

# Women victims of trafficking: Forced criminality and the criminal justice system's failure to recognize agency, victimization, and exploitation

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## Abstract

This article explores how the criminal justice system misrecognizes women victims of trafficking who are forced into criminal activities. Drawing on feminist criminological theory and international legal instruments, this critique challenges the binary opposition between “victim” and “offender,” advocating instead for an intersectional and gender-sensitive approach. The principle of non-punishment, as codified in EU Directive 2011/36 and the Palermo Protocol, is examined in light of recent Italian jurisprudence. Case analysis and feminist advocacy highlight the systemic failure to acknowledge constrained agency and the continuum of coercion. The article argues for a structural transformation of criminal justice frameworks, proposing feminist-informed legal interpretations that prioritize the voices of survivors and social justice over penal logics.

**Keywords:** trafficking in human beings, non-punishment principle, feminist criminology, forced criminality, gender-based violence.

## The gendered landscape of human trafficking in Italy

Italy remains both a destination and transit country for victims of human trafficking to other European countries. According to data collected by the National Observatory on Anti-Trafficking Interventions (SIRIT database - Integrated System for the Collection of Information on Trafficking)

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and the national helpline, the number of trafficking victims increased during 2018-2019, followed by a decline in identification during the COVID-19 pandemic: 3,555 in 2018, 3,799 in 2019, 2,166 in 2020, 2,392 in 2021, and 2,422 in 2022 (GRETA, 2024; UN General Assembly, 2020). Sexual exploitation remains the predominant form of abuse experienced by identified victims (84% in 2018, declining to 59% in 2022), followed by labor exploitation (10% in 2018, increasing to 38% in 2022). In 2022, approximately 66.7% of victims assisted in Italy were women. However, the number of men exposed to trafficking, especially for labor exploitation, and of transgender individuals is also on the rise. In the European Union, 62.8% of registered victims of human trafficking are women or girls (EUROSTAT, 2024).

An increasing number of victims were identified during the asylum procedure (GRETA, 2024).

Forced begging, domestic servitude, forced marriage, and forced criminality each account for 1-2% of cases.

As documented by civil society organizations, trafficking in women and girls is deeply rooted in structural gender- and sex-based discrimination and the feminization of poverty (Differenza Donna, 2023; GRETA, 2024; CEDAW, 2020).

Moreover, the increasing regulatory barriers to international mobility – effectively restricting the movement of large segments of the population, especially from certain geographical regions (e.g., from Sub-Saharan Africa to Europe) – expose even women and girls with relatively more significant economic resources or social status to recruitment and transfer by criminal organizations. Despite their comparative advantage, these women often find themselves, like their more vulnerable counterparts, with no other viable option for migration but to rely on informal and exploitative channels, particularly for sexual and labor exploitation.

Trafficking thus emerges as a cross-cutting phenomenon that thrives on the unequal global distribution of resources and on the discriminatory policies embedded in international, European, and national frameworks regulating human mobility.

As Rigo (2016) has shown in her analysis of women's migration across the Mediterranean, contemporary border regimes do not merely regulate movement but actively produce gendered vulnerability, exposing migrant women to violence, exploitation, and criminalization. From this perspective, trafficking cannot be understood in isolation from the legal and political architectures that restrict mobility and render certain migratory paths illegal, unsafe, and dependent on exploitative intermediaries (UNODC, 2018; 2022; CEDAW, 2020).

Gender stereotypes, discriminatory laws, exploitative conditions, the lack of access to decent work, and the absence of reliable and accurate information about opportunities and risks in transit and destination countries further constrain women's ability to migrate.

Given the quantitative and qualitative features of international human trafficking, particularly shaped by unequal power relations between the sexes and gender-based discrimination, the

European Union has acknowledged, since Directive 2011/36/EU, the gender-specific nature of the phenomenon.

The Directive recognizes that trafficking in men and trafficking in women often serve different purposes. For this reason, assistance and support measures must integrate gender-specific responses where appropriate. The factors that push individuals to leave their country of origin (“push factors”) and those that attract them to destination countries (“pull factors”) vary depending on the sectors involved, such as the sexual or labor exploitation, agriculture, or domestic servitude (§3) and recently also forced criminality.

As emphasized by the CEDAW Committee, which monitors the implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979):

*Women and girls continue to be the primary targets of criminal organizations for specific forms of exploitation, due to pervasive and persistent inequalities based on gender and age that result in lower economic, social, and legal status compared to that of men and boys (CEDAW, 2020, p. 21).*

According to CEDAW, violations of all rights enshrined in the Convention may constitute root causes of trafficking and must be addressed through a transformative approach that empowers women and girls by promoting gender equality and their civil, political, economic, social, and cultural rights, in line with Sustainable Development Goals 1, 3, 4-5, 8, 10-11, 13, and 16 (UN Women et al., 2020).

The gender perspective, recommended by Directive 2011/36/EU (Recital 25) and now reaffirmed in Article 18 of the new EU Anti-Trafficking Directive adopted on 23 April 2024, No. 1712, along with a feminist and intersectional approach – that is, one that considers the interlocking nature of multiple forms of discrimination (Palumbo, 2023) – is essential for understanding the evolving dynamics of trafficking.

It is also crucial for designing effective policy interventions, protection measures, and operational best practices that reflect the concrete needs of trafficked women and girls, allowing for highly individualized responses. Failing to do so risks producing policy frameworks that oscillate between protection and renewed forms of surveillance and exclusion (Spanger, 2011).

The Italian National Anti-Trafficking Action Plan adopted in 2016 explicitly endorsed the integration of a gender perspective, recognizing that such an approach “enables the design, implementation, monitoring, and evaluation of interventions that take into account gender inequalities and integrate gender specificity where appropriate”.

With the adoption of the new 2022 National Action Plan against trafficking in human beings, the importance of gender-specific methodologies and the need to structure interventions around the needs of survivors were reaffirmed.

This also entails the need for a feminist reading of trafficking, one that identifies structural inequalities and sexist stereotypes, and centers the lived experiences of women and girls to transform legal institutions and practices in line with their concrete needs and rights (Duong, 2019).

