

Two Birds with One Stone? Implications of conditional assistance in victim protection and prosecution of traffickers

Anette Brunovskis and May-Len Skilbrei

Abstract

Protection of victims and prosecution of traffickers are established as core principles in international and national anti-trafficking policies. In this article, we discuss the dilemmas of linking protection of victims (a term that includes social protection) to their cooperation with authorities, using Norway as a case. Our analysis of the Norwegian case is based on interviews with victims of trafficking, social workers, police and prosecutors, and examination of court decisions on cases of trafficking. The linking of protection and prosecution is anchored in international conventions and directives. While this is often framed as a mutual advantage for both protection and prosecution, in reality both goals may suffer. We discuss how the goal of prosecution affects assistance available to different groups of victims. It creates unequal access to assistance and different preconditions for well-being and predictability, depending on how useful their information about traffickers is perceived to be, and police capacity to investigate. We then move on to discuss how the incentive of protection for cooperation is interpreted and dealt with in the justice system. Victims who receive assistance and have a chance of getting permanent residence permits in exchange for their testimonies are considered to be less reliable and credible witnesses. This also brings into question how victims of trafficking are understood and constituted as witnesses. We discuss these issues in light of a broader literature on gender, law and victimhood.

Keywords: human trafficking, prosecution, Norway, assistance, conditionality

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¿Dos pájaros de un tiro? Consecuencias de la asistencia condicionada en la protección de las víctimas y en el procesamiento de los tratantes.

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Resumen

La protección de las víctimas y la persecución de los tratantes son principios fundamentales en las políticas internacionales y nacionales. En este artículo se discute la disyuntiva de vincular la protección de las víctimas (término que incluye la protección social) a su cooperación con las autoridades, utilizando el caso noruego como ejemplo. Nuestro análisis del caso noruego está basado en entrevistas con víctimas de trata, trabajadoras y trabajadores sociales, la policía y la fiscalía y el análisis de las decisiones de la corte en casos de trata. La vinculación de la protección y el enjuiciamiento está basada en los convenios y directivas internacionales. A pesar de que esta vinculación a menudo se enmarca como una ventaja mutua tanto para la protección como para el procesamiento, en realidad ambos objetivos pueden sufrir. El artículo habla de cómo el objetivo de enjuiciamiento repercute en la diferente asistencia disponible para según qué grupo de víctimas. Esto crea un acceso desigual a la asistencia y requisitos diferentes para el bienestar y previsibilidad, dependiendo de cómo de útil se considere la información que las víctimas tienen sobre los tratantes y la capacidad que tenga la policía para investigar. Continuamos hablando sobre cómo se interpreta el incentivo de protección a cambio de cooperación y cómo éste se aborda dentro del sistema judicial. Las víctimas que reciben asistencia y tienen la oportunidad de conseguir un permiso de residencia permanente a cambio de sus testimonios, son consideradas testigos menos fiables y menos creíbles, lo que cuestiona cómo se entiende y se constituye a las víctimas de trata como testigos.

Todos estos temas se tratan a la luz de una amplia documentación en género, legislación y victimización.

Palabras clave: trata de personas, procesamiento, Noruega, asistencia y condicionalidad.

Introduction

With growing attention to human trafficking over the past decades, there was also a realisation that protection of victims was difficult within existing policy frameworks. Victims of trafficking sometimes lacked legal residence, or violated laws while trafficked, and were sometimes deported/returned or prosecuted themselves, with or without being identified as victims. Victims' lack of rights was also a barrier for prosecuting traffickers, as investigations were hampered by victims disappearing.

The introduction in European policy of the 'reflection period' (that is, temporary residence status for possible victims of trafficking) aimed to secure both protection and prosecution, and explicitly linked the two. A 2004 European Union (EU) Directive¹ specified that residence permits were for victims of trafficking who cooperate with the authorities. The Council of Europe (CoE) human trafficking convention obliges States Parties to provide a reflection period of at least 30 days, with one aim being that they 'take an informed decision on cooperating with the competent authorities'.²

In this article, we discuss how the two goals of protection and prosecution are balanced in current anti-trafficking efforts in Norway, and point to dilemmas that the linking of these aspects creates. We use the term 'protection' broadly to include victims' access to social, legal and medical assistance, in contrast to a more narrow understanding of protection from retribution or intimidation from traffickers. This is based in an understanding that protection from harm also includes addressing physical and mental health, as well as socio-economic vulnerabilities likely to leave a victim at risk of harm in the form of continued exploitation and/or re-trafficking. We discuss specific challenges for victims and for the criminal justice system, which we believe are representative of the situation in several countries with policy models that in different ways link protection to cooperation with authorities. Such is the case for many States Parties to the CoE human trafficking convention, depending on national policy implementation.³ We explore two main issues: 1) How does the focus on prosecution influence the protection of victims? 2) How is the provision of residence permits/protection following cooperation understood in the prosecution system? We discuss these issues in light of a broader literature on gender, law and victimhood. Our analysis focusses on female adult victims of trafficking for sexual exploitation. While there is an increased focus on trafficking for other purposes, historically the Norwegian anti-trafficking response has been directed at this group, and policies were initially developed primarily in response to concerns over changes in the prostitution arena. Further, most prosecutions in Norway have also involved this particular category of victims.

