

The relevance of gender for the international protection of female victims of trafficking

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The two systems for the protection of victims of trafficking envisaged by Italian legislation, namely the social protection system as per Article 18 of the Consolidated Law on Immigration and the international protection system, are based and developed on different assumptions. The social protection system, pioneered in Italy since 1998, seeks to protect victims from criminal exploitation networks operating in Italy; the international protection system covers protection from forms of persecution, serious harm or other discrimination that would arise in the event of repatriation. Both systems provide a residence permit valid in Italy but with very different outcomes as regards the stability of stay, which is directly proportional to the graduated forms of protection of refugee status recognized by the 1951 Geneva Convention and the other complementary protection envisaged by European and Italian legislation. Without question, the specific characteristics that trafficking has assumed in recent years - with the prevalence of irregular entry channels along the same routes as migrants and asylum seekers, as well as the risk of *re-trafficking* in the event of repatriation and exploitation that may arise at any time during the journey or the stay in Italy - require an integrated protection system that does not overlook any of these aspects. Nevertheless, as Zorzella clearly points out in the report section of this focus document, even the preliminary collaboration required of any victim of trafficking should focus on partially different elements which, in practice, are actually overlapped. These brief notes focus, in particular, on the evaluation of gender and trafficking as a form of gender-based violence in relation to the context lived by women in the country of origin they have left behind them.

The demand for recognition of gender in international protection is rooted in decades of battles carried forward by women's rights movements with the support of lawyers and activists. The importance of this is not only of a cultural nature: it is also symptomatic of a legal context which, despite the changes to the regulatory framework over the years, still struggles to acknowledge the importance that gender must be given as regards both the evaluation of facts and the interpretation of rules. An example of such an attitude is the reduction of gender-based violence to the level of private spheres; this is by no means uncommon in rulings in this regard, despite being in open contrast with the consolidated interpretation of the jurisprudence of legitimacy and regulatory fact.

The steps that brought about the recognition of persecution and gender-based violence in the legislative framework deserve to be briefly reviewed. The first reference is unquestionably the

2002 UNHCR Guidelines on Gender Persecution in the context of Article 1 of the Convention on Refugee Status¹, approved more than 50 years after the Convention. Although it is a *soft law* tool, the 2002 Guidelines are nevertheless a cornerstone in this context, as regards both the definition of gender as a relationship based on socially constructed identities and roles, and consequently an aspect that does not arise from a purely biological attribution, and the explicit reference to women who, in certain contexts, may be considered to be a special social group under the terms of the Convention itself. Both these aspects mean that the 2002 guidelines are a vital point of reference for the topic in hand, albeit as integrated by aspects specific to trafficking in 2006², which must be considered as complementary to them. The UNHCR Guidelines dated 2002 and 2006, adopted on an international scale, should not be confused with the Guidelines on *Identification of victims of trafficking among applicants for international protection and referral procedures*³ adopted in the Italian system and addressed specifically to Territorial Commissions. In relation to European legislation, Directive 95/211/EU, which amended the previous Qualification Directive, should be considered as the first instrument of *hard law* which explicitly integrates gender-based violence into the international protection system, especially with regard to refugee status. The pertinent aspects, ratified in Italy through Legislative Decree no. 18 dated 2014 which amended Legislative Decree no. 251 dated 2007, concern both the protection by the refugee's State of origin, which must be "effective and not temporary" (Article 6, item 2 of Legislative Decree 251/2007), and include the lack of protection by the State against persecutory acts (Article 8, item 1 Legislative Decree 251/2007) and the indication of the social group, the determination of which "should take gender considerations, including gender identity, into account" (Article 8, item 1, letter d) of Legislative Decree 251/2007). Beforehand, Article 7 of the legislative decree ratifying the Qualifications Directive also included among persecutory acts, in

¹ UNHCR, *International Protection Guidelines No. 1. Gender-based persecution in the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol on the Status of Refugees*, 7 May 2002, HCR/GIP/02/01; available at <https://www.refworld.org/cgi-bin/txis/vtx/rwmain/opensslpdf.pdf?reldoc=y&docid=5513ca474>.

² UNHCR, *International Protection Guidelines No. 7. The application of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol on the Status of Refugees to victims of trafficking or persons at risk of trafficking*, HCR/GIP/06/07 dated 7 April 2006; available at https://www.unhcr.org/it/wp-content/uploads/sites/97/2020/07/linee_guida_protezione_int.pdf.

