

# Smuggled or Trafficked? Refugee or job seeker? Deconstructing rigid classifications by rethinking women’s vulnerability

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## Abstract

In the context of recent large-scale migratory flows from North Africa to the European Union, significant convergence and overlap has been observed between human trafficking and migrant smuggling, and between ‘economic’ and ‘forced’ migration. This paper draws on the case of Nigerian women asylum seekers, most of whom are identified as potential victims of human trafficking, to illustrate the problems that arise when migrants are separated into discrete categories—trafficked/smuggled, voluntary/forced—to establish their treatment. These problems derive from the application of rigid bureaucratic labels to increasingly fluid migratory identities, and from gendered and neo-colonial stereotypes that inform views of agency and vulnerability. The paper discusses vulnerability as a core concept in the construction of the ‘deserving victim’ in order to critique stereotypical representations of ‘vulnerable subjects’ in light of feminist political philosophy and philosophy of law. In doing so, it highlights the role of receiving states in producing migrant women’s vulnerability, and argues that state institutions have a duty to both guarantee protection and acknowledge the subjects’ agency.

**Keywords:** human trafficking, agency, gender stereotypes, vulnerability, labelling, Nigeria, Italy, feminist philosophy

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## Introduction

In the context of rising mixed migration flows towards Europe and shrinking opportunities for legal entry, migrants, including asylum seekers, from the Global South have increasingly resorted to the use of smugglers to facilitate their journeys.<sup>1</sup> This compounds their vulnerability, not only to potentially cruel and inhuman treatment whilst travelling, but also to human trafficking.

Passing through the central Mediterranean route on their way to the European Union (EU), growing numbers of Nigerian women and girls have been landing on the coast of Sicily since 2013. Public authorities and humanitarian agencies have described this migration flow as part of an alarming increase in trafficking for sexual exploitation.<sup>2</sup> Over these years, Nigerian women have also come to be more strongly represented within the population of asylum seekers in Italy.<sup>3</sup>

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<sup>1</sup> J Bhabha and M Zard, ‘Smuggled or Trafficked?’, *Forced Migration Review*, no. 25, 2006, pp. 6–8; J O’Connell Davidson, ‘Troubling Freedom: Migration, debt, and modern slavery’, *Migration Studies*, vol. 1, no. 2, 2013, pp. 176–195; L Shelley, *Human Smuggling and Trafficking into Europe: A comparative perspective*, Migration Policy Institute, Washington, DC, 2014.

<sup>2</sup> See: International Organization for Migration, *Human Trafficking through the Central Mediterranean Route: Data, stories and information collected by the International Organization for Migration*, IOM, Rome, 2017; Group of Experts on Action against Trafficking in Human Beings, *Report on Italy under Rule 7 of the Rules of Procedure for evaluating implementation of the Council of Europe Convention on Action against Trafficking in Human Beings*, Council of Europe, Strasbourg, 2017; Italian Ministry of Interior and United Nations High Commissioner for Refugees (UNHCR), *L’identificazione delle Vittime di Tratta tra i Richiedenti Protezione Internazionale e Procedure di Referral*, Rome, 2017. According to the IOM and UNHCR, 1,454 Nigerian women arrived in Italy in 2014, 5,633 in 2015, and 11,009 in 2016 (out of a total of 37,551 arrivals from Nigeria in 2016). Finally, in 2017, in the context of a general drop in arrivals by sea following the stipulation of a border control agreement between Italy and Libya, there were 5,425 sea arrivals of Nigerian women, accounting for 30 per cent of all arrivals from Nigeria. The International Organization for Migration believes that 80 per cent of these women are victims of human trafficking (see: IOM, *Human trafficking*).

<sup>3</sup> According to Eurostat, asylum applications submitted by Nigerian women have increased year-on-year, both in absolute numbers and as a percentage of the total number of asylum seekers from Nigeria: 1,780 (out of 10,135) in 2014; 4,085 (out of 18,145) in 2015; 7,665 (out of 27,105) in 2016, 8,505 (out of 25,500) in 2017, see: Eurostat, *Statistics on Asylum and Managed Migration*, available at: <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>.

Overall, Nigeria was the main country of origin for irregular sea migration to Italy in 2016 and 2017,<sup>4</sup> and currently accounts for the highest numbers of both victims of trafficking<sup>5</sup> and asylum seekers in Italy.<sup>6</sup> Nigerian migrants therefore offer a suitable case study to explore the interconnectedness of trafficking and smuggling along the migration route from North Africa to Southern Europe, and the convergence of voluntary and involuntary, economic and forced migration. Their case also serves to illustrate the ways in which European migration governance differentiates between ‘victims’ and ‘criminals’,<sup>7</sup> and ‘true’ and ‘bogus’ asylum seekers.<sup>8</sup>

Distinguishing between human trafficking and migrant smuggling, forced and voluntary migration, is a key organising principle underpinning Italian and European political discourse and practice. The construction and application of distinct identities, such as irregular migrant, refugee, and victim of trafficking, is used to separate between those deemed as deserving protection and others to be deported. It is through this ‘obsession with classification’ that a differential recognition of rights is achieved.<sup>9</sup> However, legal, political, and academic attempts to rigidly distinguish these subsets of migrants clash with increasingly overlapping migratory experiences that generate fluid and complex identities.

Migration studies have suggested the need to rethink the categories of forced and voluntary migration beyond the discursive constraints of bureaucratic distinctions,<sup>10</sup> and to examine the impact of labels, especially on asylum seekers

<sup>4</sup> UNHCR data service, available at: <https://data2.unhcr.org/>.

<sup>5</sup> Department of Equal Opportunities and Rights, *Vittime di Tratta, piu' di Mille Protetti Ogni Anno*, available at: <http://www.pariopportunita.gov.it/faqs/mille-protetti-ogni-anno/>.

<sup>6</sup> Eurostat.