We have in the last decade undertaken a series of studies on anti-trafficking policies with regard to both legal interventions⁴ and assistance.⁵ This article particularly builds on three research projects: an evaluation of the reflection period in Norway,⁶ a comparative study of the reflection period in seven European countries⁷ and the ongoing project Health Services and Needs in Prostitution. Through these projects we have explored the relationship between prosecution and protection from different vantage points. Findings from these previous studies are integrated in our analysis in this article, supplemented by qualitative interviews with victims of trafficking (n=12), social workers/assistance providers (n=32) and representatives from the police and prosecution (n=10), as well as analysis of written court decisions and policy documents.

¹ European Union, *EU Council Directive 2004/81/EC of 29 April 2004: On the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities*, 2005.

² Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series, No. 197, 16.V.2005*.

³ See for instance A Brunovskis, *Balancing Protection and Prosecution in Anti-Trafficking Policies: A comparative analysis of reflection periods and related temporary residence permits for victims of Trafficking in the Nordic countries, Belgium and Italy*, Nordic Council of Ministers, Copenhagen, 2012.

⁴ See for instance M L Skilbrei, 'Taking Trafficking to Court', *Women & Criminal Justice*, vol. 20, 2010, pp. 40–56; M L Skilbrei and M Tveit, 'Defining Trafficking through Empirical Work: Blurred boundaries and their consequence', *Gender, Technology and Development*, 12(1), 2008, pp. 9–30.

⁵ See for instance A Brunovskis and R Surtees, *Leaving the Past Behind: When victims of trafficking decline assistance*, Fafo, Oslo, 2007; A Brunovskis and R Surtees, 'Coming Home: Challenges in family reintegration for trafficked women', *Qualitative Social Work*, doi: 1473325011435257; A Brunovskis and R Surtees, *A Fuller Picture: Addressing trafficking related assistance needs and socio-economic vulnerabilities*, Fafo, Oslo, 2012.

⁶ A Brunovskis, M Tveit and M L Skilbrei, *Pusterom eller Ny Start? Evaluering av refleksjonsperioden for ofre for menneskehandel*. Fafo Report 2010:45, Fafo, Oslo, 2010.

⁷ Brunovskis, 2012.

Human Trafficking, Protection and Prosecution in the Norwegian Context

The Norwegian legal framework that regulates the relationship between protection and prosecution was developed in accordance with the aforementioned EU Directive and CoE Convention.⁸ First introduced as a 45-day delayed return in 2004, the reflection period was in 2006 expanded to a six-month temporary work and residence permit, with a low threshold. Should the police initiate an investigation, the residence permit can be renewed in one-year increments. In 2008 a third step was added, the so-called ‘witness instruction’: victims who testify as an injured party in a trafficking case are to be granted permanent residence in Norway.⁹

The intention behind the reflection period is specified in a Norwegian Directorate for Immigration Circular¹⁰ and government action plans against trafficking.¹¹ Victims should be given the opportunity to break with traffickers, and further, given time to take an informed decision about cooperating with the police. The main goals are to provide victims with health services and social assistance, and to facilitate prosecution of traffickers.

Data on identified possible cases are published annually by the Norwegian Police Directorate, based on reporting from governmental and non-governmental organisations. Since 2007, between 200 and 350 persons each year have been classified as possible victims, and all cases involved international migration. Since 2008, between 45 and 50 persons each year have applied for a reflection period. Around one-third of these applications have been rejected.¹² Around 30 cases of trafficking have been taken to court in Norway since the introduction of the Trafficking Act in 2003, most of which involved sexual exploitation and female victims.

Protection and Prosecution in Human Trafficking Literature

A central paradigm in international anti-trafficking policy is the so-called ‘three P’s’,¹³ of prevention, protection and prosecution¹⁴—generally reflecting the various categories of commitment/obligation assumed by States under international and national law. While the relationship between the P’s is often not problematized, prosecution has been given a prominent formal role. For instance, in the Trafficking Protocol—the only global instrument in anti-trafficking policy¹⁵—provisions relating to prosecution are mandatory for States Parties, while they are only encouraged to fulfil provisions on protection.¹⁶

Prosecution of traffickers is often framed as a primary measure of success in anti-trafficking policy. While prosecution data lend themselves very poorly to comparisons or mapping of difference and change,¹⁷ referring to numbers of prosecutions as a relative measure of success is a fairly common international exercise (e.g. the US annual Trafficking in Persons reports,¹⁸ or the Global Report on Trafficking in Persons¹⁹). Also in the Norwegian context there has been considerable attention to differences between cities in terms of numbers of identified cases

⁸ While not an EU member, Norway is obliged to implement EU Directives by its membership in the European Economic Area (EEA). Norway is a member state of the Council of Europe.