Such an approach aligns with the broader obligations set forth by the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), which encourages the creation of a multilayered protection system against all forms of gender-based violence, including violence suffered in the country of origin, during migration, or because of resistance to exploitation in the destination country.

As noted by Clemente (2022), contemporary feminism has transformative potential in counter-trafficking work, particularly when it centers the structural roots of women's marginalization, including systemic gender-based violence and economic inequality. Similarly, Pourmokhtari (2015) and Bernstein (2018) critique criminal and market-based responses, arguing instead for a feminist rights-based approach that prioritizes survivor agency and justice.

In Italy, civil society organizations with a feminist orientation play a key role in sustaining the gender perspective on severe violations of human rights of women within a criminal phenomenon. They document the complexity of trafficking dynamics, activate protection and support mechanisms—many of which they have helped to create—and consistently expose the systemic barriers faced by trafficked women and girls in accessing institutional responses, both in countries of transit and destination.

Recent feminist scholarship has drawn attention to the role of anti-trafficking narratives in sustaining carceral and neoliberal governance systems. As Andrijasevic and Mai (2016) argue, the recurring appeal to victimhood and slavery constructs a politically mobilizing image of the “trafficked woman” that often obscures the complexity of agency, migration and labour and survival strategy.

This article would like to contribute to these debates by critically examining a criminal case in Italy concerning the prosecution of a Nigerian woman victim of trafficking for sexual exploitation and forced crime exploitation, where the dichotomy between the victim's and the offender's positions becomes especially problematic and confirms what feminist criminologists have long highlighted about gender stereotypes and systemic exclusions which shape not only pathways into exploitation but also the criminal justice system's treatment of survivors (Broad, 2015).

When women are trafficked into criminal activities, especially low-level roles, courts often fail to account for their lack of agency and the coercive context behind their actions, as evidenced in the proposed case-study of M.O., where the judicial process overlooked the structural violence and

psychological manipulation she had endured, treating her instead as an autonomous perpetrator rather than a victim of trafficking.

## International and national legal frameworks

The international and European legal framework on trafficking in human beings has progressively evolved toward a more comprehensive and victim-centered approach, recognizing the gendered dimension of the phenomenon and its structural roots in inequality and discrimination. This section outlines the key legal instruments shaping the protection of trafficked women in law and policy, with a focus on the interpretation and implementation obligations imposed on national authorities.

### The Palermo Protocol (2000)

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (UNTOC), also known as the Palermo Protocol, was adopted by General Assembly resolution 55/25 on 15 November 2000 and entered into force in December 2003. The Protocol sets out a shared legal definition of trafficking in persons and establishes minimum standards for prevention, victim protection, and international cooperation.

According to Article 3 of the Protocol, trafficking is defined as the recruitment, transportation, transfer, harbouring or receipt of persons by means of coercion, deception, abuse of power, or vulnerability for the purpose of exploitation. The exploitation may include sexual exploitation, forced labour, slavery-like practices, servitude, or the removal of organs. The consent of the victim is considered legally irrelevant when any of the listed means are used. Moreover, in the case of children, the use of coercive means is not required for conduct to qualify as trafficking.

The Protocol mandates the protection of victims' physical and psychological integrity and the confidentiality of their identity. It requires that national legal systems ensure access to judicial and administrative procedures, facilitate the victim's participation without prejudice to the rights of the defense, and guarantee support through comprehensive recovery services. These include housing, counseling, access to education, training, healthcare, and legal assistance. Victims' rights to compensation and, where appropriate, temporary or permanent residence are also expressly encouraged.

From a preventative perspective, the Protocol obliges States to implement coordinated policies and programs aimed at addressing the root causes of trafficking and preventing re-victimization.

The Protocol is significant in setting the global minimum standard but has been further developed by regional instruments.

### **The Council of Europe Convention on action against trafficking in human beings (2005)**

The Council of Europe Convention on Action against Trafficking in Human Beings, adopted in 2005 and commonly referred to as the Warsaw Convention, represents a pivotal step in the European human rights framework. It builds on the Palermo Protocol, introducing more robust obligations, including a strong focus on gender equality and a human rights-based approach.

The Convention reiterates the definition of trafficking and requires States to implement comprehensive policies that encompass prevention, protection, prosecution, and partnerships with civil society. It calls for improved coordination between national authorities and the establishment of mechanisms that identify and support victims, including those who are not formally recognized or do not cooperate with law enforcement.

Victims are entitled to a minimum 30-day recovery and reflection period, access to shelter, medical and psychological care, interpretation, legal assistance, education, and vocational training. The confidentiality of victim identity is emphasized, and residence permits may be granted based on personal circumstances or cooperation with competent authorities.

The Convention is monitored by GRETA (Group of Experts on Action against Trafficking in Human Beings), which provides evaluation reports and recommendations to Member States. Importantly, the Convention mandates a gender-sensitive application of all its provisions, underscoring the vulnerability of women and girls and the need for specialized support services.

### *The “3P” anti-trafficking model and its expansion*

Since the adoption of the Palermo Protocol in 2000, anti-trafficking policies have been structured around the “3P” framework: *Protection* of victims, *Prevention* of trafficking, and *Prosecution* of traffickers and exploiters.

This framework has become a significant point of reference not only for shaping national anti-trafficking policies but also for assessing governments' efforts in combating trafficking. It has been used as a benchmark for evaluating the effectiveness of institutional responses worldwide (Cho et al., 2014).

However, civil society organizations, particularly those operating with a feminist and gender-sensitive perspective, have underscored the need to expand and revise this model. They argue that the 3Ps risk reducing trafficked persons to passive “objects” of intervention, overlooking their subjectivity and the structural factors driving their victimization. They also highlight the importance of building inter-institutional cooperation and enhancing partnerships between public

authorities and civil society actors – especially those who are the first to engage with survivors through support and assistance programs.

This critical reflection has led to the articulation of a fourth “P”: *Participation*. This refers, first and foremost, to the active involvement of trafficking survivors in shaping the protection, prevention, and justice responses they receive. Their specific needs and life paths should be the primary focus in designing and implementing institutional interventions.

