

# Obtaining Legal Residence in Norway as a Victim of Human Trafficking

*Understanding ‘vulnerability’ within immigration law  
and regulation in the context of Norwegian anti-human  
trafficking policy and practice*

Candidate number: 8010

Submission deadline: 15. January 2020

Number of words: 19847



## **Acknowledgments**

Firstly, I want to thank my supervisor May-Len Skilbrei for her support, constructive feedback and guidance throughout my research and writing process. I would also like to extend my gratitude towards the representative from the Oslo Red Cross project 'Right to be seen' who provided me with valuable guidance in steering my focus of interest in the right direction. Additionally I would like to thank those representatives from the ROSA project and Pro-Sentret who participated in the interviews I conducted for this thesis. Lastly I am grateful to my family and friends for showing interest in my work and always being supportive and understanding, thank you.

## **Abstract**

Victims of human trafficking are internationally recognised as particularly vulnerable and in need of a special system of assistance and protection. This thesis explores the operationalization of Norwegian immigration law and legislation, and analyses in what way a victim of trafficking's need for protection through obtaining a legal residence permit is being considered within the Norwegian authorities anti-human trafficking efforts. The following discussion focuses on the responsibility and obligation of the State authority as a main actor in terms of providing a system of special measures of protection, specifically in regards to the granting of residence permits, for victims of human trafficking residing in their territory, and in what way the existing mechanisms of protection addresses a lack of legal residence status as a form of vulnerability. Within the framework of vulnerability theory this thesis argues that although the Norwegian immigration system acknowledges that victims of trafficking are particularly vulnerable, there is a gap between victims actual needs in terms of vulnerabilities related to immigration status and the protection mechanisms that are accessible to ensure this in practice. In other words, the Norwegian authorities are not providing the vulnerable subject with enough resilience to protect him/herself from the risk of future harm.

## Table of Contents

<b>1</b>	<b>CHAPTER 1: INTRODUCTION .....</b>	<b>1</b>
<b>2</b>	<b>CHAPTER 2: PRESENTATION OF RELEVANT LEGAL FRAMEWORKS, MAIN CONCEPTS &amp; THEORETICAL BACKGROUND.....</b>	<b>4</b>
2.1	<i>The right to obtain legal residence as a victim of human trafficking according to the international anti-human trafficking legal framework .....</i>	5
2.1.1	<i>The United Nations Trafficking Protocol.....</i>	7
2.1.2	<i>The Council of Europe Trafficking Convention.....</i>	9
2.2	<i>The existing conditions for residence permits within Norwegian law and regulation applicable to victims of trafficking in human beings .....</i>	12
2.2.1	<i>The period of reflection.....</i>	14
2.2.2	<i>The renewed temporary residence permit.....</i>	15
2.2.3	<i>The witness instruction.....</i>	15
2.2.4	<i>Protection through asylum/ or on grounds of strong humanitarian considerations.....</i>	16
2.3	<i>A victim of human trafficking as a vulnerable person.....</i>	18
2.3.1	<i>Defining a ‘victim of trafficking’ .....</i>	19
2.3.2	<i>Vulnerability theory .....</i>	20
2.3.3	<i>Applying vulnerability theory.....</i>	23
<b>3</b>	<b>CHAPTER 3: METHODOLOGY.....</b>	<b>25</b>
3.1	<i>Collection of data, sources and research materials.....</i>	25
3.2	<i>Analysing the data .....</i>	27
3.3	<i>Ethical Considerations .....</i>	28
<b>4</b>	<b>CHAPTER 4: VULNERABILITY THEORY WITHIN THE CONTEXT OF THE NORWEGIAN HUMAN TRAFFICKING FRAMEWORK.....</b>	<b>29</b>
4.1	<i>Applying vulnerability theory to address the needs of victims of trafficking .....</i>	29
4.2	<i>The operationalization regarding the State’s obligation to protect victims of trafficking .....</i>	31
4.2.1	<i>Foundations for residence permits: The reflection period and renewed temporary residence permit.....</i>	32
4.2.2	<i>Foundations for residence permits: The witness instruction .....</i>	35
4.2.3	<i>Foundations for residence permits: Asylum .....</i>	36
4.2.4	<i>Foundations for residence permits: Strong humanitarian considerations .....</i>	38
4.2.5	<i>Thresholds for residence permits within different contexts of vulnerability.....</i>	39

4.3 *The operationalization of the State’s obligation to prosecute traffickers* ..... 43  
    4.3.1 *The Norwegian criminal justice approach in relation to their international obligations* ..... 46  
    4.3.2 *Understanding vulnerability within the objective of prosecution* ..... 46  
4.4 *Discussion and final remarks* ..... 47  
**5 CHAPTER 5: CONCLUSION** ..... 52  
**BIBLIOGRAPHY** ..... 54

# 1 Chapter 1: *Introduction*

Trafficking in human beings is deemed one of the worst crimes that can be committed to a person and is often referred to as being the modern slavery of our time<sup>1</sup>. This view clearly indicates the severity of the violation trafficked persons are victim to, leaving them in a particularly vulnerable situation through this form of victimhood. Trafficking victims are internationally recognised as particularly vulnerable and in need of a special system of assistance and protection. *But how is this need for protection being considered within the Norwegian authority's responses to human trafficking?*

It is widely recognised by the authorities in Norway that trafficking in human beings is a serious criminal act, in breach of fundamental human rights, which can have severe and harmful consequences for those who fall victim to this form of exploitation<sup>2</sup>. Since the early 2000s Norwegian authorities have been establishing a system aimed at both fighting human trafficking as a criminal phenomenon and at protecting and providing assistance to victims<sup>3</sup>. Examples being the establishment of a special residence permit for victims within the immigration system: *the period of reflection*<sup>4</sup>, the establishment of KOM as a permanent coordinating unit for victims of human trafficking within the National Police Directorate since 2011<sup>5</sup>, trained experts within regional police departments working specifically with trafficking cases<sup>6</sup>, and the general system of cooperation between the State and several organizations and agencies<sup>7</sup> contributing to ensure the rightful treatment of victims. All the above acknowledge how this particular group is in need of special arrangements and measures of assistance and protection when residing in Norway. Obtaining a legal residence status in Norway is often of high priori-

---

<sup>1</sup> The Norwegian Government's Plan of Action against human Trafficking, titled "Regjeringens handlingsplan mot menneskehandel" Published November 2016 (hereinafter *Norwegian government's Plan of Action*, (2016)), p. 4.

<sup>2</sup> Ibid., p. 7.

<sup>3</sup> Silje Sønsterudbråten, 'Bistand og beskyttelse til ofre for menneskehandel – Tverretattlig samarbeid i Oslo og Bergen', Fafo report 2013:01, (hereinafter Sønsterudbråten (2013)), p. 15.

<sup>4</sup> Forskrift 15. Oktober 2009 om utlendingers adgang til riket og deres opphold her (Utlendingsforsikriften), Unofficial translation, which does not have legal status, can be retrieved from: [https://www.udiregelverk.no/en/documents/relevant-acts-and-regulations/Immigration\\_Regulations/](https://www.udiregelverk.no/en/documents/relevant-acts-and-regulations/Immigration_Regulations/) (hereinafter Immigration Regulations), Chapter 7, § 8-3.

<sup>5</sup> Sønsterudbråten (2013), p. 22.

<sup>6</sup> Information from the official website of the Norwegian Police Department: [www.politiet.no/rad/menneskehandel/slik-jobber-politiet-for-a-bekjempe-menneskehandel/](http://www.politiet.no/rad/menneskehandel/slik-jobber-politiet-for-a-bekjempe-menneskehandel/)

<sup>7</sup> The Secretariat of the Shelter Movement's ROSA project, The Church City Mission, Pro Sentret, Oslo Red Cross *Right to be Seen* project, and The Salvation Army.

ty as a measure of protection for a majority of victims of human trafficking, especially for those whose country of origin is outside the EU/Schengen area. And a lack of legal residence status is seen as a decisive vulnerability factor when it comes to the situation of many victims who have been exploited through human trafficking residing in Norway<sup>8</sup>. The importance of legal residence in terms of ensuring victim's rights is also indicated in the most recent KOM report<sup>9</sup>.

My objective with this thesis has been to explore the operationalization of Norwegian immigration law and legislation, and analyse in what way a victim of trafficking's need for protection through obtaining a legal residence permit is being considered within Norwegian authorities anti-human trafficking efforts. The following discussion focuses on the responsibility and obligation of the State authority as a main actor in terms of providing a system of special measures of protection, specifically in regards to the granting of residence permits, for victims of human trafficking residing in their territory. Since the human trafficking policy framework in Norway is highly influenced by their adoption and signing of international and regional conventions, directives and protocols, I have included a discussion of these in this thesis in an attempt of contributing towards an increased understanding of Norway's obligations, and the extent to which these obligations are integrated in national measures and services created to protect victims of human trafficking.

This thesis also addresses the practical functionality of the category *trafficking victim*, specifically in terms of what it encompasses as an immigration status within Norwegian immigration law and regulation, and to what extent the Norwegian approach is designed to address a lack of legal residence status as a form of vulnerability. I have done this by presenting the existing immigration laws and regulations applicable to trafficking victims and by analysing the operationalization of existing arrangements, laws and regulations within the Norwegian immigration system. Throughout this thesis I have utilised the concept of 'vulnerability' both as a measure of discussing the role and responsibility of the State in terms of ensuring the protecting of trafficking victims, and in terms of how the fluidity, different understandings and utilizations of what vulnerability entails for a victim of trafficking, could be seen as affecting

---

<sup>8</sup> ROSA yearly report titled "Årsrapport 2018", published April 2019 (hereinafter ROSA (2019)), p. 5.

<sup>9</sup> KOM yearly report titled "Rapport fra Koordineringsenheten for ofre for menneskehandel - 2018" Published June 2019 (hereinafter KOM report (2019)), p. 3.

thresholds, access and/or availability to residence permits as a measure of protection within the immigration system in Norway. The following research question will function as a basis for further exploration of the extent to which Norwegian authorities' understanding and consideration of vulnerabilities and victim's needs affect how the immigration system is both constructed and operationalized in terms of applying to a specific form of applicant:

- *How is a victim of trafficking's need for protection through obtaining a legal residence permit considered within the Norwegian authorities' anti-human trafficking framework?*

## **2 Chapter 2: Presentation of Relevant Legal Frameworks, main Concepts & Theoretical Background**

Within legal anti-human trafficking frameworks the concept of ‘trafficking in human beings’ is today widely accepted as concerning: the exploitation and violation of persons (men, women and children) that can occur both within and between countries for any purpose or in any industry or situation in which revenue can be produced<sup>10</sup>. As will be demonstrated below, there has been a significant development in terms of the common understanding of what trafficking encompasses, and with this development a continuous adjustment of the conceptualization of what it entails to be ‘a victim of trafficking’ and what forms of protection and assistance it is deemed necessary to ensure for persons within this scope.