⁹ As of January 2010 the reflection period and the witness instruction are regulated by the Immigration Regulation (“Utlendingsforskriften”) 8-3 and 8-4: and Circular RS 2013-014 (“Oppholdsstillatelse for utlendingersomantas å være utsatt for menneskehandel (refleksjonsperiode mv).”)

¹⁰ Utlendingsdirektoratet, *Oppholdsstillatelse for utlendinger som antas å være utsatt for menneskehandel (refleksjonsperiode mv.)*, RS-2013-014, 2013.

¹¹ Norwegian Ministry of Justice and the Police (2006), *Stopp menneskehandelen. Regjeringens handlingsplan mot menneskehandel [2006-2009]*, Norwegian Ministry of Justice and the Police (2010), *Sammen mot menneskehandel. Regjeringens handlingsplan mot menneskehandel (2011-2014)*.

¹² Police Directorate, *Rapport fra koordineringsbeten for ofre for menneskehandel–Årene 2007-2008*, 2009; Police Directorate, *Rapport fra koordineringsbeten for ofre for menneskehandel–2009*, 2010; Police Directorate, *Rapport fra koordineringsbeten for ofre for menneskehandel–2010*, 2011; Police Directorate (2012), *Rapport fra koordineringsbeten for ofre for menneskehandel–2011*, 2012; Police Directorate, *Rapport fra koordineringsbeten for ofre for menneskehandel–2012*, 2013; Police Directorate, *Rapport fra koordineringsbeten for ofre for menneskehandel–2013*, 2014.

¹³ With a fourth ‘P’, ‘partnership’, suggested in 2009 by US Secretary of State Hillary Clinton (United States Department of State, *The ‘3P’ Paradigm: Prevention, Protection, and Prosecution*. Democracy and Global Affairs, June 2014).

¹⁴ See: J Goodey, ‘Sex Trafficking in Women from Central and East European Countries: Promoting a “victim-centred” and “woman-centred” approach to criminal justice intervention’, *Feminist Review*, vol. 76, 2004, pp. 26–45; V Samarasinghe, ‘Confronting Globalization in Anti-Trafficking Strategies in Asia’, *Brown Journal of World Affairs*, vol. 10, 2003, pp. 91–104.

¹⁵ United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000.

¹⁶ A T Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis’, *Human Rights Quarterly*, vol. 23, 2001, pp. 975–1004; A T Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A critical review of the 2005 European Convention and Related Instruments’, *European Journal of Migration and Law*, vol. 8, 2006, pp. 163–189; D F Haynes, ‘Used, Abused, Arrested and Deported: Extending immigration benefits to protect the victims of trafficking and to secure the prosecution of traffickers’, *Human Rights Quarterly*, vol. 26, 2004, pp. 221–272.

¹⁷ Brunovskis, 2012.

¹⁸ US State Department, ‘Tier Placements’, *TIP Report*, US State Department, retrieved 24 June 2015, <http://www.state.gov/j/tip/rls/tiprpt/>

¹⁹ United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Human Beings*, UNODC, Vienna, 2009.

and prosecutions, something which is debated in terms of differences in priorities and understanding of the gravity of trafficking.²⁰

Several authors are critical of the overarching dominance of the criminal justice approach in international anti-trafficking policy and problematize addressing human trafficking as primarily an issue of organised crime or as an issue for migration control.²¹ A substantial body of literature further challenges simplistic notions of the circumstances, mind-sets and needs of those defined as victims. This literature points to heterogeneous experiences falling within the definition of human trafficking, not all of which can easily be addressed within a criminal justice framework.²² This points to the potential for systematically unequal access to protection, if protection is administered through a filter of stereotypes and prosecutable cases.