Secondly, participation also refers to the inclusion of experienced civil society organizations—those with deep knowledge of trafficking and long-standing involvement in victim support—in the policymaking process. These organizations should be regularly consulted and included in all phases of program design, implementation, and evaluation.

The Italian National Action Plan against Trafficking has embraced this additional dimension under the rubric of “partnership”, emphasizing cooperation with civil society. It has also acknowledged the importance of direct participation by beneficiaries, calling for measures that not only address their vulnerabilities as women but also enhance their rights and autonomy, to avoid anti-trafficking interventions that inadvertently curtail freedom.

Despite these advancements, the updated 3P model has shown considerable limitations, especially in its bureaucratic implementation. The formalization of multi-agency cooperation at the national level often lacks substantive dialogue on the evolving nature of trafficking and the socio-political and legal factors that sustain it. As a result, protection may be reduced to a bureaucratic process in which women are not active protagonists of their own individual project.

The inadequacy of the model, and the corresponding need for new analytical and political frameworks, stems from its failure to address the broader social order, the unequal distribution of resources, and the increasingly punitive governance of migration and borders. As trafficking becomes embedded in global inequalities and restrictive immigration regimes, any meaningful anti-trafficking strategy should interrogate – not reproduce – the structural conditions of marginalization and control.

## EU Directives 2011/36/EU and 2012/29/EU

The EU Anti-Trafficking Directive 2011/36/EU and the Victims’ Rights Directive 2012/29/EU represent the normative pillars of the European Union’s legal architecture on trafficking and victim protection.

Directive 2011/36/EU, as amended by Directive 2024/1712, provides a comprehensive definition of trafficking and explicitly includes forms of exploitation such as the exploitation of the

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

It emphasizes that a position of vulnerability arises when a person has no real or acceptable alternative but to submit to abuse. The Directive also codifies the irrelevance of victim consent when coercion is present and recognizes that trafficking of children is punishable irrespective of coercive means. Member States are required to adopt measures ensuring victim protection during investigations and proceedings, including access to compensation (Art. 17) and the establishment of National Rapporteurs or equivalent mechanisms to monitor the implementation (Art. 19).

The Directive mandates a gender-specific approach and the adoption of mechanisms to identify victims promptly, with particular emphasis on minors.

Directive 2012/29/EU complements these provisions by establishing minimum standards on the rights, support, and protection of victims of crime. It expands the definition of "victim" to include family members affected by the crime and incorporates the concept of restorative justice. It affirms the right to information in clear and comprehensible language, as well as to services such as legal assistance, interpretation, and psychological support. Importantly, victims must be individually assessed to determine specific protection needs. The Directive obliges Member States to prevent secondary victimization and to ensure the proper training of professionals who may encounter victims. It thus reinforces a survivor-centred and participatory model of protection.

### **The impact of other EU legal instruments**

Victims of trafficking often encounter serious risks in the context of migration control policies. Several EU instruments affect their access to protection, including Directive 2013/33/EU on reception conditions for asylum seekers, Directive 2011/95/EU on qualification for international protection, Directive 2008/115/EC on return procedures, and Regulation 604/2013 (Dublin III).

These instruments recognize trafficking survivors as vulnerable persons and require tailored procedural safeguards. Article 21 of Directive 2013/33/EU and Article 20 of Directive 2011/95/EU impose obligations on Member States to identify victims early and provide adequate support. Directive 2008/115/EC exempts cooperating victims from re-entry bans and sets out procedural protections during return or detention.

Regulation 604/2013, while generally focusing on asylum processing responsibilities, refers to trafficking only in relation to minors. Nonetheless, obligations arising from the ECHR (Art. 4) and the anti-trafficking framework demand that Member States apply the sovereignty clause when necessary to prevent refoulement and re-victimization.

Victims must not be transferred under the Dublin system where this would breach their rights to protection. Authorities must ensure the suspension of transfers, issue temporary residence permits, and uphold the right to access justice in line with international standards. These instruments collectively underscore the necessity of aligning migration and asylum procedures with the human rights obligations of States under anti-trafficking law.

### **The protection of women victims and survivors of trafficking in Italy**

Protection represents the second pillar of the international response to human trafficking and is essential to prevent the recurrence of violence, particularly from the perpetrators identified by each woman as her trafficker or abuser.

However, it is thanks to the feminist practices developed by women's organizations committed to defending the human rights of trafficked women and girls that a broader understanding of protection has emerged. These groups have identified the need for "internal protection"—that is, protection from the institutional and judicial processes themselves, which often reinforce stereotyped and sexist readings of women's experiences and expose them to stigmatization and blame. These harmful patterns contribute to what is known as secondary victimization: when, after having suffered violence and exploitation (primary victimization), women are subjected to additional violations of their constitutional rights through their interaction with civil, criminal, or family courts.

Protection for victims of trafficking consists of two key dimensions: one internal to criminal proceedings – intended to prevent the traumatic effects of secondary victimization – and one external, aimed at preventing further violence from the perpetrator while also strengthening victims through responses to external factors of vulnerability, such as social marginalization, economic insecurity, and precarious housing and employment.

Protection, therefore, encompasses a diversified set of measures that fall under the competence of multiple authorities: cooperation between judicial bodies, the establishment of specialized support services, the adoption of protective orders, and social and economic empowerment tools.

Taken together, these measures help implement a strategy that addresses both the material obstacles that prevent women from exiting violent and exploitative situations, and the intersecting vulnerabilities at the root of trafficking, adopting a perspective focused on individual empowerment.

On a collective level, these responses invite institutions to take on the structural responsibility for addressing the inequalities that expose women to exploitation and violence. This includes the

use of economic assistance measures that aim to overcome the isolation often experienced by women subjected to trafficking and exploitation.

Feminist anti-violence centers and shelters, many of which also accommodate trafficking survivors, advocate for a broader set of protective measures that respond to women's concrete vulnerabilities to sexist violence. These include economic support, specific workplace protections, and residence permits for third-country nationals living in irregular conditions. They reject any approach that treats protection as a series of mechanisms that limit women's freedom under the guise of safety. Instead, feminist shelters promote spaces of listening and relational empowerment, where the woman's words become central to rebuilding her life. These are spaces where protection is not about isolation or surveillance but about community, solidarity, and shared responsibility among women.