While there are many cases of persons being trafficked and subjected to exploitation within their own countries, most cases identified as trafficking in Norway involves forms of international migration<sup>11</sup>. With trafficking generally taking place across borders, it leaves many victims without legal residence in the countries they have suffered exploitation<sup>12</sup>. This thesis is therefor focused on the vulnerable situation that victims who have settled in Norway illegally find themselves in. These particular and often acute vulnerabilities, stemming partly from their migration status<sup>13</sup>, results in a need for a residence permit in order to ensure their claim to assistance and protection from harm, and avoid being re-victimized or re-trafficked. This thesis therefor attempts to utilize vulnerability theory in addressing both the conceptualization of what it entails to be a victim of trafficking and in what ways the Norwegian human trafficking framework have established mechanisms to ensure their protection.

---

<sup>10</sup> Anne T. Gallagher, ‘Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage’, Chapter 14 in “The theory and Practice of International Criminal Law”, Author: Michael Scharf, Editor: Leila Sadat, 2008, Chapter 14 pp. 397-430 (hereinafter Gallagher (2008)), p. 399.

<sup>11</sup> Anette Brunovskis, ‘Special rights within universal welfare: Assistance to trafficking victims in Norway’, In *Journal of Comparative Social Work*, 2016, Vol. 11:1, PP. 5-37, (hereinafter Brunovskis (2016)), p. 9.

<sup>12</sup> Anette 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’, written for Fafo on commission from the Nordic Council of Ministers, 2012 (hereinafter Brunovskis (2012)), p. 21.

<sup>13</sup> Anne T. Gallagher, ‘Human Rights and Human Trafficking: Quagmire or Firm Grand? A Response to James Hathaway’ In *Virginia Journal of International Law*, Volume 49, no. 4, 2009, pp. 789-848 (hereinafter Gallagher (2009)), p. 822.

Firstly, this chapter provides an overview of the development and existing international legal framework that directly relates to trafficking in human beings. A framework that is both steering the development of the Norwegian approach towards the issue, and provides obligations that the State of Norway must comply with. Secondly, this chapter presents the existing conditions for residence permits for victims of trafficking within Norwegian law and regulation. Thirdly this chapter presents the framework of vulnerability stemming from the theory provided by Martha Fineman, from which the main body of this thesis will build on further.

## *2.1 The right to obtain legal residence as a victim of human trafficking according to the international anti-human trafficking legal framework*

A trafficking victim's claim to obtaining a residence permit as a foreign national is not only anchored in the national laws and regulations of the State in which they are residing, but could be argued from the perspective of an international anti-human trafficking framework.

In other words, Norway is obligated to provide specific forms of assistance and protection to victims of trafficking residing in their territory according to the international treaties, protocols and conventions the State has signed and/or ratified. The objective of these documents is to guide global, or regional, efforts towards addressing specific issues and maintaining the international rule of law with established obligations that State Parties must comply with. The development of such international anti-trafficking instruments, and the efforts towards establishing a best practice within the field, has remained of high priority throughout the last decades<sup>14</sup>. Two of the most relevant international legal sources to utilise when addressing the issue of residence permits for victims of human trafficking are: the United Nations 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' commonly referred to as the 'Palermo Protocol' or the 'Trafficking Protocol', (hereinafter the Trafficking Protocol), ratified by Norway in 2003, and the 'Council of Europe Convention on Action against Trafficking in Human Beings' (hereinafter the Trafficking Convention) ratified by Norway in 2008. These two documents therefor serve as the main international legal instruments to be addressed further in this thesis.

---

<sup>14</sup> May-Len Skilbrei, 'Moving Beyond Assumptions? The Framing of Anti-Trafficking Efforts in Norway', Chapter 10 in *Transnational Migration, Gender and Rights Advances in Ecopolitics*, 2012, Emerald Group Publishing Limited, Volume 10, pp. 211-227 (hereinafter Skilbrei (2012)), p. 211.

The protection of human beings who fall victim to exploitation through trafficking, being a grave violation of human rights, would be a natural task to take on within the field of human rights law. However, there exists no comprehensive prohibition against trafficking, or legal mechanisms for protection of victims of trafficking, within international human rights law<sup>15</sup>. From being an area mainly addressed by international human rights advocates, the anti-human trafficking framework has gradually been embedded into global efforts focused on tackling the issue of transnational organized crime<sup>16</sup>. This transition could be seen as stemming from the fact that a human rights treaty on trafficking would not have rallied State commitment, or created the necessary level of political support to the cause. There was therefore a need to identify human trafficking as an issue of transnational crime that required international cooperation and responses from States imposed on them by obligations set out in a global instrument or document<sup>17</sup>. The linking of trafficking to widely accepted international principles within international criminal law created normative clarification and a foundation justifying specific obligations that not only criminalized trafficking but aimed to secure justice for victims<sup>18</sup>. Although building on efforts within the field of human rights law, the international organized crime approach is credited for the rapid establishment of international, regional and national reforms addressing this specific issue, and in having created specific tools that are also applicable within the human rights system<sup>19</sup>.

However, the establishment of trafficking in human beings as a human rights issue within an organized crime framework could be seen as causing tensions, in that specific responses related to the protection of victims are seen as inadequate or down-prioritized compared to other State interests. It is argued that some responses to the trafficking issue, stemming from the transnational organized crime framework, could be harmful to victims. The focus on criminal justice was seen as overshadowing the human rights of victims, and States could often be seen as taking advantage of their right to control their own borders and implement strict migration

---

<sup>15</sup> Gallagher (2008), pp. 399-400.

<sup>16</sup> Anne T. Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2006 European Convention and Related Instruments', In *European Journal of Migration and Law*, Volume 8, 2006, pp. 163-189 (hereinafter Gallagher (2006)), p. 163.

<sup>17</sup> Anne T. Gallagher, 'Two Cheers for the Trafficking Protocol', In *Anti-Trafficking Review*, Issue 4, 2015, pp. 14-32, Access: [www.antitraffickingreview.org](http://www.antitraffickingreview.org) (hereinafter Gallagher (2015)), p. 16.

<sup>18</sup> Gallagher (2008), p. 430.

<sup>19</sup> Gallagher (2009), p. 793, 847.

regimes under the cover of securing human rights in denying traffickers access to a “market” for exploitation to occur. In reality, it is argued that such approaches are more often seen as increasing discrimination and inequalities and leaving victims to suffer even more<sup>20</sup>. As a response to the initial criticisms of the global human trafficking framework further adjustments were made in terms of securing victim’s rights. These developments will be discussed further below.

### 2.1.1 *The United Nations Trafficking Protocol*

The Trafficking Protocol is an agreement supplementing the ‘United Nations Convention against Transnational Organised Crime’ and was created due to the absence of an existing instrument that sufficiently protected persons who are vulnerable to trafficking<sup>21</sup>. It is the only global instrument concerning trafficking in human beings and is argued to have done, “more than any other single legal development of recent times to place the issue of human exploitation firmly on the international political agenda”<sup>22</sup>, especially in terms of establishing a definition of ‘trafficking in persons’ that has become widely accepted by States<sup>23</sup>. The Trafficking Protocol defines the act of ‘human trafficking’ in Art. 3a), stating that: “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”. In defining what constitutes trafficking in persons, Article 3 of the Trafficking Protocol establishes what type of action, violation, or crime a person exploited through trafficking has suffered from, also depending on the circumstances under which this has occurred, but does not explicitly define what it entails to be a victim that would have a claim to be protected within this scope.

The Trafficking Protocol focuses on three main strands of action in terms of anti-human trafficking efforts, or the ‘three Ps: *prevention* of trafficking, *protection* of victims, and the de-

---

<sup>20</sup> Gallagher (2009), pp. 830-834.

<sup>21</sup> ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’ (hereinafter Trafficking Protocol), Preamble, paragraph 3-4.

<sup>22</sup> Gallagher (2015), p. 15.

<sup>23</sup> Gallagher (2006), p. 165.

velopment and use of appropriate legal means to *prosecute* traffickers. The Trafficking Protocol states that, “(...) effective action to prevent and combat trafficking in persons (...) requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognised human rights”<sup>24</sup>. One of the main purposes of this Protocol is stated in Art. 2b). as being, “To protect and assist the victims of such trafficking, with full respect for their human rights”. The Trafficking Protocol continues in Art 6.3 to state that, “Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons”. The Trafficking Protocol addresses prevention of trafficking in Art. 9.1 by stating that, “States Parties shall establish comprehensive policies, programmes and other measures; (...) (b) To protect victims of trafficking in persons (...) from revictimization” and in Art 9.4 by stating that, “States Parties shall take or strengthen measures, including through bilateral and multilateral cooperation, to alleviate the factors that make persons (...) vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.

In terms of States’ obligation to provide protection through residence permits the Trafficking Protocol states in Art. 7. 1 that, “(...) each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases”. This proposition is further stressed in Art 7.2 stating that, “In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors”. In terms of returns Art 8.2 of the Trafficking Protocol states that, “When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the rights of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary”.

The trafficking Protocol has received criticism for its detailed obligations related to prosecution while not containing equally strong or elaborate obligations related to the protection of

---

<sup>24</sup> Trafficking Protocol, Preamble, paragraph 2.

victims. This prioritization is claimed to be steering the overall focus of the international anti-trafficking governance system towards a narrow approach focused on establishing systems that are well suited for prosecuting traffickers, but leaving less room for action focused on preventing trafficking from happening or protecting and providing assistance to those already victimized<sup>25</sup>. The Trafficking Protocol uses strong wording in obligating states to prosecute traffickers, for example Art. 5.1 and 5.2 stating that each State Party *shall* adopt specific legislative measures needed to establish trafficking as criminal offences. In terms of safeguarding the rights of victims the wording is not as strong, one example being Art. 7.1 which states that each State Party *shall consider* adopting specific measures. In relation to protecting victim's rights the Trafficking Protocol offers little in terms of requirements, in the form of legal obligations, for State action. There is a dual purpose in encouraging States to provide specific forms of protection and assistance to victims, with the main focus still being to secure the prosecution and conviction of traffickers by facilitating towards victims being able and willing to cooperate in ensuring this.

As will be demonstrated below, the Council of Europe's Trafficking Convention is therefore generally viewed as being stronger than the Trafficking Protocol in terms of safeguarding the rights of victims, also when it comes to regulating a State's obligation to provide residence permits to victims of trafficking.