'The Ideal Victim' and Credibility

Much of the literature on the relationship between protection and prosecution in anti-trafficking policy takes as a starting point a (human) rights based perspective for a critique of the linking of the two elements. Perhaps less considered are the particularities involved in the prosecution and adjudication of trafficking cases.²³ One important issue is the consequences of awarding advantages to trafficking victims who agree to cooperate as witnesses, in terms of how this is understood and dealt with in the criminal justice system. It has been pointed out that offering residency conditioned upon testifying can backfire in court and provide opportunity for the defence to draw into doubt the veracity of the testimony,²⁴ or indeed, even induce exaggeration of information in order to obtain a residence permit.²⁵ Problems with linking testimonies with high-valued rewards in relation to credibility and due process are not exclusive to the field of trafficking. Gribaldo²⁶ demonstrates how in domestic violence trials, the female victim who does not make demands is often construed as more credible. Having something to gain for testifying easily weakens the credibility of the victim and threatens corresponding rights. Gender constructions play a part in this. Women who make demands are particularly vulnerable to having their credibility questioned as they are seen to be possibly manipulative. They are expected to live up to an idealised form of victimhood.²⁷

There is a broad literature on how victims/witnesses in cases of sexual or sexualised violence face challenges in legal proceedings²⁸ and how it is necessary for victims to live up to the standard of an 'ideal',²⁹ 'iconic'³⁰ or 'culturally approved'³¹ victimhood to appear credible in court. Christie describes how in order to be a credible victim, she needs to live up to respectability standards and be seen as someone who has not contributed anything towards her own victimisation.³² Several researchers have analysed how these perceptions impact on the evaluation of anti-trafficking policies,³³ victims' access to services³⁴ and also on the identities of the victims themselves.³⁵ What is particularly relevant here is whether being seen as a credible victim is contingent on cooperation with police and

²⁰ M L Skilbrei, 2010.

²¹ See for instance A D Jordan, 'Human Rights or Wrongs? The struggle for a rights-based response to trafficking in human beings', *Gender & Development*, vol. 10, 2002, pp. 28–37; C Aradau, 'The Perverse Politics of Four-letter Words: Risk and pity in the securitisation of human trafficking', *Millennium-Journal of International Studies*, vol. 33, 2004, pp. 251–277; J Berman and C Friesendorf, 'EU Foreign Policy and the Fight Against Human Trafficking: Coercive governance as crime control', *European Foreign Affairs Review*, vol. 13, 2008 pp. 189–209; C Nieuwenhuys and A Pecoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control', *American Behavioral Scientist*, vol. 50, 2007, pp. 1674–1695.

²² See for instance L M Agustín, *Sex at the Margins: Migration, labour markets and the rescue Industry*, Zed Books: London, 2007; C Hoyle, M Bosworth and M Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the borderland between rhetoric and reality', *Social & Legal Studies*, vol. 20, 2011, pp. 313–329; K Kempadoo 'The War on Human Trafficking in the Caribbean', *Race & Class*, vol. 49, 2007, pp. 79–85.

²³ A Constantinou, 'Human Trafficking on Trial: Dissecting the adjudication of sex trafficking cases in Cyprus', *Feminist Legal Studies*, vol. 21, 2013, pp. 163–183.

²⁴ Haynes, 2004.

²⁵ R Rafaelli, 'The European Approach to the Protection of Trafficking Victims: The Council of Europe Convention, the EU Directive, and the Italian experience', *German Law Journal*, vol. 10, 2009, pp. 205–222.

²⁶ A Gribaldo, 'The Paradoxical Victim: Intimate violence narratives on trial in Italy', *American Ethnologist*, vol. 41, 2014, pp. 743–756.

²⁷ S Lamb, 'Constructing the Victim: Popular images and lasting labels' in S Lamb (ed.), *New Versions of Victims. Feminists struggle with the concept*, New York University Press, New York, 1999, pp. 108–138; Gribaldo, 2014.

²⁸ C Smart, *Law, Crime and Sexuality: Essays in feminism*, SAGE, London, 1995; Lamb 1999; J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A question of attitude*, Hart Publishing: Oxford, 2008.

²⁹ N Christie, 'The Ideal Victim' in E A Fattah (ed.), *From Crime Policy to Victim Policy*, MacMillan, Basingstoke, 1986, pp. 17–30.

³⁰ J Srikantiah, 'Perfect Victims and Real Survivors: The iconic victim in domestic human trafficking law', *Boston University Law Review*, vol. 87, 2007, pp. 157–211.

³¹ Lamb, 1999, p. 117.

³² Christie, 1986.

³³ M Wilson and E O'Brien, 'Constructing the Ideal Victim in the United States of America's Annual Trafficking in Persons Report', *Crime, Law & Social Change*, online first 14 January 2016 DOI 10.1007/s10611-015-9600-8.

³⁴ A Brunovskis and R Surtees, 'Agency or Illness—The conceptualization of trafficking victims' choices and behaviors in the assistance system', *Gender, Technology and Development*, 12(1), 2008, pp. 53–76.

³⁵ C Jacobsen and M L Skilbrei, 'Reproachable Victims? Representations and self-representations of Russian women in transnational prostitution', *Ethnos*, vol.75, no. 2, 2010, pp. 190–212.

prosecution. Srikantiah points out in her research on victim identification and credibility in the US: 'Just as blamelessness prior to rescue required demonstrated passivity, blamelessness post-rescue requires active cooperation with law enforcement.'³⁶ The question is also whether such cooperation will contribute towards credibility in the same way for all victims, or whether this is dependent on how she lives up to other aspects of the 'ideal' victim.