<sup>7</sup> S Plambech, ‘Between “Victims” and “Criminals”’: Rescue, deportation, and everyday violence among Nigerian migrants’, *Social Politics*, vol. 21, no. 3, 2014, pp. 382–402.

<sup>8</sup> J Freedman, *Gendering the International Asylum and Refugee Debate*, Palgrave Macmillan, New York, 2015.

<sup>9</sup> C Marchetti and B Pinelli, ‘Introduzione’ in *Confini d'Europa. Modelli di controllo e inclusioni informali*, Cortina, Milano, 2017, p. XIX.

<sup>10</sup> See: E Fussell, ‘Space, Time, and Volition: Dimensions of migration theory’ in M R Rosenblum and D J Tichenor (eds.), *The Oxford Handbook of the Politics of International Migration*, Oxford University Press, New York, 2012, pp. 25–52; S Castles, H De Haas, and M J Miller, *The Age of Migration*, Palgrave Macmillan, Oxford, 2014; M B Erdal and C Oeppen, ‘Forced to Leave? The discursive and analytical significance of describing migration as forced and voluntary’, *Journal of Ethnic and Migration Studies*, vol. 44, issue 6, 2018, pp. 981–998.

and refugees.<sup>11</sup> More recently, scholars have also approached this issue from a gendered perspective, showing that the application of rigid dichotomies fuels the dominant gendered and racialised discourse that serves as a tool for the moral and political governance of migration.<sup>12</sup>

In this paper, I first draw on the existing literature to illustrate the case of women who migrate irregularly from Nigeria to Italy. While tracing the different stages involved in the identification and reception of migrants, I discuss the specific problems that arise when categories defined by international, regional and national law are employed as mutually exclusive to separate them. I describe this separation as relying on labelling practices enacted by state and humanitarian actors, producing stereotypes of ‘true’ or ‘bogus’ asylum seekers, genuinely vulnerable persons and real victims. Second, I link the unsuitability of the bureaucratic categories to the underspecified and vague definition of the concept of vulnerability as codified in Italian and European legislation, and adopted in policies on migration, human trafficking and asylum. Finally, I argue that feminist philosophy can help highlight the role of migrant-receiving states in producing migrant women’s vulnerability and the duty of state institutions to both guarantee protection and acknowledge the subjects’ agency.

While other scholars have focused on the voluntary/forced binary with a view to interpreting these categories more clearly,<sup>13</sup> in concentrating on the notion of vulnerability I do not set out to recommend more effective procedures for

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<sup>11</sup> See: R Zetter, ‘Labelling Refugees: Forming and transforming a bureaucratic identity’, *Journal of Refugee Studies*, vol. 4, no. 1, 1991, pp. 39–62; R Zetter, ‘More Labels, Fewer Refugees: Remaking the refugee label in an era of globalization’, *Journal of Refugee Studies*, vol. 20, no. 2, 2007, pp. 172–192.

<sup>12</sup> See, among others: J Bhabha and M Zard; S Plambech; J Freedman, *Gendering the International Asylum and Refugee Debate*; J O’Connell Davidson; P Testai, ‘Debt as a Route to Modern Slavery in the Discourse on “Sex Trafficking”: Myth or reality?’, *Human Security Journal*, vol. 6, 2008, pp. 68–76; C Giordano, ‘Practices of Translation and the Making of Migrant Subjectivities in Contemporary Italy’, *American Ethnologist*, vol. 35, no. 4, 2008, pp. 588–606; R Andrijasevic, *Migration, Agency and Citizenship in Sex Trafficking*, Palgrave Macmillan, London, 2010; N Mai, ‘Between Embodied Cosmopolitanism and Sexual Humanitarianism: The fractal mobilities and subjectivities of migrants working in the sex industry’ in V Baby-Collins and L Anteby (eds.), *Borders, Mobilities and Migrations: Perspectives from the Mediterranean in the 21st century*, Peter Lang, Brussels, 2014, pp. 175–192; N Mai, “‘Too Much Suffering’”: Understanding the interplay between migration, bounded exploitation and trafficking through Nigerian sex workers’ experiences’, *Sociological Research Online*, vol. 21, no. 4, 2016.

<sup>13</sup> V Ottonelli and T Torresi, ‘When is Migration Voluntary?’, *International Migration Review*, vol. 47, no. 4, 2013, pp. 783–813; M B Erdal and C Oeppen.

dividing migrants into different groups. Rather, my aim is to question the current regime of migration and border control, and to advocate for political responses that are sensitive to the protection needs of individuals.

## The Voluntary/Involuntary Dichotomy under Scrutiny

The *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children* (UN Trafficking Protocol), adopted in 2000 in tandem with the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, defines human trafficking as an act—recruitment, transportation, transfer, harbouring or receipt of persons—carried out by means of threat, deception or coercion, among others, for the purpose of exploitation. While migrant smuggling is framed through voluntariness on the part of those who are smuggled, human trafficking implies a form of involuntariness, based on the use of means that vitiate the victim's consent to the subsequent exploitation. Additionally, this distinction centres on the relation of the trafficker/smuggler to subsequent exploitative conditions, with human trafficking requiring the continued exercise of control over a person, while the role of the smuggler is primarily to facilitate border crossing.<sup>14</sup> The voluntary/involuntary binary is thus key in the framing of migrant smuggling and human trafficking, and is reflected in the more extensive obligations that states are deemed to have in relation to victims of trafficking than to smuggled persons.<sup>15</sup> As stated by Bhabha and Zard, 'There is thus much to be gained from being classified as trafficked, and much to lose from being considered smuggled.'<sup>16</sup>

However, the case of Nigerian women and girls arriving in Italy by sea illustrates that the conditions and practices involved in smuggling and trafficking can overlap and be difficult to disentangle. In recent years, it has been shown that multiple unorganised local agents, more often than international trafficking networks, set up transport and border-crossing arrangements for Nigerians migrating to Europe via Libya.<sup>17</sup> These local agents are clearly engaged in the

<sup>14</sup> B Anderson and J O'Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A multi-country pilot study*, IOM Migration Research Series, no. 15, Geneva, 2003.

