



# Vulnerability to Exploitation through the Lens of Intersectionality

*A Critical Analysis of Instruments and Approaches to Identify and Support Exploited and Trafficked Migrants Seeking Protection*

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Received 10 September 2023 | Accepted 20 October 2023 |  
Published online 21 December 2023

## Abstract

This article critically analyzes, from an intersectional perspective, the instruments and approaches adopted to identify, support and protect exploited and trafficked migrants, including asylum seekers, in European countries. By building on relevant findings from the VULNER research project, and drawing on feminist and socio-legal studies highlighting the complex dimension of both exploitation and vulnerability, the article examines the ways victims' vulnerabilities are addressed by national protection systems, the main challenges in tackling such situations, and the interconnection between asylum and anti-trafficking systems in this regard. In doing so, the paper mobilizes intersectionality from two different yet complementary angles: as a lens to recognize the interplay of multiple factors contributing to situations of vulnerability to exploitation, and as a way to shed light on the limitations of relevant instruments and approaches that focus on some specific models and understandings of victims, neglecting the systemic character of exploitation, and the situational and intersectional dimension of vulnerabilities. The article focuses on relevant legal and policy instruments and approaches in some of the European countries covered by the VULNER project, especially Italy, Belgium and Norway.

## Keywords

situational and intersectional vulnerabilities – exploitation – trafficking – gender

### 1 Introduction

In recent years, especially in European countries, there has been a growing number of migrant people becoming victims of exploitation, including severe exploitation such as forced labour and trafficking.<sup>1</sup> Among these exploited people, especially since 2015 with the so-called “refugee crisis” in Europe, there are also refugees and asylum seekers.<sup>2</sup> Following these events, institutional attention to the issues of exploitation and trafficking of migrants and related networking and cooperation between relevant authorities and actors in the field have increased in several European countries.

However, as several studies and reports have underlined,<sup>3</sup> significant difficulties and obstacles in addressing victims’ vulnerabilities to exploitation and related needs still persist. Indeed, identification mechanisms adopted by many European countries hardly grasp the different facets of exploited migrants’ experiences and adapt to them. At the same time, assistance and support measures struggle to meet victims’ needs, desires and agency, with the consequence of stripping many migrants of the opportunities to build the life and choose the job alternatives they want.<sup>4</sup>

All this raises the question of to what extent national protection systems are capable and willing to comprehend, recognize, and tackle the complexity of situations of vulnerability involving exploited migrants, taking into account the intersection of different and simultaneous factors – such as, for instance,

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- 1 See, for instance, UNODC (2022). *Global report on trafficking in persons*. United Nations, New York.
  - 2 See ibidem and UNODC (2018). *Global report on trafficking in persons*. United Nations, New York.
  - 3 See Marchetti, S. and Palumbo, L. (2022). *10 Years After the Directive 2011/36/EU*. VULNER, Policy Brief; Nicodemi, F. 2020. Protecting Victims of Human Trafficking among Mixed Migration Flows and the Link with International Protections. *Gonzaga Journal of International Law*, 22 (2), pp. 102–113; Meyer, C.K. and Boll, S. (eds.). (2018). Irregular Migrants, Refugees or Trafficked Persons?, *Anti-trafficking Review*, 11, pp. 1–15.
  - 4 Meyer, C.K. and Boll, S. 2018. Editorial: Categorising Migrants: Standards, complexities, and politics. *Anti-Trafficking Review*, 11; Marchetti, S. and Palumbo, L. *10 Years After the Directive 2011/36/EU*, cit.; Palumbo, L. and Romano, S. (2022). Evoluzione e limiti del sistema anti-tratta italiano e le connessioni con il sistema della protezione internazionale. In *Prostituzione e lavoro sessuale in Italia*. G. Garofalo Geymonat, G. Selmi (eds.), pp. 64–84, Rosenberg and Sellier, Turin, Italy.

precarious legal statuses – that contribute to exposing a person to dynamics of exploitation, including trafficking. This article seeks to explore this issue by critically analyzing, from an intersectional perspective, the instruments and approaches adopted to identify, support and protect exploited and trafficked migrants, including asylum seekers, in European countries. By building on relevant findings from the VULNER research project,<sup>5</sup> and drawing on feminist and critical studies highlighting the complex dimension of both exploitation and vulnerability, the article examines the ways victims' vulnerabilities are addressed by national protection systems, the main challenges in tackling such situations, and the interconnection between asylum and anti-trafficking systems in this regard. In this light, the paper mobilizes intersectionality from two different yet complementary angles: as a lens to recognize the interplay of multiple factors contributing to situations of vulnerability to exploitation, and as a way to shed light on the limitations of relevant instruments and approaches that focus on some specific models and understandings of victims, neglecting the systemic character of exploitation, and the situational and intersectional dimension of vulnerabilities.

The article focuses on relevant legal and policy instruments and approaches in some of the European countries covered by the VULNER project, especially Italy, Belgium and Norway. Special attention, in particular, is given to the Italian context, considering the peculiarities of the Italian referral/coordination mechanism between anti-trafficking and asylum systems,<sup>6</sup> and the innovative elements of national legislation on assistance and protection of victims of exploitation and trafficking.<sup>7</sup> Furthermore, in Italy, there have been significant case law developments regarding international protection and former humanitarian protection,<sup>8</sup> which pay attention to the complex character of vulnerabilities of exploited migrants in line with a situational and intersectional approach.<sup>9</sup>

5 Marchetti, S. and Palumbo, L. (2022), *10 Years After the Directive 2011/36/EU*, cit. VULNER Country Reports.

6 Nicodemi, F. (2020). Il sistema anti-tratta italiano compie venti anni. L'evoluzione delle misure legislative e di assistenza per le vittime e le interconnessioni con il sistema della protezione internazionale, in: *Ius Migrandi. Trent'anni di politiche e legislazioni sull'immigrazione in Italia*, M. Giovannetti and N. Zorzella (eds.), pp. 703–728, FrancoAngeli, Milan, Italy.

7 Degani, P. (2020). *Lotta alla tratta di persone e diritti umani*, Università degli Studi di Padova, Padova.

8 Humanitarian protection (former Art. 5(6) of Legislative Decree 286/1998) was abolished in 2018 with Law Decree 113/2018. In 2020, Law Decree 130/2020 introduced a new residence permit for “special protection” similar to former humanitarian protection.

9 Marchetti, S. and Palumbo, L. (eds.) (2020). *Vulnerability in the Asylum and Protection System in Italy: Legal and Policy Framework and Implementing Practices*. Vulner Research Report 1; Giammarinaro, M.G. and Palumbo, L. (2021). Vulnerabilità situazionale, genere e

With regard to the structure of the paper, Section 2 is dedicated to unpacking the notions of exploitation, vulnerability and intersectionality that define the conceptual framework of the article. Successively, Section 3 looks at vulnerability to exploitation as defined in law, highlighting that the definition of a position of vulnerability in EU Directive 2011/36 on trafficking is open to be read through a situational and intersectional approach. Section 4 focuses on the issues of recognition and understanding of the situations of vulnerabilities of exploited and trafficked migrants, including asylum seekers, underlining dominant approaches and limitations in the three examined countries – thereby highlighting how these issues could be overcome while adopting an intersectional approach to identifying situations of vulnerability. Section 5 then underlines innovative elements and limits of the Italian referral mechanism aimed at identifying victims of exploitation and trafficking among asylum seekers. This referral mechanism creates space for an approach that is attentive to recognizing and addressing the complexity of migrants' vulnerabilities and the interplay of factors that contribute to these. However, it often results in practices that tend to address vulnerabilities through rigid categories and conditions, in contradiction to a situational and intersectional approach. Finally, Section 6 focuses on assistance and residence permit provisions for victims of exploitation and trafficking, exploring to what extent instruments and approaches adopted in Italy, Belgium and Norway sustain state practices that take into account people's vulnerabilities in their situational and intersectional dimensions.