In feminist shelters, protection is redefined as an opportunity: a space – physical, temporal, and emotional – shared with other women (both staff and residents) that allows for reclaiming time, voice, and agency. It is not a passive retreat, but a political experience of rebuilding: living collectively, rediscovering trust, regaining control over one's life and body, and developing a new relationship with the world.

Protection, in this context, is not a technocratic or judicial mechanism, but a transformative feminist practice rooted in the autonomous and independent management of shelters. This model is now under threat from a bureaucratic and “neutral” governance of anti-trafficking services that sidelines the gender and feminist dimensions in favor of depoliticized, generalized welfare approaches.

#### *Residence permit for social protection*

Article 18 of Legislative Decree No. 286/1998 introduced a progressive and human rights-centered measure into the Italian legal framework, widely considered pioneering at the time (Giammarinaro, 1999; Nicodemi, 2020). It allows the issuance of a special residence permit to foreign nationals who are victims of violence or severe exploitation and face tangible risks to their personal safety as a result of their attempts to escape the control of criminal organizations involved in trafficking, sexual exploitation, or other serious crimes.

The residence permit can be issued either at the initiative of judicial authorities (in the context of criminal investigations) or via a “social route”, when signs of exploitation emerge during interactions with local social services. In both cases, the primary aim is to guarantee immediate protection to the person affected, enabling them to break free from coercion and begin a process of social integration.

From the outset, both administrative authorities and legal scholars clarified that the references to “organization” or “criminal association” in Article 18 should be interpreted broadly, so as not to unduly restrict access to protection.

What made this provision innovative – and still relevant today – is its departure from the logic of rewarding cooperation with law enforcement. Instead, the permit is not conditional on the victim’s willingness to testify or participate in investigations. Rather, it prioritizes the urgent need to protect survivors and support them in regaining control over their lives.

Nonetheless, the judicial route has become the dominant pathway in practice, often overshadowing the social route. Moreover, authorities frequently assess the credibility of the woman’s account through a lens of bias and suspicion. A pervasive prejudice persists – that the victim’s report is merely a pretext to obtain a residence permit, thereby undermining the legal and substantive value of the protection instrument.

Recent case law has further eroded the original spirit of Article 18. The Council of State has emphasized a “reward-based” interpretation of the permit, framing it as a benefit granted to those who “collaborate with justice”, thereby reintroducing a conditional logic contrary to the provision’s protective intent. This restrictive interpretation also threatens to exclude asylum seekers and refugee women who are survivors of trafficking but either cannot or choose not to testify against their traffickers.

To restore the protective function of Article 18, it is essential to reaffirm the importance of the social route, especially for women exposed to exploitation during forced or unsafe migration. These women are often at risk of re-trafficking or secondary victimization within the EU, especially if they are transferred between Member States without coordinated protection mechanisms in place.

Moreover, the support programs linked to Article 18 – originally designed to foster empowerment – have become increasingly bureaucratized. Today, they typically include language classes, access to public services, and job placement programs. However, these are often shaped by gender stereotypes, offering limited employment options in domestic work and caregiving sectors, reinforcing women’s subordination rather than supporting genuine autonomy.

To reclaim these programs’ transformative power, it is necessary to reimagine them around women’s individual competencies, aspirations, and life projects. Programs should move beyond predefined, top-down paths and instead support self-determination through active participation. In this sense, participation should be considered the fifth “P” – a long-overlooked pillar in the anti-trafficking strategy, alongside prevention, protection, prosecution, and partnership (Boiano & Cecchini, 2021).

Finally, public authorities must acknowledge the increasing local entrenchment of trafficking networks and the associated risks for women – regardless of whether they cooperate with law enforcement.

Enhanced cross-border judicial cooperation between Italian courts and authorities in other EU Member States is urgently needed, as an increasing number of women previously identified as victims of trafficking in Italy are subsequently subjected to intra-EU trafficking and forced to reapply for protection in other countries. This not only signals a weakening of the Italian protection system but also highlights the growing risk of double victimization and procedural fragmentation within the EU.

#### *The refugee status for victims of trafficking*

Another key mechanism for protecting victims of human trafficking is the recognition of refugee status, as international law has increasingly acknowledged trafficking as a form of gender-based violence that may give rise to a well-founded fear of persecution (UNHCR, 2017; UNHCR, 2021; UN, 2023). Sexual exploitation, abduction, imprisonment, rape, slavery – all acts commonly associated with the trafficking of women – are recognized by UNHCR as grave human rights violations that may constitute persecution under the 1951 Geneva Convention. Even when the trafficking experience has technically ended, return to the country of origin may expose the woman to retaliation, renewed violence, or re-trafficking. Therefore, international protection remains essential.

Trafficked women are often considered to belong to a “particular social group”, defined by shared immutable characteristics or by a common historical experience – such as that of being a woman or a trafficking survivor in contexts where state protection is absent or ineffective. According to UNHCR (2006, § 39), victims of trafficking may form such a group simply by virtue of having experienced trafficking.

Each case must be assessed individually, with special attention to whether state authorities in the country of origin are unwilling or unable to offer protection. In Italy, refugee status began to be recognized more consistently from 2015, particularly in cases involving Nigerian women who applied for asylum after recounting experiences of violence and trafficking. Despite clear UNHCR guidelines, Italian administrative and judicial authorities long failed to recognize trafficking as a valid ground for refugee status. Decisions often reflected discriminatory and sexist stereotypes, and even today, territorial commissions frequently deny protection by downplaying the severity or credibility of trafficking claims.

Between 2013 and 2015, as the number of female asylum seekers increased, civil society organizations advocated for a closer integration of the asylum and anti-trafficking systems, to allow for the timely identification of trafficking victims within the asylum process (Differenza Donna, 2013-2015). This led to the publication of UNHCR guidelines (2016, updated in 2022), encouraging

authorities to identify indicators of trafficking and promptly refer applicants to specialized services.

These guidelines recommend a referral mechanism, defined as: “A system for coordinating and referring the individual and their specific needs to the appropriate authorities or service providers, in a way that ensures confidentiality and respects the person’s consent” (UNHCR, 2022).