<sup>15</sup> J O'Connell Davidson, p. 178.

<sup>16</sup> J Bhabha and M Zard, p. 7.

<sup>17</sup> L Beretta *et al.*, *Inter/rote: Storie di Tratta e Percorsi di Resistenza*, Sapere Solidale, Rome, 2016; A Malakooti, *Assessing the Risks of Migration along the Central and Eastern Mediterranean Routes: Iraq and Nigeria as case study countries*, IOM, 2016; N Abdel Aziz, P Monzini, and F Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, Report, New-Med Research Network, 2015.

transportation and transfer of migrants—actions connected with human trafficking; they may also resort to threats and coercion, which constitute the means in human trafficking. However, the agents are primarily interested in profit from facilitating border crossings and thus fall under the international definition of smugglers.<sup>18</sup> Moreover, it is not always easy to ascertain whether they pursue or benefit from the ‘purpose of exploitation’ even where migrants end up in exploitative circumstances along their route or at their destination.<sup>19</sup>

Further, sociological and anthropological studies suggest that migrants’ reasons for leaving their country of origin are far more complicated than the dominant narrative of women and girls who have been deceived or forced to move against their will.<sup>20</sup> Although some young Nigerians who are leaving their country have been tricked with false employment prospects, over the past several years prospective migrants have displayed increasing levels of awareness of sex work being the economic activity that is most likely available to them in Italy and other European countries.<sup>21</sup> And yet, their migration may still turn into an exploitative experience, for example, due to unexpectedly harsh conditions of work in the destination country or a higher than anticipated migratory debt.<sup>22</sup>

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<sup>18</sup> E M-O Baye and S Heumann, ‘Migration, Sex Work and Exploitative Labor Conditions: Experiences of Nigerian women in the sex industry in Turin, Italy, and counter-trafficking measures’, *Gender, Technology and Development*, vol. 18, no. 1, 2014, pp. 77–105.

<sup>19</sup> J O’Connell Davidson.

<sup>20</sup> L Agustín, *Sex at the Margins: Migration, labour markets and the rescue industry*, Zed Books, London, 2007.

<sup>21</sup> M-L Skilbrei and M Tveit, ‘Defining Trafficking through Empirical Work: Blurred boundaries and their consequences’, *Gender, Technology and Development*, vol. 12, no. 1, 2008, pp. 9–30; S Vanderhurst, ‘Governing with God: Religion, resistance, and the state in Nigeria’s counter-trafficking programs’, *PoLAR: The Political and Legal Anthropology Review*, vol. 40, no. 2, 2017, pp. 194–209; N Mai, ‘Between Embodied Cosmopolitanism and Sexual Humanitarianism’; N Mai, ‘Too Much Suffering’.

<sup>22</sup> C Giordano; E M-O Baye and S Heumann. On the monetary and moral bondage to which Nigerian women are subjected, and a critique of humanitarian and institutional narratives on this topic, see also: P Testai; I Peano, ‘Bondage and Help: Genealogies and hopes in trafficking from Nigeria to Italy’ in J Quirk and D Wigneswaran (eds.), *Slavery, Migration and Contemporary Bondage in Africa*, Africa World Press, Trenton, NJ, 2013.

The above complexities make it challenging to distinguish between trafficking and smuggling. Although a smuggling agreement is seen as consensual, it too can lead to indebtedness and debt-induced exploitation, i.e. experiences similar to those encountered by victims of trafficking.<sup>23</sup> The neat line of demarcation assumed by the two Protocols, between voluntary and consensual, and involuntary and non-consensual processes of migration, thus, is deeply problematic.<sup>24</sup>

It is equally difficult to use the voluntary/involuntary dichotomy to distinguish between economic and forced migration.<sup>25</sup> Whereas refugees are assumed to have moved non-voluntarily to escape war or civil upheaval, political unrest, terrorism, or large-scale human rights violations in oppressive state regimes, economic migrants are usually represented as leaving their country voluntarily. This contrast may seem plausible as long as ‘certain implications of staying (for example, being forced to change religion or being made a political prisoner) are recognised as an affront to human dignity and as unacceptable alternatives to fleeing, whereas other implications (for example, extreme poverty) are not seen in the same way’.<sup>26</sup> However, while those who were ‘forced to leave’ may well have weighed up their decision against available alternatives and thus exercised a form of volition, job seekers may feel compelled to escape conditions of social and economic deprivation. Thus, to describe either decision to migrate as entirely voluntary or entirely forced is simplistic.<sup>27</sup>

Nevertheless, when migrants reach the coast of southern Italy, most are referred to so-called ‘hotspots’ and subjected to an initial screening designed to separate irregular ‘economic’ migrants from those who are entitled to apply for asylum.<sup>28</sup> Their next destination will depend on the answers they give to the questions posed by Italian and EU authorities at the hotspots, especially those pertaining

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<sup>23</sup> J Bhabha and M Zard; J O’Connell Davidson.

<sup>24</sup> B Anderson and J O’Connell Davidson; J Bhabha and M Zard; P Testai; J O’Connell Davidson; M B Erdal and C Oeppen.

<sup>25</sup> V Ottonelli and T Torresi; M B Erdal and C Oeppen.

<sup>26</sup> M B Erdal and C Oeppen, p. 7.

<sup>27</sup> *Ibid.*, p. 2.