This article is based on the analysis of relevant literature, legal and policy documents and reports, as well as the thematic questionnaires that each VULNER team partner filled out – drawing on data collected through interviews with key stakeholders at national level (257 interviews) and during fieldwork among migrants seeking protection (657 interviews), and the information gathered in the reports that were established as part of the VULNER projects. Stakeholders in the field of trafficking and exploitation included social workers, lawyers, judges, policymakers, and civil servants. The number of stakeholders interviewed in the three VULNER project countries considered in this article was 20 in total (10 in Italy, 5 in Belgium and 5 in Norway). VULNER teams from these three countries also conducted 21 interviews with migrants, including asylum seekers, who had experienced different forms of exploitation, including trafficking (13 in Italy, 5 in Belgium and 3 in Norway). For this reason, the

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diritti umani. Analisi della normativa e della giurisprudenza italiana e sovranazionale sullo sfruttamento lavorativo, in: *Diritti umani in crisi?*. G. Gioffredi, V. Lorubbio, A. Pisanò (eds.), pp. 45–62, Pacini Giuridica, Pisa, Italy.

article refers to exploited and trafficked migrants. At the same time, the choice of this terminology is in line with a conception of exploitation as a continuum characterized by varying forms and degrees of submission and/or acceptance to certain exploitative situations, including (but not limited to) severe forms such as trafficking.

## 2 Challenging Dominant and Reductive Narratives on Vulnerability to Exploitation

Exploitation is a highly contested concept, from both socio-economic and legal perspectives.<sup>10</sup> Although it is at the heart of legal frameworks concerning crimes such as “trafficking”, exploitation is not actually defined by any international legal instruments. Only a few pieces of national and regional legislation, such as EU legislation,<sup>11</sup> contain a definition of this notion. The phenomenon of trafficking, instead, was defined at international level by the 2000 UN Protocol on Trafficking in Human Beings (the so-called “Palermo Protocol”). However, discussions amongst jurists, lawmakers and experts on the definitional aspects of trafficking continue without clear resolution.<sup>12</sup>

This is not the place for a detailed analysis of these definitional debates and the related issues at stake. Here, instead, it is worth underlining that when considering the issue of exploitation, including in its severe forms such as trafficking, one cannot avoid facing dominant legal and political discourses that consider exploitation as an exceptional phenomenon, requiring mainly a criminal law response.<sup>13</sup> From this perspective, exploitation and its severe forms (such as trafficking) are considered mainly as a contingent event<sup>14</sup> and, in any case, are seen only at the level of abusive and pathological interpersonal relationships between victims and exploiters. Similar reductive representations reflecting a mere repressive vision of criminal phenomena are not

10 Mantouvalou, V. (2018). Legal Construction of Structures of Exploitation, in: *Philosophical Foundations of Labour Law*, H. Collins, G. Lester and V. Mantouvalou (eds.), Oxford University Press, Oxford.

11 See, for instance, Art. 2 of Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

12 Kotiswaran, P. (2017). *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*. Cambridge University Press, Cambridge.

13 Marks, S. (2008). Exploitation as an International Legal Concept, in: *International Law on the Left: Re-Examining Marxist Legacies*, S. Marks (ed.), pp. 281–307 Cambridge University Press, Cambridge. See also Mantouvalou, V. Legal Construction of Structures of Exploitation, cit.

14 Marks, S. (2008). Exploitation as an International Legal Concept, cit.

suitable for grasping and tackling the socially widespread dimension of exploitation. Moreover, such representations often constitute the conceptual framework for securitarian interventions and restrictive migration policies,<sup>15</sup> which have the effect of increasing situations of vulnerability to exploitation for the very same people that these measures are intended to protect.

Far from being reduced to exceptional facts and to a pathological dimension of contractual relationships, exploitation shall be considered – as a significant body of literature has pointed out<sup>16</sup> – in its systemic dimension, and therefore as a structural component of capitalist systems developed exponentially in the current neo-liberal era – an era characterized by deregulation of the markets, as well as by increasingly exclusive and selective social and migration policies.<sup>17</sup> In this sense, legal scholar Laura Calafà has mobilized the notion of “intersectional exploitation”, highlighting that exploitation has to be addressed beyond the limited confines of criminal law, taking into account legal and policy frameworks regulating migration, employment and working conditions, and access to justice and citizenship.<sup>18</sup> At the heart of this reflection is the need to treat exploitation in its complexity from a social and rights based approach, going beyond the dichotomy of victims vs. exploiters-perpetrators.

Such a perspective is in line with the idea – suggested by some legal scholars and experts – to consider exploitation as a continuum ranging “from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour or trafficking”.<sup>19</sup> Along this continuum, there are varying degrees of submission and/or acceptance towards a certain exploited working situation, and therefore there are different degrees of vulnerability to exploitation. Thus, for example, within this prism, exploitation also includes cases in which elements of coercion are nuanced and people accept exploitative working and living conditions due to the conditions of precarity and economic difficulty in which they find themselves.

15 See, for example, Jaskulowski, K. 2019. The Securitisation of Migration: Its Limits and Consequences. *International Political Science Review*, 40 (5), pp. 710–720; Thomas, C. (2017). Immigration Controls and “Modern-day Slavery”, in: *Revisiting the Law and Governance of Trafficking*. P. Kotiswaran (ed.), cit., pp. 238–270.

16 Mantouvalou, V. (2018). Legal Construction of Structures of Exploitation, cit.

17 Geddes, A., Hadj-Abdou, L. and Brumat, L. (2020). *Migration and mobility in the European Union*. Red Globe Press, London, UK; Chiaramonte, W., Ferrara, M.D. and Ranieri, M. (eds.) (2020), *Migranti e lavoro*. Il Mulino, Bologna, Italy.

18 Calafà, L. (2021). Per un approccio multidimensionale allo sfruttamento lavorativo. *Lavoro e diritto*, 35(2), pp. 193–213.

19 Skrivankova, K. (2010). Between decent work and forced labour: examining the continuum of exploitation, cit., p. 16.

Closely linked to this view, attentive to the complex and systemic dimension of exploitation, is therefore a contextual conception of vulnerability to exploitation. The notion of vulnerability is inherently polysemous and has historically been particularly ambiguous for women's and feminist movements.<sup>20</sup> Feminist scholars have contested the patriarchal origin of a conception that identifies vulnerability with inherent weakness, and attributes it to certain subjects (including women and minors) who, precisely because they are considered ontologically fragile, would be worthy of protection. They have underlined how such a conception of vulnerability reinforces marginalization and dynamics of victimization by conveying a passive representation of persons/groups without agency.<sup>21</sup> This risks, in turn, fostering stigmatizing views, and supporting paternalistic measures and related criminal law policies. For example, scholarship in the field of trafficking for sexual exploitation has highlighted how the idea of migrant sex workers as vulnerable *per se* has served as a lever for paternalistic interventions and – to use Ticktin's term<sup>22</sup> – “armed love” towards victims of trafficking, and simultaneously for punitive approaches to sex work.<sup>23</sup>

In contesting this dangerous use of vulnerability, feminist, social and legal scholars have promoted a different and more complex approach to vulnerability, seeking to challenge the dichotomy “vulnerable/passive vs. non-vulnerable/active”, and highlighting the potentialities of this notion, especially with regard to the protection of fundamental rights.<sup>24</sup> More precisely, by recalling the classic theories of modern political-legal thought, which based the origin of the institutions of modernity on the assumption of human vulnerability,<sup>25</sup> feminist, social and legal theorists have underlined that vulnerability is a universal,

20 See, for instance, Mackenzie, C., Rogers, W. and Dodds, S. (eds.) (2014). *Vulnerability. New essays in ethics and feminist philosophy*. Oxford University Press, Oxford.

21 Ibidem. See also Giolo, O. and Pastore, B. (eds). *Vulnerabilità. Analisi multidisciplinare di un concetto*, Carocci, Rome, Italy, pp. 229–252.

22 Ticktin, M. (2011). *Casualties of Care: Immigration and the politics of humanitarianism in France*, University of California Press, Berkeley, US.

23 See, for example, Kotiswaran, P. (2017). *Revisiting the Law and Governance of Trafficking*, cit.

24 See, for instance, Fineman, M.A. 2008. The Vulnerable Subject: Anchoring Equality in the Human Condition. *Yale Journal of Law and Feminism* 20 (1), pp. 177–191; Butler, J. (2004). *Precarious Life: The Powers of Mourning and Violence*. Verso, London; Mackenzie, C., et al. (eds) (2014). *Vulnerability. New essays in ethics and feminist philosophy*, cit.

