Moreover, one of the most significant additions is Article 11(4), which outlines the minimum functions to be performed by National Referral Mechanisms for trafficking victims, including the referral of these individuals to the most suitable services. Consequently, Member States must ensure that the development of such mechanisms provides appropriate assistance tailored to the specific needs of each victim. This requirement is further emphasized in Recital (17), which underscores the importance of considering the particular needs of trafficking victims with disabilities when providing support measures.

The Draft Organic Law, in Article 2, when outlining its objectives, encompasses a comprehensive approach to combating human trafficking, framed within a Human Rights perspective centered on victims. Furthermore, it emphasizes the incorporation of a gender perspective and addresses the specific needs of minors, which are to inform all actions articulated within the scope of this Organic Law.

Upon a deeper examination of the Draft Organic Law, particularly Title III, which focuses on the rights of victims, it can be observed a more sensitive approach to this issue. The wording of Article 30(2) suggests that the assistance and protection mechanisms outlined in the Draft Organic Law must be tailored to the type of exploitation experienced and to the profile of the victim. Additionally, it specifies that specialized assistance will be provided to those victims who require it, particularly considering their physical and mental health, experiences of physical, psychological, or sexual violence, pregnancy status, disability, or age. This Article aligns with the provisions set forth in the amended Article 11(1) of Directive 2011/36/EU. Nonetheless, given its current phrasing, it would be advisable to avoid a closed enumeration of the particularities or special needs that trafficking victims may require. Instead, an inclusive approach employing an open-ended enumeration would be more beneficial. Therefore, it is anticipated that this point will receive special consideration in the national legislative process to ensure that the norm reflects a holistic perspective in the fight against human trafficking and the protection of its victims.

(2) The incorporation of Human Rights principles: non-discrimination and non-conditionality

A Human Rights-based approach is essential in the fight against human trafficking, as it ensures that all efforts to combat trafficking prioritize the dignity, rights, and well-being of the individuals involved. By framing Anti-trafficking measures within this perspective, several key Human Rights principles are emphasized. These include the principles of non-discrimination, respect for human dignity, non-conditionality and non-coercion in the provision of protection measures, as well as the non-punishment of trafficking victims³⁵.

Nonetheless, due to limitations of space and time, a comprehensive analysis of all the principles cannot be undertaken. Therefore, only two principles will be examined: the principle of non-discrimination and the principle of non-conditionality.

In the new version of Directive 2011/36/EU, the recognition of the principle of non-discrimination in the provision of protection and assistance to victims of trafficking is particularly noteworthy. Firstly, Recital (1) stipulates that support must be provided to victims regardless of their origin. Secondly, Recital (18) elaborates on the principle of non-discrimination, stating that victims should receive assistance irrespective of their nationality, statelessness, citizenship, or place of residence, as well as the way they were exploited.

Additionally, a significant innovation in the amended Directive 2011/36/EU is its explicit reference to intersectional discrimination in Recital (4)³⁶. This recital notes that human trafficking may be exacerbated when combined with discrimination based on various grounds prohibited by Union law, including gender discrimination. Consequently, Member States are urged to pay special attention to victims affected by intersectional discrimination and the resultant vulnerabilities, particularly in relation to discrimination based on racial and ethnic origin.

This incorporation is highly beneficial, as it acknowledges for the first time in a legal text of the European Union the existence of intersectional discrimination within the context of human trafficking³⁷. The inclusion of this concept in the recitals is a

³⁵ G. Rodríguez, *La protección de la víctima de trata de personas en el ordenamiento jurídico internacional y su aplicación en la Unión Europea: hacia un estatuto de la víctima* (Doctoral Thesis, Universitat de Girona, 2024) at 141.

³⁶ On the concept of intersectional discrimination, see: S. Fredman, *Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law* (Publications Office of the EU, Brussels, 2016) at 27-28. For a study on the importance of adopting an intersectional approach to human trafficking, see: W. Corrêa Da Silva, 'La interseccionalidad en la trata de seres humanos: un encuentro necesario para el enfoque de derechos humanos' in N. Cordero Ramos, P. Cruz Zúñiga, Pilar (eds.), *Trata de personas, género y migraciones en Andalucía (España), Costa Rica y Marruecos: Retos y propuestas para la defensa y garantía de los derechos humanos* (Dikinson, 2019), at 37.

³⁷ The European Court of Human Rights has critically examined and recognized intersectionality as a form of discrimination. A notable example is the case of *B.S. v. Spain* (2012), in which the Strasbourg Court concluded that national courts failed to consider the specific vulnerability of the applicant, who was an African woman engaged in prostitution. As a result, the authorities did not meet their obligations under the doctrine derived from Article 14 of the European Convention on Human Rights in conjunction with Article 3, which mandates that all necessary measures be taken to determine whether a discriminatory

commendable initial step from a Human Rights perspective. However, it would have been more appropriate to mention intersectional discrimination within the substantive provisions of the Directive to grant it greater significance and applicability.

Regarding the Draft Organic Law, several welcome provisions have been introduced. Firstly, Article 3o(1) states that victims, regardless of their nationality – whether Spanish or foreign – and irrespective of their administrative status or any other personal or social circumstances, are guaranteed the rights recognized by the Draft Organic Law. Therefore, it appears that the new law aims for full alignment with the principle of non-discrimination and, consequently, with International Human Rights Law.

Moreover, Article 2 establishes the objective of ensuring universal accessibility as a fundamental prerequisite for individuals targeted by this Organic Law. This accessibility is essential for enabling these individuals to access the procedures and benefits outlined within the law without facing barriers or discrimination, in alignment with the relevant legislation. Nonetheless, it remains to be determined whether this commitment to non-discrimination is effectively implemented in practice. The Spanish Draft Organic Law makes no mention of intersectional discrimination. It would be beneficial to include a reference to this form of discrimination, which is being increasingly recognized. Therefore, it is recommended that the Spanish legislative process will include at least a minimal reference to this form of multiple discrimination, which is frequently evident in cases of human trafficking.

Another issue closely related to a Human Rights-based approach is the application of the principle of non-conditionality in providing protection and assistance measures to trafficking victims. As Anne T. Gallagher has defended, imposing conditions on the protection afforded to victims effectively undermines the very essence of the obligation and the victims' right to receive such protection³⁸. Some studies indicate that linking victim protection to the criminal investigation process introduces a range of practical complications for both victim protection and the prosecution of traffickers³⁹. These investigations show that when victim protection is made contingent upon their cooperation with authorities, it can lead to unintended consequences for the prosecution of traffickers, such as undermining the credibility of victims as witnesses. Nevertheless, despite its clarity from a theoretical or academic perspective, the incorporation of this principle into international legal instruments and its application in practice can often be somewhat ambiguous⁴⁰.

The European Anti-trafficking Directive fails to adequately protect and uphold this principle, which has led to significant criticism⁴¹. Conversely, Article 11 of Directive 2011/36/EU, despite facing considerable backlash, continues to link the provision of

attitude may have influenced the circumstances surrounding the case, see: *B.S. v. Spain*, ECHR (2012) 47159/08, at 62-63.

³⁸ A.T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, New York, 2011) at 289.

³⁹ A. Brunovskis, M.L., Skilberi, 'Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers', 6 *Anti-Trafficking Review* (2016) 13-30 at 7.

⁴⁰ G. Rodríguez, *supra* n. 28 at 181.

⁴¹ M. Jordana, 'La lucha contra la trata en el contexto europeo: ¿existe un sistema Internacional de protección de víctimas verdaderamente respetuoso con los Derechos Humanos?' J. Sorreta (dir.) *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (Vol. XX) (Thomas Reuters Aranzadi, 2020), 331-355 at 347.

protection and assistance to the duration of criminal proceedings, being an aspect that has not been modified in the review⁴². This approach is fundamentally at odds with a Human Rights-based framework. In this regard, there was hope that the amendment process would eliminate or, at the very least, mitigate this issue. Yet, the situation has remained unchanged in the transformed Anti-trafficking Directive, which diverges markedly from the Human Rights approach that the instrument supports to promote⁴³.