³ These guidelines were adopted as of 2016 and subsequently amended in 2020; they refer in particular to the *referral procedure*, UNHCR, *Identification of victims of trafficking among applicants requesting international protection and referral procedures. Guidelines for Territorial Commissions for the recognition of international protection* (2020), available at https://www.unhcr.org/it/wp-content/uploads/sites/97/2021/01/Linee-Guida-per-le-Commissioni-Territoriali_identificazione-vittime-di-tratta.pdf. For critical analysis of the subject, refer to Zorzella, in this focus document.

addition to sexual violence, disproportionate or discriminatory criminal sanctions, refusal of access to means of legal protection and acts specifically directed against a gender.

Lastly, the 2011 Istanbul Convention, in defining a binding standard at all decision-making levels, explicitly requires that gender-based violence be included in evaluations of all forms of protection, with the provision, in Article 60, whereby “The parties adopt the legislative or other measures necessary to ensure that gender-based violence against women can be recognized as a form of persecution pursuant to Article 1 A (2)... and as a form of serious harm that gives rise to complementary/subsidiary protection.”

The literature dealing with this topic has not failed to highlight that the decision by the Qualification Directive not to mention women explicitly as a social group, unlike the case for sexual orientation, is a missed opportunity⁴, even if the more generic reference to gender considerations, as well as gender identity, allows similar results to be achieved from an interpretative point of view. Once again, the observation is not merely a doctrinal exercise since gender-based violence can affect women *as women* or *because they are women*⁵, that is, because they belong to a given social group. In the first case, consideration is given above all to the specific nature of the persecutory acts, such as sexual violence, that are directed mostly (albeit not exclusively) against the female gender. In the second case, women are considered as a social group within the meaning of the persecutory cases detailed by the Convention, although the interpretative approaches consolidated in Italy seem to be less rigid than the proof of the causal link than in other systems such as, for example, in US courts. The 2002 Guidelines dedicated to the "given social group" clarify this point by specifying that the risk of persecution by a non-State entity may be associated with the inability or unwillingness of the State to provide protection attributable to one of the reasons indicated by the Convention⁶.

Without any question of doubt, trafficking combines aspects of perpetuating violence against women *as women*, since sexual exploitation takes the form of inhuman and degrading treatment

⁴ A. Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy*, in *Refugee Survey Quarterly*, 29, 2010, pages 21-45.

⁵ In relation to this distinction, developed above all in the English-speaking debate, see A. Binder, *Gender and the membership in particular social group category of the 1951 refugee convention*, in *Columbia Journal of Gender and Law*, 10(2), 2001, pages 167-194.

⁶ Under the UNHCR guidelines, the causal link is met: (1) when there is a genuine risk of persecution by a non-state entity for reasons associated with one of those listed in the Convention, regardless of whether the failure of the State to protect the applicant is related to the Convention itself; or (2) when the risk of persecution by a non-state entity is not related to one of the reasons listed in the Convention but the inability or unwillingness of the State to provide protection can be attributed to one of the reasons indicated by the Convention. UNHCR, *International Protection Guidelines No. 2, "Membership of a specific social group"*; available at <https://www.unhcr.org/it/risorse/documenti-e-pubblicazioni/posizioni-unhcr-linee-guida/>.

that often includes sexual violence, physical coercion and rape, and *because they are women*, in that in being objects of subjection their bodies are used for sexual ends (both women and, albeit less frequently, men) qualified as such not only biologically but also socially and culturally. It is this second perspective that - as Zorzella points out - escapes evaluation when administrative and judicial decisions alike focus excessively or exclusively on the material elements of trafficking, presuming the preliminary collaboration of the victim in this context, and lose sight of the circumstances giving rise to them and therefore gender as the "*reason*" for persecution or discrimination. As already pointed out, under the 2002 guidelines, gender "refers to the relationship between men and women based on socially or culturally constructed and defined identities, status, roles and responsibilities" and, in this regard, is not a static concept but rather "acquires meanings constructed socially and culturally over time."⁷

The condition of women in Nigeria, as described in specific sections of this focus document, is a good example of this social and cultural construction of gender, the consequences of which can be further discussed in the light of evidence collected during targeted fieldwork conducted within the scope of the Sciabaca & Oruka project in February 2020. If, for example, we look at the risk of being trafficked (again) following repatriation, this is not only associated with revenge by criminal networks (an aspect on which requests for collaboration on the part of victims often focus) but also with the role of social alienation that women experience following the failure of their migratory project, which is often even worse than the context they originally left. As highlighted during fieldwork involving many interviews by representatives of NGOs operating in Nigeria, the stigma associated with prostitution is amplified by a social perception that assigns the success of the migration project an indication of personal merit, if not of divine benevolence, and, conversely, interprets its failure as proof of the demerit that took such women out of the "grace of the Lord."