25 Verza, A. (2018). Il concetto di vulnerabilità e la sua tensione tra colonizzazioni neoliberali e nuovi paradigmi di giustizia, in: *Vulnerabilità. Analisi multidisciplinare di un concetto*, O. Giolo and B. Pastore (eds.), pp. 229–252, cit.; Santoro, E. (2020). Vulnerabilità fra teoria politica e testi normativi: un linguaggio per dire cose vecchie o un nuovo strumento teorico?, in: *La vulnerabilità come metodo. Percorsi di ricerca tra pensiero politico, diritto e etica*, A. Furia and S. Zullo (eds.), pp. 131–164, Carocci, Rome, Italy.

inevitable, common trait of human beings, inherently linked to bodies, which implies exposure to offense, disease and injury. According to Butler, the “body is constitutively social and interdependent”, and it is this corporeal vulnerability that makes human life precarious.<sup>26</sup>

While stressing that vulnerability is an ontological condition of human life, these scholars, including Butler, have also highlighted that individuals are not all affected by it to the same degree. Indeed, complementary to the understanding of vulnerability as a constitutive element of people is the acknowledgment of the context-specific dimension of vulnerabilities.<sup>27</sup> Vulnerability is a variable condition, in its form and in its intensity, depending on people’s positions in society and in power relations. In this sense, in their taxonomy of different sources of vulnerability, feminist scholars Mackenzie, Rogers and Dodds have developed the concept of “situational vulnerability”.<sup>28</sup> Such a notion sheds light on the interplay of personal and structural factors (including legal, economic, political and social elements) that produce and/or foster situations of vulnerability, and that are differently articulated according to gender, class, age, race, nationality etc.

This concept of situational vulnerability is therefore strongly related to that of “intersectionality”, which focuses on the structural and simultaneous functioning of gendered, racialized, classed, etc. systems of subordination and oppression.<sup>29</sup> As Kimberly Crenshaw has underlined, “the intersectional problem is not simply that one discrete form of discrimination is not fully addressed, but that an entire range of human rights violations are obscured by the failure to address fully the intersectional vulnerabilities of marginalized women”<sup>30</sup> – or other marginalized people.

In this light, a situational and intersectional understanding of vulnerability requires the adoption of a perspective that is attentive to capturing the interplay between the various subjective and contextual elements that determine situations of vulnerability in a context marked by structural and concurrent

26 Butler, J. (2009). *Frames of War: When is Life Grievable?*, Verso, London, p. 31.

27 See Butler, J. (2004). *Precarious Life: The Powers of Mourning and Violence*, cit.; Mackenzie, C. et al. (eds.) (2014), *Vulnerability. New essays in ethics and feminist philosophy*, cit.; Giolo, O. and Pastore, B. (eds.), *Vulnerabilità. Analisi multidisciplinare di un concetto*. Cit.

28 Mackenzie, C. et al. (eds.) (2014), *Vulnerability. New essays in ethics and feminist philosophy*. Cit.

29 Crenshaw, K., 1991. Mapping the Margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review*, 43, pp. 1241–1299; Yuval-Davis, N. 2015. Situated Intersectionality and Social Inequality, *Raisons politiques*, 58 (2), pp. 91–100. See also Atrey, S. (2020). *Intersectional Discrimination*. Oxford University Press, Oxford.

30 Crenshaw, K., (2014). The Structural and Political Dimensions of Intersectional Oppression, in: *Intersectionality: A Foundations and Frontiers Reader*. P. Grzanka (ed.), p. 18, Routledge, New York-London.



inequalities and discriminations.<sup>31</sup> This means that, for instance, the situational and intersectional vulnerabilities of exploited migrant people, including asylum seekers, cannot be assessed without taking into account the impact of restrictive and selective migration policies, the inadequacies of reception and protection systems, the gendered and racialized models and stereotypes incorporated in relevant legislation and assistance measures, and more generally the normative mechanisms that create and amplify scales and dynamics of power and subordination.

Such a conception of vulnerability – which pays attention to the specificities of the context within which a given person acts and makes choices – does not exclude or oppose individual agency: instead, it recognizes the elements of agency and, in particular, the ways in which people act (or try to act), negotiate and make their choice within a framework of economic, social, affective and power relationships.<sup>32</sup> Vulnerability and agency are two sides of the same coin.<sup>33</sup> In particular, along the continuum of exploitation there are various combinations of vulnerability and agency, depending on the possibilities/capacity for action and bargaining of the person concerned.

Within this framework, therefore, a situational and intersectional approach to vulnerabilities to exploitation should entail the implementation, at national levels, of a system of interventions and practices that – by involving relevant multidisciplinary and multi-agency actors – ensure an appropriate assessment of the specific conditions of exploited and trafficked migrants, and provide them with adequate and individualized responses that meet people's different needs, recognizing their life projects, work projects, desires and agency.<sup>34</sup>

### 3 Vulnerability to Exploitation as Defined in Law: Room for an Intersectional Approach?

As clearly emerged in the findings of the VULNER project, vulnerability is a particularly contentious notion when it is translated at the legal level.<sup>35</sup> When

31 Giammarinaro, M.G. and Palumbo, L. (2021). Vulnerabilità situazionale, genere e diritti umani. Analisi della normativa e della giurisprudenza italiana e sovranazionale sullo sfruttamento lavorativo, in: *Diritti umani in crisi? Emergenze, disuguaglianze, esclusioni*. G. Gioffredi, V. Lorubbio, A. Pisanò (eds.), pp. 45–62, Pacini Giuridica, Pisa, Italy.

32 On the concept of agency see, among others, De Pretis, S. 2005. "Tra "Agency" e Differenze. Percorsi del Femminismo Postcoloniale". *Studi Culturali*, 2, pp 259–290.

33 Giammarinaro, M.G. and Palumbo, L. (2021). Vulnerabilità situazionale, cit.

34 Giammarinaro, M.G. and Palumbo, L. (2021). Vulnerabilità situazionale, genere e diritti umani, cit.

35 Peroni, L. and Timmer, A. 2013. Vulnerable groups: The promise of an emerging concept in European Human Rights Convention Law, *International Journal of Constitutional Law*,

mobilized as part of legal reasoning, vulnerability seeks to ensure that everyone can access their rights on an equal footing, and without opposing the universal character of human rights. However, one key contention is that dedicated attention to vulnerable persons as part of legal reasoning and legal instruments bears the risk of fostering selection and exclusion dynamics by marking a distinction between those persons/groups considered vulnerable, and therefore deserving of protection, and those who are not.<sup>36</sup> This categorical and group-based approach to vulnerability, which can be found in the EU Asylum legal framework,<sup>37</sup> risks favouring essentialist and deterministic views.<sup>38</sup>

In this context, and specifically with regard to vulnerability related to exploitation, the definition of position of vulnerability found in the EU legislation on trafficking, and in particular in EU Directive 2011/36/EU, seems to be particularly innovative as it reflects a situational understanding of vulnerability. More precisely, by incorporating in the text the definition of a position of vulnerability (in relation to the unlawful means of the “abuse of a position of vulnerability”) contained in the Interpretative Note in the *Travaux Préparatoires* of the 2000 UN Palermo Protocol on trafficking, the Directive defines a position of vulnerability as “a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved” (Art. 2(2)). Rather than limiting vulnerability to inherent characteristics of certain persons/groups, this definition stresses the importance of taking into account the interplay of personal, social, economic, and political factors that render a person vulnerable to forms of abuse and exploitation, leaving them without any concrete and real alternative but to “accept” being involved in exploitative relations and conditions.

Such a situational conception of vulnerability can also be found in the Explanatory Report of the 2005 Council of Europe Convention on human trafficking, which also explicitly recognizes that certain situations of vulnerability are created or exacerbated by relevant legislation and policies.<sup>39</sup> A similar

(11) 4, pp. 1056–1085; Leboeuf, L. 2022. The Juridification of ‘Vulnerability’ through EU Asylum Law: The Quest for Bridging the Gap between the Law and Asylum Applicants’ Experiences. *Laws*, 11(3), p. 45.