Fortunately, Spain is also bound by the provisions set forth in the Warsaw Convention, which adopts a different and commendable perspective on this issue. According to Article 12(6) of the Council of Europe Convention, each Party shall adopt the necessarily measures to ensure that assistance to a victim is not made conditional on the victim willingness to act as a witness⁴⁴.

This provision of the Warsaw Convention is reflected in two Articles of the Draft Organic Law. On one hand, Article 2, which outlines the objectives of the norm, provides in its section (j) that it aims to ensure that the protection and assistance provided to victims is carried out with full respect for their Human Rights, without making it conditional on the ability or willingness of the victim to participate in the prosecution of the crime. On the other hand, Article 31 further elaborates on this principle by addressing the specifically disconnection of victim protection and assistance from their reporting and participation in criminal investigations. Article 31 stipulates that immediate and ongoing access to the rights mentioned in this title shall not be contingent upon the filing of a complaint or the willingness or ability of the victim to cooperate with authorities in the investigation or potential criminal proceedings.

Still, it is important to note that this Article pertains specifically to the rights outlined in Title III, which focuses on the rights of victims. Consequently, any aspects not covered within this title fall outside its scope of application. For instance, this implies that provisions for the recovery and reflection period for trafficking victims, as well as residence permits, are not subjected to the non-conditionality principle. Thus, while the incorporation of the principle is indeed a welcome development, it should be expanded to encompass all matters related to the protection of trafficking victims in order to align the Draft Organic Law with International Human Rights Law standards. This has significant consequences, as the applicability of the principle, even on paper, is already questionable in terms of its breadth. In practice, its applicability is further restricted⁴⁵.

⁴² Article 11 Directive 2011/36/EU: “Member States shall take the necessary measures to ensure that specialised assistance and support are provided to victims in a victim-centred, gender , disability and child-sensitive approach before, during, and for an appropriate period of time after the conclusion of, criminal proceedings [...]”.

⁴³ M. Jordana, *supra* n. 36.

⁴⁴ According to the Explanatory Report of the Warsaw Convention, the drafters sought to clarify that, under the present Article of the Convention, assistance to the victim is not contingent upon their willingness to cooperate with the competent authorities in criminal investigations and proceedings. Council of Europe, *Explanatory Report of the Warsaw Convention*, 2005, at 168.

⁴⁵ Reports by GRETA on the Member States of the Council of Europe demonstrate that this conditionality is a common practice. See, for example, GRETA Evaluation Report on the Netherlands, 2018 (GRETA(2018)19) at 119, and GRETA Evaluation Report on Italy, 2019 (GRETA(2018)28) at 159. For the ambiguous applicability of the principle in Spain, see: N. Torres and C. Villacampa, ‘Protección jurídica y asistencia para víctimas de trata de seres humanos’, 27 *Revista General de Derecho Penal* 2017 at 16. The authors conduct a series of interviews with members of the Spanish security forces responsible for investigating human trafficking

Indeed, practice demonstrates that there are still many States where the identification and assistance of victims remains frequently contingent upon their willingness to cooperate with the authorities. Spain is not an exception in this regard. Many Spanish civil society organizations have reported that, in some cases, identification and assistance to trafficking victims are provided only within the framework of criminal investigations⁴⁶. In line with this, the latest GRETA report indicates that the Spanish security forces condition the identification of victims on their cooperation with ongoing investigations or judicial proceedings⁴⁷.

Thus, all these complexities are intended to be addressed through the adoption of the first comprehensive regulation on trafficking in Spain. Article 2(2)(j) explicitly indicates that unconditional assistance to victims is integral to the objectives and guiding principles of the Law, a notion that, as has already been said, is further elaborated upon in Article 31. The importance of this provision cannot be overstated, as it establishes a foundational commitment to prioritizing the well-being and rights of victims. In fact, conditioning the protection and assistance of victims proves to be a clearly counterproductive approach⁴⁸. Therefore, this incorporation is very welcome; however, it remains to be seen how effectively it will be implemented in practice and whether the wording is maintained in the final version of the Organic Law.

(3) The creation of National Referral Mechanisms: identification and assistance to trafficking victims

Another mechanism incorporated into Directive 2011/36/EU following its 2024 amendment is the obligation for Member States to establish National Referral Mechanisms for victims. This incorporation stems from the advocacy of civil society organizations involved in the public consultation process of Directive 2011/36/EU, where the identification and protection of trafficking victims were central to the discussions⁴⁹.

crimes. From these interviews, it can be inferred that some professionals within the police and judicial systems perceive victim assistance and protection services as a means to encourage cooperation with the justice system and to obtain information. Such a perspective instrumentalizes and dehumanizes the victims, viewing them more as sources of information than as subjects entitled to rights.

⁴⁶ International Amnesty Spain, *Cadenas invisibles: identificación de víctimas de trata en España*, 2020, at 41. In this regard, Carolina Villacampa has emphasized the importance of the involvement of NGOs in the formal identification processes of victims and their assistance, see: C. VILLACAMPA, *Trata de seres humanos y explotación laboral: retos pendientes en la asistencia a sus víctimas*, 28 *Revista de Derecho Penal y Criminología* (2022) 433-480, at 450.

⁴⁷ GRETA, *supra* n. 12 at 226. This concern was previously highlighted in the 2018 GRETA report regarding Instruction 6/2016 issued by the Secretary of State for Security, which emphasized that identification is an administrative act and, therefore, should be independent of the statements of the victims during the proceedings, see: Ministry of Interior, Secretary of State and Security, Instruction 6/2016 from the Secretary of State and Security on the actions of the State law enforcement agencies in the fight against human trafficking and in collaboration with organizations and entities with proven experience in victim assistance, 2016.

⁴⁸ C. Villacampa, *supra* n. 34 at 451.

⁴⁹ In the follow-up reports of Directive 2011/36/EU from 2018, 2020, and 2022, the need to enhance the protection of trafficking victims was a central point, see: Report from the Commission to the European Parliament and the Council. Second Report on Progress Made in the Fight Against Human Trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating human trafficking and

These organizations argued that the existing instruments were insufficient and did not ensure effective victim identification, leading to calls for significant improvements.

As a result of extensive debate on this issue, Article 11.4 of the amended Directive 2011/36/EU urges Member States to establish, through laws, regulations, or administrative provisions, one or several mechanisms aimed at the early detection, identification, assistance, and support for both identified and presumed victims. This should be done in collaboration with relevant support organizations, and a focal point must be appointed for the cross-border referral of victims.

The tasks of these referral mechanisms, in line with the amended Directive 2011/36/EU, must include at least the following: (a) Setting minimum standards for the detection and early identification of victims and adapting procedures to account for the different forms of exploitation covered by the Directive; (b) Referring victims to the most appropriate support and assistance services; (c) Establishing cooperation arrangements or protocols with asylum authorities to ensure that assistance, support, and protection are provided to trafficking victims who are also in need of international protection or wish to apply for it, taking into account the individual circumstances of the victim.

Thus, Article 11.4 delineates the tasks to be undertaken by National Referral Mechanisms, representing a significant step towards achieving a minimum level of coherence on this crucial issue across the Member States of the Union. Accordingly, an analysis will follow to assess whether the Spanish Draft Organic Law aligns with the guidelines established by the supranational regulation.

Title II of the Draft Organic Law introduces one of the major contributions of the legislative instruments, which is no other than the establishment of a National Referral Mechanism. In accordance with Article 59 of the Spanish Draft Organic Law, the National Referral Mechanism is responsible for the immediate referral of presumed victims of trafficking and exploitation to specialized assistance and protection services, as well as overseeing the identification process. In this regard, the Draft Organic Law includes the establishment of a National Referral Mechanism, as required by the amended Directive 2011/36/EU, which is a highly welcomed step. Notwithstanding, it is crucial to examine how this mechanism is structured and whether it aligns with the minimum and rather vague requirements outlined in the European Anti-trafficking Directive.