<sup>28</sup> European Council for Refugees and Exiles, *The Implementation of the Hotspots in Italy and Greece. A study*, Dutch Council for Refugees, Amsterdam, 2016; Amnesty International, *Hotspot Italy. How EU’s flagship approach leads to violations of refugee and migrant rights*, London, 2016; Council of Europe, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 13 June 2017*, Strasbourg, 2018.

to the reasons for their journey. Based on their responses, they will be classified as asylum seekers, unaccompanied foreign minors, victims of trafficking, people with vulnerabilities or irregular migrants, the last of which results in a repatriation order. In recent years, there have been cases of large groups of Nigerian women, classified as job-seeking migrants, who were sent from landing sites to detention centres for deportation.<sup>29</sup> This is despite a growing number of them being registered as asylum seekers.<sup>30</sup>

Further, only few Nigerians are referred to anti-trafficking programmes, although many are identified as potential victims of human trafficking by the International Organization for Migration (IOM).<sup>31</sup> At the initial identification stage, it is difficult to discern victims of trafficking from a broader pool of migrants under the UN Trafficking Protocol. Recognition of trafficking is not only hindered by the complexities of mixed migration patterns and the actors involved, but also by the frequent discrepancy between the legal implications of migratory experiences and the perceptions of the migrants themselves. Many new arrivals who have been subject to human trafficking do not see themselves as victims of trafficking and are reluctant to identify with this status.<sup>32</sup> In fact, the difficulties associated with unequivocally identifying Nigerian women as victims of trafficking persist even when they apply for asylum and are accepted into the reception and protection system, as discussed in the next section.

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<sup>29</sup> L Beretta *et al.*, Commissione Straordinaria per i Diritti Umani, *Rapporto sui Centri di Permanenza per il Rimpatrio*, Italian Senate of the Republic, Rome, 2017.

<sup>30</sup> Eurostat.

<sup>31</sup> IOM, 'Human trafficking'. In 2016, out of a total of 6,599 Nigerian women and girls identified by the IOM as victims of human trafficking, 290 were reported to authorities or provided with assistance, while 135 were referred to the anti-trafficking network.

<sup>32</sup> P Degani, 'Richiedenti Asilo e Vittime di Tratta nel Quadro dei Flussi Migratori misti tra Differenziazione dei Sistemi di Protezione e Necessità di Coordinamento dei Meccanismi di Referral', *Pace diritti umani*, no. 2, 2011, pp. 79–116; Y K Doherty and A Harris, 'The Social Construction of Trafficked Persons: An analysis of the UN Protocol and the TVPA definitions', *Journal of Progressive Human Services*, vol. 26, no. 1, 2015, pp. 22–45.



## The Dual Protection Path and its Failures

According to the United Nations High Commissioner for Refugees (UNHCR), ‘inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution’, and may thus justify the ‘well-founded fear of persecution’ mentioned in the definition of ‘refugee’ under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.<sup>33</sup> Further, within the Common European Asylum System (CEAS), victims of trafficking are recognised as having special vulnerabilities requiring coordinated and effective responses, alongside single parents with children, pregnant or breastfeeding women, unaccompanied minors, and victims of torture, rape, or other serious forms of psychological, physical or sexual violence.

Moreover, Italian law<sup>34</sup> states that applicants for international protection who are identified as victims of trafficking can benefit from a social assistance and integration programme, which includes measures enabling individuals to escape from the exploitation imposed upon them. According to the Italian Ministry of Interior and UNHCR,<sup>35</sup> these provisions may also be applied to persons who have newly arrived on Italian territory, even when exploitation has not yet occurred.

Victims of trafficking who apply for asylum can therefore potentially benefit from a dual protection path, comprising recognition of their right to asylum on the one hand, and of their particular vulnerability due to their trafficking experience on the other. This dual recognition is subject to verification of at least one of two kinds of involuntariness on the part of the migrants: they must have either left their own country for reasons beyond their control, or been coerced or deceived into acting against their will.

<sup>33</sup> UNHCR, *Guidelines on International Protection: 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*, UNHCR, 2006, available at <http://www.unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html>.

<sup>34</sup> Legislative Decree 18 August 2015, n. 142 – Implementation of Directive 2013/33/EU laying down rules on the reception of applicants for international protection, as well as Directive 2013/32/EU, laying down common procedures for the recognition and withdrawal of the status of international protection.

<sup>35</sup> Ministry of the Interior and UNHCR, *L'identificazione delle Vittime di Tratta tra i Richiedenti Protezione Internazionale*, Guidelines for the Territorial Commissions for the recognition of international protection, Rome, 2017.

The notion of vulnerability in the international definition of human trafficking is ambiguous and generally interpreted in two main ways: first, as a condition produced by the experience of trafficking itself, from which special protection obligations derive for states; and second, as a characteristic of individuals and their environments that makes them more exposed than others to the risks of human trafficking. In its *Legislative Guide* for the Trafficking Protocol, the United Nations Office on Drugs and Crime articulates both interpretations. Firstly, the *Legislative Guide* states that ‘[p]ersons who have been trafficked are victims of the crime and are being exploited as a result of the trafficking and the intended or subsequent exploitation and through intimidation or retaliation on the part of the traffickers’. Secondly, the *Legislative Guide* highlights scenarios in which there is an ‘abuse of a position of vulnerability’, defined as ‘any situation in which the person involved has no real and acceptable alternatives but to submit to the abuse involved’. However, defining what is ‘acceptable’ is challenging, and migrants, immigration authorities, non-governmental and intergovernmental organisations may have very different perceptions in this respect.

When referring to victims of trafficking as ‘vulnerable’ asylum seekers, EU and Italian legislation understand ‘vulnerability’ as a condition acquired by individuals as a result of the trafficking experience and consider victims of trafficking as ‘vulnerable’ in this sense. However, to be recognised as vulnerable within the reception and protection system for asylum seekers, victims of trafficking must be successfully identified as such, and this requires them to produce a set of acts that are both declarative—affirming their victim status—and performative—acting in a manner that is consistent with the bureaucratic identity of a trafficking victim, the failure of which will lead to withdrawal of support measures.<sup>36</sup>

It has been noted, for example, that Nigerian women staying in shelters for asylum seekers risk losing part of their entitlements or being denied reception benefits entirely if they are found to be involved in sex work outside the facility.<sup>37</sup> There have also been cases of Nigerian women whose asylum applications were rejected and for whom the courts ordered deportation to

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<sup>36</sup> For a critique of the procedures and practices implemented to identify ‘victims of trafficking’ and ‘vulnerable asylum seekers’ among Nigerian sex workers, see: C Giordano; S Plambech; E M-O Baye and S Heumann; and S Vanderhurst.