The goal of referral is to bridge different systems and competencies, so that asylum seekers can access targeted protection and support, including specialized programs and access to justice.

However, inconsistent training and divergent methodologies among territorial authorities and anti-trafficking services have resulted in uneven practices that compromise both access to international protection and the effectiveness of anti-trafficking measures: a) making refugee status conditional on the filing of a criminal complaint or formal participation in a social protection program under Article 18 of the Immigration Law; b) using women’s decisions in this regard to assess credibility or determine the outcome of their asylum claim, contrary to applicable legal standards; c) suspending decisions on asylum applications for excessively long periods, even when the applicant has already denounced her traffickers or entered a protection program.

These practices often place women in a legal *limbo* that is incompatible with their rights and contrary to the protective rationale of both asylum law and anti-trafficking legislation.

While some concerns about criminal networks exploiting immigration procedures are legitimate, they cannot justify limiting individual rights. The failure to coordinate information-sharing between Member States, along with inadequate cross-border cooperation, exposes women to double victimization, including intra-EU trafficking and forced reapplication for asylum in multiple countries.

Civil society organizations are thus central in ensuring that beneficiaries can engage voluntarily with protection services, and that these services do not become tools of control or coercion. Referral should focus on enabling access to rights, not on conditioning them.

Finally, the information requested from anti-trafficking entities involved in the referral process should be strictly limited to assessing eligibility for protection and recognizing indicators of trafficking. The ultimate purpose must be to support the survivor’s self-determined exit from violence and exploitation, not to scrutinize her private life or exert institutional control over her choices.

The primary responsibility of anti-trafficking agencies involved in referral should be to guarantee access to fundamental rights, psychological recovery, social reintegration, and a future beyond violence. Any attempt to condition this support on personal behavior or decisions is fundamentally incompatible with a gender-sensitive, feminist approach and with international human rights obligations.

*Non-prosecution or non-application of penalties to the victim*

The United Nations Office on Drugs and Crime emphasizes that *forced criminality*—where individuals are coerced into committing unlawful acts as a direct result of being trafficked—constitutes a growing yet inadequately addressed dimension of human trafficking (2020).

This phenomenon particularly affects women and girls who, after enduring manipulation, threats, and systemic vulnerabilities, are compelled to engage in activities such as drug trafficking, shoplifting, or fraud (UNODC, 2018).

Despite their clear victimization, these women are often arrested, prosecuted, and punished without any substantive assessment of the coercive circumstances that led to their involvement in crime. The failure of judicial systems to recognize the intersection between victimhood and offending reproduces patterns of secondary victimization and institutional injustice.

This misrecognition is not merely procedural; it is grounded in more profound structural failures.

Law enforcement agencies, lawyers, and prosecutors often lack the gender-sensitive training required to identify trafficking indicators in criminal contexts. As a result, trafficked women, particularly those from marginalized racial and migrant backgrounds, are rendered hyper-visible as offenders and invisible as victims. For the transformative model, it is worth considering the international human rights standards that codify the non-punishment principle, which requires that no victim of trafficking be penalized for unlawful acts committed as a direct consequence of their exploitation.

The Council of Europe Convention on Action against Trafficking in Human Beings (2005) and the EU Directive 2011/36/EU both affirm the need for victim-centered responses that include the non-punishment principle.

Article 8 of EU Directive 2011/36/EU, as amended by EU Directive 2024/1712 prescribes that

*Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal or other unlawful activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.*

This provision, within the same rationale of the article 26 Council of Europe Convention on Action against Trafficking in Human Beings (2005), recognizes that victims of trafficking may be coerced into criminal activity and emphasizes non-punishment as essential to victim protection and recovery, as recommended by the UN Palermo Protocol in its interpretative guidance.

However, these provisions remain unevenly implemented across jurisdictions.

The gap between law and practice highlights the need to integrate intersectional feminist perspectives into both national and transnational anti-trafficking frameworks. Such integration would not only correct misidentification but would also reframe the legal subjectivity of trafficked women – from criminal to victim-survivor, with rights to redress and protection.

Ultimately, the invisibility of forced criminality in legal proceedings reveals a profound tension between the retributive impulses of criminal justice systems and the protective obligations embedded in international law.

Bridging this gap requires not only doctrinal clarity but a paradigmatic shift in how institutions conceptualize agency, coercion, and complicity under conditions of gendered exploitation, complying with the European Court of Human rights' case law on the principle of non-punishment, that affirm the duty of States to refrain from prosecuting trafficking victims for acts committed under coercion. It introduces the interpretative obligation derived from article 4 ECHR and art. 26 of the Warsaw Convention<sup>1</sup>.

## The case of M. O.

The case of M. O., a Nigerian woman persecuted by the Italian authorities for transporting narcotics while being a victim of human trafficking, was selected as the central case study for this article due to its jurisprudential complexity. This case, in fact, uniquely illustrates how the Italian criminal justice system has historically struggled – and eventually succeeded – in recognizing the intersecting realities of victimization and coercion in the prosecution of trafficked women.

The case reflects a common trajectory experienced by many women trafficked to Europe from West Africa: recruitment under false promises, debt bondage sealed by ritual coercion (Juju), sexual exploitation, and eventual involvement in criminal activities controlled by trafficking networks. It also mirrors the institutional delays in identifying trafficking victims, which often result in punitive outcomes before protective mechanisms are triggered.

This case is particularly significant because it traversed all levels of the Italian judiciary – from the first instance court to the Court of Appeal, to two separate rulings by the Supreme Court (Corte di Cassazione).

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<sup>1</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010 ; *V.C.L. and A.N. v. The United Kingdom*, Application nos. 77587/12 and 74603/12, 16 February 2021; *Lăcătuș v. Switzerland*, Application no. 14065/15, 19 January 2021; *A.N. v. France*, Application no. 12928/20, 7 April 2022.

It thus provides a complete procedural arc that allows for a thorough analysis of how different judicial authorities engage – or fail to engage – with international and European obligations, including the non-punishment principle under Directive 2011/36/EU and Article 26 of the Warsaw Convention.