With the above discussions in mind, we seek to explore how the relationship between protection and prosecution plays out in the Norwegian context, both in terms of the situation for victims and with respect to the criminal justice system.

How Prosecution Affects Protection

A common notion is that providing protection to victims also 'produces' witnesses for prosecuting traffickers.³⁷ This underestimates that not all victims will be useful witnesses in terms of having valuable information, or indeed well served by testifying.³⁸ While policy documents also frame the 'causal relationship' as protection leading to cooperation,³⁹ in practice it may equally be understood as cooperation leading to protection. This distinction, in terms of its impact on victims' decision-making and well-being, is an important one.

In this section, we explore three main issues. First, the pressures created by the relative value of different forms of protection and the importance of the migration context for victims. Second, the unequal access to protection, depending on whether victims have useful information to share with authorities. Finally, we question whether decisions about cooperation are generally informed (as set forth, for instance, in the CoE Convention) or in the best interest of victims, given the highly unpredictable outcomes of criminal justice processes, which have great bearing on the actual outcomes for victims.

While the widespread assumption that recovery and protection will lead more victims to testify may seem reasonable, it is nevertheless largely undocumented. A common understanding is that a central part of deciding on whether to cooperate is about individual recovery, including trust, or a generic 'confidence in the state'.⁴⁰

While we believe that both trust and recovery can be important, we nevertheless contend that this does not sufficiently address the migration context for victims of trafficking and its importance in many victims' decisions about cooperation. For several victims we have interviewed, deciding to cooperate was not primarily about their recovery or gaining trust in the state, but what cooperation would mean for their future, not least in terms of where they would be able to live. Obtaining permanent residence in Norway can substantially change how the future is imagined, not only for the individual victim, but for their ability to help family with remittances, or creating a better life for children. Speaking of her thoughts on her future, one woman, who had been granted permanent residence said:

I'm thinking that I'm going to stay in Norway, go to school, learn Norwegian, get a job, and help my family [back home]. I know that my life is going to be OK because I'm being helped.

Others spoke of affordable access to health care and education for children as a strong motivator for trying to obtain a residence permit. This is not to suggest that protection or assistance is only available in Norway, or in the so-called destination countries. Several of the countries from which victims in Norway come, offer assistance. Nevertheless, the quality and availability of these services vary to a great extent, and may not always be, or be perceived as, a good or even possible alternative.⁴¹ For several reasons, most of our respondents did not consider going 'home' a real alternative. Said one woman:

My lawyer told me that IOM helps people return. I asked what kind of help they provide, can I stay with the IOM in Nigeria? No, after a month with assistance at the premises you'll go on by yourself. I cried

³⁶ Srikantiah, 2007, p. 199.

³⁷ See for instance Haynes, 2004; Rafaelli, 2009; M Ventrella, 'Protecting Victims of Trafficking in Human Beings in the UK: The Italian Rimini method that could influence the British approach', *Journal of Migration and Refugee Issues*, vol. 3, 2007, pp. 64–86.

³⁸ Goodey, 2004.

³⁹ For instance, the 2011 EU Directive on human trafficking on the subject of trafficking victims' protection from prosecution lists the aims as '...to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators'. (European Union, *EU Council Directive 2011/36/EU of 5 April 2011: On preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 2011, explanatory paragraph 14.)

⁴⁰ See for instance: UNODC, *Toolkit to Combat Trafficking in Persons*, UNODC, Vienna, 2008, p. 220.

⁴¹ M L Skilbrei and M Tveit, 'Mission Impossible? Voluntary and dignified repatriation of Nigerian victims of trafficking' in T D Truong and D Gasper (eds.), *Transnational Migration and Human Security*, Springer, 2011, pp. 135–145.

when I heard about that alternative. It would be hopeless to go back to Nigeria. I don't know where the woman who brought me to Europe is. They can kill me.

While several of the women we interviewed spoke of fear of traffickers, there were also other reasons. For instance, one had had a child out of wedlock and said that this effectively would exclude her from her family. In other cases, women spoke of deep poverty and lack of prospects for the future. For our respondents, even the possibility of permanent residence contributed strongly to motivating cooperation.