<sup>37</sup> R Pascoal, ‘The Vulnerability of Nigerian and Romanian Women in Sexual Exploitation. Motherhood as being a double vulnerability’, PhD dissertation, Università di Palermo, 2018.

prevent them from falling victim to sexual exploitation networks.<sup>38</sup> Hence, the institutions of the Italian state may (and do) see women's engagement in sex work both as an expression of agency that is in contradiction with the condition of being a victim, and as a manifestation of vulnerability that obscures any residual capacity for agency in the context of a migratory plan.

Enrica Rigo analysed the asylum applications submitted by 56 Nigerian women and processed by Italian authorities between 2015 and 2016. Although the applicants' stories were similar, only seven were granted authorisation to stay in Italy for humanitarian reasons. The study suggests that the positive decisions were based on markers of the asylum seeker's vulnerability, notably her willingness to represent herself as a victim and to join an assistance and integration programme for victims of trafficking, along with her performance of the victim script.<sup>39</sup>

Difficulties in applying legal protections to refugees and victims of trafficking are therefore not so much due to the normative provisions themselves as to the labels used by the authorities in charge of managing migration and asylum. A critical discussion of such labels will advance our understanding of how stereotyping, especially in gender and racial contexts, acts to construct the victim in need of protection.

## Who is the Refugee? Who is the victim?

Labelling has been defined as the dialectic of conformity to the bureaucratic requirements for the recognition of various forms of protection, in which asylum seekers become caught up when interacting with the institutions of the host country and humanitarian organisations.<sup>40</sup> The asylum system, in Italy as in other countries, is characterised by the use of rigid bureaucratic classifications, which leads to forms of exclusion or inclusion.<sup>41</sup>

In analysing the 'refugee' label, Roger Zetter shows that, far from indicating a clear identity, the term captures an extremely complex set of values and judgements as it is contingent upon the intervention and interests of state

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<sup>38</sup> E Rigo, 'Donne Attraverso il Mediterraneo. Una prospettiva di genere sulla protezione internazionale', *Politeia*, vol. XXXII, no. 124, 2016, pp. 82–94.

<sup>39</sup> *Ibid.*

<sup>40</sup> R Zetter, 'Labelling Refugees'; 'More Labels'.

<sup>41</sup> C Marchetti and B Pinelli.

and non-state actors, and upon the actions and demands of the labelled subjects, who are requested to conform to and incorporate it. For Zetter, labelling is ‘a process of *stereotyping*, which involves disaggregation, standardisation, and the formulation of clear cut categories’.<sup>42</sup> Its corollary is ‘control’, because labels require compliance on the part of the individual, not uniqueness or singularity, and ‘the need to conform to an institutionally imposed stereotype can both reinforce control and transform an identity’.<sup>43</sup>

When the subjects are women, the role of gender stereotyping in assigning the refugee label must also be taken into account.<sup>44</sup> For example, stereotypes can be used to draw distinctions between ‘true’ and ‘bogus’ asylum seekers and refugees, or ‘vulnerable’ and ‘threatening’ subjects,<sup>45</sup> depending on how closely they are seen to fit the ideals of women’s innocence and helplessness on the one hand, and sexual and personal independence on the other.<sup>46</sup> For example, the perceived vulnerability of women asylum seekers, often fuelled by culturalist stereotypes such as ‘the weak Muslim woman, the defenceless Asian girl, the female victim of brutal tribal norms’,<sup>47</sup> may provide some with better chances to be granted asylum. However, the same preconceptions, by reinforcing the representation of women as ‘passive’ and ‘apolitical’ victims, can ‘create a continuing notion of “illegitimacy” of asylum claims based on the grounds of gender-related persecutions’.<sup>48</sup> In addition, discourses that essentialise the impotence and passivity of the ‘third world woman’,<sup>49</sup> constructing her migratory experience as one of extreme victimhood, make

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<sup>42</sup> R Zetter, ‘Labelling Refugees’, p. 44.

<sup>43</sup> *Ibid.*, p. 45.

<sup>44</sup> M Calloni, S Marras and G Serughetti, *Chiedo Asilo. Essere rifugiato in Italia*, UBE, Milano, 2012; J Freedman, *Gendering the International Asylum and Refugee Debate*.

<sup>45</sup> J Freedman, *Gendering the International Asylum and Refugee Debate*, p. 20.

<sup>46</sup> J Doezema, ‘Loose Women or Lost Women? The re-emergence of the myth of white slavery in contemporary discourse of trafficking in women’, *Gender Issues*, vol. 18, no. 1, 2000, pp. 23–50; N Sharma, ‘Anti-Trafficking Rhetoric and the Making of a Global Apartheid’, *NWSA Journal*, vol. 17, no. 3, 2005.

<sup>47</sup> J Bhabha, ‘Demography and Rights: Women, children and access to asylum’, *International Journal of Refugee Law*, vol. 16, no. 2, 2004, p. 231.

<sup>48</sup> J Freedman, ‘Women’s Right to Asylum: Protecting the rights of female asylum seekers in Europe?’, *Human Rights Review*, no. 9, 2008, p. 431.