Article 59 of the Draft Organic Law establishes the National Referral Mechanism as a collegiate body affiliated with the National Rapporteur on Trafficking and Exploitation of Human Beings. It will be chaired by the National Rapporteur and composed of representatives from the Ministry of the Presidency, Justice, and Relations with Parliament, as well as from the Ministry of Equality, through the head of the Government Delegation against Gender Violence. Additionally, representatives from other departments whose

protecting its victims, COM(2018) 777 final, 2018 at 7, 12, 14; Report from the Commission to the European Parliament and the Council. Third Report on Progress Made in the Fight Against Human Trafficking (2018) pursuant to Article 20 of Directive 2011/36/EU on preventing and combating human trafficking and protecting its victims, COM(2020) 661 final, at 15-17; Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Report on Progress Made in the Fight Against Human Trafficking (Fourth Report), COM(2022) 736 final, at 14-15.

competences fall within the scope of this Organic Law will be included, in accordance with regulatory provisions.

Concerning the functions assigned to the Mechanism, its primary role is to refer presumed victims of trafficking to specialized assistance services, which is deemed appropriate. However, upon closer examination of who is responsible for carrying out this function, it becomes evident that the Mechanism will involve the security forces, in coordination with the labour and social security inspectorate. This raises an important issue concerning the actors involved in this critical task.

Victims of trafficking often do not feel safe when interacting with Security Forces, as they may fear potential reprisals due to their eventual irregular immigration status or crimes committed during their exploitation⁵⁰. Therefore, it would be crucial to expand the range of actors involved in the referral process for trafficking victims, particularly at the initial stage of provisional identification. In fact, the European Anti-trafficking Directive provides for the inclusion of a broad spectrum of professionals with diverse backgrounds who can participate in this important task⁵¹. For instance, the involvement of healthcare professionals, social workers, educators, and even civil society representatives could be considered, as victims tend to feel safer with these professionals⁵².

The second function of the Spanish National Referral Mechanism is to coordinate the identification process for trafficking victims. To this end, the Mechanism will propose guidelines and criteria aimed at achieving uniform practices across the entire national territory. Finally, the third function involves developing operational protocols, specific indicators for victim detection, and referral resource guides to assist victims.

These measures are highly welcomed, as they aim to ensure consistent identification practices throughout Spain. Additionally, it is essential to strive for uniform identification and protection standards across all European Union Member States⁵³. Hence, after analysing the structure and functions of the Spanish National Referral Mechanism as outlined in the Draft Organic Law, it can be concluded that the Mechanism fails to fully align with the three minimum requirements set by the Anti-trafficking Directive. First, it establishes the minimum standards for detecting, identifying, and protecting trafficking victims. Second, regarding the referral of victims to the most appropriate services, a review of other provisions in the Draft Organic Law suggests that this obligation is indeed met. Nonetheless, it is essential to involve a broader range of actors in the referral process to ensure more personalized support for victims. Therefore, it will be important to emphasize this issue throughout the entire national legislative process.

However, regarding cooperation agreements with asylum authorities, which constitute the third and final requirement for National Referral Mechanisms outlined in the Anti-trafficking Directive, Article 59 of the Draft Organic Law fails to address this matter. While Article 45 allows trafficking victims to apply for international protection, it does

⁵⁰ G. Rodríguez, *supra* n. 28 at 240.

⁵¹ Article 11b Directive 2011/36/EU.

⁵² The CEDAW Committee has emphasized the crucial role of civil society in the protection of trafficking victims, see: CEDAW, *supra* n. 12 at 27(a).

⁵³ For a systematic overview of the key indicators of human trafficking, classified according to the form of victim exploitation, see: G. Rodríguez, *supra* n. 28 at 642.

not provide for joint protocols between trafficking and asylum authorities. Similarly, Article 63, which is dedicated to cooperation and coordination, does not include specific provisions regulating the relationship between them. Therefore, while complementarity between both systems is implied, it should be more explicitly and formally outlined to ensure effective protection for trafficking victims who find themselves in an irregular situation. This issue will be addressed in the section concerning the rights of foreign victims.

In summary, the establishment of the National Referral Mechanism at the domestic level had been anticipated before the entry into force of the Anti-trafficking Directive; hence, it represents a proactive initiative of the Spanish government. However, upon examining the specific functions and responsibilities assigned to the Spanish Referral Mechanism, it becomes evident that they do not fully align with the minimum responsibilities outlined in the Directive 2011/36/EU. Given that these responsibilities are minimal, the National Referral Mechanism should extend beyond these basic requirements and specify concrete measures, as the European Directive is designed as a minimum standards instrument.

(4) The recovery and reflection period for trafficking victims

Once a potential victim of trafficking has been identified, and to ensure the effective application of the rights and services to which the victim is entitled, a recovery and reflection period is granted⁵⁴. This period was first introduced with the adoption of Directive 2004/81/EC. Still, it was originally conceived solely as a reflection period; accordingly, it is intended only to allow the victim to contemplate and consider their potential cooperation with the authorities responsible for prosecuting the crime. This conception reflected a predominantly criminal and functional approach to trafficking victims, with a limited scope that only encompassed third-country nationals in an irregular situation who were willing to cooperate with the authorities responsible for prosecuting the crime⁵⁵.

Over time, with the adoption of Directive 2011/36/EU, an additional purpose was incorporated into the reflection period: the recovery aspect. Consequently, since then, the period now known as the “recovery and reflection” period serves a dual function. On one hand, it offers victims an opportunity to contemplate their potential cooperation

⁵⁴ A. Moreno, *La lucha contra la trata de seres humanos en la Unión Europea: análisis de los instrumentos de protección, persecución y prevención* (Doctoral Thesis, Universitat Autònoma de Barcelona, 2019) at 118.

⁵⁵ This perspective is also reflected in the preparatory documents of the instrument, as well as in the original proposal of the European Commission. In the 2002 Directive proposal, it was stated that each State should provide assistance to the victim according to their needs, covering accommodation, medical and psychological care, and potentially social support, to help them achieve the necessary material and psychological autonomy to make the decision to cooperate. Additionally, the authority responsible for the investigation and judicial proceedings would determine whether the presence of the victim was necessary in the investigation or the initiation of legal actions against the alleged perpetrators. This authority would also assess the victim’s willingness to cooperate and the credibility of their disconnection from the alleged perpetrators, see: European Commission, Proposal for a Council Directive on the issuance of a short-term residence permit for victims of assistance with illegal immigration or human trafficking who cooperate with the competent authorities, of 28 May 2002 (COM(2002)71 final) at 2.1.

with the authorities responsible for investigating the crime. On the other hand, it enables them to recuperate from the influence of their exploiters. Yet, in practice, the distinction between these two objectives is often unclear, leading to frequent overlap between them⁵⁶.

After its reform, Directive 2011/36/EU continued to refer to Directive 2004/81/EC for the regulation of the recovery and reflection period, emphasizing the importance of informing victims about this aspect⁵⁷. In this context, there was an expectation that this issue, having been one of the most contentious over the years, would be effectively addressed during the amendment process of Directive 2011/36/EU. Nevertheless, Directive (EU) 2024/1712 remains faithful to the reference to Directive 2004/81/EC, representing one of the most significant missed opportunities in the process of modifying the legal framework governing the fight against human trafficking within the European Union.