### 2.1.2 *The Council of Europe Trafficking Convention*

The Trafficking Convention builds on the core provisions, the three Ps, and utilises the general language found within the trafficking Protocol. However, the Convention goes further in terms of integrating a rights-based and victim-centred approach in articulating the obligations of States towards anti-human trafficking efforts<sup>26</sup>. The Trafficking Convention is meant to be a supplement to the Trafficking Protocol, and with this it aims to address what could be seen as lacking from the latter<sup>27</sup>. As a regional instrument the Trafficking Convention establishes precise, and potentially stricter, standards for States Parties than a global instrument dealing with the same issue. The Trafficking Convention is seen as representing significant improve-

---

<sup>25</sup> Skilbrei (2012), p. 212.

<sup>26</sup> Gallagher (2006), p. 170 & Gallagher (2015), p. 18.

<sup>27</sup> Gallagher (2006), pp. 172-173.

ments in terms of recognising trafficking as a human rights violation, stressing the importance of both addressing and improving the rights of the victims, and is generally stronger in its establishment of legal obligations protecting victims from harm<sup>28</sup>. It is stated in the Trafficking Convention's Preamble that, "(...) trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being". The Trafficking Convention also provides something lacking from the Trafficking protocol, namely a stated definition of what it entails to be a victim, and with this facilitates the application of protection measures for all identified victims who fall under this scope<sup>29</sup>. The Trafficking Convention also specifies in several of its provisions (Trafficking Convention, Article 10 paragraph 2 and Article 13 paragraph 1) that specific obligations also apply to persons whom there are reasonable grounds for believing to be victims. This widens the conception of victims of trafficking beyond those individuals who have been formally identified.

The Trafficking Convention is intended to be "a comprehensive international legal instrument focusing on the human rights of victims"<sup>30</sup> and specifically addresses the issue of residence permits in several of its articles. Some provisions within the Trafficking Convention, such as Articles 13 and 14 apply specifically to victims who are either illegal residents of a State or who only have a short-term residence permit. In general, the provisions regarding victim's legal residence status and repatriation provided by the Trafficking Convention is viewed as improvements compared to similar provisions provided by the Trafficking Protocol<sup>31</sup>. Article 10.2 states that any person the authorities have reasonable grounds to believe is a victim of trafficking, "shall not be removed from its territory until the identification process as a victim of an offence (...) has been completed by the competent authorities". Further, Article 14.1 states that, "Each Party shall issue a renewable residence permit to victims", if a) "the competent authority considers that their stay is necessary owing to their personal situation" and/or if b) "the competent authority considers that their stay is necessary for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings". Article 14.4 states that, "If a victim submits an application for another kind of residence permit, the party concerned shall take into account that he or she holds, or has held, a residence permit in

---

<sup>28</sup> Gallagher (2006), p. 174, 177 & 187.

<sup>29</sup> Ibid., p. 176.

<sup>30</sup> 'Council of Europe Convention on Action against Trafficking in Human Beings' (hereinafter the Trafficking Convention), preamble, paragraph 14.

<sup>31</sup> Gallagher (2006), p. 179.

conformity with paragraph 1”. Article 14.5 states that, “Having regard to the obligations of Parties to which Article 40<sup>32</sup> of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum”. Article 16.2 states that, “When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary”.

The Trafficking Convention also stresses how victims should not be used as instruments in a process of prosecuting traffickers, as is stated in Article 12.6, “Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness”. The Trafficking Convention therefor holds that assistance and protection of victims should not be directly linked to, or dependent on, cooperation in criminal proceedings.

In terms of addressing vulnerability the Trafficking Convention could be seen as reaching further than the Trafficking Protocol. The Trafficking Convention’s Explanatory Report explains how the sentence: ‘the abuse of (...) a position of vulnerability’, as embedded in the definition of trafficking in Article 4(a), entails any kind of physical, psychological, emotional, family-related, social, economic or being in a insecure situation, having a fragile health, or in the form of illegality in administrative status<sup>33</sup>, and this could leave a person with no real and acceptable alternative to submitting to abuse or exploitation<sup>34</sup>. The Explanatory Report also addresses the vulnerability of victims in stressing that, “Victims who break free of their trafficker’s control generally find themselves in a position of great insecurity and vulnerability”<sup>35</sup>. Later in the Report it is pointed out that victims of trafficking who are residing in a Party’s territory without a legal residence permit or with a short-term residence permit, most of whom are likely to be removed from the territory, are “extremely vulnerable after all the trauma they

---

<sup>32</sup> Trafficking Convention Article 40 relates to the Conventions relationship with other international instruments: pointing to obligations and responsibilities under human rights law, protection of refugees and the principle of non-refoulement, paragraph 4.

<sup>33</sup> CETS 197, ‘Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings’ Warsaw 16. V. 2005, Paragraph 62) (hereafter Trafficking Convention Explanatory Report), paragraph 83.

<sup>34</sup> Ibid. paragraph 124.

<sup>35</sup> Ibid., paragraph. 146.

have experienced”<sup>36</sup>. Notably however, this vulnerability is not being directly linked to victim’s migration status but to them being victims of trafficking, as the Explanatory Report links ‘extremely vulnerable’ to all victims of trafficking in the same paragraph.

The Trafficking Convention provides all State members that have ratified the Convention with specific obligations. However, the Convention can only have effect on the ground to the extent that national authorities, for example national courts, governments, or the parliament actually implement and rely on these in practice. In order for this regional protection mechanism to have any effect beyond functioning as a symbolic statement or agreement, it is essential that a State government party to the Convention internalize their obligations both on paper and in practice<sup>37</sup>. State Parties’ implementation of the Trafficking Convention is monitored by a Group of Experts on Action Against Trafficking in Human Beings (hereinafter GRETA). GRETA, consisting of fifteen independent and impartial experts, evaluates each State Party and draws up reports on their findings with the objective of providing “recommendations intended to strengthen the implementation of the Convention by the Party concerned”<sup>38</sup>. GRETA’s second evaluation of Norway will be explored further in chapter 4 of this thesis.

## 2.2 *The existing conditions for residence permits within Norwegian law and regulation applicable to victims of trafficking in human beings*

The existing conditions for residence permits in Norwegian law and regulation are set out in the Norwegian ‘Act relating to the admission of foreign nationals into the realm and their stay here’ (hereinafter the ‘Immigration Act’)<sup>39</sup> and ‘Regulation of 15 October 2009 on the entry of foreign nationals into the Kingdom of Norway and their stay in the realm’ (hereinafter the ‘Immigration Regulations’). As will be presented below, these laws and regulations include provisions that are especially relevant for, and at times specifically addressed to, the category

---

<sup>36</sup> Trafficking Convention Explanatory Report, paragraph. 172.

<sup>37</sup> Olivier De Schutter, “International Human Rights Law”, (2014) Second Edition, Cambridge, Cambridge University Press, (hereinafter *De Schutter* (2014)), pp. 807-808.

<sup>38</sup> GRETA, ‘Report Concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway’, Second Evaluation Round, Published 21. June 2017, (hereinafter GRETA Second Evaluation (2017)), p. 4.

<sup>39</sup> Lov 15 mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (Utlendingsloven), Unofficial translation, which does not have legal status, can be retrieved from: <https://lovdata.no/dokument/NLE/lov/2008-05-15-35> (hereinafter Immigration Act).

of ‘victim of human trafficking’. The definition of ‘human trafficking’ as applied in the Norwegian Penal Code, and then further utilised within national immigration law and regulation, stems from the definition found in the Trafficking Protocol. Both the Immigration Act §38 and the Immigration Regulations §8-4 gives reference to the Norwegian Penal Code §257. Section 257 of the Penal Code defines the criminal act of *trafficking human beings*, in terms of what is punishable by law, in stating that “Any person who by violence, threats, taking advantage of a vulnerable situation or other improper conduct forces, exploits or deceives another person into/for a) prostitution or other sexual services, b) labour or services, including begging, (...) shall be punished for human trafficking (...)”<sup>40</sup>. Section 258 of the Penal Code also points to ‘aggravated human trafficking’ and lists certain elements, such as the age of the victim (or subject of the act) and the severity of the violence or force that was used, in determining punishment in terms of length of imprisonment for the perpetrator. By determining the criminal act of ‘trafficking human beings’ the Penal Code also determines what it constitutes to be ‘a victim of human trafficking’, or rather determines a foreign national’s claim to obtaining a residence permit on the grounds of being a victim of a specific criminal act.

Chapter 8 of the Immigration Regulations addresses the legal scope of a person’s claim to attaining a residence permit as being a victim of human trafficking in Norway. All applications for a residence permit under §8-3 of the Immigration Regulations must be submitted to the police and are then decided by the Directorate of Immigration<sup>41</sup>. After initial identification a victim of trafficking can choose to apply for different types of residence permits, presented below in the following sub-chapters, such as a *period of reflection*, which could be further lengthened through a *renewed temporary residence permit*, or result in a residence permit through the so-called *witness instruction*. While the former two permits for residence are limited, in that they do not form the basis for a permanent residence permit, the witness instruction together with a residence permit obtained through the *asylum* system or on *grounds of strong humanitarian considerations* could lead to a victim being able to obtain permanent legal residence in Norway.

---

<sup>40</sup> Lov om Straff 1. oktober 2015 (Straffeloven), Unofficial translation, which does not have legal status, can be retrieved from: <https://lovdata.no/dokument/NLE/lov/2005-05-20-28> (hereinafter Penal Code).

<sup>41</sup> Immigration Regulations §8-3, paragraph 5.

### 2.2.1 *The period of reflection*

The reflection period functions as a special residence scheme designed for trafficking victims, and is formalised as an international obligation through the Trafficking Convention<sup>42</sup>. The period of reflection for victims of human trafficking was first implemented in Norwegian immigration regulation in 2004 and consisted of 45 days in total. This arrangement was initially intended to function more as a delay of expulsion than a residence permit but has since 2006, with an expansion in length from 45 days to 6 months, functioned as a temporary residence permit for victims of trafficking<sup>43</sup>. The reflection period is intended to be a low threshold form of residence permit, with the objective of allowing victims to break free from their former traffickers, or situation of exploitation, and provide access to further assistance and protection from the State. This intention is specified in a Norwegian Directorate for Immigration Circular<sup>44</sup>.