<sup>49</sup> T C Mohanty, ‘Under Western Eyes: Feminist scholarship and colonial discourses’, *Boundary 2*, vol. 12, no. 3, 1984, pp. 333–358; R Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “native” subject in international/post-colonial feminist legal politics’, *Harvard Human Rights Journal*, vol. 15, 2002, pp. 1–37.

more nuanced and ambivalent expressions of suffering unrecognisable.<sup>50</sup> Sex workers, in particular, may be seen as morally illegitimate for protection, if they do not claim being deceived, sold, and/or forced to sell sex.<sup>51</sup>

Labels such as ‘vulnerable person’ or ‘victim of trafficking’ also imply stereotyping and require a degree of conformity that does not always reflect the agency of the subjects involved.<sup>52</sup> The dichotomy of coercion and consent informing the distinction between trafficking and smuggling translates into representations of victims of trafficking as passive, innocent and deserving of protection, unlike other migrants who are instead held accountable for a situation to which they consented. Often, there is also a gender and age dimension to this dichotomy, with women and children ‘more likely to be considered as trafficked whilst men are more likely to be considered as smuggled (although this assumption is certainly open to question)’.<sup>53</sup> For men, this implies a special invisibility within policies aimed at combating human trafficking and protecting its victims.<sup>54</sup>

As a result, asylum seekers at times need to make active use of labels as a survival strategy, exercising ‘a very particular kind of agency in re-appropriating and mobilising these representations for their own benefit’.<sup>55</sup> In other words, people may enact performative behaviours in an attempt to match one of the ideal types associated with those deserving protection, so as to maximise their chances of obtaining authorisation to stay. But this kind of agency can easily prompt a representation of women as ‘using their perceived “vulnerability” to “take advantage” of Western states’.<sup>56</sup>

When a wide range of socio-economic and cultural experiences of vulnerability and resilience are disregarded, when ‘distinctions between self-identification and imposed labels’<sup>57</sup> are ignored, and when state benevolence is reserved for those who identify as victims and/or perform the *real* victim script, access to protection may be denied to others who cannot, or do not want to offer a coherent story of victimisation, despite showing various signs of vulnerability.

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<sup>50</sup> N Mai, ‘Between Embodied Cosmopolitanism and Sexual Humanitarianism’.

<sup>51</sup> S Plambech.

<sup>52</sup> N Mai, ‘Too Much Suffering’.

<sup>53</sup> J Bhabha and M Zard, pp. 6–7.

<sup>54</sup> *Ibid.*

<sup>55</sup> J Freedman, *Gendering the International Asylum and Refugee Debate*, p. 117.

<sup>56</sup> *Ibid.*, p. 134.

<sup>57</sup> M B Erdal and C Oeppen, p. 13.

Thus, the notion of vulnerability is key to the construction of the deserving victim, especially in relation to asylum seekers who are assumed to be victims of trafficking. The shortcomings in the practices and procedures assessing the reception and protection needs of Nigerian asylum seekers can be traced back—at least partially—to stereotypes derived from an inadequate understanding of vulnerability. In particular, the interpretation of vulnerability as in opposition to and incompatible with the human capacity for agency and resilience, or as an essential characteristic of specific individuals and groups, has to be put under scrutiny. In the final section of the paper, I criticise this view, putting forward an alternative interpretation.

## Rethinking Vulnerability and Agency

While, as noted earlier, vulnerability lacks an unequivocal definition in law, it is increasingly the focus of academic debate. As part of the so-called ‘vulnerability turn’,<sup>58</sup> which has entailed increased use of the terms ‘vulnerability’ and ‘vulnerable groups’ in both EU policies and the case law of the European Court of Human Rights, a distinction has been drawn between the perspective of legal and political philosophy, on the one hand, and the sphere of political debate and applied legal scholarship, on the other.<sup>59</sup> Whereas applied ‘legal scholarship aims to normatively identify the class (or classes) of individuals who are particularly vulnerable and therefore in need of care and protection’, philosophical reflection ‘tends to deconstruct the very category of “vulnerable subjects”, uncovering the specific mechanisms of domination and power concealed beneath it’.<sup>60</sup> A crucial contribution to this deconstruction has been made by feminist philosophers.

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<sup>58</sup> D Morondo Taramundi, ‘¿Un Nuevo Paradigma para la Igualdad? La vulnerabilidad entre condición humana y situación de indefensión’, *Cuadernos Electrónicos de Filosofía del Derecho*, no. 34, 2016, pp. 205–221.

<sup>59</sup> O Giolo, ‘Conclusions: Vulnerability and strength: A timeworn pairing in need of reconsideration’, *Gênero & Direito. Periódico do Núcleo de Estudos e Pesquisas sobre Gênero e Direito Centro de Ciências Jurídicas - Universidade Federal da Paraíba*, vol. 5, no. 3, 2016, pp. 221–230.

<sup>60</sup> *Ibid.*, p. 223.

Various studies<sup>61</sup> have approached this issue by critiquing the theoretical and political fiction of a sovereign subject (male, white, heterosexual and able-bodied) who stands in contrast with a dependent and vulnerable subject that is in need of care.<sup>62</sup> Within the modern Western tradition, rational subjects have imagined themselves to be free and independent, denying their intrinsic vulnerability only to project it onto someone or something else, outside of and beneath the sphere of the human: ‘women, children, the insane, the poor, prisoners, the colonized, slaves, homosexuals, the disabled, the elderly, etc’.<sup>63</sup> In opposition to this view, philosophers like Adriana Cavarero<sup>64</sup> and Judith Butler<sup>65</sup> have reinterpreted vulnerability as an intrinsic quality of human beings, who due to their constitutive bodily fragility are radically exposed, from birth to death, to the possibility of injury (*vulnus*).