One consequence of linking prosecution and residence permits, as is done in Norway, is that access to this highly valued form of protection is unequally distributed. Victims' ability to stay in Norway and receive assistance is linked not only to their willingness to cooperate, but also the usefulness of the information they share. And the actual outcome depends on investigations and police capacity, not least for cross border investigations. Whether charges are actually filed may also be influenced by previous court decisions and whether prosecutors assess that there is a chance of a successful trial. One respondent very clearly problematized the unequal ability to give useful information:

Sometimes when the police want the story and you tell them what you know, they say you're lying because your information isn't right, it doesn't check out. If you live with the pimp, then maybe you can give useful information, but otherwise it's almost impossible. None of the girls in the street have correct information about the pimps anyway. There's so much bad stuff on the street, you need to be someone else, you need to use a fake name. If someone says their name is Joy, it never really is.

When highly sought after protection becomes dependent on usefulness of the information that victims are willing or able to share, one consequence is the instrumentalisation of victims. What assistance is offered to them and what their further trajectories become, depends on their function in and value to a criminal justice process, not their individual needs. Somewhat bizarrely, this also creates an inequality in access to protection that particularly disfavours victims who have been very isolated, had very little control over their situation and/or very limited access to information about their traffickers.⁴²

We argue above that the current pairing of protection and prosecution serves to create a considerable pressure on victims to cooperate with authorities. By implication, it needs to be discussed whether victims may be pressured into taking decisions about cooperating that they otherwise would not have taken, due to the high stakes and potential high returns. In lay terms this can be framed as whether they are given an offer they cannot refuse. In the field of ethics this is generally termed 'undue inducement'.⁴³ Central to this discussion is whether it is in the best interest of victims to cooperate, or whether they are induced to cooperate even if it is against their best interest, because of potential high gains. This must also be seen in relation to the often considerable socio-economic vulnerability of trafficked persons.

Our respondents described different experiences with (and assessments of) their cooperation with authorities in criminal proceedings against their traffickers. Some were satisfied both with the process and the outcome, some had very strong regrets that they had cooperated. In yet other cases, the picture was more complicated and our respondents spoke of cooperation having both high costs and high benefits.

In one successfully prosecuted case, the woman voiced a strong sense of relief that her traffickers were punished:

If I had to choose again, I would have done the same thing. What else could I have done? I had no choice. Should I have gone back to the street? I couldn't go [home] and I was terrorised by the pimps. The reflection period was a great help, I got the chance to start anew. Not having to be in the street, get a new start, a new life. It was very good.

Very negative consequences ensued when charges were dropped or investigations did not lead anywhere. One woman expressed strong regret that she had cooperated with authorities and given them the name and address of her trafficker:

⁴² Brunovskis, 2012.

⁴³ See: Brunovskis, 2012, pp. 56–58 for a discussion of due/undue inducement and victim protection. For discussions of undue inducement and coercive offers in research ethics literature, see for instance EJ Emanuel, 'Ending Concerns about Undue Inducement', *The Journal of Law, Medicine & Ethics*, 32(1), 2004, pp. 100–105; R Macklin, "Due' and 'Undue' Inducements: On passing money to research subjects", *IRB: Ethics & Human Research*, 3(5), 1981, pp. 1–6; J McGregor, "'Undue Inducement' as Coercive Offers", *The American Journal of Bioethics*, 5(5), 2005, pp. 24–25.

I've been in this process for two or three years now, I feel like my life is just passing me by, and I don't know where I belong or how this is going to end. After the reflection period my situation is even worse than before. If I'd stayed with the pimp I might have been free by now, but it's like I've wasted several years for nothing. I can't go home, he will find me.

For others, there was considerable ambivalence and both high costs and benefits. In another successfully prosecuted case, a feeling of fear and guilt was overwhelming. Two of the woman's family members had died at times that coincided with important developments in the investigation of her case. She tearfully explained that they had died as a result of voodoo⁴⁴ because she had cooperated with authorities, and blamed herself for their deaths. At the same time, she expressed that she had no alternative and that the assistance she received had finally given her some hope for her future.

These different outcomes and experiences challenge the assumption that cooperating or testifying is generally empowering, or always in the victims' best interest. Another issue that bears discussion is whether and to what extent decisions about cooperating can really be 'informed' (as set forth, for instance, in the CoE Convention). That it is in the victim's best interest to cooperate will rarely be clear at the time that the decision needs to be taken, but depends on an unpredictable future outcome in the criminal justice system. Several women we interviewed described it as a disempowering process with loss of control and waiting for information. It is our impression that police, lawyers and social workers in many cases tried to offset this uncertainty to the best of their abilities, though in periods there might not be any new information to share.

How Protection Affects Prosecution

As demonstrated above, the linking of protection and prosecution affects the access victims have to protection and is also something that stands in the way of their ability to protect themselves from possible harms of testifying. In this section, we focus on two sets of issues to understand how current policy affects the ability of police and prosecution to successfully prosecute trafficking. The first issue has to do with the ability to build a trafficking case in the first place, and the other with the likelihood of success once a case reaches court.