The ‘Immigration Regulations’ §8-3 defines the conditions under which a person has a claim to this specific type of residence permit. The paragraph is inclusive in terms of clearly stating that this regulation applies within the scope of there being “reasons to believe that a foreign national staying in the realm is a victim of human trafficking”<sup>45</sup>, hence allowing the regulation to apply to so-called *potential victims* that have not been formally identified. However, the paragraph then continues to limit the scope of the regulation by demanding that the recipient of a period of reflection residence permit must be “prepared to accept help and participate in measures offered by the authorities”<sup>46</sup> and that this is a form of residence permit “that does not form the basis of a permanent residence permit”<sup>47</sup>.

---

<sup>42</sup> Brunovsksis (2012), p. 17.

<sup>43</sup> Anette Brunovskis, May-Len Skilbrei and Marianne Tveit, ‘Pusterom eller ny start? Evaluering av refleksjonsperioden for ofre for menneskehandel’, Fafo report 2010:45 (hereinafter Brunovskis, Skilbrei & Tveit (2010)), pp. 19-20.

<sup>44</sup> RS 2013-014, ‘Oppholdstillatelse for utlendinger som antas å være utsatt for menneskehandel (refleksjonsperiode mv.)’ (hereinafter Directorate of Immigration Circular 2013-014), Article 1.1, paragraph 2.

<sup>45</sup> Immigration Regulations §8-3, paragraph 1.

<sup>46</sup> Ibid., paragraph 1.

<sup>47</sup> Ibid., paragraph 1.

### 2.2.2 *The renewed temporary residence permit*

In terms of the renewed temporary residence permit the Immigration Regulations §8-3 further states that, “A foreign national who has had a period of reflection under the first paragraph may be granted a new residence permit that does not form the basis for a permanent residence permit at the end of the period of reflection in accordance with guidelines established by the Directorate of Immigration”<sup>48</sup>. These guidelines are found in the Norwegian Directorate of Immigration Circular Article 4. The residence permit is initially limited to one year, with the possibility of extension, and relates to the objective of facilitating the process of building a criminal case and prosecuting traffickers<sup>49</sup>. Linked to this objective there are specific terms within this permit that distinguishes it from the period of reflection. Namely, added criterion stating that in order for an applicant to be granted this form of residence permit they would need to have completely removed themselves from their former trafficking situation, the traffickers and their crime would need to be reported to the police leading to a police investigation and/or leading to an on-going process of prosecution of the traffickers, and finally, the police or prosecutors considers the presence of the applicant in Norway to be necessary in order to follow through on such investigations and/or process of prosecution. With this the police or prosecutors also holds the power to limit the permit of residence to a period shorter than one year, although as a starting point this would usually not be set to less than six months<sup>50</sup>. Imbedded in these criteria is an obligation of cooperation from the applicant, or victim of trafficking, with the authorities in terms of being of value to the criminal case they are attempting to establish against the traffickers. Finally, this residence permit does not form the basis of a permanent residence permit<sup>51</sup>, but could be renewed for up to a year at a time, still depending on the applicant meeting the criteria presented earlier<sup>52</sup>.

### 2.2.3 *The witness instruction*

The Immigration Regulations §8-4 firstly defines the conditions for residence permits for witnesses in cases concerning human trafficking by stating that “A foreign national who applies for protection after having given testimony as an aggrieved party in legal proceedings in

---

<sup>48</sup> Immigration Regulations §8-3, paragraph 2.

<sup>49</sup> Directorate of Immigration Circular 2013-014, paragraph 4.1.

<sup>50</sup> *Ibid.*, paragraph 4.1.

<sup>51</sup> *Ibid.*, paragraph 4.2.

<sup>52</sup> *Ibid.*, paragraph 4.3.

which an indictment has been preferred under §257 (human trafficking) of the General Civil Penal Code shall be granted a residence permit that form the basis for a permanent residence permit under §38 of the Immigration Act”<sup>53</sup>. Article 8-4 continues to point out that this form of residence permit does not apply if “the foreign national meets the conditions for protection under §28 of the Act”<sup>54</sup> or if “there are special grounds for not granting a permit”<sup>55</sup>.

The witness instruction as a form of residence permit for victims of trafficking was expanded in scope in 2010, with a new instruction from the Ministry of Justice and Public Security and their publication of the Circular GI-31/2010, providing instructions on the application of the Immigration Regulations §8-4<sup>56</sup>. The Immigration Regulations §8-4 thereby expands its scope to also apply in cases where “a foreign national who has given testimony to the court or to the police in a case under §257 (human trafficking) or §315 first paragraph (procurement) of the General Civil Penal Code, if there are grounds to deem that the foreign national, on account of his/her testimony, is in a situation as difficult as that of such foreign national as mentioned in the first paragraph”<sup>57</sup>.

The 2010 Circular points out, both on the front page and in its introduction, that the objective of providing witnesses in cases involving human trafficking with a residence permit is to facilitate in the ability and willingness of victims to cooperate and aid the police in the prosecution process without the fear of reprisals<sup>58</sup>. This is an example of the strong link between the function of residence permits as a form of protection for victims, and as an element that facilitates the process of prosecuting traffickers.

#### *2.2.4 Protection through asylum/ or on grounds of strong humanitarian considerations*

In addition to the residence permits that follows from the Immigration Regulations, a victim of trafficking can also apply for legal residency based on §28 of the Immigration Act, based on their need for protection in being recognised as a refugee. The immigration Act §28 states

---

<sup>53</sup> Immigration Regulations, §8-4, paragraph 1.

<sup>54</sup> Immigration Regulations, §8-4, paragraph 1. section (a).

<sup>55</sup> Ibid., paragraph 1. section (b).

<sup>56</sup> Ministry of Justice and Public Security GI-31/2010 'Instruks om Oppholdstillatelse til vitner i sak om menneskehandel mv.' (hereinafter Circular GI-31/2010).

<sup>57</sup> Immigration Regulations §8-4., paragraph 2.

<sup>58</sup> Circular GI-31/2010, pp. 1-2.

that, “A foreign national who is in the realm or at the Norwegian border shall, upon application, be recognised as a refugee if the foreign national (...) faces a real risk of being subjected to death penalty, torture or other inhumane or degrading treatment or punishment upon return to his or her country of origin”<sup>59</sup>. Article 28 continues to state that, “A foreign national who is recognised as a refugee under the first paragraph shall be entitled to a residence permit (asylum)”<sup>60</sup>. The article also continues to state that, “The applicant shall normally also be recognised as a refugee under the first paragraph when his or her need for protection has arisen since the applicant left his or her country of origin, and is a result of the applicant’s own acts”<sup>61</sup>. If an asylum application is rejected, or in cases where an asylum application does not apply, Article 28 refers to a possible application of §38 of the Immigration Act<sup>62</sup>.

The Immigration Act §38 states that even if a person does not fulfil the conditions or terms otherwise stated in the Immigration Act there could be grounds for granting a person with a residence permit on the grounds of strong humanitarian considerations or a particular connection with the realm<sup>63</sup>. Article 38 continues to list some of these grounds as being: “social or humanitarian circumstances relating to the return situation that gives grounds for granting a residency permit”<sup>64</sup> or “the foreign national has been a victim of human trafficking”<sup>65</sup>. However, §38 also states that when assessing whether a permit should be granted, “weight may be given to considerations relating to immigration control”<sup>66</sup>, and that when a need for residence is seen as temporary the validity in terms of length of the permit may be adjusted accordingly<sup>67</sup>.

In addition to the laws and regulations that have already been presented, Norwegian authorities also need to abide by the principle of non-refoulement. This is stated in the Immigration Act §73 concerning absolute protection against refoulement, which applies to all forms of decisions under the Immigration Act<sup>68</sup>, stating that “A foreign national may not be sent to an area

---

<sup>59</sup> Immigration Act §28, paragraph 1, section (b).

<sup>60</sup> Ibid., paragraph 2.

<sup>61</sup> Immigration Act §28., paragraph 4.

<sup>62</sup> Ibid., paragraph 7.

<sup>63</sup> Immigration Act, §38, paragraph 1.

<sup>64</sup> Ibid., paragraph 2, section (c)

<sup>65</sup> Ibid., paragraph 2, section (d)

<sup>66</sup> Ibid., paragraph 4.

<sup>67</sup> Ibid., paragraph 5, section (a), (c) and (d)

<sup>68</sup> Ibid., §73, paragraph 4.

where he or she would be in a situation as mentioned in §28, first paragraph (b)<sup>69</sup>. Article 73 also states that, “The protection under the first and second paragraphs shall also apply to re-foulment to an area where the person concerned would not be secure against subsequent re-foulment to such an area as mentioned in section 28, first paragraph”<sup>70</sup>.

### 2.3 *A victim of human trafficking as a vulnerable person*

All of the international and national laws and regulations presented above are examples of special measures designed and implemented to make it possible to provide specific types of assistance and protection to those who fall under the category of being a victim of trafficking, a category of persons generally deemed to be particularly vulnerable<sup>71</sup>. The concept of vulnerability, specifically in terms of a victim of trafficking’s distinct experience of vulnerability, provides a need for clearance in terms of what this vulnerability entails. This thesis aims to address in what ways victims of human trafficking could be seen as having a distinct vulnerability in the sense of the law, leading to a specific need for protection provided through a residence permit. In this way, vulnerability is seen as related to the availability of rights one can access, in that there are certain measures of protection that are dependent on a victim meeting specific criteria. An example of this can be found within migration regimes regulating what persons have, or do not have, a claim to be granted a legal residence permit.

Victims of trafficking are not a homogenous group, as they are individuals who are vulnerable in distinct ways. It could be problematic to refer to victims of trafficking as a group or category of persons, in that this indicates that all victims of trafficking have been in the same situation or suffered the same degree of violation or same form of exploitation, and that they have the same needs in terms of protection and assistance as a result of this suffering. It is important to acknowledge that there is a comparative element in terms of addressing the vulnerabilities of victims of trafficking. This chapter therefore firstly seeks to define how the concept ‘victims of trafficking’ will be utilized within the following discussion in terms of what type of vulnerability will constitute the focus of this thesis. Secondly, this chapter explores vulnerability as an important concept in both international and national law by applying and discussing the

---

<sup>69</sup> Immigration Act §73, paragraph 2.

<sup>70</sup> Ibid., paragraph 3.

<sup>71</sup> Brunovskis (2016), p. 8.

theory of vulnerability as introduced by Martha Fineman. Fineman's approach establishes useful tools and a conceptual framework that will make up the foundation from which the following discussion of State obligation and responsibility, the nature of vulnerability, and a victim of trafficking's claim to obtaining a residence permit will be based on.