Therefore, the recovery and reflection period, in accordance with the reviewed Directive and its reference to Directive 2004/81/EC, is exclusively intended for trafficking victims who are nationals of third countries and who cooperate with law enforcement authorities. The fundamental rationale for granting this recovery and reflection period to trafficking victims lies in their vulnerability following severe violations of their most basic Human Rights⁵⁸. Consequently, the trauma experienced by the victim must be fully considered, as it could be exacerbated if they do not receive the appropriate space and assistance. It is inexplicable that European citizens victims of trafficking victims are denied a period aimed at their rehabilitation and recovery, which directly contradicts the principle of non-discrimination, a principle that is repeatedly emphasized throughout the Directive. This period should be transformed into one available to all victims of human trafficking, resulting in a more comprehensive and inclusive approach across the European Union and within the practices of the Member States.

An illustrative example of the consequences resulting from the approach adopted by the amended Directive 2011/36/EU can be seen reflected in the provisions of the Spanish Draft Organic Law itself. Following the approach adopted in the Anti-trafficking Directive, the text presented by the Spanish government does not regulate the recovery and reflection period. In fact, the only reference to this period that can be found in the Draft Organic Law appears in the specific Final Provision (5), which pertains to the amendment of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration⁵⁹.

⁵⁶ G. Rodríguez, *supra* n. 28 at 309.

⁵⁷ Article 11.6 of Directive 2011/36/EU stipulates that the information available to victims should include, where applicable, details regarding a reflection and recovery period. However, recent documents published by the European Commission indicate that in certain countries, such as Belgium, Latvia, and Italy, there is no explicit requirement to inform the individual about this reflection period, see: European Commission, Commission Staff Working Document, Evaluation of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, 19 December 2022 (SWD(2022) 247 final) at 97.

⁵⁸ R. Piotrowicz, 'The European legal regime on THB', in R. Piotrowicz, C. Rijken, and H.B. UHL, Heide Baerbel (eds.), *Routledge Handbook of Human Trafficking* (Routledge, New York, 2019) 14 at 43.

⁵⁹ Article 45 of the Spanish Draft Organic Law outlines the guarantees for foreign victims of trafficking and exploitation in Spain. Specifically, it states that when individuals suspected of being victims of human

This Article stipulates that the recovery and reflection period will be developed through regulatory means and establishes a minimum duration of ninety days, in accordance with the provisions of the Council of Europe Convention, since the Anti-trafficking Directive does not specify a minimum duration for the recovery and reflection period and neither does Directive 2004/81/EC. During this time, the victim will be issued a temporary residence permit, and neither expulsion nor the initiation of any administrative sanctioning procedures against the victim will be permitted. Furthermore, the period may be extended when the particular circumstances of the victim warrant such an extension.

Moreover, in extraordinary circumstances, the competent Public Administration will ensure the safety and protection of other individuals in Spain with whom the victim has family or other types of connections when it can be demonstrated that their vulnerable situation in relation to the alleged traffickers poses an insurmountable obstacle to the willingness of the victim to cooperate. Notwithstanding, one critical issue warrants attention. The language of the Article reflects a clear functionalist view of the victim, suggesting that assistance will only be extended to family members when their lack of protection hinders the cooperation of the victim, thus overlooking the broader Human Rights concerns involved. This perspective implies a fundamentally flawed understanding of trafficking, perceiving the victim merely as evidence in an investigation rather than as an individual in need of care and healing. As has been said previously, numerous reports indicate that when greater attention is given to the well-being of the victim, they are more inclined to cooperate, rather than the other way around⁶⁰.

In conclusion, it should be considered that, in order to adopt a comprehensive protective framework for trafficking victims, the recovery and reflection period should be regulated within the same overarching instrument rather than relegated to a provision solely aimed at victims who are in an irregular situation. This period should be applicable to all trafficking victims, regardless of their origin or any other characteristic. Victims who are citizens of the European Union or who possess a valid residence permit should also have access to this period, providing them with the necessary space and time to heal. Consequently, once they have begun their recovery, they can then decide whether to cooperate with the authorities responsible for investigating the crime. Furthermore, any extension of this protection to family members should be considered when those individuals are in a vulnerable position in relation to the traffickers, rather than based on whether their presence poses an obstacle to the cooperation of the victim. A contrary perspective would result in a Law that fails to adopt a holistic approach and does not align with International Human Rights standards.

(D) PROTECTING VICTIMS OF HUMAN TRAFFICKING: SPECIFIC MEASURES

Having previously analysed the general protection measures for trafficking victims, the following section will focus on a detailed examination of specific measures available

trafficking or exploitation are foreign nationals, the provisions set forth in Article 59 bis of Organic Law 4/2000, regarding the rights and freedoms of foreigners in Spain and their social integration, will apply.

⁶⁰ C. Villacampa, *supra* n. 34 at 451.

to trafficking victims throughout their recovery process. To provide a structured framework, this analysis will adhere to the framework set forth in the Spanish Draft Organic Law, as it offers a clear and organized basis for evaluating whether it aligns with the European Anti-trafficking Directive and other relevant legal instruments, such as the Warsaw Convention. The study will begin by reviewing the victims' rights to information and assistance, followed by an assessment of the protective, social and economic rights. It will then conclude with a review of additional protective measures specifically designed for foreign trafficking victims.

(1) Information and assistance rights

The rights to information and assistance constitute the first significant set of measures outlined in Chapter I of Title II of the Spanish Draft Organic Law, which addresses the rights of trafficking victims. This chapter sets forth the obligations of public authorities to ensure that victims are provided with clear information regarding their rights, the relevant procedures, and access to specialized assistance from the moment there is even minimal suspicion that they may be potential victims of trafficking.

The right to information is essential for trafficking victims; throughout the amended Directive 2011/36/EU, various provisions emphasize the necessity of informing victims about their rights and the services available to them⁶¹. Furthermore, an additional relevant instrument to consider is Directive 2012/29/EU, which pertains to the status of victims of crime and is currently under review⁶². Specifically, Article 3 of Directive 2012/29/EU recognizes the right of the victim to understand and effectively communicate all the steps to be taken within the context of criminal proceedings.

In the Draft Organic Law, Article 31 addresses the right to information for victims of trafficking. The first point establishes that this right is available to victims from the moment of their identification, ensuring that the information is conveyed in an understandable manner, with the presence of an interpreter or cultural mediator if necessary. The inclusion of a cultural mediator is particularly noteworthy and commendable, as no previous international instrument regulating human trafficking has considered the

⁶¹ Despite the existing regulations that establish the right of victims to be informed about the legal proceedings in which they are involved and to receive legal assistance, these rights are not always guaranteed with the same ease in practice. This issue has been a concern for GRETA for several years. For example, in its latest compendium of good practices regarding labour exploitation, GRETA reiterates the importance of ensuring that victims have access to information about their rights. It emphasizes that this information must be provided in a language that is comprehensible to the victims, accompanied by competent interpretation services and specialized legal assistance. GRETA highlights that not only is this crucial for building trust with victims, but it also helps them better understand their circumstances and significantly increases the likelihood of successful investigation and prosecution. GRETA, *Compendium of good practices in addressing trafficking in human beings for the purpose of labour exploitation*, 2022 at 36.

⁶² Commission Directive 2012/29, OJ 315 L 57/73. On 12 July 2023, the European Commission introduced a proposal to reformulate the current framework of the European Union regarding the protection of victims of crime, governed by Directive 2010/29/EU. In April 2024, the European Parliament adopted its final position to initiate interinstitutional negotiations, followed by the Council of the European Union in June 2024. Consequently, the next step will be the commencement of interinstitutional negotiations. All information on the legislative process can be consulted here: 2023/0250(COD).

incorporation of this role within the measures to be adopted for the recovery of the victim. This innovation represents a significant step forward in addressing the complex cultural and linguistic barriers that often hinder victims' ability to seek assistance and fully engage in recovery processes.