Moreover, this case is emblematic of the gender-blind and formalistic approaches often adopted in the criminal adjudication of migrant women, as well as the transformative potential that lies in strategic litigation and feminist legal intervention. M. O.’s protection and legal defense was conducted with the support of Differenza Donna, a feminist organization that combines legal expertise with anti-trafficking advocacy. This collaboration enabled the articulation of a gender-sensitive and human rights-based defense strategy, culminating in a Supreme Court ruling that now stands as a leading precedent for the application of the non-punishment principle in Italy.

#### **First instance judgment: Reductionism and denial of context**

The first instance judgment rendered on 1 March 2022 by the GUP (Judge for preliminary hearing) of the Rome Tribunal convicted M. O. for the offense of the transport of marijuana (charge B.22), sentencing her to two months of imprisonment and a fine of € 400.

The sentence was suspended, and the penalty was reduced for the choice of an abbreviated procedure and for general mitigating circumstances. The conviction was issued as an enhancement for continuation of prior conduct judged in a final 2019 ruling.

The court justified its decision by highlighting the “coherent evidence resulting from preliminary investigations [...] whose overall assessment persuaded the court of the substantive soundness of the accusations”.

The sentence, however, exhibited a markedly reductionist approach to the defendant’s experience as a trafficked person. The court made no attempt to assess whether M. O.’s conduct could be understood within the framework of coercion, psychological subjugation, or economic and migratory vulnerability – all of which had been extensively documented by the defense, complying with the research *Female victims of trafficking for sexual exploitation as defendants* conducted by the UNODC (2020).

The national protection system had officially recognized her status as a victim of trafficking, and she had received international protection following an asylum procedure that confirmed years of forced prostitution and coercion under threats to her and her family.

Despite this, the court dismissed the potential relevance of Article 54 of the Penal Code (state of necessity), based on the assertion that “there was no absolute, prolonged, and persistent impossibility for the woman to free herself from the directives of her compatriots or to contact public authorities”.

This assertion failed to engage with the broader framework established by national and supranational anti-trafficking norms. The judgment ignored the detailed evidence of coercion and fear, such as the use of Juju rituals, debt bondage, the risk of retaliation against her grandmother in Nigeria, and the impossibility of escaping the traffickers' network. The fact that she contacted authorities only after her arrest was used against her, rather than understood as a reflection of the structural barriers faced by trafficked persons.

Moreover, the court never mentioned the national identification indicators for victims of trafficking or the relevant EU and international legal framework, which require an individualized and trauma-informed approach to evaluating the responsibility of individuals coerced into crime. The decision stands as a clear example of judicial blindness to gendered exploitation and intersectional vulnerability: rather than interrogating the conditions under which M. O. had committed the criminal act, the tribunal adopted a formalistic view of criminal liability, erasing the structural and psychological dimensions of trafficking from the legal analysis. As such, the first instance judgment not only failed to meet the standards of fair trial and victim protection under Article 4 ECHR and Directive 2011/36/EU, but also reflected a profound disregard for the principle of non-punishment of trafficking victims enshrined in Article 26 of the Warsaw Convention and Article 8 Directive 2011/36/EU.

#### **Appellate judgment: Denial of vulnerability and persisting gender-blindness**

In its judgment of 9 January 2023, the Rome Court of Appeal confirmed the conviction issued by the trial court, entirely dismissing the appeal lodged on behalf of M. O. The appellate court reaffirmed the criminal liability for the transport of marijuana (charge B.22), rejecting the application of Article 54 c.p. on the state of necessity, and offered only a cursory discussion of her status as a victim of trafficking. The reasoning behind this confirmation was predicated on the assertion that M. O. could have sought protection from Italian authorities: "Nothing in the case file indicates the absolute, prolonged and persistent impossibility for the woman to extricate herself from the directives of her compatriots or to turn - as eventually happened, but only after her arrest - to public institutions".

The appellate judges based their conclusion on abstract presumptions about the availability and accessibility of State protection, failing to recognize the real-life barriers faced by a trafficking victim unfamiliar with the language, socially isolated, and psychologically subordinated. The ruling dismissed the complexity of coercion in trafficking contexts, instead upholding a formalist test that centered on theoretical autonomy, rather than the psychosocial and structural context of exploitation.

Critically, the judgment aligned with the restrictive interpretation stated by the Italian Supreme Court in unrelated precedents: “The state of necessity cannot be invoked where the subject could have escaped the threat by resorting to practicable and effective protection by the authorities”.

This invocation of precedent, however, revealed the court’s failure to engage with the specificity of trafficking, and in particular the vulnerabilities of a woman subjected to debt bondage, Juju rituals, sexual violence, and threats to her family. The appellate panel’s treatment of the appeal was mechanical, wholly lacking in any attempt to apply international or EU standards on the non-punishment of trafficked persons, as codified in Article 26 of the Warsaw Convention and Article 2 of Directive 2011/36/EU.

The judgment neither referenced nor applied the national “Guidelines for the Rapid Identification of Victims of Trafficking” nor did it mention the indicators of vulnerability codified in both international instruments and soft law. Most notably, the appellate court neglected its duty of individualized assessment, a cornerstone of the European Court of Human Rights’ jurisprudence.

By concluding, with insufficient justification, that M.O. “could have gone to the authorities”, the judgment reproduced a gender-blind, punishment-oriented perspective, perpetuating the legal invisibility of trafficked women’s lived realities. The Court’s narrative, in its blind reliance on “available alternatives”, rendered structural exploitation invisible and normalized a male-coded standard of rational choice that is incompatible with a victim-sensitive approach to criminal liability.

### **First appeal to the Court of Cassation: Invoking the non-punishment clause and the principle of conforming interpretation**

In her appeal before the Court of Cassation, M. O., through her legal counsel Rossella Benedetti of the NGO Differenza Donna, challenged the appellate ruling on both domestic constitutional and supranational legal grounds. The defense built its argument around the non-punishment clause for victims of trafficking, as enshrined in Article 8 of Directive 2011/36/EU, Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings, and Articles 4 and 8 of the European Convention on Human Rights (ECHR).