### 2.3.1 *Defining a 'victim of trafficking'*

In order to establish appropriate forms of protection mechanisms that apply to all victims, it is crucial to understand the actual needs of the group that is being targeted. It is important to recognize that "the situation of persons who fall under the term "trafficked" vary enormously, as do their priorities and desires for the future"<sup>72</sup>. Many victims of trafficking residing in Norway have stressed how they would not consider going back to their country of origin as being an option<sup>73</sup>. This thesis therefor limits its scope somewhat to focus on those victims who have a desire or need for obtaining a residence permit in Norway, moving beyond a more simplistic notion of victims as solely being traumatised and in need of rescue towards an understanding of victims as exploited migrants from varied backgrounds and with varied needs<sup>74</sup>.

Within Norwegian law and regulation, building on the international legal framework, a trafficking victim is defined as a person who is verified to have suffered from any, or combinations, of the criminal acts found within the Penal Code §257 or §258. However, the extent to which a victim of trafficking needs to verify their status varies within the different immigration laws and regulations, and the scope of some residence permits applies to both verified and unverified or potential victims<sup>75</sup>. But as will be discussed further in Chapter 4 the establishment of this verification, or lack thereof, affect how victims are treated within the system in terms of the degree to which they could be seen as having a valid claim or right to residency.

---

<sup>72</sup> Brunovskis (2012), p. 55.

<sup>73</sup> Anette Brunovskis and May-Len Skilbrei, 'Two Birds with One Stone? Implications of Conditional assistance in victim protection and prosecution of traffickers', In *Anti-Trafficking Review*, Issue 6, 2016, pp. 13-30, Retrieved from: [www.antitraffickingreview.org](http://www.antitraffickingreview.org) (hereinafter Brunovskis and Skilbrei (2016)), p. 17.

<sup>74</sup> Brunovskis, (2012), p. 62.

<sup>75</sup> KOM report (2019), p. 6.

### 2.3.2 *Vulnerability theory*

Fineman has developed a conception of vulnerability that intends to provide an alternative approach to existing anti-discrimination and equality frameworks. Such frameworks, according to Fineman, are too focused on addressing discrimination against specifically defined groups, and tend to ignore diverse contexts and people's different circumstances and abilities<sup>76</sup>. Fineman notes that her conception of vulnerability derives from a human rights discourse where it has evolved to focus on the *human* part rather than the *rights* part<sup>77</sup>. Fineman seeks to reconceptualise the idea of vulnerability, moving it away from prejudice, stigmatizations and the idea that individuals should be blamed for their own failings, weakness or dependence on assistance from the State<sup>78</sup>. Fineman argues that vulnerability should be viewed as a universal, constant and inherent part of the human condition and experience<sup>79</sup>. Her understanding of vulnerability is that of an "ever-present possibility of harm, injury, and misfortune"<sup>80</sup>. With addressing vulnerability as universal, existing beyond human control, it takes away some of the former stigmatizations that are linked to it and related concepts such as victimhood, dependency and deprivation<sup>81</sup>.

Within her theory Fineman presents what she terms 'the vulnerable subject', and argues that when policy or laws are created there should be a focus on vulnerability as an inherent part of the human experience<sup>82</sup>. The vulnerable subject approach recognises that throughout a lifetime people experience temporary, and some times permanent, dependency and/or loss of capacity making us vulnerable to a continuous possibility of harm<sup>83</sup>. Fineman seeks to detach vulnerability from only applying to specific subgroups, as she argues that vulnerability should define humanity as it applies to all human beings<sup>84</sup>. Fineman argues that former theories addressing 'vulnerable populations', which attributes vulnerability to specific groups of people

---

<sup>76</sup> Martha A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Conditions', In *Yale Journal of Law & Feminism*, Volume 20, Issue 1, 2008, pp. 1-23 (hereinafter Fineman (2008)), p. 1 & Martha A. Fineman, 'The Vulnerable Subject and The Responsive State', *Emory Law Journal*, Volume 60, No. 2, 2010, pp. 251-276 (hereinafter Fineman (2010)), p. 251.

<sup>77</sup> Fineman (2010), p. 255.

<sup>78</sup> *Ibid.*, p. 259.

<sup>79</sup> Fineman (2008), p. 1.

<sup>80</sup> *Ibid.*, p. 9.

<sup>81</sup> *Ibid.*, pp. 8-9.

<sup>82</sup> *Ibid.*, p. 10.

<sup>83</sup> *Ibid.*, p. 12.

<sup>84</sup> Fineman (2010), p. 266.

seen as more vulnerable compared to others, has resulted in a fixation on personal responsibility and vulnerability being viewed as signifying a lack of autonomy, independence or self-sufficiency<sup>85</sup>. Instead Fineman argues that equality must be a universal resource, and that State efforts in ensuring it should not be conditioned upon group- belonging or identity<sup>86</sup>.

However, Fineman does not completely reject the need for special arrangements for some individuals, or the idea that the State might need to award privileges or advantages to some and not others, but that this practice must be justified<sup>87</sup>. The paradox within Fineman's vulnerability theory suggests that even with vulnerability being defined as a universal concept it also acknowledges that vulnerability could be seen as particular in that it affects humans on an individual level through unique experiences and/or access to available resources that each of us possess or have the ability to command to lessen our vulnerability. The quality and quantity of resources each of us possess affect our vulnerabilities and could be mediated, compensated for and/or lessened by society, the State or other institutions<sup>88</sup>. Fineman also stresses that discrimination based on sexuality, race or gender should not be ignored<sup>89</sup>, and that vulnerability is manifested differently on an individual level that affects the position or circumstances we find ourselves in<sup>90</sup>. Even though Fineman's theory recognises a particular or individual form of vulnerability, her most stressing point is the argument that the nature of vulnerability is a universal and constant part of being a human, and that this forms the basis for a claim that the State has an obligation to respond to this vulnerability<sup>91</sup>. Fineman sees vulnerability as being "a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model"<sup>92</sup>.

Fineman argues that the ultimate objective of her vulnerability analysis is to argue for a State to be more responsive to and responsible for the vulnerable subject, specifically in terms of

---

<sup>85</sup> Martha A. Fineman, 'Vulnerability and Inevitable Inequality', In *Oslo Law Review*, Volume 4, No. 3, 2017, pp. 133-149 (hereinafter Fineman (2017)), p. 142.

<sup>86</sup> Fineman (2008), p. 23.

<sup>87</sup> *Ibid.*, p. 22.

<sup>88</sup> *Ibid.*, p. 10 & Fineman (2010), p. 269.

<sup>89</sup> Fineman (2017), p. 143.

<sup>90</sup> *Ibid.*, p. 133.

<sup>91</sup> Fineman (2010), pp. 255-256.

<sup>92</sup> Fineman (2008), p. 9.

mediating or lessening disadvantages<sup>93</sup>, with the objective of structuring conditions under which people are more likely to be able to realize their individual capabilities<sup>94</sup>. Fineman seeks to reconceptualise the role of the State with her vulnerability analysis, and magnify the State's responsibility for providing "resources that cushion us when we are facing misfortune, disaster, and violence"<sup>95</sup>, or in other words provide individuals with "resilience in the face of their vulnerabilities"<sup>96</sup>. According to Fineman resilience is "what provides an individual with the means and ability to recover from harm, setbacks and the misfortune that affect our lives"<sup>97</sup>. This resilience depends on the quality and quantity of resources each of us possess, meaning that a lack of resilience should not be seen as a personal failing but as a symptom of unequal access or distribution of privilege and power that advantages some while disadvantages others<sup>98</sup>.

According to Fineman the law and legislature, as encompassing a primary State institution under which resilience could be provided, should be responsive to vulnerability<sup>99</sup>. As Fineman puts it, "One way to understand the vulnerability approach is to see it as an articulation of a duty for the state to actively assume broad societal responsibility in regards to ensuring equality for its citizens and others to whom it owes obligation"<sup>100</sup>. Fineman does not limit state responsibility to the notion of citizenship, pointing out how State responsibility should apply to all citizens, residents or long-term visitors residing in a State's territory<sup>101</sup>. Fineman's vulnerability approach calls on State involvement in contributing towards empowering the vulnerable subject, in not tolerating disadvantage and vulnerability<sup>102</sup>, and in ensuring equality of opportunity for all<sup>103</sup>.

---

<sup>93</sup> Fineman (2008), p. 10, 13.

<sup>94</sup> Fineman (2010), p. 274.

<sup>95</sup> Fineman (2008), p. 19.

<sup>96</sup> *Ibid.*, p. 20.

<sup>97</sup> Fineman (2017), p. 146.

<sup>98</sup> *Ibid.*, p. 147.

<sup>99</sup> Fineman (2008), p. 6, 20.

<sup>100</sup> Fineman (2010), p. 256.

<sup>101</sup> *Ibid.*, p. 256.

<sup>102</sup> Fineman (2008), pp. 19-20.

<sup>103</sup> Fineman (2010), p. 256.

### 2.3.3 *Applying vulnerability theory*

According to Fineman, a vulnerability approach could add a valuable critical perspective, approaching issues from an alternative angle, within discussions concerning both policy and law<sup>104</sup>. Fineman's theory is also valuable when discussing how vulnerability and the vulnerable subject is understood and operationalized within policy and legal frameworks, in an attempt to look beyond generalized notions of the vulnerabilities and needs of victims of trafficking, towards an increased understanding of the different notions such vulnerabilities might entail. With seeing vulnerability as a product of public policy or State laws<sup>105</sup>, and not being the responsibility of each individual, this conceptual tool is also useful when discussing how such public policy or State laws function in terms of addressing a specific issue. In the context of this thesis, resilience could be provided through the granting of a residence permit, with the State being the main actor able to bring this into legal existence. This suggests the importance of State's obligation to be responsive in providing this for vulnerable subjects residing in their territory<sup>106</sup>. Fineman's vulnerability theory provides a solid foundation for further exploration and discussion of how vulnerability, as an inherent and universal part of the human condition, demands State response in the form of protection from harm and in establishing mechanisms that provide individuals with resilience. This approach is useful in terms of establishing an argument for the importance of addressing migration status as a vulnerability factor that affects a person's situation, and creates a need for protection through legal residence.

Fineman points out that her theory was originally fashioned for an American audience in reference to the American system<sup>107</sup>, a context which in general terms could be seen as lacking the same established and comprehensive welfare system already in place in Norway. However, I still find Fineman's argument calling for a need for an active and responsive State to hold relevance in the context of Norwegian immigration regulations, seeing as a welfare system is highly focused on providing for its citizens or those with legal residence permits, and victims of trafficking that are not in possession of this often fall outside of this system.

---

<sup>104</sup> Fineman (2008), p. 2.

<sup>105</sup> Fineman (2008), p. 23.

<sup>106</sup> Fineman (2010), p. 269-272.

<sup>107</sup> *Ibid.*, p. 255.