36 Santoro, E. (2020). Vulnerabilità fra teoria politica e testi normativi. *Cit.*

37 See, for instance, Qualification Directive 2011/95/EU art. 20 and Reception Directive 2013/33/EU, art. 21.

38 Mustaniemi-Laakso, M., Heikkilä, M., Del Gaudio, E., Konstantis, S., Nagore Casas, M., Morondo, D., Hegde, V.G. and Finlay, G. (2016). *The Protection of Vulnerable Individuals in the Context of EU Policies on Border Checks, Asylum and Immigration*. European Commission, Brussels.

39 Council of Europe (2005). *Explanatory Report to the Council of Europe Convention on Action against Trafficking*. Warsaw, para 83.

approach has been followed in the landmark decision of the European Court of Human Rights (ECtHR) *Chowdury and Others v Greece* of 2017 (No. 21884/15), concerning the labour exploitation of undocumented migrant workers in the agricultural sector in Greece. In this case, the judges of Strasbourg paid specific attention to the different factors producing the situations of vulnerability to exploitation of these migrant workers – in particular their condition as “irregular migrants without resources and at risk of being arrested, detained and deported” (para. 97). The Court, therefore, focused on the dynamics and contextual elements generating a situation of vulnerability in which labour exploitation becomes the only feasible choice in the face of a worse alternative. As explained in the section below on the Italian context, a similar approach has also been followed by some Italian case law regarding international protection, and in particular former humanitarian protection.

A distinguishing element of a “situational” conception of vulnerability to exploitation – such as that found in Directive 2011/36/EU on trafficking – is the requirement of a case-by-case assessment of the interplay of personal and contextual/structural elements producing persons’ vulnerabilities. In this sense, as already stressed in Section 2, a situational understanding of vulnerability is open to be read – and in our opinion should be read – through an intersectional approach, in terms of both analyzing the interplay of multiple factors contributing to individuals’ specific situations of vulnerability to exploitation, and developing adequate protective responses that address people’s different needs.

However, as discussed in the following sections examining VULNER project findings, such a situational and intersectional approach to vulnerability to exploitation is still rarely adopted by relevant supranational and national policy and legal actors – including judges, lawyers and legal practitioners. As feminist legal scholar Enrica Rigo has highlighted, over recent years, especially in countries such as Italy, there has been a sort of “battle”, involving relevant policy and legal actors, on the understanding of exploitation/trafficking. Within this battle, vulnerability has tended mainly to be associated with personal qualities and characteristics,<sup>40</sup> and channelled into paths aimed primarily at disciplining people rather than recognizing and supporting their agency and specific needs. However, in Italy there has also been important case law on international protection, which addresses vulnerability in its complex contextual dimension.<sup>41</sup>

40 Rigo, E. (2022). *La straniera. Migrazioni, asilo, sfruttamento in una prospettiva di genere*. Carocci Editori, Rome.

41 Giammarinaro, M.G. and Palumbo, L. (2021). Vulnerabilità situazionale, cit.

By building on a situational and intersectional conception of vulnerability to exploitation, the following sections will critically examine these issues, exploring how national protection systems recognize, understand and address the situations of vulnerability of exploited and trafficked migrant people, including asylum seekers. As already illustrated above, given the innovative elements of the Italian protection system for victims of exploitation and trafficking, the article will pay specific attention to the Italian context, while also providing some considerations on approaches and dynamics in two other European countries involved in the VULNER project: Belgium and Norway.

#### 4 Intersectionality as a Way to Question the “Perfect Victim Model”

As a significant amount of literature and reports have underlined, in many European countries there are difficulties and obstacles regarding the identification of victims of exploitation and trafficking.<sup>42</sup> These include, for instance, the absence of efficient coordination mechanisms in the identification process, as well as the fact that many relevant actors lack adequate knowledge and training in the field.

With specific regard to the VULNER project countries examined in this article, it is worth highlighting that Norway does not have a formal National Referral Mechanism, i.e. a formal cooperative framework involving relevant government actors and civil society organisations aimed at identifying, assisting and supporting victims of exploitation and trafficking.<sup>43</sup> Italy has a National Referral Mechanism on paper, but de facto this is not implemented.<sup>44</sup> In both cases, the formal and/or practical absence of a National Referral Mechanism significantly affects the efficiency of coordination among main actors involved in the field and, in particular, in the identification process of victims. Unlike Norway and Italy, Belgium has adopted a National Referral System, which is based on multi-disciplinary cooperation among main actors in the field of trafficking.<sup>45</sup> As testimonies of experts and social workers collected for this research have highlighted,<sup>46</sup> such multidisciplinary cooperation between all relevant actors constitutes good practice, leaving room for the development of

42 See, for instance, GRETA (2018). *7th General Report on Greta's Activities*. Council of Europe, Strasbourg, France.; Meyer, C.K. and Boll, S. 2018. *Categorising Migrants: Standards*, cit.

43 GRETA (2022), *Evaluation Report. Norway*. Council of Europe, Strasbourg, France.

44 Nicodemi, F. (2020). *Il sistema anti-tratta italiano compie venti anni*, cit.

45 GRETA (2022), *Evaluation Report. Belgium*. Council of Europe, Strasbourg, France.

46 Data collected through VULNER internal survey on Belgium. See also Marchetti, S. and Palumbo, L. (2022). *10 Years After the Directive 2011/36/EU*, cit.

a situational and intersectional approach to migrants' vulnerabilities. However, as discussed below, even in this case there are several factors that undermine the recognition and understanding of the vulnerabilities of exploited and trafficked migrants.

Indeed, despite the differences between national systems for identification of victims, data and testimonies collected in Italy, Norway and Belgium reveal that main actors – such as police officers, administrative decision makers and judges – often are not aware of the complex dynamics of exploitation and trafficking.<sup>47</sup> They tend to overlook the structural and dynamic character of exploitation and consider it as a contingent event mainly to be addressed in criminal law terms. At the same time, and related to this point, actors tend hardly to recognize the complexity of victims' vulnerabilities and their complicated relation with dynamics of exploitation. In this context, the assessment of situations of vulnerability and requests for protection by victims is often affected by the stereotypical idea of the “model victim”, or “perfect victim”,<sup>48</sup> as a passive subject considered to be without agency and depicted – especially in cases of trafficking – as a (mostly young) woman. According to such a model, victims are expected to show their vulnerability and to be “worthy” of protection, without revealing ambiguities and nuances. They must demonstrate a willingness to be “collaborative”. Indeed, the credibility of exploited people is seen as strongly related to their willingness to collaborate with relevant authorities. In Belgium, for example, the formal identification as a victim is, in practice, closely linked, since its first steps, to the person's co-operation with the judicial authorities. This data has also been confirmed in the GRETA country report on Belgium, affirming that “[i]f the victim decides not to co-operate with the judicial authorities or is not housed at a centre, they stand no real chance of benefiting from the identification and assistance mechanism provided for under Belgian law”.<sup>49</sup>

Testimonies collected in the three examined countries also reveal that key decision makers often expect people to clearly self-identify as victims and talk

47 Data collected through VULNER internal surveys on Belgium, Italy and Norway. See also Marchetti, S. and Palumbo, L. (eds.) (2021), *Vulnerability in the Asylum and Protection System in Italy*, cit.; Carnassale, D. and Marchetti, S. (2022), *Vulnerabilities and the Italian Protection System*. VULNER Research Report 2; Saroléa, S., Raimondo, and F., Crine, Z. (2021), *Exploring Vulnerability's Challenges and Pitfalls in Belgian Asylum System*. VULNER Research Report 1; Lidén, H., Schultz, J., Paasche, E. and Wessmann, H (2021). *Vulnerable Protection Seekers in Norway*. VULNER Research Report 1.

48 See Pinelli, B. and Giuliani, G. 2021. Perfect victims and monstrous invaders: media, borders, and intersectionality in Italy. *From the European South*, 9, 13–30.