The first ground of appeal was the alleged violation of Article 117 of the Italian Constitution, which requires national laws to be interpreted consistently with Italy’s international obligations. The appellant argued that: “The Court of Appeal failed to assess and examine the core grievance, which challenged the omission to apply the so-called non-punishment clause for trafficking victims – a supranational and binding principle for the Italian legal system under Article 8 of Directive 2011/36/EU”.

The appellant further stated that: “The ruling ignored both the international obligations and the duty of the national judge to seek a conforming interpretation, even disapproving domestic norms that are in conflict with EU law”.

In substantiating the nexus between the offense and the trafficking condition, the defense emphasized that the criminal act was committed: “[...] as a direct result of the trafficking situation, characterized by extreme socio-economic vulnerability and a total lack of autonomy and independence at the time of the facts”.

The appeal was also grounded on Article 54 of the Italian Penal Code (state of necessity), which the lower courts had dismissed without proper consideration of the factual background of exploitation, coercion, and violence endured by the accused. The defense emphasized the protracted subjugation experienced by M. O., including sexual violence and psychological control, and criticized the appellate court for failing to: “[...] take into account the victim’s previous lived experience, her state of subservience, and the conditions of continuous danger she was in”.

The appellant cited authoritative instruments such as the OHCHR Guidelines and the UN Trafficking Protocol, highlighting that: “Victims must be provided with protection, not punishment, for acts committed as a direct consequence of their trafficking status”.

In essence, the cassation appeal confronted the judicial blind spot that had erased the gendered and systemic dimension of trafficking from the earlier proceedings. It demanded the recognition of a fundamental shift in legal interpretation, consistent with evolving international and European standards, requiring that national courts engage with the lived realities of coercion and apply protections accordingly.

This first cassation appeal set the stage for a potential jurisprudential shift, urging the Court to harmonize national criminal law with international human rights obligations, particularly concerning gender-based exploitation and criminalization.

#### **First Cassation ruling: A jurisprudential turning point for the non-punishment of trafficked women**

In its landmark decision No. 2319 of 16 November 2023 (deposited 18 January 2024), the Italian Supreme Court (Corte di Cassazione, Sixth Criminal Division) accepted the appeal presented on behalf of M. O. (Fazzeri, 2024; Massaro, 2024).

The Court not only overturned the judgment of the Rome Court of Appeal but also delivered a foundational interpretation of the non-punishment principle for victims of human trafficking, marking a decisive shift in Italian case law.

The judgment directly addressed the lower courts' failure to engage with the applicable international and European legal framework. As the Court stated, "The Court of Appeal failed to assess the core issue regarding the non-punishment clause, as required by supranational sources binding upon the Italian legal system".

The Court reconstructed the full body of relevant norms, starting with the Warsaw Convention (Article 26), the UN Palermo Protocol, and Article 8 of Directive 2011/36/EU, all of which prohibit the criminalization of victims for offenses committed as a direct consequence of their exploitation. It highlighted that:

*The non-punishment of victims of trafficking for crimes committed due to their condition is a consequence of the legal system's internal coherence. It would be irrational to punish someone for actions caused by circumstances that the law recognizes as violations of fundamental human rights.*

The Court also stressed the role of Article 54 of the Italian Penal Code (state of necessity) as the appropriate domestic provision to give effect to these obligations. The judgment acknowledged that, although Italian law lacks an express non-punishment clause, a conforming interpretation of Article 54 allows judges to exclude criminal liability for trafficking victims who act under coercion. In doing so, the Court affirmed that: "Article 54 c.p. must be interpreted in line with three fundamental principles: the protection of inalienable human rights, the prohibition of secondary victimization, and the prevention of international liability for Italy due to the violation of Articles 10, 11 and 117 of the Constitution".

Importantly, the Court moved beyond formalist conceptions of autonomy, recognizing that: "Victims of trafficking, due to the psychological and economic pressure they are subjected to, may entirely or partially lose their capacity for self-determination".

The ruling thus rejected the simplistic notion that the availability of institutional remedies (e.g. contacting authorities) is sufficient to negate necessity. Instead, it emphasized that judges must conduct an individualized assessment of the victim's specific vulnerabilities, including traumatic experiences (e.g. sexual violence, Juju ritual coercion); social isolation and language barriers; fear of retaliation against family members in the country of origin; economic desperation and debt bondage.

The Court also affirmed the central role of trafficking indicators, as outlined in the UNHCR's *Guidelines for the Rapid Identification of Victims of Trafficking* and EU soft law. These indicators, according to the Italian Supreme Court, are not merely tools for administrative identification but must inform judicial reasoning when determining criminal liability.

The judgment concludes that: “A person in a position of vulnerability, who is a victim of trafficking and subordinated to criminal networks, may invoke the justification of necessity under Article 54 c.p. when forced to engage in criminal conduct, such as drug transportation, and where no reasonable alternative, including seeking State protection, is concretely viable”.

In short, the Supreme Court vindicated the defense’s arguments and established a doctrinal foundation for protecting trafficked persons from penalization. The ruling represents an alignment of Italian criminal law with the values of gender justice, human dignity, and non-revictimization, affirming that the legal system must not punish women for acts that are manifestations of the very violence and exploitation from which they are entitled to be protected.

#### **Judgment on remand: The struggle for conforming interpretation**

Following the Supreme Court’s annulment of the prior appellate ruling, the case was remanded to a different division of the Court of Appeal in Rome. This judgment represented a critical test for the Italian judiciary’s capacity to internalize and apply the interpretative guidelines established by the Court of Cassation, particularly regarding the recognition of trafficking victim status and the application of Article 54 c.p. (state of necessity) as a domestic conduit for the non-punishment principle.

However, in its reasoning, the remand court failed to fully comply with the substantive obligations of individualized assessment, gender-sensitive interpretation, and conforming application of supranational norms.

Despite the Supreme Court’s explicit instruction to evaluate

*the defendant’s personal conditions when she left Nigeria, the experiences lived during the journey – including in transit countries – the exploitation suffered in Italy, the existence and nature of her debt, her subjective perception of coercion, and the realistic impossibility of escaping her traffickers or turning to the authorities*

the remand court limited itself to formalistic reasoning. It did not engage in a substantive reassessment of M. O.’s lived conditions or of the systemic coercion that shaped her actions. The judgment remained silent on key elements such as: a) her psychological state due to prolonged subjugation; b) the intersectional vulnerabilities (gender, migration status, language barrier); c) the documented recognition of her trafficking status in administrative and judicial contexts.