During research into the reflection period, we found among police officers and representatives of the prosecution different opinions about how protection and prosecution should complement each other. The view that protection leads to prosecution is, as mentioned above, central in the CoE Convention and in Norwegian policy documents, but it is less clear how this actually plays out. While police officers we interviewed generally were of the opinion that they *should* be linked, only representatives from one of the larger police districts explicitly talked about how this link directly contributed to their ability to prosecute trafficking cases. Representatives from this police district described that they relied on how assumed victims would accept to cooperate with them after receiving information about their entitlement to protection and non-punishment as a victim.

The initial reflection period in Norway is not dependent on cooperating with the authorities. Instead this period is meant to give the victim a chance to recuperate and to think about whether or not she wants to press charges against her trafficker and testify in a case against him or her. This lack of a link between protection and prosecution at this stage is described as a problem by police officers; it hampers the investigation and under-communicates how important cooperation with the authorities actually is for the outcomes for victims. As cooperation is not a prerequisite at this initial stage, few victims give information to the police. Victims typically only formally 'report' the case as the reflection period is about to expire.⁴⁵ The police respondents see this as an understandable response to the system and they believe the report comes at this stage because the one-year temporary residence permit mandates cooperation with the police. A representative of the prosecution explained how the prospect of a case going to court is weakened when victims delay giving information to the police: 'The thought behind the reflection period is good, but the problem with giving people six months to reflect is that that is exactly what many do.' By the time most report their traffickers to the police, technical evidence and witnesses that can corroborate her testimony have disappeared, he explains.

⁴⁴ The role of 'voodoo' pacts in the trafficking of Nigerian women in particular has received quite a lot of attention. In our previous research we found that voodoo takes on different meanings for different women—in some cases, it appears to be more of a ritual connected to agreements in general and is not necessarily given much weight or seen as a real threat. In other cases, however, such as this, voodoo is experienced as extremely powerful and terrifying (Skilbrei and Tveit 2008).

⁴⁵ A police report has not necessarily been filed by the victim during the course of the reflection period and for that and other reasons, the police may not have initiated an investigation. If a victim files a report, the police are obliged to open an investigation, and if this happens towards the end of the initial reflection period, it usually also means that the victim will be granted the one-year work and residence permit that is issued when their presence in the country is necessary for the investigation (Brunovskis et al. 2010).

While victims are implicitly encouraged by the system to delay reporting to the police in order to secure as long a temporary residence permit as possible, their chances of obtaining a permanent residence is weakened because that depends on the case going to court. Reporting late also contributes to producing the result that we mentioned above: only a few of the cases of trafficking reported to the police end up being prosecuted. The police report that victims are often surprised when the investigation is closed down quickly and no one gets prosecuted.

A related issue is that a delay in sharing information with authorities can weaken the credibility of the victim, should the case go to court. An 'ideal' victim is devastated by the event, and willing to cooperate with the police without delay.⁴⁶ Delays can therefore be a reason for the police to not prioritise a case. Due to high costs linked to trafficking investigations, the police naturally prioritise stronger cases, and this mandates a victim who appears credible and willing to aid the police without thinking about how it will benefit her.

There are concrete instances where the link between protection and prosecution has been made relevant in court. Particularly impacting on the strategies of the defence and the deliberation of the judges is the fact that cooperation with police and prosecution can award assumed victims a temporary and permanent residence period respectively. The focus has been on how the legal protection of the defendant is infringed and the credibility of the witness' statement is weakened when the witness is receiving great rewards in return for testifying. These concerns are most explicitly stated in a court decision from Oslo City Court⁴⁷ in a large-scale case from 2008, which involved perpetrators and victims from Nigeria. While the case resulted in a conviction, the written sentence explicitly refers to how using a permanent residence permit to convince someone to testify may induce victims to give false testimony and that this possibility weakens the credibility of the testimony:

Testimonies given to the police and court in a situation where someone has a strong personal motive to give the testimony a particular content, can never have the same evidentiary value as in situations where the witness has nothing to gain from her testimony.

Even before the verdict in that particular case, police brought up some inherent problems with this way of linking protection and prosecution. Said one police representative:

Creating a system that promotes or presses forward statements, that are then presented in court, when the goal is a residence permit, harms much more than the victims, it harms the case.

One lawyer, experienced in serving as legal representative for victims in trafficking cases, also brought up how this way of linking protection and prosecution threatens due process:

In terms of the rights of the defendant, this creates a very dangerous situation: If someone says that they are a victim of trafficking, they are believed even if their story is not coherent. I believe that there are cases where one does not to a large enough degree problematize whether the story is told only to access rights; that there are cases that are not in reality trafficking, but that is handled as such.

In line with what we demonstrated in the last section, the failure to prosecute human trafficking produces some adverse consequences for victims. Once the credibility of the testimonies is questioned, it weakens the likelihood of a successful case and therefore also of a permanent residence permit.