49 GRETA (2022). *Evaluation Report. Belgium*, cit. p. 44.

about the exploitation they suffered. However, as has been revealed, for example, through interviews with victims of exploitation and trafficking in Italy and Belgium, victims are often reluctant to speak about their experiences.<sup>50</sup> They do not want to relive the traumatic situations they have undergone, and, in some cases, struggle to recall episodes and details of tough experiences. Furthermore, most victims are aware they have experienced abusive situations, but they also know that they did not have other alternatives than accepting exploitative conditions. As a victim of trafficking – interviewed in Belgium for the VULNER project – said: “I didn’t know the word ‘trafficking’, I was working, that’s all”.<sup>51</sup> Such a sentence is emblematic of the limitations concerning the use of rigid categories and approaches requiring people to self-define, for example, as “victims of trafficking”, without taking into account the intersection of complex factors that have led that person to be involved in exploitative relations and conditions.

It is also worth noting that only some European countries, such as Italy,<sup>52</sup> have a definition of labour exploitation in their legislation and identify it as a separate crime. National legislations of other European countries, including Belgium,<sup>53</sup> contain a definition of labour exploitation in the definition of trafficking and do not consider it as a separate crime. In this context, legal and political discourses and interventions often tend to associate the meaning of exploitation primarily with extreme forms of abuse, such as trafficking. As a consequence, migrants who experience less severe exploitation and do not demonstrate, for instance, that they fit into the category of “victims of trafficking”, risk being excluded from services and protection. Such an approach – which puts “labels” before human rights protection – overlooks the structural and continuum dimension of exploitation, which also includes cases not necessarily amounting to serious crimes such as trafficking.

Gender stereotypes also have a significant impact on how exploitation – including in its severe forms (such as trafficking) – is portrayed and considered, and on how vulnerabilities are recognized and assessed. In recent years, in countries such as Norway, Italy and Belgium, there has been more institutional attention to various forms of exploitation occurring in different labour market

50 See, for example, Marchetti, S. and Palumbo, L. (eds.) (2021), *Vulnerability in the Asylum and Protection System in Italy*, cit.

51 Interview collected by VULNER Belgian Team, 21.01.2022.

52 The Italian Criminal Code (CC), in Art.603bis, includes the crime of “illegal gang-mastering and labour Exploitation”.

53 Art. 433 *quinquies* of the Belgium Criminal Code.

sectors and involving women, men and trans people.<sup>54</sup> However, gendered and sexualized victimization paradigms are still dominant. Indeed, trafficking still tends to be largely associated with sexual exploitation and seen as involving mostly women, while other forms of exploitation (generally not amounting to trafficking) are viewed as related mainly to men. There is still not much awareness of forms of exploitation (including trafficking) experienced by women and trans people in sectors other than the sex industry, nor much attention paid to the fact that men can also be trafficked, including for sexual exploitation. Moreover, within this frame, while exploited migrant men are generally viewed as active subjects capable of making voluntary decisions and, in consequence, frequently deemed to be “irregular migrants” “abusing” the national protection system, migrant women are more commonly seen as passive and powerless, in accordance with the “perfect victim” model.<sup>55</sup>

In this scenario, the dimension of irregularity definitely plays a crucial role in both preventing people from escaping exploitation and in accessing justice. When intercepted by authorities – e.g. during labour site inspections or anti-trafficking operations carried out by law enforcement – undocumented migrants are often subjected to immigration control, and are detained and repatriated without previous screening and without being informed of their rights as victims or potential victims.<sup>56</sup> Many of the exploited and trafficked migrants interviewed for the VULNER research expressed their fear in this situation – as undocumented migrant workers experiencing exploitation – to report abuse and violation and claim their rights. In particular, one of the victims interviewed in Belgium expressed this fear clearly: “I can’t describe what I feel because I used to be afraid. In the street, as soon as I saw the police I was afraid, as soon as there was a fight or something, I had to run away because I couldn’t be in places where there were problems”.<sup>57</sup>

54 Marchetti, S. and Palumbo, L. (eds.) (2021), *Vulnerability in the Asylum and Protection System in Italy*, cit.; Saroléa, S., et al. (2021), *Exploring Vulnerability's Challenges and Pitfalls in Belgian Asylum System*, cit.; Lidén, H., et al. (2021). *Vulnerable Protection Seekers in Norway*, cit.

55 See, among others, Serughetti, G. 2018. Smuggled or Trafficked? Refugee or job seeker? Deconstructing rigid classifications by rethinking women's vulnerability, *Anti-Trafficking Review*, 11, pp. 16–35; Lingaas, C. 2022. Directing the Legal Radar at Forced Labour – Under Special Consideration of Male Victims in Norway. *Laws* 11, p. 39.

56 See, among others, Paasche, E., Skilbrei, M.-L. and Plambech, S. 2018. Vulnerable Here or There? Examining the vulnerability of victims of human trafficking before and after return. *Anti-Trafficking Review*, 10, pp. 34–51; PICUM 2022. *Unconditional access to services for undocumented victims of crime*. PICUM.

57 Interview collected by VULNER Belgian Team, 21.01.2022.

In contrast to the reductive and gender-based model of the “perfect victim” and associated restrictive practices that erode victims’ protection and rights, an approach rooted in a situational and intersectional conception of vulnerabilities to exploitation should prioritize a thorough and careful assessment of the specific situations of migrant persons involved and the complexities of exploitation dynamics they have endured. In doing so, this approach should consider the intersection of personal and structural elements, including for instance precarious legal statuses, that foster people’s vulnerabilities and lead them to “accept” degrading and exploitative working and living conditions. The next section explores whether and to what extent this situational and intersectional approach to vulnerabilities is considered within coordination mechanisms between anti-trafficking and asylum systems.

## 5 Moving towards an Intersectional Approach to Protecting Victims of Trafficking? The Italian Coordination Mechanism between Anti-trafficking and Asylum Systems

As underlined in the introduction to this article, in recent years, particularly since the so-called 2015 refugee crisis, many European countries have seen a rise in the number of victims of exploitation and trafficking that have applied for international protection, in accordance with the 2006 UNHCR Guidelines n. 7 regarding the possibility of granting refugee status to victims – or potential victims – of trafficking.<sup>58</sup> In this scenario, only a few countries in Europe, such as Italy and Norway,<sup>59</sup> have adopted specific coordination mechanisms to facilitate the identification of victims of exploitation, and in particular of trafficking, among asylum seekers, and to refer them to specialized and appropriate support and assistance services. This section examines, from an intersectional perspective, the innovative elements as well as the limitations of the Italian coordination mechanism between anti-trafficking and asylum systems, which experts and international organizations have recognized as good practice based on a multidisciplinary and multi-agencies approach.<sup>60</sup>

58 UNCHR (2006). *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked.*

59 In Norway there are some guidelines for identification of victims of trafficking among asylum seekers. See UDI 2013-014V1 Tiltakskort – Menneskehande and UDI 2013-014 Oppholdstillatelse til ofre for menneskehandel.

60 GRETA (2018). *Evaluation Report. Italy.* cit., p.



This coordination mechanism was developed in 2017 through the Guidelines for the identification of victims of trafficking among applicants for international protection and referral procedures,<sup>61</sup> that were defined by UNHCR Italy in association with the National Commission for the Right of Asylum (CNDA) to improve the convergence between asylum and anti-trafficking systems – in accordance with relevant provisions contained in Legislative Decree 24/2014 (art. 10) transposing Directive 2011/36/EU on trafficking. These UNHCR Guidelines, which were updated in 2021, are intended for the Territorial Commissions (TCs) – which are the bodies appointed to examine applications for international protection – and provide some standard operating procedures (including indicators) aimed at supporting the early identification of victims among asylum applicants and their referral to specialized anti-trafficking organizations.

In practice, the referral procedure introduced by the UNHCR Guidelines provides that when – during the asylum seeker's hearing – the TCs identify the presence of exploitation or trafficking indicators, they may report the case to an anti-trafficking organization and, if necessary, they can suspend asylum proceedings while waiting for a “feedback note” from the anti-trafficking organization.<sup>62</sup> This referral mechanism allows victims to benefit from adequate forms of assistance and TCs to acquire – through the referral to anti-trafficking organizations – a more complete picture of elements necessary for the evaluation of the concerned person's application for international protection. However, as the same 2017 UNHCR guidelines have clarified, the main function of such a referral mechanism is not to support TCs in making their own decision with respect to the recognition of international protection, but to “allow the applicant, who is believed to be a victim of trafficking, to get in touch with the services specifically designed for their protection and assistance”.<sup>63</sup>

61 UNHCR (2017). *L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral. Linee guida per le Commissioni Territoriali per il riconoscimento della protezione internazionale*. These guidelines were updated in 2021 paying more attention to victims of labour exploitation.