Regarding the content of this information, the second point is comprehensive, stipulating that victims must be informed about all matters included in the Draft Organic Law, ranging from their basic protection to the procedures for filing a complaint, as well as potential compensations and resources. Additionally, it mandates public funding for these services to ensure the right to information is effectively realized, with specific attention to victims with disabilities or minors, guaranteeing that information is tailored to their unique conditions.

These provisions should minimize the problematic issues raised by GRETA in its follow-up report on Spain, where effective access to the right to information was questioned⁶³. GRETA recommended that further training and instructions be provided to law enforcement officials on how to adequately explain victims of trafficking their rights, considering their psychological state and understanding of the Spanish legal system. Moreover, particular attention should be given to presumed victims of trafficking who are also asylum seekers, ensuring they are properly informed of their rights in a language they comprehend, with the involvement of trained professionals and guaranteeing the presence of specialized Non-Governmental Organizations (hereinafter, NGOs) at borders⁶⁴. Additionally, steps should be taken to ensure the availability of qualified interpreters and their sensitization to human trafficking issues. It remains to be seen how the right to information will ultimately be configured in the draft law and how effectively it will be implemented in practice.

Alongside the right to information, the right to assistance emerges as a key component of Chapter III in Title II. Article 35 sets forth a series of measures aimed at providing assistance to trafficking victims, such as appropriate and secure accommodation, basic subsistence resources, specialized medical and psychological care, specialized social assistance, legal advice, immediate and urgent support through a 24-hour hotline, and outreach services via mobile units. These provisions are considerably broader than some of those outlined in Directive 2011/36/EU, which, in certain cases, make assistance contingent upon the duration of criminal proceedings or the victim's participation in them.

However, there is an issue regarding the measures to be adopted for victims of human trafficking that requires greater attention in the national framework compared to the thorough consideration given in the amended Directive 2011/36/EU. Specifically, this issue pertains to the provision of accommodation for trafficking victims, an aspect that is expected to improve during the national legislative process. A critical factor in ensuring the safety of trafficking victims is the availability of secure shelter. In many cases, while victims are being exploited, they are compelled to remain in the very locations where

⁶³ GRETA, *supra* n. 17 at 54.

⁶⁴ *Ibid.*, at 63. The report, published in June 2023, highlights that this deficiency had already been noted in 2020, and no measures were taken to address the issue, not even partially. This ongoing lack of action remains a matter of significant concern.

the exploitation occurs. This not only perpetuates their victimization but also increases their vulnerability. Providing safe and secure accommodation is therefore essential for breaking this cycle, offering victims a refuge from their exploiters and a space where they can begin to rebuild their lives in safety.

As a result, access to a safe refuge is considered a fundamental need for those affected by human trafficking, crucial for their protection and recovery. The establishment of specialized shelters for these individuals emerges as one of the most notable innovations of the amended Directive 2011/36/EU, primarily advocated by the European Parliament during interinstitutional negotiations⁶⁵. This improvement is realized through a twofold approach. First, an amendment to Article 11(5) of Directive 2011/36/EU stipulates that measures for assistance and support for victims must ensure living standards that meet their basic needs, thereby guaranteeing their sustenance through the provision of adequate and secure accommodation. Notably, the Directive expands the definition of suitable accommodation to include reception centres and other forms of adequate temporary housing.

Second, a new article dedicated exclusively to the accommodation of victims of trafficking has been added. The new article 11(6) of Directive 2011/36/EU specifies that shelters and temporary housing for victims must be provided in sufficient quantities and must be easily accessible to both presumed victims and those identified as such. Furthermore, it emphasizes that these shelters and temporary accommodations should facilitate the recovery of victims by providing appropriate living conditions aimed at aiding their reintegration into society in an independent manner. Additionally, these facilities must be equipped to meet the specific needs of children, including those who have been victims of trafficking. This language significantly enhances the availability of shelters for victims of trafficking, making them more accessible to both potential victims and those already identified, while underscoring the importance of addressing the specific needs of victims and their children.

Unlike the Anti-trafficking Directive, the Spanish Draft Organic Law is less developed on these issues. Specifically, Article 35(1)(f) of the Draft Law requires public authorities to ensure appropriate and secure accommodation, including emergency housing, from the moment a potential victim is detected, throughout the identification process, and for as long as needed after final identification. However, it does not include provisions for establishing specialized shelters or refuges specifically for trafficking victims. Since the Draft Law is still in its early stages, those involved in the legislative process should consider the provisions of the amended Directive 2011/36/EU, which Spain is obligated to transpose⁶⁶.

⁶⁵ European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, Ag-0285/2023, 10 December 2023 at 19.

⁶⁶ In relation to this issue, Article 41.1 of the Organic Draft Law stipulates that victims of trafficking or exploitation, once definitively identified, will be considered a priority group for access to subsidized housing and housing assistance programs, in accordance with the applicable legislation. They will also have priority access to residential facilities and other care centers for individuals in situations of dependency. To this end, Article 41.2 allows public authorities to enter into agreements with accredited specialized entities to fulfill this objective.

(2) Protection and legal assistance

In accordance with Article 36 of the Draft Organic Law, presumed victims of trafficking have the right to receive protection from the moment of their detection. To ensure the effectiveness of this protection, the Spanish Security Forces are required to conduct an early and individualized risk assessment, not only for the victims themselves but also for their family members or close associates. This assessment should consider various variables, including the specific situation of each victim, the context in which the trafficking occurred, and the potential dangers that may threaten their safety.

It is necessary that the evaluation process is not limited to the State Security Forces. The scope of stakeholders involved in the risk assessment must be expanded to include professionals from diverse sectors. For instance, incorporating social workers, psychologists, lawyers, and representatives from NGOs specializing in victim support is crucial for enhancing the process. Their expertise and perspectives are essential to ensuring that the evaluation is not only thorough but also addresses the complex, multifaceted nature of the situation of the victim. This broader participation is vital for achieving a more holistic and comprehensive assessment, ultimately leading to more effective interventions and support measures.

The participation of these additional actors would allow for addressing the specific needs of victims from a multidisciplinary perspective, ensuring that not only safety aspects are considered but also emotional, psychological, and social dimensions. For instance, social workers can provide a deeper understanding of family and community dynamics, while psychologists can assess the trauma's impact on the victim and propose appropriate interventions.

Furthermore, involving NGOs that work directly with victims can facilitate the establishment of support networks and resources crucial for the recovery and reintegration of the victim into society. These organizations often possess valuable knowledge of best practices in handling cases of trafficking and exploitation, as well as closer access to the realities and needs of the victims.

In addition to the protective rights afforded to trafficking victims, a crucial pillar of their security is the preservation of their identity and privacy. Safeguarding these elements is essential not only to shield victims from further harm or retaliation by traffickers but also to help them restore a sense of safety and dignity. Ensuring confidentiality throughout the recovery process is vital for building trust, encouraging victims to seek assistance, and facilitating their reintegration into society without fear of exposure or re-victimization.

Still, within the EU regulatory framework for combating trafficking, neither the original Directive 2011/36/EU nor its amended version addresses this issue adequately. As a result, it is necessary to reference Directive 2012/29/EU, which only covers the matter in cases of particular significance. In this regard, the amendment process of Directive 2011/36/EU should have prioritized introducing substantial changes to more effectively address this critical issue, thereby strengthening the protections for trafficking victims in terms of safeguarding their identity and privacy.

Fortunately, the Spanish Draft Organic Law on trafficking does incorporate these issues in a comprehensive and thorough manner, marking a significant and welcome development. Article 37, pertaining to the right to privacy and protection of identity, addresses this matter. From the moment of detection, various measures will be implemented to safeguard the privacy and identity of suspected victims of trafficking or exploitation in all administrative and judicial proceedings. Interviews and statements will be conducted in a confidential and private manner, ensuring respect for the victims' intimacy and the protection of their personal data. Public disclosure of names, addresses, or any information that could identify the victims, including photographs, will not be permitted. Both authorities and the media must adopt the necessary measures to enforce this prohibition. Such measures represent a proactive approach to addressing the shortcomings identified in the existing Anti-trafficking Directive and underscore the commitment of Spain to improve the welfare of trafficking victims.