Many testimonies recounted by repatriated women highlighted how, on returning home, rejection by their families of origin is linked to the fact that they no longer make contributions to the income managed by the head of the family, and indeed become a unproductive burden. Such evidence is confirmed in many research projects that highlight how families of origin themselves urge women to leave, even in the awareness of the sexual exploitation they may have to face, as

⁷ UNHCR, *International Protection Guidelines No. 1. Gender persecution*, cit., p. 3. A definition of gender is also contained in the Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011. Article 3, letter C, states: "Gender refers to socially constructed roles, conduct, activities and attributes that a given society considers appropriate for women and men."

well as the fundamental contribution that remittances linked with sexual exploitation provide for the survival of certain segments of the population⁸. These aspects become particularly important in certain circumstances, such as the loss of parents or husbands, which expose women even more to a socio-cultural concept that considers them as the "property" of their husband's family or the extended family of origin (see the report by Odi Lagi). The very practice of forced marriages which widows and orphans are often obliged to accept, rather than a context of traditional customs, can be interpreted in the light of an economic and social context wherein women who occupy a marginal position in society can only emerge through the protection of fathers or husbands or by making themselves "productive" through sexual exploitation.

It is not uncommon that the stories women tell to territorial commissions or in court highlight such contextual factors, even before the characteristic aspects of trafficking, pushing them to leave the country and which should actually be evaluated as characteristic of socially widespread violence based on gender; the latter aspect should not be seen in purely biological terms but as a social and cultural construct which, in certain social bands, assigns women to roles of subordination, psychological, economic and at time even physical constraint. The outcomes to which the foregoing considerations bring us - that is, whereby in certain circumstances women are to be considered exposed to the risk of trafficking *because they are* women, given the social role assigned to them by gender, and not simply *as women*, and therefore subject to persecutory acts directed mainly against the female gender - are by no means insignificant. If we look, for example, at the risk of falling victim to trafficking as a consequence of repatriation, this not only concerns women who have already suffered from trafficking but also those who, repatriated after a migration project implemented at least in part independently even if it failed, find themselves at home again in conditions of extreme social and family alienation.

The critical aspects highlighted by Zorzella as regards assessment of the credibility of asylum seekers, which cannot stop at the consistency of the story pertaining to the material elements of trafficking, is also reflected in the contrasting rulings of the Court of Appeal. Some recent decisions have in fact reiterated, even as regards episodes of trafficking, that it is not subjective credibility that must be considered but the story itself, "understood by taking into account the objective context existing in the country of origin or transit where the violence reported by the applicant was perpetrated" (most recently, Civil Court of Appeal. Section I, 2464/2021); In this the context,

⁸ A. Ohonba, K. Agbontaen-Eghafona, *Transnational Remittances from Human Trafficking and the Changing Socio-Economic Status of Women in Benin City, Edo State, Nigeria*, in *Women's Studies*, 48:5, 2019, pages 531-549.

economic difficulties and the denial of protection by local authorities are circumstances in line with stories told by asylum seekers who are potential victims of trafficking. Citing previous jurisprudence, the sentence then states that, in accordance with these principles, the judge "is required to verify the condition of persecution of opinions, customs and practices on the basis of external and objective information pertaining to the actual situation in the country of origin, while only specific traceability *fumus persecutionis* to the applicant of may also be based on personal evaluations such as the credibility of the statements of the interested party." The ordinance of the Civil Court of Appeal, section II 1750/2021 gave rise to heated debate in 2021 over the statement that "where the story deduced from the asylum seeker objectively seems to suggest, on the basis of the indicators identified in the UNHCR Guidelines, that there is a significant and actual risk, in the event of forced repatriation, of exposure to sexual or labour exploitation within the human trafficking circuit, such that there is every likelihood of the existence of conditions for reporting crimes pursuant to Articles 600 and 601 of the Italian Penal Code and reporting as per Article 32, paragraph 3 bis of Italian Legislative Decree 25/2008, there exists a condition of personal vulnerability that may justify recognition of humanitarian protection even if this condition is not explicitly recognized by the applicant." If this sentence is, on the one hand, to be welcomed because it explicitly excludes that non-recognition or non-admission of the condition of victim of trafficking by asylum seekers jeopardizes their right to protection, on the other hand, it only apparently seems to limit them to humanitarian protection, by now replaced by protection for special cases. If this were the case, the contradiction would in fact be evident in that the risk, if the woman were repatriated, that she might be subject to serious gender-based violence such as trafficking should ensure the recognition of refugee status, falling entirely within one of the cases of persecution envisaged by the Convention. Since this is a judgement of legitimacy, it is not possible to obtain more details about the facts subject to the evaluation of merit nor the *claim* of the appeal. The judgement issued by the Court of Appeal in Bari, impugned in the proceedings, makes it possible to deduce that the party had limited its claim before the court to recognition of humanitarian protection and subsidiary protection as per Article 14, letter c) of Italian Legislative Decree 251/2007, i.e. for "serious and individual threat to the life or person of a civilian arising from indiscriminate violence in situations of internal or international armed conflict." The mere mention of humanitarian protection by the Court of Appeal may therefore be interpreted in the light of the *judicial procedure* applied in the specific case, while it would be wrong to grant it broader application.