Lastly, it should be pointed out that there are certain elements of Fineman's theory that are argued to need some adjustments when applied to a specific target group. Chapter 4 will address these adjustments before vulnerability theory is directly applied to discuss the rights of persons categorised as being victims of human trafficking.

### 3 Chapter 3: *Methodology*

In this thesis I have applied methods developed by social science, and mainly taken a constructivist approach to my research with the objective of creating an in-depth understanding of a specific issue, while allowing for both flexibility and subjective interpretation and analysis of the research material<sup>108</sup>. I have therefor chosen to utilise a qualitative research approach<sup>109</sup>. This approach has also allowed me to adjust my objective and research questions according to continuous findings I have made throughout my writing process<sup>110</sup>. I have attempted to provide a systematic investigation with the aim of increasing knowledge regarding a specific issue in a specific context. Although my approach has been focused on addressing a global issue it is mainly a case study of Norway. This has provided me with an opportunity to conduct a more in-depth analysis than would have been possible to conduct while focusing on a larger context within the limits of this thesis<sup>111</sup>.

#### 3.1 *Collection of data, sources and research materials*

The data collection process is an important step towards providing a thorough and systematic grounding for further discussion<sup>112</sup>. I started this process by identifying what material I found relevant in order to explore my preliminary research topic, and then moved on to designing a plan of what materials I would need in order to answer my research question<sup>113</sup>. Initially, it was important for me to map out, or conduct a review of, the existing literature already published. Seeing as I wanted my thesis to supplement existing research, specifically related to the situation of victims of human trafficking residing in Norway, I attempted to identify where within this field there could be a need for further exploration<sup>114</sup>. I conducted a preliminary search within my University library database ‘Oria’, and through the search engine “Google

---

<sup>108</sup> May-Len Skilbrei, ‘Kvalitative Metoder – Planlegging, Gjennomføring og Etisk Refleksjon’ 2019, 1st edition, Fagbokforlaget, Oslo, (hereinafter Skilbrei (2019)), p. 37.

<sup>109</sup> Bruce L. Berg and Howard Lune, ‘Qualitative Research Methods for the Social Sciences’ 2012, Eight Edition, Pearson, United States, (hereinafter Berg and Lune (2012)), p. 15.

<sup>110</sup> Todd Landman, ‘Studying Human Rights’, 2006, Routledge, London and New York, (hereinafter Landman (2006)), pp. 60-62.

<sup>111</sup> Ibid., p. 73.

<sup>112</sup> Ibid., p. 150.

<sup>113</sup> Ibid., p. 151.

<sup>114</sup> Skilbrei (2019), p. 96.

Scholar” to identify existing literature related to my topic. I then read abstracts, or skimmed through the materials I found, and made a selection of materials that contained information, data or theories I found relevant for my discussion and analysis<sup>115</sup>. I also focused on including up-dated research in the form of recently published work. Further, I utilised the preliminary research material I collected to identify material or additional sources that were being referenced within the literature. Throughout the writing process I repeated this search for materials based on new findings, due to a need for additional sources to properly present my discussion, or if I found it necessary to look more closely at a specific issue. I therefor continuously applied different search words, and combinations of search words, also in terms of finding new concepts mentioned within the literature I was reading<sup>116</sup>.

An essential part of my research has been to map out and discuss existing laws, regulations, policy and practice. I begin looking at the laws, regulations, conventions and protocols I already recognised as relevant and looked for references to additional sources, both within the texts and through the National Government’s and the United Nations’ and the Council of Europe’s official websites. I was then able to identify several additional materials such as an explanatory report providing further insight to the Trafficking Convention and government circulars, reports, Action Plans and internal notifications providing further insights to the objectives and practical implementation of national law and regulation that were important for my analysis.

Additionally, early on in my data collection process I spoke with representatives from three of the main agencies and organizations responsible for providing victims of trafficking with assistance and protection, namely the Oslo Red Cross project ‘Right to be Seen’<sup>117</sup>, the ROSA project, and Pro Sentret. The purpose of these interviews was mainly to gather information about my topic and get an overview of the main issues that existed regarding the situation of victims of trafficking in Norway. I used a semistandardized interview model and applied a flexible approach when conducting my interviews, providing the interview subjects with an

---

<sup>115</sup> Skilbrei (2019), p. 101.

<sup>116</sup> Ibid., p. 101.

<sup>117</sup> With the representative from the Oslo Red Cross I did not conduct a formal interview, but discussed the objective with my research. We conversed about the situation of victims of trafficking residing in Norway, and existing issues within the Norwegian immigration system in regards to victims of trafficking, which provided me with valuable information at the initial stage of my research process.

overall topic, but often choosing to adjust my questions according to new knowledge and the information that was provided for me during the interviews<sup>118</sup>. The accessibility factor was determinant in terms of what subjects were interviewed<sup>119</sup>, and my sample of subjects was small and arguably affected by their personal experiences, opinions or the role they represented. This could be seen as problematic, but I have not relied on these interviews in my analysis as they were mainly used to provide me with an overview during the initial stage of the research process or to build arguments that are also validated through the use of literature or secondary sources.

### 3.2 *Analysing the data*

I have applied an inductive research strategy which entails that I have built further on existing empirical findings within the data and materials I have collected, and then processed, interpreted and attempted to further develop these with the objective of furthering an understanding, or creating increased knowledge, about a specific issue<sup>120</sup>. In order to create knowledge from findings a researcher will also need to utilise a form of theory to analyse their research material<sup>121</sup>. I have chosen to base my analysis within the framework of vulnerability theory, as presented in chapter 2.

I began my analysis process by asking, *how can I use the material I have collected to answer my research question?*<sup>122</sup> During my analysis of the data collected I utilised the technique of content analysis. This entails “a careful, detailed and systematic examination and interpretation of a particular body of material in an effort to identify patterns, themes, biases, and meanings”<sup>123</sup>. I have applied a content analysis strategy in my analysis of laws, regulations, official reports, Government Action Plans, Internal notifications and circulars with the objective of creating a deeper understanding of what these documents express and how this can be seen as affecting action<sup>124</sup>.

---

<sup>118</sup> Berg and Lune (2012), p. 114.

<sup>119</sup> Ibid., p. 51.

<sup>120</sup> Skilbrei (2019), p. 53.

<sup>121</sup> Ibid., p. 50.

<sup>122</sup> Ibid., p. 164.

<sup>123</sup> Berg and Lune (2012), p. 349.

<sup>124</sup> Skilbrei (2019), p. 164.

### 3.3 *Ethical Considerations*

In terms of the material collected from my interviews it was important for me to ensure confidentiality<sup>125</sup>. The purpose and future use of the material collected through the interviews were presented to the participants in written form through an information sheet explaining my research topic, my affiliation to the University of Oslo, and that I was conducting research for my Master's thesis. I received an oral agreement of informed consent<sup>126</sup> from the participants allowing me to utilise the information and statements they provided during the interviews. I did not make any form of audio recordings during the interviews, only handwritten notes, and the interview subjects were kept anonymous in the sense that they are not identified by name in this thesis, solely by their affiliation with the group of agencies or organisations they represent. When utilising statements made by participants in this thesis I have focused on rendering their views in an honest and balanced manner, in applying the information they provided accurately and within the correct context. Much of the information the participants provided has also been validated through my use of ROSA and Pro Sentret's official reports and publications<sup>127</sup>.

As a researcher you also have specific ethical obligations in terms of your utilisation of literature and correct use of citations and referencing. It is important to treat documents, and the data and theories they present, with a consideration of the research community<sup>128</sup>, and render sources in a balanced and reasonable manner, not attempting to add new meaning to the text or interpret statements out of context<sup>129</sup>. I have focused on abiding by these principles throughout my research process.

---

<sup>125</sup> Berg and Lune (2012), p. 90-91.

<sup>126</sup> Ibid., 90-91.

<sup>127</sup> Due to the focus and content of my thesis, the utilisation of data collected from interviews I conducted, and my choice to not identify participants by name, I evaluated that there was no need for further registration with the NSD (Norsk Senter for Forskningsdata) for this project.

<sup>128</sup> Skilbrei (2019), p. 25.

<sup>129</sup> Ibid., pp. 74-75.

## 4 Chapter 4: *Vulnerability Theory within the Context of The Norwegian Human Trafficking Framework*

This chapter contains a discussion of the principal theory of vulnerability and the existing legal conditions and foundations related to a victim of trafficking's claim and right to legal residence as a form of protection in Norway. Building on Fineman's vulnerability theory as presented in Chapter 2, I will now attempt to apply this theory directly to the issue at hand, namely a victim of trafficking's access to, and need for, a legal residence permit in Norway. Firstly this chapter discusses some of the challenges in terms of tying Fineman's vulnerability theory to a specific group within the context of human trafficking. Secondly, the chapter moves on to address the main issues within the existing framework for residence permits for victims of trafficking that has been established, and are in a continuous development, in Norway. The following discussion is focused on determining Norway's practical implementation of their obligation to protect victims and prosecute traffickers within the existing immigration system, and the application and understanding of vulnerability as a determinant factor shaping the existing anti-human trafficking efforts within this framework.

### 4.1 *Applying vulnerability theory to address the needs of victims of trafficking*

As already established, Fineman's vulnerability theory is a useful tool in discussing how policy, law and regulations are established to provide services for the vulnerable subject. But her rejection of tying vulnerability to a specific group of subjects, such as victims of trafficking, creates a need for some clarification of how this theory will be utilised within this context before moving forward. In her article, on how vulnerability theory could be used as a helpful framework for policy intervention and in understanding the responsibility and role of the State, Nina Kohn attempts to move beyond Fineman's theory of vulnerability<sup>130</sup>. Kohn stresses that in order for vulnerability to be viewed as an appropriate trigger in terms of demanding specific forms of protection or intervention from the State it needs to be conceptualized "as a result

---

<sup>130</sup> Nina A, Kohn, 'Vulnerability Theory and the Role of Government', In *The Yale Journal of Law and Feminism*, 2014, Vol. 26:1, PP. 1-28, Available at: <https://digitalcommons.law.yale.edu/yjlf/vol26/iss1/2> (hereinafter Kohn (2014)), p. 27.

of a relationship between individuals and his or her environment (...) an environment that may be disabling for the individual”<sup>131</sup>. This in contrast to viewing vulnerability as a quality a person possesses, but rather as experiences or conditions that constantly increases or decreases a persons risk of being target, exploited or harmed and being unable to protect themselves<sup>132</sup>. A State could then create policies, targeted at specific issues or specific people based on their vulnerability to a specific threat, that support conditions that allows a person to withstand a threat and/or recover from past experiences<sup>133</sup>. From this view, victims of trafficking do not necessarily need to be addressed as a vulnerable group, but as individuals facing a similar vulnerable situation or having similar experiences of vulnerability ending with them being dependent on protection or support form the State.