Additionally, medical examinations conducted throughout the process will be treated as confidential and used solely for investigative and criminal proceedings. Information exchanged between the victims and the professionals involved in the process will remain confidential and will not be shared with third parties without the victim's consent, unless required by a judicial authority within the context of criminal proceedings. Finally, the processing of personal data will be limited to the purposes established in the regulations and those for which the victim has provided consent.

These measures are crucial for protecting trafficking victims, as they ensure their privacy and safety. By fostering a secure environment for recovery, victims are more likely to feel comfortable sharing their experiences and needs. This, in turn, strengthens their trust in the authorities and the judicial system, facilitating their access to necessary assistance and promoting successful social reintegration. Furthermore, the protection of their identity helps prevent potential reprisals and stigmatization, which is essential for their healing and empowerment process.

An additional critical aspect of protecting and assisting victims of human trafficking is the provision of legal assistance and advice, which empowers them to assert their rights as conferred by law. This measure is essential for their recovery, reintegration, and the prevention of re-victimization; yet, such assistance is not always available free of charge to trafficking victims. Directive (EU) 2024/1712, while maintaining the provisions of Directive 2011/36/EU, stipulates the right to legal advice and representation in Article 12(2), establishing that such representation will be free of charge when the victim lacks sufficient financial resources. The ambiguity in this provision has led to a variety of procedures across Member States regarding the access of the victim to legal aid⁶⁷.

In Spain, the Draft Organic Law outlines in Article 38 that victims of trafficking and exploitation are entitled to free legal defence and representation in all administrative

⁶⁷ For instance, in Luxembourg and Italy, procedures differ for trafficking victims who are not citizens of the European Union, while in the Netherlands, not all forms of exploitation are addressed. However, in certain Member States, such as Greece, Croatia, Latvia, and Sweden, this assistance is provided free of charge, regardless of the financial resources of the victim. This situation constitutes a genuine violation of the principle of non-Discrimination. Consequently, it was anticipated that the amendment process for Directive 2011/36/EU would progress in this regard. European Commission, *supra* n. 45 at 101.

processes related to their trafficking and exploitation situations, in accordance with the legal provisions established in Law 1/1996 of January 10, on Free Legal Assistance. Furthermore, it mandates that Professional Bar Associations implement necessary measures to ensure the urgent appointment of specialized defence attorneys and to guarantee their immediate presence and support for the victims.

These provisions align with the recommendations made by GRETA in its latest follow-up report on Spain, which advocates for timely and effective notification of Bar Associations by authorities upon the detection of trafficking victims, the development of cooperation protocols, specialized training for lawyers to assist trafficking victims, and ensuring legal assistance for those victims who are also asylum seekers⁶⁸.

(3) Rights to reparation and compensation

Another highly significant issue for trafficking victims pertains to their compensation. Many victims experience significant financial devastation following the end of their exploitation, ranging from lost wages and confiscated earnings to debts incurred during their time as trafficking victims. Thus, compensation not only acknowledges the severe economic challenges they face but also plays a crucial role in their recovery and reintegration. This financial support can serve as a lifeline toward self-sufficiency and independence, facilitating access to vocational training and employment opportunities, ultimately enabling them to establish themselves in the labour market.

Directive (EU) 2024/1712 has introduced various modifications to address this matter more comprehensively. The earlier Articles 17 and 18 of Directive 2011/36/EU, prior to its amendment, which addressed victim compensation and trafficking prevention, have been revised and consolidated into a reformulated Article 17. Article 17 of the amended Directive 2011/36/EU stipulates that Member States are required to ensure that victims of intentional violent crimes have access to established compensation systems. Furthermore, it permits the establishment of a national fund for victims or similar mechanisms to provide compensation, in accordance with the national legislation of each Member State.

Despite the increased emphasis on compensation and the potential creation of national funds for victims, the establishment of clear and uniform guidelines for compensating trafficking victims across the European Union remains the responsibility of national legislators. Moreover, while the creation of state funds for victims is mentioned, there is no provision for a specific fund for trafficking victims, similar to those available for victims of terrorism. Such a fund would have been appropriate from a comprehensive perspective⁶⁹.

Additionally, the removal of Article 7 eliminates the possibility of funding these compensation mechanisms with assets seized from trafficking-related crimes⁷⁰. These omissions reflect a lack of consideration for the needs and rights of trafficking victims, resulting in a persistent inconsistency in the compensation framework for victims across Member States of the European Union.

⁶⁸ GRETA, *supra* n. 17 at 63.

⁶⁹ M. Jordana, *supra* n. 27 at 487.

⁷⁰ In the European Union, the current instrument for the freezing and confiscation of assets is Directive 2024/1260/EU, see: European Commission Directive 2024/1260, OJ 101 L 1/28.

Considering the modifications to the European Anti-trafficking Directive, it is essential to examine its incorporation into the Spanish Draft Organic Law, as this represents one of the areas in which the Draft Organic Laws of 2022 and 2024 exhibit the most significant differences, with the latter being considerably more restrictive than the former. Chapter V of the last draft addresses the recognition of the right to comprehensive reparation for victims. Article 42 of the Draft Organic Law enshrines the right to comprehensive reparation, which signifies that trafficking victims have the right to full compensation for the harm they have suffered, including the victims' rights mentioned in Title III. This also encompasses adequate compensation, in accordance with Law 4/2015 of April 27, which establishes the statute of victims of crime.

Subsequently, Article 43 of the Draft Organic Law stipulates the right to compensation and restitution within the framework of criminal proceedings. This Article establishes that compensation awarded to victims of trafficking and exploitation will cover various aspects. First, it includes compensation for material damages incurred because of exploitation. Second, it recognizes compensation for psychological and moral damages suffered during the exploitation period, acknowledging the emotional and mental impact experienced by victims. Finally, it provides for the restitution of benefits obtained by their exploiters at the expense of the victim, ensuring that victims receive a fair share of the profits generated from their exploitation. In addition to financial compensation, the Article also empowers the national courts to order the restoration of the rights of the victim.

Furthermore, Article 43(3)(c) specifies that the compensation for victims shall include the benefits derived from their exploitation. However, as previously noted, this Article pertains to compensation and restitution within the context of criminal proceedings. Numerous reports related to human trafficking indicate that very few cases initiated as trafficking investigations lead to convictions⁷¹. Consequently, many victims may be left unprotected in exercising the rights established in Article 43(3)(c) of the Draft Organic Law. In this regard, Article 44 of the Draft Organic Law is particularly significant as it ensures the right to compensation and restitution for victims in cases where no judicial ruling has determined civil liability. It states that regulations will be implemented to facilitate the mechanisms and funding necessary to guarantee the effectiveness of this right.

At this point, it is crucial to highlight that in the Draft Organic Law of 2022, Article 45, which addressed the right to extrajudicial compensation and restitution, proposed the establishment of a Fund for the Compensation of Victims of Trafficking and Exploitation⁷². The creation of a specific fund for trafficking victims was one of the most

⁷¹ European Commission, Commission Staff Working Document, Statistics and trends in trafficking in human being in the European Union in 2019-2020, Accompanying the document report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report On The Progress Made In The Fight Against Trafficking In Human Beings (Fourth Report), SWD/2022/429 final, 19 December 2022, at 13-19.

⁷² The fund lacked legal personality and was attached to the General Administration of the State through the Ministry of the Interior, as stated in Article 45.2. The purpose of this fund was to ensure financing for the right to compensation and restitution for victims in cases where there had been no judicial ruling on civil liability. Additionally, it was proposed to establish a Fund Management Council and a Monitoring and Control Committee, both of which were affiliated with the Ministry of the Interior. To finance the fund, a provision was included in the General State Budget Law, specifying that it would be supported by various resources. Notably, section (b) indicated that the fund would be replenished by "the sums

significant aspects of the 2022 draft. Yet, this provision was omitted without justification in the 2024 Draft Organic Law and its accompanying memorandum. This omission represents a serious setback in the protection of trafficking victims.