It is also worth highlighting that, given the cogency of the Istanbul Convention, gender-based violence must also be taken into consideration in subsidiary and complementary protection, and included in the overall picture governing all forms of protection. In other words, where there is no specific traceability to the applicant of *fumus persecutionis* for recognition of refugee status, the gender-based violence that prompted the woman to leave the country, and which would expose her to serious harm in the event of repatriation, may well integrate the risk of harm arising from inhuman and degrading treatment that entitles her to subsidiary protection pursuant to Article 14, letter b) of Italian Legislative Decree 251/2007. A number of judgements in this sphere by the Court of Rome take this direction whereby, in contexts where gender violence is endemic and widespread, subsidiary protection has been recognized under Article 14, Letter b) of Italian Legislative Decree 251/2007, even though an orientation has prevailed over time which, in the presence of objective and subjective aspects compatible with trafficking, has correctly settled on the recognition of refugee status. On the other hand, it would be wrong to deduce from the declarations of the Court of Appeal that the lack of recognition on the part of petitioners of their condition as victims of trafficking means that the causal link leading *fumus persecutionis* back to one of the typified cases in hand of the 1951 Convention is not fulfilled. If persecution based on membership of a social group is correctly connected to the fact that women may, in certain circumstances, be persecuted simply *because* they are women, and therefore exposed to the risk of trafficking not only because they were previously forced into such circumstances by criminal networks against which the State offers no appropriate protection, personal *fumus persecutionis* will also be assessed on the basis of gender which must be interpreted in the light of the information discussed extensively so far.

Far from being able to trace them back to traditional practices, which are often accompanied by exotic perceptions, persecution and violence based on membership of a gender group must therefore be considered in the current context in which the very notion of gender is given a social and cultural meaning that changes over time. The report on the condition of women in Nigeria included in this focus document clearly highlights the historical link between colonialism and the forms and diffusion of sexual exploitation and prostitution seen in the country. In an article published in the 1990s analysing the phenomenon from an historical perspective, Benedict B. B. Naanen used the metaphor of "itinerant gold mines"⁹ to describe women exploited in the

⁹ B.B. Naanen, "Itinerant Gold Mines": Prostitution in the Cross River Basin of Nigeria, 1930-1950, in *African Studies Review*, Vol. 34, No. 2, 1991, pages 57-79.

prostitution business. In the author's intentions, this metaphor not only highlights the profitability of this sector but also the ways in which women are valued: as in the mining sphere, the sex industry requires a very low investment compared to potential earnings, it does not require infrastructures whose benefits also assist the local area, nor investments to train and qualify the workforce. In other words, it applies the same logic as colonial exploitation. The metaphor also perfectly describes the forms that trafficking has taken in recent years by exploiting, as already mentioned, the so-called mixed flow routes. In fact, it is rather difficult to identify a single criminal network which invests, from finding documents to transport, in organizing travel by women to Europe and thence into prostitution. This *business* rather focuses on the conditions that push women to leave that also expose them to blackmail during the various stages of the journey, the sexual exploitation that takes place even before they arrive in Europe, as in the "connection houses" in Libya where women are forced to prostitute themselves to "buy" their freedom for the next leg of the journey, and the large numbers that offset deaths at borders and losses through repatriation. In short, it is precisely the plea for freedom from patriarchal violence that is endemic to the social conditions that generate and perpetuate the trafficking system itself. Searching within this system for the risk of *re-trafficking* associated solely with personal subjection to the exploiter, crushing the assessment of women's credibility on this point over protection decisions, conditioning protection to the self-representation of asylum seekers as victims or participation in a legalization program, are far from a correct interpretation of the regulatory framework and, rather, are the legacy of a moralizing attitude that risks instrumentally bending the international protection system for purposes of criminal policy that should be no part of it. Not to mention the re-victimization process which prompts distorted claims for collaboration on the part of the victim which not infrequently themselves resemble coercion.