Recognising vulnerability as intrinsic to the human condition debunks any notion of a mutually exclusive opposition between vulnerability and agency. Martha Nussbaum, in *Upheavals of Thought*, argues that the status of victim, which reflects our human vulnerability to disgrace, and the status of agent, which is attributed with dignity, are presented in the form of a rigid binary; yet, it is crucial to recognise that ‘agency and victimhood are not incompatible’.<sup>66</sup>

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<sup>61</sup> See, in particular: A Cavarero, *Horrorism: Naming contemporary violence*, Columbia University Press, New York, 2008; A Cavarero, *Inclinations: A critique of rectitude*, Stanford University Press, Stanford, 2016; J Butler, *Precarious Life: The powers of mourning and violence*, Verso, New York, 2004; J Butler, *Frames of War: When is life grievable?*, Verso, New York, 2009; J Butler, *Notes for a Performative Theory of Assembly*, Harvard University Press, Cambridge, 2015; J Butler, ‘Rethinking Vulnerability and Resistance’ in J Butler, Z Gambetti and L Sabsay (eds.), *Vulnerability in Resistance*, Duke University Press, Durham and London, 2016, pp. 12–27; M Fineman, ‘The Vulnerable Subject: Anchoring equality in the human condition’, *Yale Journal of Law & Feminism*, vol. 20, no. 1, 2008, pp. 1–23; M Fineman, *The Vulnerable Subject and the Responsive State*, Emory University School of Law, Public Law & Legal Research Paper Series, 2010.

<sup>62</sup> B Casalini, ‘Politics, Justice and the Vulnerable Subject: The contribution of feminist thought’, *Gênero & Direito. Periódico do Núcleo de Estudos e Pesquisas sobre Gênero e Direito Centro de Ciências Jurídicas - Universidade Federal da Paraíba*, vol. 5, no. 3, 2016, pp. 15–29.

<sup>63</sup> L Re, ‘Introduction: The vulnerability challenge’, *Gênero & Direito. Periódico do Núcleo de Estudos e Pesquisas sobre Gênero e Direito Centro de Ciências Jurídicas - Universidade Federal da Paraíba*, vol. 5, no. 3, 2016, p. 3.

<sup>64</sup> A Cavarero, *Horrorism, Inclinations*.

<sup>65</sup> See, in particular: J Butler, *Precarious Life* and *Frames of War*.

<sup>66</sup> M Nussbaum, *Upheavals of Thought: The intelligence of emotions*, Cambridge University Press, Cambridge, 2001, p. 406.

Making a similar point, Judith Butler condemns the tendency to transform recognition of vulnerability into a form of paternalism that locks groups identified as ‘vulnerable’ into a political position of impotence and lack of agency; for the two constructs are not mutually exclusive, but rather interdependent.<sup>67</sup>

In Butler’s theorising, this perspective on vulnerability has been further refined to include the distinction between an ontological dimension and a social, economic and political one:<sup>68</sup> ‘As much as “vulnerability” can be affirmed as an existential condition, since we are all subject to accidents, illness, and attacks that can expunge our lives quite quickly, it is also a socially induced condition, which accounts for the disproportionate exposure to suffering, especially among those broadly called the precariat for whom shelter, food, and medical care is often quite drastically limited.’<sup>69</sup>

In line with this reading of a differential experience of vulnerability is Martha Fineman’s emphasis on the responsibility of the state in relation to the production of conditions of vulnerability, and on the need for resources to address and mitigate such conditions: ‘The counterpoint to vulnerability is *not* invulnerability, for that is impossible to achieve, but rather the *resilience* that comes from having some means with which to address and confront misfortune.’<sup>70</sup> Like Butler, Fineman also draws attention to the dual nature of vulnerability as both a constant of the human condition and as an effect of social, economic and institutional relationships.<sup>71</sup> This leads her to distinguish *vulnerability as a universal feature* from *vulnerability as the particular experience of individuals* who are positioned differently in social, economic and institutional relationships and whose position greatly influences the quality and quantity of resources they possess or can command. An intersectional approach is required, Fineman argues, to explore the ‘systems of power and privilege that interact to produce webs of advantages and disadvantages’.<sup>72</sup>

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<sup>67</sup> J Butler, *Notes for a Performative Theory of Assembly*; ‘Rethinking Vulnerability and Resistance’.

<sup>68</sup> *Ibid.*

<sup>69</sup> J Butler, ‘Rethinking Vulnerability and Resistance’, p. 25.

<sup>70</sup> M Fineman, *The Vulnerable Subject and the Responsive State*, pp. 31–32.

<sup>71</sup> *Ibid.* pp. 28–30.

<sup>72</sup> M Fineman, ‘The Vulnerable Subject: Anchoring equality in the human condition’, p. 16.



Returning to the protection of Nigerian women asylum seekers in Italy who are identified as potential victims of trafficking, the above reflections on vulnerability allow us to advance a critique of how the notion is used within the Italian asylum system and its interaction with the anti-trafficking framework, and to propose an interpretation that is more sensitive to the complexity of people's experiences.

Raising awareness of vulnerability as a universal condition, one that all human beings share, will help us to go beyond dualistic approaches that position vulnerability and agency along the lines of gender, race, geographical origin, age, ability, etc. Further, concurrently exploring vulnerability as a peculiar experience of groups and individuals will provide us with insight into the factors exacerbating it. These not only include situations of armed conflict, political instability, humanitarian emergencies, and environmental crises, but also structural inequalities reflected in access to resources, discrimination, or domestic violence. Gender power structures, for instance, make migrant women vulnerable not only in their regions of origin, but also in the host country.<sup>73</sup>

Recognising vulnerability as both a constant in human beings and an effect of social, economic and institutional relationships brings to light the role played by a multiplicity of actors, going beyond those responsible for deviant activities such as smuggling and trafficking. Indeed, scrutiny of the processes of vulnerability production underpinned by the unequal distribution of privilege exposes vulnerability as a systemic feature of our social order, and points to the role played by states and supranational institutions. For example, national and European border control policies, by minimising opportunities for legal access, generate demand for the facilitation of irregular border crossings and make migration routes more dangerous. Ultimately, therefore, restrictive border control policies contribute to the increasingly violent actions of smugglers and to conducive conditions for human trafficking.<sup>74</sup>

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<sup>73</sup> J Freedman, *Gendering the International Asylum and Refugee Debate*; J Freedman, 'Engendering Security at the Borders of Europe: Women migrants and the Mediterranean "crisis"', *Journal of Refugee Studies*, vol. 29, issue 4, 2016, pp. 568–582; G Serughetti, 'Richiedenti Asilo e Vittime di Tratta. Le donne fra vulnerabilità e resilienza' in C Marchetti and B Pinelli, *Confini d'Europa. Modelli di controllo e inclusioni informali*, Cortina, Milano, 2017, pp. 63–93.