62 The 2021 version of the Guidelines offers two options: 1) the suspension of asylum proceedings when potential indicators of trafficking or exploitation are identified, and the TCs decide to report the case to anti-trafficking organizations, awaiting feedback before resuming the procedure; 2) the alternative possibility that, if the TC already possesses all the necessary information to make a decision on international protection, they can refer the case to anti-trafficking organizations without the need to suspend the asylum proceedings. Giammarinaro, M.G. and Nicodemi, F. 2021. *L'edizione aggiornata delle linee guida su “L'identificazione delle vittime di tratta tra i richiedenti protezione internazionale e procedure di referral”*. *Questione Giustizia*, 3.

63 UNHCR (2017). *L'identificazione delle vittime di tratta*, cit. p. 58.

The aim is therefore to provide the applicants with adequate assistance and support, addressing their specific needs and situations of vulnerability.

These referral procedures have been initiated by all TCs and, in most cases, formalized through Memoranda of Understanding (Protocols) with anti-trafficking organizations. Furthermore, such referral mechanisms have also been applied in other contexts, including Reception centers and local Civil Tribunals.<sup>64</sup>

All of this has led to a significant increase in the number of identified victims of exploitation and trafficking who have been referred to appropriate organizations and services to address their vulnerabilities and related needs.<sup>65</sup> Indeed, this referral mechanism between anti-trafficking and asylum systems contains innovative elements, creating the space for a careful and thorough assessment of victims' vulnerabilities and the development of appropriate responses to their specific protection needs. However, there are also significant limitations that need to be underlined.

With regard to the innovative aspects, as emerged from interviews with exploited and trafficked migrants and other key stakeholders,<sup>66</sup> this referral mechanism has allowed many victims to receive adequate assistance and support by multidisciplinary teams – qualified social workers, legal practitioners, cultural mediators, etc. – who have helped them in the reconstruction of their stories, and in the identification of the factors that contributed to producing and fostering their situations of vulnerability. Furthermore, many victims have had the possibility to know and understand better their rights, related legal instruments and options. Many have also received adequate accommodation meeting their needs and been supported in a path of social and labour inclusion. All these elements, when they effectively occur, constitute positive aspects of the Italian referral mechanism that are in line with an approach attentive to addressing vulnerabilities in all their complexity according to a holistic and more appropriate assessment of personal conditions and protection needs. Significantly, in this regard, the 2021 updated version of the UNHCR Guidelines clarifies that referral mechanisms should encompass not only TCs and anti-trafficking organizations, but also various actors and services involved in the protection of victims of exploitation and trafficking. They should be contacted based on the situation's characteristics, the forms of violation and

64 Nicodemi, F. (2020). Il sistema anti-tratta italiano compie venti anni, cit.

65 Ibidem.

66 Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit.; Carnassale, D. and Marchetti, S. (2022). *Vulnerabilities and the Italian Protection System*, cit.

exploitation experienced by the individual in question, and their specific needs.

Concerning the evaluation of asylum applications, thanks to this referral mechanism some TCs and Civil Tribunals have developed a more attentive approach to the complexity of dynamics of exploitation and situations of vulnerability, and to their “timing of emersion”.<sup>67</sup> As a consequence, the number of protections issued, in particular to victims of trafficking, has significantly increased.<sup>68</sup> For instance, our research revealed that in the area of Rome, since 2017, with the introduction of the referral mechanism, the TCs have recognized refugee status for many victims of trafficking. Even in the contest of the dispute before the Tribunal of Rome, there has been an important increase in the percentage of acceptance of appeals by victims of trafficking, especially Nigerian women.

However, despite these positive elements, there are also several limitations in the application of the Italian referral mechanism between anti-trafficking and asylum systems; limitations that are in contrast with an approach attentive to the situational and intersectional dimension of victims’ vulnerabilities. First of all, although in their 2021 updated version the UNCHR Guidelines defining this referral mechanism paid more attention to different types of exploitation, the former, 2017, version of this document adopted a more limited focus on sexual exploitation. In particular, the first version of the Guidelines contained only specific indicators for identification of Nigerian women victims of sexual exploitation (indicators with respect to age, geographic origins, social and cultural background). As some testimonies of experts collected in this research have underlined, such a limited focus and detailed description of a specific model of victim have contributed to fostering a prototypical image of victims of trafficking, which overlooks both those applicants who have been subjected to other forms of exploitation and those people who have experienced sexual exploitation but do not conform to the identified characteristics because of their nationality, age, gender etc.<sup>69</sup>

But there is more than this. Besides meeting some specific characteristics, victims are often asked to be “collaborative”. Indeed, from both the testimonies collected and the analysis of some decisions of TCs concerning the

67 Ibidem.

68 Nicodemi, F. (2020). Il sistema anti-tratta italiano compie venti anni, cit.

69 Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit.; see also Aricò, R.M. 2023. Governance migratoria e protezione delle vittime di tratta tra narrazioni stereotipiche e bias normativi: una seconda frontiera interna? *Diritto, immigrazione e cittadinanza*, 2, pp. 1–19.

applications for international protection submitted by Nigerian women,<sup>70</sup> what has also emerged – in line with other studies<sup>71</sup> – is a worrying trend to deny protection when applicants do not evidently self-identify as victims, fail to provide detailed accounts of the exploitation they endured, or do not show that they want to escape exploitative situations. For instance, one of the victims of trafficking interviewed for our research stressed her difficulties in talking about her story in front of the TCs, which included Nigerian interpreters. She also underlined the pressures she felt in speaking about the exploitation experienced and in conforming her story to dominant narratives on trafficking in order to obtain protection: “If I say that I don’t want to say this thing, you won’t force me to say it. It’s like they were forcing me: ‘If you say it, they are going to give you documents. If you say someone that brought you, they are going to give you documents’. If you say this, if you say that ... But you can’t force me to say”.<sup>72</sup>

Such an approach, requiring applicants to be “collaborative” in providing detailed information about the context and dynamics of exploitation they experienced, significantly weakens the referral system, which should instead aim to sustain a more appropriate assessment of personal conditions and protection needs of the victim. More generally, as Giovannetti and Zorzella have argued, this approach constitutes a distortion of the asylum system, because what should be prerequisites for the concrete recognition of situations of vulnerability (such as, for example, the reticence to talk about exploitation), and that the same UNHCR identified as indicators of exploitation and trafficking, become a reason for denying protection.<sup>73</sup>

Moreover, as the analysis of data and relevant documents reveals,<sup>74</sup> there is a tendency, especially in the case of victims of trafficking, to subordinate the recognition of the right to international protection to the applicant’s participation in the assistance and social integration program provided by the anti-trafficking system (art. 18 of D.lgs 286/1998). This is again a distortion of the asylum system. Indeed, as Giammarinaro, former UN Special Rapporteur

70 Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit.

71 Giovannetti, M. and Zorzella, N. (2022). Donne, straniere e vulnerabilità, in: *Donne straniere, diritti umani, questioni di genere*. A. Brambilla, P. Degani, M. Paggi and N. Zorzella (eds.), pp. 25–50, Università degli Studi Padova, Padova.

72 Interview collected by VULNER Italian team (in particular by Martina Millefiorini), 30/09/2021.

73 Giovannetti, M. and Zorzella, N. (2022). Donne, straniere e vulnerabilità, cit.

74 Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit; Giovannetti, M. and Zorzella, N. (2022). Donne, straniere e vulnerabilità, cit.; GRETA (2019). *Evaluation Report. Italy*, cit.

on Trafficking, has underlined, the referral mechanism between anti-trafficking and asylum systems cannot be used to “channel” victims towards the trafficking system.<sup>75</sup> Being a victim of trafficking can be relevant for the purpose of granting international protection, irrespective of the fact the concerned person has been involved in the assistance and protection program provided by the national anti-trafficking system.