Conclusion

We have argued in this article that the linking of protection and prosecution brings with it a number of practical complications for victims and their protection, as well as for the prosecution of traffickers. Policy discussions and documents tend to frame victims primarily as trauma patients in need of time, recovery and trust building, and consider less the implications of many victims being migrants and how this means that a residence permit can be extremely highly valued. Missing this aspect means missing the context for many victims' decision making and the pressures to cooperate that can ensue, even in cases where cooperation may not be in their best interest. We also show how protection of victims contingent on cooperation with authorities can have adverse effects on the prosecution of traffickers: it can undermine victims' credibility as witnesses when they are 'rewarded' with a residence permit; 'ideal' victims do not act out of self-interest. It can also, when organised in the way it is in Norway, cause delays in sharing information central to investigations and prosecution.

⁴⁶ R Strobl, 'Constructing the Victim: Theoretical reflections and empirical examples,' *International Review of Victimology*, vol. 11, 2004, pp. 295–311.

⁴⁷ 10-018699MED-OTIR/03.

An overarching concern of this paper is the domination of a strong criminal justice focus in relation to policy, practice and discourse around human trafficking. That focus is not unique to the human trafficking field but has been discussed in research on sexual violence and feminist activism. These discussions have particular relevance and parallels here, given the dominant focus on sexual exploitation in international (and Norwegian) trafficking debates. It has been argued that criminal justice approaches towards various forms of sexual and sexualised violence have been prioritised by the women's movement to such a degree that it is affecting victims' access to rights and assistance. Legal strategies have perhaps been particularly central to Scandinavian feminism.⁴⁸ Their appeal is not difficult to understand, as law has such great definitional and practical consequences, not only by what understandings it brings forth, but also by what stories it silences.⁴⁹ As legal strategies are important instruments for feminist battles for justice and recognition, low conviction rates are read as evidence of political and cultural failures. However, this further justifies creating conditions for (or alternatively, increasing pressure towards) victims to come forward and testify, and uncritically marries the interests of feminism and the criminal justice system. Wendy Larcombe⁵⁰ urges feminists to carefully consider whose interest convictions serve, instead of just accepting the dominant notions about preventive and transformative power of criminal justice.

Victims of sexual and sexualised violence talk about pressure to report by those who have demanded rights on their behalf.⁵¹ And following cooperation it may be difficult for the victim/witness to actually take care of her own interest. This is parallel to what we have observed with victims of trafficking. While it is sometimes claimed that testifying is inherently empowering,⁵² we argue that this is not a given, and to the contrary, that it can be a process that is both disempowering and unpredictable.

An important issue is whether legal strategies, while beneficial for 'the cause', are harmful for the victim/witness. Several have written on how trials on sexual and sexualised violence may be retraumatising for victims.⁵³ In addition to the prospective harm of being questioned in detail about the violence experienced, the court setting requires a particular narration of the events, where ambiguity and agency may need to be left out in order to produce the victim as 'ideal', something which may impact on the victims' recovery process.⁵⁴

When prosecution and criminal justice are prioritised, this also reflects a deeper understanding of what human trafficking is about and how it can best be addressed. When victims are given protection based on cooperation to achieve prosecution, this can be read as their exploitation being a question *primarily* of criminal acts. However, most cases of trafficking that we have encountered have not merely been about cynical criminals misleading and exploiting victims, but have been anchored in a deeper, structural vulnerability on the part of those exploited. It is not simply a question of ending trafficking by eradicating organised crime. A dominant criminal justice approach deflects focus from the pressing need to address deeper, structural conditions that continue to facilitate exploitation.

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⁴⁸ M L Skilbrei and C Holmström, *Prostitution Policy in the Nordic Region: Ambiguous sympathies*, Farnham, Ashgate.

⁴⁹ N Henry, 'The Fixation on Wartime Rape: Feminist critique and international criminal law', *Social & Legal Studies*, vol. 23, 2014, pp. 93–111.

⁵⁰ W Larcombe, 'Falling Rape Conviction Rates: (Some) feminist aims and measures for rape law', *Feminist Legal Studies*, vol. 19, 2011, pp. 27–45.

⁵¹ L Hengehold, 'Remapping the Event: Institutional discourses and the trauma of rape', *SIGNS*, vol. 26, 2000, pp. 189–214.

⁵² See for instance Haynes, 2004.

⁵³ B Krahe and J Temkin, 'Addressing the Attitude Problem in Rape Trials: Some proposals for methodological considerations' in M Horvath and J Brown (eds.), *Rape: Challenging contemporary thinking*, Willan, Collumpton, 2009, pp. 301–321.

⁵⁴ Hengehold, 2000, p.198.