<sup>74</sup> N Abdel Aziz, P Monzini, and F Pastore; L Achilli and G Sanchez, 'Introducing the Human Smugglers Roundtable', *Open Democracy*, 26 March 2016, retrieved 31 January 2018, <https://www.opendemocracy.net/beyondslavery/hsr/luigi-achilli-gabriella-sanchez/introducing-human-smugglers-roundtable>.

The responsibility of state institutions and other humanitarian actors for producing migrants' vulnerability is not limited to the systems put in place to manage arrivals, but extends to the overall governance of migration, including the policies and practices for the identification and reception of newcomers illustrated above, with their structural weaknesses, disciplinary aims, labelling practices, and outcomes of social abandonment.<sup>75</sup>

In addition, greater attention to the particular vulnerability to which some individuals may be exposed, as suggested by Judith Butler and Martha Fineman, will help us to transcend an approach based on the identification of a single cause of fragility for an entire group of individuals—such as sex, pregnancy, dependent children, age, disability, or an experience of torture, sexual violence, or human trafficking. This more differentiated framework will make us more sensitive to the intersection of different factors of disadvantage. As a result, it becomes possible to extend the notion of 'particular vulnerability' to include the situations of people who do not fall within the categories defined as vulnerable in legislative and bureaucratic guidelines, and who risk being represented as invulnerable.

Finally, the philosophical discussion illustrated above, by challenging the association of human vulnerability with characteristics of passivity and impotence, suggests that we view the capacity for resistance or resilience as a possible expression of a vulnerable condition rather than as its denial. This means deconstructing the rigid dichotomies that shape labels such as *victim of trafficking* or *vulnerable person*, which tend to link, on the one hand, deservingness of protection with the lack of individual agency, and on the other hand, the capacity for resistance and resilience with invulnerability. Individual and collective resistance to unjust and violent regimes can be understood as informed by vulnerability, where the latter is conceived as 'a constituent feature of a human animal both affected and acting', that can be marshalled and mobilised for the purpose of asserting one's existence or claiming one's own rights.<sup>76</sup> Resilience, on the other hand, is nothing more than the human ability to cope with vulnerability as a universal condition.<sup>77</sup> While this capacity does not imply the eradication of vulnerability, it requires resources with which individuals are unequally equipped. It is therefore the responsibility of societal

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<sup>75</sup> I Peano; E M-O Baye and S Heumann.

<sup>76</sup> J Butler, 'Rethinking Vulnerability and Resistance', p. 26.

<sup>77</sup> M Fineman, 'The Vulnerable Subject: Anchoring equality in the human condition'; *The Vulnerable Subject and the Responsive State*.

institutions and organisations to provide the means necessary for resilience to be strengthened, in order to lessen, ameliorate and compensate the condition of vulnerability.<sup>78</sup>

## Conclusion

This paper has drawn on the literature examining human trafficking and asylum from a gendered perspective to scrutinise labelling practices and procedures that are intended to separate migrants into discrete categories. It has illustrated how these attempts to separate fail to acknowledge the specific protection needs of individuals because they are insufficient to the task of capturing increasingly overlapping phenomena that are generating progressively complex migrant identities.

In particular, the case of Nigerian women migrating to Italy, many of whom are registered as job-seeking migrants, but concurrently identified by the IOM as potential victims of trafficking, clearly illustrates the fallacy of the voluntary/involuntary dichotomy and reveals the preconceptions underlying the recognition of some migrants as deserving of protection and others as undeserving.

I have argued that at the core of the *deserving victim* label is an understanding of vulnerability as an invariable characteristic of individuals and their environments, which constrains or erases their ability to make meaningful choices and act as autonomous agents. This understanding has been challenged by feminist philosophers such as Cavarero, Nussbaum, Butler, and Fineman, who have questioned stereotypical representations of vulnerable subjects and vulnerable groups, suggesting that vulnerability is both a constant in human beings and a condition experienced differentially, based on people's position within a web of social, economic, and institutional relationships. Further, they claim that this condition cannot be separated from the human capability for agency, which is to be conceived, likewise, as both universal and particular.

Based on the work of these scholars, I have highlighted the role played by migrant-receiving states in producing migrant women's vulnerability. I have argued that it is the duty of state institutions to guarantee protection, both by alleviating vulnerability and supporting resilience, and recognising the ability

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<sup>78</sup> *Ibid.*

of migrants to determine their own lives. State and humanitarian actors fail to fulfil their duty of protection not only when they base their legislation, policies, and practices on misconstrued concepts of vulnerability and employ rigid and stereotypical labels, but also when they fail to acknowledge agency and respect people's, and especially women's, choices.

Instead of objectifying asylum seekers and victims of trafficking, I have contended that we need to attend to the lived experiences of women who, because of the harmful actions of a multiplicity of institutional and non-institutional actors, have been forced to undertake dangerous journeys and have often suffered various forms of violations of their rights. This means rejecting both the transformation of women into passive recipients of humanitarian action, and the criminalisation and expulsion of those with non-conforming identities.

More broadly, such a perspective requires us to recognise that being exposed to violence and risks of exploitation can determine a particular state of vulnerability in any subject that is beyond classifications based on the smuggling/trafficking, economic/forced, or voluntary/involuntary binaries. This conceptual evolution may prompt us to shift our focus from analysing migrants' reasons for departure towards assessing their protection needs upon arrival, demanding more responsibility of migrant-receiving states.

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