However, in contrast to these limited and reductive approaches, in recent years there has been a significant Italian case-law orientation, both by the Court of Cassation and local Civil Tribunals, in the field of international protection. Such case law has paid attention to the difficulties applicants may have in the reconstruction of their past and traumatic experiences,<sup>76</sup> and has taken into consideration the interplay of personal and contextual/structural factors – including gender dynamics, age, level of education, social and family contexts and institutional aspects – combining to create and exacerbate vulnerabilities.<sup>77</sup> Furthermore, in some decisions, judges have further underlined the importance of considering the indicators of trafficking and exploitation defined by the UNCHR Guidelines to recognize the situation of vulnerability of the applicant, irrespective of the fact that the person does not clearly refer to conditions of exploitation or self-identify as a victim.<sup>78</sup> Some judges have also stressed the sentiment of trust that applicants may acquire through the support of anti-trafficking NGOs during the referral mechanism. In line with a gender and intersectional perspective, some rulings have paid attention to the structural consequences of the interactions between multiple forms of discrimination, abuse and subordination regarding the person concerned, even in the country of arrival. For instance, decisions of some local Tribunals<sup>79</sup> have considered and assessed jointly persecution on FGM-related grounds and the risk of persecution due to the fact of being a victim of trafficking or of forced marriage, by taking into account the structural consequences of gender-based inequalities and discriminations.

75 Giammarinaro, M.G. 2018. L'individuazione precoce delle vulnerabilità alla tratta nel contesto dei flussi migratori misti, *Questionegiustizia*.

76 See Tribunal of Bologna, Decree of 17.7.2019, no. 3272; Tribunal of Trento, Decree of 17.1.2019.

77 See Court of Cassation, Civ., Decision of 24.11.2017, no. 28152; Court of Cassation, Civ., Decision of 17.5.2017, no. 12333; Tribunal of Bologna, Decree of 17.7. 2019, no. 3272. See Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit.

78 Tribunal of Bologna, Decree of 16.1.2020; Court of Cassation, Civ., Decision of 27.1.2021, no. 1750, and Decision of 12/01/2022, no. 676.

79 Tribunal of Rome, Decree of 3.5.2018, no. 6328; the Tribunal of Bologna, Decree of 3.2.2020, no. 698.

Important judicial decisions to be mentioned in this regard concern also cases of asylum seekers who were victims of labour exploitation. For example, two 2021 decisions of the Civil Tribunal of Milan<sup>80</sup> granted former humanitarian protection to two asylum seekers who were victims of labour exploitation in the agri-food sector in Italy. In both cases, the judges highlighted the position of vulnerability caused by violence and abuse experienced in the countries of origin and during the migratory path. Furthermore, by paying attention to the situational and intersectional dimension of vulnerability, they highlighted that the applicants had no other alternatives than to accept exploitative conditions in Italy. As the judges argued, the situation of vulnerability of the concerned person “has its roots in the total absence of concrete alternative solutions, given the impossibility of finding a regular job combined with the fear of losing the one found which – although irregular and without the minimum guarantees of protection – allows [him] to survive in an extremely inhuman and degrading context”.<sup>81</sup> In a significant way, therefore, the judges have recognized how the intersection of various circumstances and factors including the precarious status of asylum seekers may contribute to generating a situation of vulnerability in which labour exploitation becomes the only viable choice in the face of a worse alternative.

## 6 Intersectionality as a Way to Shed Light on the Deficiencies of Assistance and Support Measures to Victims of Exploitation and Trafficking

The adoption of a situational and intersectional view on vulnerabilities to exploitation reveals that difficulties and critical issues do not solely pertain to the identification process of victims of exploitation and trafficking and the assessment of their applications, but also concern assistance and support measures provided by national protection systems.

Indeed, testimonies and data collected in Italy, Belgium and Norway reveal that, outside the asylum procedure, receiving assistance, support and a residence permit as a victim of trafficking or other forms of exploitation almost always requires victims' cooperation with law enforcement authorities and is also often *de facto* related – as in the case, for instance, of Belgium – to the

80 Tribunal of Milan, Decision of 12.5.2021, RG. 42440/2019; Tribunal of Milan, Decision of 12.5.2021, RG. 57114/2018.

81 Tribunal of Milan, Decision of 12.5.2021, RG. 57114/2018, p. 21.

conduct of criminal proceedings.<sup>82</sup> This prevents many people from escaping exploitation and asking for protection, as they are often not willing to testify against their exploiters/traffickers, and can be afraid to cooperate with, and/or mistrust, the police.<sup>83</sup> Some testimonies interviewed in Belgium emphasized that it is hard to believe that obtaining a residence permit is a satisfactory (and motivating) reason for the victims to be encouraged to denounce the traffickers and make statements to the police. As a Belgian lawyer argued, exploited and trafficked migrants are mostly interested in finding a job to make a living, and they know that if they become an informer to the police they could be even more at risk.<sup>84</sup> It makes their situation even worse, increasing vulnerabilities.

It is worth mentioning that the 2005 *Council of Europe Convention on Action against Trafficking in Human Beings* (Art. 12.6) explicitly states that assistance must not be made conditional on the victims' willingness to co-operate with the competent authorities in criminal investigations and prosecutions.<sup>85</sup> Consonant with this perspective, Directive 2011/36/EU on trafficking obligates states to take the appropriate measures to guarantee assistance and support for victims independent of their "willingness to cooperate in the criminal investigation, prosecution or trial" (Article 11). However, Directive 2004/81/EC<sup>86</sup> specifies that residence permits should be granted to third-country nationals who are victims of trafficking only if they show an intention to cooperate with authorities (art. 8). This provision, as many lawyers and experts – including Giammarinaro – have argued,<sup>87</sup> contradicts the principle of unconditional assistance affirmed by Directive 2011/36/EU. Furthermore, it implies an unjustifiable difference of treatment between victims who are nationals or EU citizens, who are provided with unconditional assistance, and third country nationals, who are instead required to cooperate. In this sense, according to Giammarinaro, it is necessary to revise Directive 2004/81/EC on this issue to establish a consistent legal framework.<sup>88</sup>

82 Marchetti, S. and Palumbo, L. (eds.) (2021). *Vulnerability in the Asylum and Protection System in Italy*, cit. GRETA (2022). *Evaluation Report. Belgium*, cit.

83 Giammarinaro, M.G. 2018. L'individuazione precoce delle vulnerabilità, cit.

84 Data collected through VULNER internal survey on Belgium.

85 See also Council of Europe (2005). *Explanatory Report*, cit., para.165.

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

87 Marchetti, S. and Palumbo, L. (2022). *10 Years After the Directive 2011/36/EU*, cit.

88 Giammarinaro, M.G. 2021. *Revising EU Directive on trafficking? For bad or good reasons?*, available on <https://giammarinaro.net/en/revising-eu-directive-on-human-trafficking-for-bad-or-good-reasons/>.

An important exception at national level is offered by the Italian legislation, in particular Art. 18 of D.Lgs. 286/1998. This provision, through the so-called “social path”, offers victims of exploitation and trafficking the possibility of assistance and a residence permit irrespective of their cooperation with relevant law enforcement authorities and of the outcome of criminal proceedings. Attention is therefore shifted from viewing protection of victims as a means of criminal law measures, to seeing the protection of their rights as a priority that cannot be subordinated to the fight against exploiters/traffickers. Within this system, anti-trafficking NGOs and associations are assigned a central role in the identification and support of victims. However, despite being considered an innovative and good practice, the “social path” provided by art. 18 of D.Lgs. 286/1998 is inadequately implemented.<sup>89</sup> Consequently, most victims are de facto required to cooperate with relevant authorities to obtain a residence permit.