Thus, it is hoped that the legislative process concerning the 2024 Draft Organic Law will address this matter. It is essential to establish a specific fund for victims of trafficking, not only to meet the expectations set forth by the Directive but also to facilitate the rehabilitation of the victims. Furthermore, this fund should be created through the same Organic Law rather than via regulatory means, thereby giving greater significance to the issue.

Along with compensation and reintegration, another important aspect for the full rehabilitation of trafficking victims is long term support. This includes providing ongoing access to socio-economic opportunities, as well as creating a stable environment that fosters their reintegration into society. Without a comprehensive long-term strategy, victims may remain vulnerable to re-trafficking and may struggle to achieve true recovery and autonomy.

At this point, one significant question that is not addressed by the Directive is included in Chapter IV, on labour and economic rights. The trafficking Directive offers minimal guidance on this matter, despite its critical importance for victims. In contrast, Spanish legislation aligns more closely with international Human Rights law by recognizing the essential role of social reintegration for victims. In this regard, the Spanish legal framework introduces Article 39, which establishes the right to social and labour integration; Article 40, which pertains to access to minimum vital income support; and Article 41, which ensures access to housing. These provisions underscore the importance of facilitating not only the legal protection of victims but also their economic and social stability as vital components of their recovery and reintegration into society.

(4) Rights of foreign victims

Having considered the issues that affect all victims of human trafficking throughout their recovery process, both of a general and a more specific nature, it is crucial to assess the additional measures for victims of human trafficking who find themselves in an irregular situation. This group faces heightened vulnerability and unique challenges due to their precarious circumstances. In this context, three critical areas warrant examination: the provision of residence permits, the possibility of seeking international protection, and the adverse prospect of deportation or forced return, often euphemistically referred to by legislators⁷³.

confiscated and the proceeds from the sale of goods or assets seized from those responsible for trafficking crimes or related offenses, once any judicial compensations to the victims had been satisfied”.

⁷³ In the vocabulary employed by the European Union, the term ‘return’ is used as a euphemism for expulsion (see: J.P. Cassarino, Jean-Pierre, ‘Are Current ‘Return Policies’ Return Policies? A Reflection and Critique’ in T. Bastia and R. Skeldon (eds.), *Routledge Handbook of Migration and Development* (Routledge, New York, 2020) at 343. For a broader discussion on the use of euphemisms in the context of migration and asylum, refer to: M. Grange, ‘Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?’, *Global Detention Project Working Paper No. 5*, 2013.

With respect to residence permits for victims of trafficking, the amended Directive 2011/36/EU refers to Council Directive 2004/81/EC, which addresses the issuance of residence permits to third-country nationals who are victims of human trafficking or have been subjected to assistance in illegal immigration, provided they cooperate with the competent authorities. As indicated by its title, the instrument adopts a notably functionalist view of the victim, making the granting of a residence permit contingent upon the cooperation of the victim with authorities responsible for prosecuting the crime. It was anticipated that this issue would be addressed during the amendment process of the Anti-trafficking Directive. However, the problematic situation has persisted, undermining a Human Rights-based approach to address trafficking.

The regulation of residence permits for trafficking victims in Spain aligns closely with Directive 2011/36/EU, as the Draft Organic Law does not include any specific regulations concerning residence permits for trafficking victims. Instead, the Draft Organic Law refers in its Fifth Final Provision to Article 59 bis of Organic Law 4/2000, of January 11, on the rights and freedoms of foreigners in Spain and their social integration. In fact, the Draft Organic Law aims to amend Article 59 bis of Organic Law 4/2000 with a new wording, stipulating that the competent authority, once the victim of trafficking has been definitively identified, will declare the victim exempt from administrative liability. Following this determination, the authority may offer the victim several options. The victim can choose to receive assisted return to their country of origin after provisional identification, or they may be granted a residence and work permit on exceptional grounds, taking into consideration their personal circumstances or when their cooperation is deemed necessary for investigative or criminal proceedings. Additionally, the victim will be provided with support for social integration in accordance with the provisions of the law. Pending the resolution of the residence and work permit application, a temporary authorization will be granted.

Today, the Spanish reality is that residence permits for victims of trafficking are challenging to obtain, particularly the ones based on personal circumstances⁷⁴. Consequently, the infrequent issuance of such permits leads many trafficking victims to seek comparable protection through international protection mechanisms instead. In this regard, one of the most notable additions to Directive 2011/36/EU is Article 11a, titled ‘Victims of trafficking who may require international protection’. In its first section, the provision mandates that Member States ensure complementarity and coordination between the authorities responsible for combating human trafficking and those in charge of asylum matters. The second section focuses on recognizing the right of victims to apply for international protection or an equivalent national status, even while receiving assistance, support, and protection as presumed victims of trafficking.

⁷⁴ Practice shows that the majority of residence permits granted to victims of human trafficking in Spain are issued in exchange for cooperation with the justice system. As of July 2021, 38 permits had been granted for cooperation with the authorities, compared to 15 for personal circumstances. In 2020, 42 permits were issued for cooperation, and 21 for personal circumstances, while in 2019, 45 permits were granted for cooperation and 27 for personal circumstances. See: GRETA, Reply from Spain to the Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, 2021, at 79-80.

This new article is vital because, today, in several Member States, a persistent incompatibility exists between applying for international protection and receiving assistance and protection as a victim of human trafficking, a result of the ongoing criminalization of migratory flows⁷⁵. This situation creates a dilemma for many trafficking victims who, while participating in recovery programs, seek international protection after the conclusion of the reflection and recovery period, as they face potential deportation. Under these circumstances, they are forced to choose between forfeiting legally recognized assistance and protection or refraining from applying for international protection⁷⁶. In response to this issue, Article 11a aims to secure and formalize the complementarity between both processes, which face significant challenges in practice.

In the Spanish legal context, the Draft Organic Law incorporated the principle of complementarity prior to the publication of the amended European Anti-trafficking Directive. This inclusion was prompted by both reports from the CEDAW Committee and GRETA, highlighting concerns regarding the practical effectiveness of this complementarity in Spain⁷⁷. These reports highlighted that many trafficking victims, particularly those in irregular situations, were frequently compelled to choose between different forms of protection, which ultimately compromised their rights. To address this issue, Article 46 of the Draft Organic Law grants individuals identified as presumed victims of trafficking, along with their dependents, the right to apply for international protection at any time, if they meet the legal requirements. Additionally, the provision clarifies that applying for or receiving a recovery and reflection period, or a residence permit as a victim of trafficking, does not limit or restrict their right to seek and obtain international protection. In essence, the procedures aimed at providing assistance and protection to victims of trafficking do not interfere with their access to international protection mechanisms, such as refugee status, as long as the established criteria are met.

As for foreign victims of trafficking, the Draft Organic Law introduces a significant innovation through Article 47, which addresses the voluntary return of victims. Unlike the Anti-trafficking Directive, which does not provide specific guidance on the return of victims⁷⁸, this provision relies on the general framework set out in the Return Directive⁷⁹.

⁷⁵ A. Salinas de Frías, 'La insuficiente protección internacional de los migrantes irregulares víctimas de trata' 73(2) *Revista Española de Derecho Internacional* (2021) 161-175, at 163 [doi: 10.17103/redi.73.2.2021.1a.10].

⁷⁶ European Parliament, *supra* n. 61 at 33.

⁷⁷ CEDAW, *supra* n. 12 at 14 and 27; GRETA, *supra* n. 17 at 56 and 63.