Although the remand court acknowledged that M. O. had been granted international protection, it failed to connect this legal recognition to the alleged criminal conduct. The court did not consider the soft law instruments, such as the National Guidelines for the Identification of Victims

of Trafficking, nor did it reference the structural factors of inequality and gender-based subordination that frame most trafficking situations.

This disconnect between formal recognition and substantive legal protection reveals the persistence of a punitive gaze, even after the Supreme Court's directive. The appellate judgment thus reproduced a blind spot: it reaffirmed M. O.'s guilt for transporting drugs, neglecting to contextualize her conduct as part of the exploitation matrix described in Directive 2011/36/EU.

The failure to apply the state of necessity ex art. 54 penal code and the omission to exclude culpability – despite the clear parameters outlined by the Supreme Court – constitute a renewed denial of justice. The judgment exemplifies what feminist legal scholars identify as “institutional deafness” to gendered forms of constraint and violence. It risks revictimizing survivors by reinserting them into punitive structures that disregard their systemic subordination and the coercive environments in which their actions occur.

This outcome paved the way for a new appeal to the Supreme Court, challenging the Court of Appeal's insufficient alignment with the obligations to protect trafficked persons from criminal punishment in line with both constitutional principles and international human rights law.

### **Second appeal to the Court of Cassation: Challenging the invisibility of victimization**

Following the remand court's inadequate response, M. O.'s lawyer filed a second appeal with the Court of Cassation, asserting critical violations of both substantive and procedural law. The appeal focused on the continued failure to recognize the non-punishment clause applicable to victims of trafficking, as enshrined in binding international and European legal instruments.

At the heart of the argument was the omission of any meaningful assessment of M.O.'s status as a trafficked woman. As outlined in the appeal:

*the non-punishment clause was never applied across any of its three essential dimensions: 1) the duty of national authorities not to punish a trafficking victim for unlawful acts linked to her exploitation; 2) the recognition that the offense was committed in the context of trafficking; 3) the causal link between the criminal act and the coercive circumstances resulting from trafficking.*

The defense emphasized that the lower court failed to connect M. O.'s illegal conduct – transporting drugs – to her subjection to trafficking, thereby denying the required causal nexus for Article 54 c.p. (state of necessity) to apply. The failure was particularly egregious given the abundance of documentation demonstrating her status, including her recognition as a beneficiary

of international protection, prior victimization in proceedings where she was recognized as trafficked, and psychosocial reports detailing her subjugation.

Further, the appeal noted that the appellate court's reasoning remained trapped in traditional doctrinal categories, ignoring both the interpretive obligation under Article 117 of the Italian Constitution and the principle of conforming interpretation established by the ECtHR and EU law: "The appellate judges should have interpreted national norms considering international obligations and chosen the interpretation that ensures compliance with those obligations. The principle of primacy of EU law required disapplying the domestic norm in conflict".

The defense insisted that M. O.'s conviction was not only inconsistent with international law, but also with the internal coherence of the Italian legal order. As the appeal succinctly argued:

"To punish a trafficking victim for a crime that was the result of her condition of subjugation is to deny both reality and justice" (quoting OSCE, 2013).

Additionally, the appeal denounced the manifest illogicality of the remand court's motivation, which had merely speculated, without a factual basis, that the defendant could have escaped the trafficking network. This assumption, the defense argued, amounted to an abstraction of facts and ignored: a) her illiteracy and lack of language skills; b) her economic dependence and fear of reprisal; c) the documented control exerted by traffickers, including legal representation arranged by the network after her arrest.

Ultimately, the second cassation appeal reasserted the necessity of aligning domestic criminal law with internationally codified protections for trafficked persons, calling for the annulment of the appellate judgment and demanding judicial accountability for its failure to incorporate a gender-sensitive and human rights-compliant framework.

### **Conclusion: forced criminality, gendered victimization, and feminist legal critique**

A critical contribution to the feminist criminological understanding of trafficking and exploitation through criminal activity is offered by Silvia Rodríguez-López (2019), who conceptualizes *forced criminality* not merely as a strategy employed by traffickers but as a legal and ethical dilemma that courts routinely mismanage. In her analysis, the dominant legal narratives – structured around a binary opposition between victim and offender fail to capture the continuum of coercion and constrained agency experienced by trafficked individuals, particularly women. She calls for a more nuanced, structurally informed approach, grounded in the non-punishment principle enshrined in the Palermo Protocol and Directive 2011/36/EU.

Yet, as she observes, national courts often disregard this obligation, opting to prosecute rather than protect. This critique is exemplified in the M.O. case, where, despite clear indicators of trafficking and coercion, the courts of merit prioritized criminalization over contextualization. This oversight exemplifies what Winterdyk and Jones, editors of the *The Palgrave International Handbook of Human Trafficking* (2019), term the “ethical dilemma of victimhood”, highlighting the urgent need for a gender-sensitive and structurally aware jurisprudence aligned with both international standards and feminist legal critique (Dempsey, 2010).

This case illustrates broader systemic difficulties in recognizing trafficked women as victims when their exploitation involves criminalized conduct.

As noted by Crowhurst (2012) and Varela (2017), women in marginal positions are often “caught in the victim/criminal paradigm”, mainly when they are exploited in illegal markets. In the Italian case at hand, legal narratives erased the coercive context and emphasized the woman’s supposed “complicity”, reinforcing a punitive reading of trafficking.

The failure to apply the non-punishment principle not only violates international law but also reproduces gendered injustice: the legal system often fails to account for the coercive contexts that entangle trafficked women in criminalized roles.

Feminist criminological scholarship has consistently demonstrated that criminal law not only reflects but often reinforces structural inequalities, particularly when it fails to account for intersecting histories of gender-based violence, migration, and socio-economic marginalization. In this context, the implementation of the non-punishment principle should not be regarded as a mere symbolic gesture, but rather as a substantive and structural commitment to justice.

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