In their exploration of vulnerability in victims of human trafficking, in terms of State responsibility and obligation to protect such persons, Fouladvand and Ward seek to expand the understanding of vulnerability while building on the theory of Fineman<sup>134</sup>. The authors find certain aspects of Fineman’s vulnerability theory problematic in the context of human trafficking, in that they see people not only as vulnerable subjects in a constant or universal sense, but as this being dependent on situational factors. Stemming from this view is an acknowledgement that some people are more vulnerable than others due to an increased risk or exposure to specific harms, a form of heightened vulnerability<sup>135</sup>, and that this relates more strongly for some people and in some contexts than (for) others<sup>136</sup>. Fouladvand and Ward follows Fineman’s argument in stressing the importance of viewing victims of trafficking as having agency and not in a stereotypical way as being passive victims in need of simply being rescued from an exploitative situation<sup>137</sup>. From this view of vulnerability in trafficking victims, a State would not only need to ensure that a victim is free from exploitation, but also address what caused or allowed the exploitation to occur in the first place, and determine what is needed in order to avoid exploitation from re-occurring. The authors state that, “the exploitation involved in many cases of human trafficking is so egregious that people would be unlikely to

---

<sup>131</sup> Kohn (2014), p. 23.

<sup>132</sup> Ibid., p. 24.

<sup>133</sup> Ibid., p. 24.

<sup>134</sup> Shahrzad Fouladvand and Tony Ward, “Human Trafficking, Vulnerability and the State”, In *The Journal of Criminal Law*, 2019, Vol. 83(1), pp. 39-54, (hereinafter Fouladvand & Ward (2019)).

<sup>135</sup> Ibid., p. 49.

<sup>136</sup> Ibid., p. 41.

<sup>137</sup> Ibid., p. 40.

submit to it unless something in their situation made them particularly vulnerable to coercion, manipulation or deception”<sup>138</sup>. They refer to victims of human trafficking as often being in ‘a particular type of situational vulnerability’ making them more vulnerable than others<sup>139</sup>.

Fouladvand and Ward claim that States could also be seen as creating vulnerabilities that causes persons to be trafficked or increases their risk of getting harmed for example through having hostile immigration policies<sup>140</sup>. By not having access to legal residence and/or legal forms of employment, often caused by strict border controls and immigration regulations, is given as an example of situational vulnerability<sup>141</sup>. It is also pointed out that when States return migrants who have been in a trafficking situation they often fail to properly address those persons’ vulnerability to be re-trafficked<sup>142</sup>. According to the international human rights system a State must not only provide victims with reparation on a case-by-case basis, they must also demonstrate efforts towards removing any structural causes of the violation that occurred and create measures to ensure that such violations are not continuously repeated<sup>143</sup>. The following sections will therefor examine this responsibility more closely within the Norwegian context in mapping out and discussing the rights and obligations that exist within the Norwegian anti-human trafficking framework in relations to residence permits.

#### 4.2 *The operationalization regarding the State’s obligation to protect victims of trafficking*

Representatives from some of the main agencies and organisations responsible for providing victims with assistance expressed during interviews conducted for this thesis how they experienced frustration in terms of a lack of possibility to provide victims with assistance beyond providing for acute needs within the existing human trafficking framework in Norway. One participant expressed their work as mostly focused on “putting out fires” and not being able to ensure long-term or predictable forms of protection for victims. It was explained that since the

---

<sup>138</sup> Fouladvand and Ward (2019), p. 40.

<sup>139</sup> Ibid., p. 40.

<sup>140</sup> Ibid., p. 41.

<sup>141</sup> Ibid., p. 40.

<sup>142</sup> Ibid., p. 41.

<sup>143</sup> De Shutter (2014), p. 808.

threshold for permanent residence, such as through the witness instruction or the asylum system, is high in Norway most victims are being returned and potentially face future harms and the risk of re-trafficking. Another participant expressed how the existing framework was focused on temporary solutions, reflecting the fact that most victims only reside in Norway temporarily, and that this foundation leaves the victims with a general lack of predictability and leaves less room to focus on preventing re-trafficking. Recently, representatives within the victims assistance field have also stressed through the media that the Norwegian authorities are not adequately fulfilling their obligation to protect victims of human trafficking, claiming that victims should be granted residence on humanitarian grounds regardless of their ability or willingness to cooperate with authorities in criminal proceedings<sup>144</sup>, and that there is a need for new solutions within immigration regulation in terms of expanding the potential that legal residence could have in terms of functioning as a protection mechanism for victims<sup>145</sup>.

The following will look at how the Norwegian immigration framework is operationalized through a presentation of the foundations these arrangements are built on. In other words, address how the laws and regulations related to residence permits applicable to victims of trafficking are transformed into practice, and further discuss how different contexts and understandings of vulnerability within the immigration system affect a victim's claim to protection.

#### *4.2.1 Foundations for residence permits: The reflection period and renewed temporary residence permit*

The governance and practical implementation of the Immigration Regulations §8-3, related to the period of reflection and renewed temporary residence permits is further established in Circular RS 2013-014 administered by the Norwegian Directorate of Immigration. The Circular functions as an instruction meant to aid immigration professionals in interpreting the existing law and regulations and in the use of discretion and prioritization in decision-making<sup>146</sup>. The

---

<sup>144</sup> See online articles, NRK: <https://www.nrk.no/ostlandssendingen/mener-regjeringen-svikter-ofre-for-menneskehandel-1.14700062> and Dagsavisen: <https://www.dagsavisen.no/debatt/regjeringen-svikter-ofrene-1.1583632>

<sup>145</sup> Ibid.

<sup>146</sup> Directorate of Immigration Circular RS 2013-014, p. 2, 3.

function of the period of reflection and renewed temporary residence permits, as presented in this Circular, is to provide victims with a temporary residence permit in an environment in which they are protected from their former exploitative living situation, and with this enhance the possibility of building a criminal case and prosecute traffickers, both according to Norway's international obligations<sup>147</sup>. The reflection period is further governed by this Circular through the establishment of specific terms that need to be met, these include that a person must be considered a victim of trafficking, in other words that there are grounds to believe that person is a victim of trafficking, and be receptive to receive assistance and follow up on measures offered to them<sup>148</sup>. In relation to a renewed temporary residence permit the terms are further expanded to include that a person must have removed him/herself from the trafficking situation and pressed charges against their former traffickers, that there is an on-going police investigation or process of prosecution, and that the presence of the victim in the country is needed in relation to this<sup>149</sup>. The period of reflection and renewed temporary residence permits are through this operationalization highly focused on efforts towards enabling a successful prosecution of traffickers, and could be seen as lacking in substantial consideration of the protection of victims.

The Norwegian government's most recent Action Plan on anti-human trafficking efforts refers to Norway's obligation under the Trafficking Convention towards establishing efforts aimed at preventing and fighting human trafficking<sup>150</sup> and assisting victims with their physical, psychological and social restitution<sup>151</sup>. One of the efforts highlighted in the Action Plan relates to the period of reflection, presented as being a low threshold temporary residence period intended to provide victims with assistance for recovery and to escape their former exploitative situation while evaluating whether or not to press charges against their former traffickers<sup>152</sup>. In relation to the reflection period the Action Plan is mostly concerned with preventing the arrangement from being misused and in securing its proper function in terms of enabling victims to cooperate with the authorities in the prosecution of traffickers<sup>153</sup>.

---

<sup>147</sup> Directorate of Immigration Circular RS 2013-014, p. 2.

<sup>148</sup> Ibid, pp. 4-5.

<sup>149</sup> Ibid., p. 5-6.

<sup>150</sup> Action Plan 2016, p. 8.

<sup>151</sup> Ibid., p. 9.

<sup>152</sup> Ibid., p. 14.

<sup>153</sup> Ibid., 14.

There have been previous evaluations concerned with the functionality of the period of reflection, and other related residence permits, as mechanisms for the protection of victims of trafficking residing in Norway. A general critique relates to the Norwegian authorities being highly focus on criminal prosecution as the main means to resolving the issue, which has led to the initial path to obtaining legal residence for victims of trafficking in Norway being through the criminal justice system. It is often difficult for victims to take care of their own interest in the process of cooperating with authorities, acting as witnesses, or testifying. This can be both disempowering and harmful to victims as it may impact their recovery process and leave them with unpredictable results. The latter specifically in terms of their possibility of obtaining protection through a residence permit. It is a system that is neither constructed for the purpose of providing victims with permanent residence permits nor with removing the underlying structural vulnerabilities that enables exploitation from occurring in the future<sup>154</sup>.

The Trafficking Convention's Explanatory Report presents the dual objective of the period of recovery and reflection as intended to allow victims to recover and escape the influence of traffickers and with that also ensure that victims are able and willing to cooperate with the authorities and making them better witnesses<sup>155</sup> in a similar fashion as can be found within the Norwegian framework. However, the Explanatory Report defines the 'personal situation' requirement, as found within the Convention's Article 14.1 (a) regarding whether or not a victim's stay is necessary owing to their personal situation, to include a variety of factors such as, "a victim's safety, state of health, family situation or some other factor which has to be taken into account"<sup>156</sup>. This statement leaves room for interpretation in regards to the utilisation of Article 14.1 in terms of a State not only renewing a victim's residence permit due to considerations related to the purpose of prosecution (as found within Article 14.1(b)), but due to considerations of the victims' personal circumstance.

In their report concerning the second evaluation round of Norway, GRETA points to Article 12.6 of the Trafficking Convention in questioning why Norwegian authorities have not shown any signs of improving their efforts in terms of providing assistance to victims unconditionally. GRETA's evaluation strongly indicates that efforts towards ensuring protective measures

---

<sup>154</sup> Brunovskis and Skilbrei (2016), p. 21.

<sup>155</sup> Trafficking Convention Explanatory Report, paragraph 172-174.

<sup>156</sup> Ibid., paragraph 184.

for victims are lacking in practical implementation within the Norwegian system, stressing that the function of the reflection period is too focused on facilitating the prosecution of traffickers and that this should be removed as a main objective as it puts the victim and their needs in the background<sup>157</sup>.