⁷⁸ It is important to note that both Directive 2011/36/EU and the current amended Directive have consistently overlooked the matter of the repatriation of victims, particularly regarding considerations of their safety. Valentina Milano has been a critical voice on this issue, see: V. Milano, *The human rights-based approach to human trafficking in international law* (Doctoral Thesis, Universitat de les Illes Balears, 2018) at 404. In fact, this deficiency was already evident in the previous Framework Decision, which led Anne T. Gallagher to assert that the proposal's inability to prohibit, or at least to cautiously warn against, repatriation in situations where the victim may face serious human rights violations constituted a potentially serious omission in the instrument. Similarly, Gallagher noted that this omission raised doubts about the proclaimed commitment of the EU to safeguard the human rights of victims of serious crimes, such as human trafficking, see: A. Gallagher, *supra* n. 30, at 170.

⁷⁹ Commission Directive 2008/115, OJ 348 L 98/107. The instrument has been the subject of significant academic criticism, both for marking a regression in the stance of the European Union on Human Rights and for its insufficiency in formulating a repatriation policy grounded in consistent standards. This critique stems from the considerable discretion granted to individual states in defining key aspects of the repatriation process, see: A. Baldaccini, 'The Return and Removal of Irregular Migrants under EU

Article 47 establishes that, from the moment of their provisional identification, presumed victims of trafficking are entitled to assisted return, which ensures their safety, dignity, and respect for their fundamental rights. Furthermore, judicial authorities may determine whether the continued presence of the victim in Spain is necessary for the purposes of criminal investigations or legal proceedings. However, it makes no mention of the necessity for the victim to remain in Spain for humanitarian reasons or due to their personal situation, as provided for in Article 14(1) of the Warsaw Convention⁸⁰.

Competent authorities, under the supervision of the National Referral Mechanism, are required to implement assisted return programs or incorporate these mechanisms into existing voluntary return programs. These programs are designed to guarantee the safe return of both national and foreign victims, regardless of their residence status in Spain, provided the return is voluntary and based on the victim's informed consent. Additionally, in cases where the victim, after being informed, requests a return without participating in an assistance program, non-assisted return will be facilitated.

The inclusion of a specific provision regulating the return of trafficking victims in the Spanish Draft Organic Law is a positive development, as it prevents the application of the general framework, which often fails to adequately assess the risks of secondary victimization, the stigma associated with being a trafficking victim, or the potential for re-exploitation. However, it would be preferable to introduce specific residence permits for trafficking victims that allow them to remain in the country where they can continue their recovery process, should they wish to do so.

(E) FINAL CONSIDERATIONS

The presentation of the Draft Organic Law by the Spanish government to address human trafficking represents a significant and necessary advancement in rectifying the legal void that affects trafficking victims in Spain. This legislative framework aims not only to provide comprehensive protection for those affected but also to establish effective mechanisms for the prevention, investigation, and prosecution of these crimes, thereby ensuring the adherence to a holistic approach. Currently, Spain lacks specific legislation to confront this serious phenomenon, prompting various international institutions, such as the CEDAW Committee and GRETA, to urge the country to implement appropriate legislative measures. Therefore, the adoption of this Draft Organic Law is an urgent and

Law: An Analysis of the Returns Directive', 11 *European Journal of Migration and Law* 2009 11-17; D. Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive)' *European Journal of Migration and Law* 2009 19-39. Specifically concerning Spain, it is essential to cite M. Illamola and I. Barbero, 'Deportations without the Right to Complaint: Cases from Spain' in S. Carrera and M. Stefan (eds), *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice* (Routledge, New York, 2020) at 34.

⁸⁰ Article 14(1) Warsaw Convention: "Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: (a) the competent authority considers that their stay is necessary owing to their personal situation; (b) the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings".

necessary response to the recommendations of these bodies, reflecting the commitment of Spain in combating human trafficking.

However, it is important to consider the legislative context in which the Draft Organic Law is situated. It would have been prudent for the Spanish government to await the official publication of the European instrument. The Anti-trafficking Directive imposes obligations on Member States, requiring them to transpose its provisions into national legal systems within a specified timeframe. In this context, the Spanish government should have considered postponing the introduction of its Draft Organic Law until the European Anti-trafficking Directive amendment process was finalized, thereby ensuring full alignment with the supranational instrument.

This temporal discrepancy results in some of the advancements, albeit minimal, of the amended Directive 2011/36/EU not being reflected in the Draft Organic Law. For instance, the Anti-trafficking Directive introduces human trafficking for the purpose of surrogacy exploitation as a new form of exploitation, a provision not included in the Draft Organic Law. Consequently, this issue must be incorporated into the national legislation without exception, as it is the State's obligation to do so. In addition to this matter, other aspects of the Draft Organic Law will also need to be revised to align national legislation with the standards of the European Directive and the boarder requirements set forth by international institutions.

Regarding measures for the protection of trafficking victims, the Draft Organic Law represents a step forward by adopting a comprehensive approach, prioritizing Human Rights principles such as non-discrimination and non-conditionality, and providing tailored support that respects the individual recovery paths of each victim. A particularly noteworthy improvement lies in the recognition of the unique and personal nature of each recovery process. Additionally, it is encouraging to see significant progress in formalizing the complementarity between victim protection and the provision of international protection. This is crucial, as many trafficking victims also seek asylum or refugee status.

Nevertheless, this advancement in complementarity is undermined by deficiencies in other critical areas. One of the most concerning shortcomings is the lack of regulation regarding the recovery and reflection period for trafficking victims, which is a significant flaw in the Draft Organic Law. This period is crucial for providing victims with the necessary time and support to recover and make informed decisions about their cooperation with authorities. The absence of clear provisions on this matter represents a major oversight, limiting the effectiveness of the proposed legal framework in ensuring comprehensive protection for victims.

Another critical issue is the provision of secure accommodation for trafficking victims. Although access to safe housing is an essential component of the recovery process, the Draft Organic Law fails to adequately address this necessity. The lack of a clear and operational framework to ensure the access of the victim to secure housing can have serious consequences, exacerbating their vulnerability and hindering their social reintegration.

Furthermore, the Draft Organic Law notably lacks provisions for the establishment of national funds specifically dedicated to compensating victims of human

trafficking. This omission is particularly concerning given that the 2022 Draft Organic Law was significantly more comprehensive and detailed on this issue, proposing the creation of a national fund with specific regulations to support trafficking victims. This step backward raises concerns about the current legislative direction and highlights potential shortcomings in the commitment of the Spanish government to ensuring a holistic instrument for trafficking victims.

Finally, the role of civil society and NGOs is crucial in the fight against human trafficking and should have received greater attention in the Draft Organic Law. These organizations bring invaluable expertise and insights, advocating for the inclusion of measures that address the specific needs of victims. Their involvement is essential in shaping policies that are both victim-centered and practical. Effective collaboration between government entities, civil society, and other relevant stakeholders is key to ensuring that the legal framework is not merely symbolic but leads to tangible, effective actions that improve the lives of trafficking victims. Without such cooperation, the implementation of the law risks being incomplete and less responsive to the complexities of trafficking.

In conclusion, the publication of the Draft Organic Law on Comprehensive Protection Against Human Trafficking and Exploitation represents an important step toward recognizing and safeguarding the rights of trafficking victims in Spain. Nonetheless, a detailed analysis reveals that while the Draft Organic Law aligns with many essential measures for victim protection, it also presents significant limitations in several critical areas that must be addressed to ensure its effectiveness, particularly in relation to the comprehensive protection of trafficking victims. Therefore, it is essential that the Draft Organic Law moves forward and does not remain stagnant, as was the case with the 2022 proposal. All stakeholders involved in the legislative process must approach this task with ambition, ensuring that Spain implements a comprehensive and effective system for the protection of trafficking victims. This important legislative tool must not only align with the requirements of the European Anti-trafficking Directive but also adhere to the standards established by International Human Rights Law.