Critical issues, in the examined countries, emerge also with regard to the duration of the residence permits for victims of trafficking or other forms of exploitation. Such residence permits are mostly temporary, and migrants who have been granted them have few possibilities to gain long-term legal status. For example, in Norway the residence permit for victims of trafficking, the so-called “witness residence permit”,<sup>90</sup> is contingent on the criminal prosecution of the traffickers. In a system like this, as testimonies have underlined,<sup>91</sup> the main focus is to facilitate the criminal prosecution of traffickers, rather than protect victims of trafficking and address their situations of vulnerability. Similar concerns have been underlined in the GRETA evaluation report on Norway.<sup>92</sup>

With regard to Italy, the residence permit for victims of exploitation and trafficking provided by Article 18 D.Lgs. 286/1998 lasts 6 months and can be renewed up to one year or longer if this is needed for justice reasons. At the end of this period, if the person has an ongoing employment relationship, the residence permit can be converted into a work permit. However, the limited duration of the Art. 18 residence permit makes it inadequate to ensure an effective process of labour and social integration for the victim. It also appears disconnected from the real time of inclusion in the national job market.<sup>93</sup> Such an aura of precarity and uncertainty concerning the Art. 18 residence permit has

89 Palumbo, L. and Romano, S. (2022). *Evoluzione e limiti*, cit.

90 UDI 2013-031: <https://www.udiregelverk.no/rettskilder/udi-retningslinjer/udi-2013031>.

91 Lidén, H., et al. (2021). *Vulnerable Protection Seekers in Norway*, cit.

92 GRETA (2022). *Evaluation Report. Norway*, cit.

93 Palumbo, L. and Romano, S. (2022). *Evoluzione e limiti*, cit.



led many victims to opt for the asylum track rather than be “involved” in the anti-trafficking system, as the channel of international protection guarantees greater possibilities for long-term regularization.<sup>94</sup>

Interestingly, the Belgium system provides for a long-term perspective for victims of trafficking: victims may be granted with a permanent residence permit at the end of the judicial proceedings, if they cooperated fully with the prosecution.<sup>95</sup> This represents potentially an important provision that can allow exploited/trafficked people to rebuild their social and professional lives on a long term perspective. However, such a residence permit is strictly tied to criminal proceedings and relevance of victims’ complaints. Therefore, once again, primary attention is paid to facilitating criminal proceedings rather than addressing victims’ situational and intersectional vulnerabilities and supporting their social and labour integration.

In general, the fact that assistance and access to a residence permit depend on criminal proceedings fails to acknowledge how situations of vulnerability arise from the intersection of factors, including, for instance, the precarity of legal status, which this “criminal approach” de facto further perpetuates. This results, in turn, in fostering and amplifying situations of vulnerability to exploitation rather than addressing the elements producing them.

Data collected in the research also revealed that assistance and support programs (including in terms of accommodation and social integration services) for victims of exploitation and trafficking are often insufficiently tailored to people’s vulnerabilities and unable to address different positions and experiences. For example, as GRETA has also underlined, in Belgium the capacity of specialized centres is not sufficient to receive all the presumed victims detected.<sup>96</sup> Furthermore, access and the maintenance of assistance provided by specialized centres is in practice dependent upon the victim’s willingness to cooperate with relevant authorities and progress of the criminal proceedings. Therefore, if the status of victim is revoked by the responsible prosecutor or the case is dismissed,<sup>97</sup> the concerned person loses his/her right to assistance<sup>98</sup> and, accordingly, his/her situations of vulnerability seem suddenly to vanish.

Inadequacies also emerge in relation to gender-related dimensions. For example, reception systems in many countries are inadequate to address

94 Ibidem.

95 See Aliens Law of 1980, chapter IV.

96 GRETA (2022). *Evaluation Report. Belgium*, cit. p. 47.

97 There are exceptions in cases where the proceedings have lasted more than two years. See GRETA (2022). *Evaluation Report. Belgium*, cit. p. 45.

98 Ibidem.

family-related issues and the needs of people with different gender identities.<sup>99</sup> In particular, testimonies in our research highlighted that authorities often do not understand the situations of vulnerability of women victims with children and their related needs.<sup>100</sup> This is something that clearly became evident in Italy, where there have been many cases of women victims of trafficking, including Dublined migrants, with children, and cases in which children have been separated from these women. In this context, the criteria by which social services and juvenile courts assess the parenting or mothering skills of migrant women often fail to consider their needs and the complexity of the situations of vulnerability in which these women find themselves.<sup>101</sup>

Furthermore, the assistance and social integration programs offered by anti-trafficking organizations are frequently perceived by victims as requiring experiences of isolation and restricted freedom. For instance, as highlighted by testimonies in Italy, many victims perceive Art. 18 anti-trafficking programs as “prison like”, and entailing a loss of autonomy. Such programs often create disciplining and controlling paths rather than addressing people’s vulnerabilities and supporting their agency.<sup>102</sup>

## 7 Concluding Remarks: Putting Intersectionality to Work

In recent years, in many European countries, there has been an increase in institutional attention paid to migrants, including asylum seekers, who have been victims of exploitation and trafficking. Nonetheless, the vulnerabilities of exploited and trafficked migrants are still hardly recognized and addressed by relevant actors from a situational and intersectional perspective. Such a perspective focuses on the intersection of personal and structural factors (legal, economic, political, social, and cultural) that generate and exacerbate people’s vulnerabilities within a socio-economic context marked by the simultaneous functioning of different systems of oppression and subordination related to gender, nationality, class, ethnicity, etc.

Far from being considered in these complex dimensions, vulnerabilities of victims of exploitation and trafficking tend to be assessed and addressed by relevant authorities through a standardized approach and a stereotyped

99 Saroléa, S. et al. (2021). *Exploring Vulnerability's Challenges and Pitfalls in Belgian Asylum System*, cit.; Carnassale, D. and Marchetti, S. (2022), *Vulnerabilities and the Italian Protection System*, cit.

100 Ibidem.

101 Interview collected by VULNER Italian team (in particular by Letizia Palumbo), 13/10/2021.

102 Palumbo, L. and Romano, S. (2022). *Evoluzione e limiti*, cit.

understanding of people's experiences. For instance, data and testimonies collected in the VULNER project countries, such as Belgium, Norway and Italy, have revealed that the conception of the "ideal" victim – considered without agency, mainly depicted as a (young) woman (especially in the case of trafficking), and able to self-identify as a victim and demonstrate a willingness to escape exploitation – significantly affects national relevant instruments and related practices. Consequently, people whose profiles and/or dynamics of exploitation do not align with these narratives and archetypes, and who deviate from the most common expectations, are not provided with adequate assistance and protection. This creates a sort of pressure, as applicants feel they need to portray themselves according to such a model to secure their chances at obtaining access to protection.

Such a dynamic also occurs in Italy. Here, the national referral mechanism between anti-trafficking and asylum systems, based on a multidisciplinary and multi-agencies approach, has led to an increase in the recognition of victims of exploitation and trafficking among asylum seekers, providing them with adequate protection and assistance. But, even in this system, there is still a tendency to see vulnerability as related to certain categories of people/group, reducing the variety of situations of vulnerability to exploitation into a single interpretative framework.

On the other hand, in recent years, Italy has seen the development of an interesting case law in the field of international protection that challenges a reductive conception of vulnerability to exploitation. This case law pays attention to the complexity of individual experiences, gender-related dynamics, and contextual elements that expose people to exploitation. Vulnerabilities are here considered through an attentive assessment of personal and contextual conditions, fundamental rights violations and related protection needs.

However, despite the advanced perspectives adopted by some national case law on international protection, the data and testimonies collected in the three examined VULNER project countries reveal a tendency to provide protection and support only to victims who show a willingness to be "collaborative", fit into certain narratives and, thus, demonstrate that they "deserve" protection.

Outside the asylum system, in particular, the recognition and assessment of victims' vulnerabilities, and the related possibility to provide them with assistance and a residence permit, are strictly dependent on their cooperation with the relevant authorities in criminal proceedings. Such an approach, primarily focusing on punishing exploiters/traffickers, tends to overlook both the systemic character of exploitation and the interplay of background conditions and factors contributing to the construction of vulnerabilities to exploitation. These include, for instance, the precarity of legal statuses that this criminal law

approach perpetuates, by providing victims with temporary residence permits dependent on criminal proceedings.

In contrast to this limited view, exploitation should be confronted through a social and rights based approach, and attention should be paid to recognizing and addressing, from a situational and intersectional perspective, the complexity and specificities of migrants' vulnerabilities and experiences. Such an approach should entail the implementation, at national levels, of a system of interventions and practices that – by involving relevant multidisciplinary and multi-agency actors – aim to ensure a careful assessment of the specific situations of exploited and trafficked people and their protection needs. This system should make use of all the instruments offered by the different – but coordinated – protection regimes, providing victims with adequate and individualized responses on a long term perspective. This would mean sustaining effective pathways of empowerment and social inclusion that respond to migrant people's different needs and projects, recognizing their desires and agency.