#### 4.2.2 Foundations for residence permits: The witness instruction

Victims who give testimony as an aggrieved person in a trial concerning human trafficking or give testimony to the police or a trial regardless of the result could determine valid grounds for attaining legal residence in Norway according to the Immigration Regulations §8-4. Circular GI-31/2010, as presented in chapter 2, functions as an instruction meant to aid immigration professionals in interpreting the existing law and regulations and in the use of discretion and prioritization in decision-making<sup>158</sup>. One consideration the Instruction points to is the implementation of a risk evaluation that determines whether or not a person could risk being abused or harmed in their country of origin, or in which a person has otherwise obtained a legal residence status, as a result of having acted as a witness<sup>159</sup>. It should be evaluated whether or not a person could be returned to another State or if they are in need of protection through a residence permit in Norway. In other words, it should be determined whether Norway is the only State that can provide a person with protection, or if this protection could be provided by another State authority in a country a victim has a claim to legal residence. The Instruction GI-31/2010 differentiates between grounds constituting when a residence permit *must* be provided, and grounds constituting when a residence permit *could* be provided to witnesses. In terms of the former this includes a foreign national seeking protection after having acted as an offended witness in a trial concerning the Penal Code §257<sup>160</sup> (human trafficking)<sup>161</sup>, regardless of whether it leads to a conviction<sup>162</sup>. It is also mentioned that if a victim of trafficking resumes contact with criminals involved in the act of human trafficking, it could constitute reasons for a revocation or refusal of the residence permit<sup>163</sup>. In the terms of the latter, in which

---

<sup>157</sup> GRETA Report (2017), p. 28.

<sup>158</sup> Circular GI-31/2010, p. 2.

<sup>159</sup> *Ibid.*, p. 3.

<sup>160</sup> The document refers to an older Instruction in reference to §257 and refers to it as §224 of the Penal Code in the Instruction text.

<sup>161</sup> Instruction GI-31/2010, p. 4.

<sup>162</sup> *Ibid.*, p. 7.

<sup>163</sup> *Ibid.*, p. 4.

the Instruction GI-31/2010 refers to the added provisions within the Immigration Regulations §8-4 second paragraph, there is an acknowledgement that some persons who act as witnesses in a trial concerning human trafficking could be exposed to pressure and insecurity if returned or denied access to legal residence in Norway. This must be determined through a discretionary evaluation<sup>164</sup>. The permits under The Immigration Regulations §8-4 constitute a foundation for permanent legal residence in Norway<sup>165</sup>, leading to its practical application being of critical importance for many victims seeking protection through this specific immigration arrangement.

The Norwegian government's most recent Action Plan stresses the need for further evaluation of the existing regulations related to residence through asylum, strong humanitarian considerations and the witness instruction. Focusing mostly on the latter the Action Plan stresses the need for further evaluation of the existing regulations related to residence in securing more clarity, efficiency and predictability in their practical implementation<sup>166</sup>.

#### 4.2.3 *Foundations for residence permits: Asylum*

Victims of trafficking who are in need of protection have the right to attain asylum in Norway according to the Immigration Act §28. The Norwegian Directorate of Immigration has written an internal notification or a form of instruction, concerning the handling of applications for residence permits where the applicant might be a victim of trafficking, within their asylum department<sup>167</sup>. One of the intentions of this internal notification is to provide guidelines in the decision-making and evaluation process of determining asylum cases where the applicant is a potential victim of trafficking<sup>168</sup>. The Directorate of Immigration's internal notification references Norway's obligation according to the Trafficking Convention in terms of seeking to identify potential victims, where there are reasons to believe a person could be a victim of trafficking, within applicants seeking asylum, to make sure they receive further assistance and protecting as potential victims and contribute towards enabling a potential prosecution of traf-

---

<sup>164</sup> Instruction GI-31/2010, p. 5.

<sup>165</sup> *Ibid.*, p. 7.

<sup>166</sup> Action Plan (2016), p. 15.

<sup>167</sup> IM 2014-004, 'Asylavdelingens håndtering der søkere er mulige ofre for menneskehandel' (hereinafter IM 2014-004).

<sup>168</sup> *Ibid.*, p. 2.

fickers, and that such persons should not be removed from the territory until this identification process has been followed through<sup>169</sup>.

The Directorate of Immigration's internal notification also provides foundations determining the need for protection and the risk of a person being re-trafficked, which could constitute grounds for a residence permit seeing as applicants who have been a victim of trafficking could be exposed to the risk of being re-trafficking if returned<sup>170</sup>. Some of these risk factors are mentioned as being: risk of retaliation in relation to unpaid debts to former traffickers, retaliation as a consequence of having cooperated with the police and stigmatization and social exclusion<sup>171</sup>.

The Directorate of Immigration's internal notification also provides guidance in terms of the overlap between an asylum application and the period of reflection in stating that if an applicant is presumed to be a victim of human trafficking and fulfil the terms of applying for residence within the Immigration Regulations §8-3, the existing asylum application should be dismissed. The asylum application could then be re-assessed at a later time<sup>172</sup>. While Circular RS 2013-014 determines the Municipality as the governing institution in terms of providing assistance and protection to victims of trafficking according to the Immigration Regulations §8-3<sup>173</sup>, it is the State that holds the main responsibility of protecting and assisting asylum seekers. One issue within the system of existing residence permits for victims of trafficking is that there is a lack of continuity and transferability between the different arrangements within the immigration system, for example between those regulations intended for trafficking victims and the regulations applying to all persons seeking residence such as the asylum system<sup>174</sup>. This is problematic seeing as for many victims asylum becomes the only alternative to gain protection through residence permits. A victim of trafficking would therefore need to obtain a residence permits on separate grounds than those directly linked to their status as being a victim of trafficking within the Immigration Regulations §8-3 and §8-4.

---

<sup>169</sup> IM 2014-004, p. 2.

<sup>170</sup> Ibid., p. 9.

<sup>171</sup> Ibid., p. 10.

<sup>172</sup> Ibid., p. 7.

<sup>173</sup> Directorate of Immigration Circular RS 2013-014, p. 3.

<sup>174</sup> Brunovskis, Skilbrei and Tveit (2010) p. 97-98.

In regards to Article 13 and 14 of the Trafficking Convention GRETA also points out how it is problematic that the recovery and reflection period remains incompatible with the asylum process in Norway<sup>175</sup>, while stressing the issue of how there is, “no evidence that vulnerability to trafficking would be taken into account in asylum decisions”<sup>176</sup> so that it often falls on the applicant, or the victim, themselves to prove the risk of re-trafficking when applying for residency through the asylum system. Further GRETA advises the Norwegian authorities to review their practical implementation of the legislation relating to granting of residency permits to victims of human trafficking in terms of considering each victim’s personal circumstances<sup>177</sup>.

#### 4.2.4 *Foundations for residence permits: Strong humanitarian considerations*

If none of the above mentioned residence permits are valid, a victim could obtain legal residence due to strong humanitarian considerations or a particular connection with the realm according to the Immigration Act §38, and referred to within the Immigration Regulations §8-4. The Immigration Act §38 specifically mentions foreign nationals who have been a victim of human trafficking within its provision in paragraph 2(d). The Instruction GI-31/2010 also stress that there must always be an evaluation made in terms of determining whether the Immigration Act §38 applies to person applying for residence if §8-4 (witness instruction) is not valid for obtaining legal residence<sup>178</sup>. The Norwegian Directorate of Immigration internal notification, IM 2014-004, also mentions that the provisions under the Immigration Act §38 must be considered if an applicant is denied protection under the Immigration Act §28<sup>179</sup>. Although mentioned specifically within the Immigration Act §38 provisions, being a victim of trafficking is not necessarily enough to make out the foundations that would grant a person a residence permit under §38 seeing as there would be a need to evaluate the degree of the violation, mostly leaving the most grave cases of violation and exploitation applicable<sup>180</sup>. In addition, there would also be an evaluation of the circumstances and risk of harm related to return, cooperation and aid a person could continue to provide for the police authorities if allowed to

---

<sup>175</sup> GRETA (2017), 28.

<sup>176</sup> Ibid., 30.

<sup>177</sup> Ibid., 30.

<sup>178</sup> Instruction GI-31/2010, p. 7.

<sup>179</sup> IM 2014-004, p. 11.

<sup>180</sup> Ibid., p. 12.

remain in the country, and a person's need to remain in Norway would need to be continuously followed up on and re-evaluated<sup>181</sup>.

#### 4.2.5 *Thresholds for residence permits within different contexts of vulnerability*

Within the existing Norwegian immigration system discussed in the previous sections there are different thresholds affecting the applicability of laws and regulations in practice, both in terms of what applicant holds a claim to a specific form of residence permit, and what form of protection a specific type of residence permit actually provides. A person applying for a residence permit within the arrangements presented in this thesis will need to exist within a specific context of vulnerability constituting grounds for a claim to protection. The foundations for residence permits existing in Norway are regulated by different thresholds, and within them are different ways of understanding vulnerabilities, in terms of victims gaining access to protection. The period of reflection is an example of a low threshold residence arrangement, in that it is also applicable to potential or non-verified victims of trafficking. The renewed temporary residence permit also has a low threshold, but depends on a victim being viewed as relevant or useful in terms of the building of a criminal case against traffickers, where a victim will have to cooperate with the authorities and need to provide them with useful information. The witness instruction has a higher threshold in terms of depending on a case making it to court, and the ability and willingness of a victim to act as a witness, although in relation to the period of reflection and renewed temporary residence permit it holds the highest gains in that it could lead to a victim obtaining permanent residence in Norway. Both the application for asylum and strong humanitarian considerations have high thresholds, in that an applicant must prove their need for this form of protection, and specifically why he/she cannot be returned to another State for protection.

To access any of these forms of residence permits a victim of trafficking needs to be put within a specific category applicable to the type of residence permits they are applying for, for example as a victim of trafficking applying for a period of reflection or as an asylum seeker applying for asylum. The type of residence permits seen as applicable to a victim of trafficking could also be seen as determined by their particular situation or vulnerabilities, as an applicant needs to be seen as vulnerable within the scope of the relevant law or regulation de-

---

<sup>181</sup> IM 2014-004, p. 12.

termining their claim. Within the scope of the period of reflection and the renewed temporary residence permit, both steered by the definition of trafficking determined by the Penal Code, the vulnerability of an applicant is defined by them being a victim of a criminal act, and is therefor approached as a past experience of vulnerability. By receiving this form of residence permit a victim is rescued from their former exploitative situation and gain protection from their traffickers. However, this form of protection is temporary and in order for a victim to gain further access to legal residence they would have to prove their need for protection from future harms. The witness instruction acknowledges the need for protection from existing or future harms, as it is intended as a form of protection for victims who have witnessed and contributed towards the prosecution of their former traffickers. The act of witnessing is through this measure seen as creating potential threats in the form of retaliation. Both within the arrangements of asylum and strong humanitarian considerations a person's particular vulnerabilities, in terms of needing protection from existing or future harms or threats, constitute important factors when determining their application. A victim of trafficking could therefor be viewed as vulnerable in one sense within the reflection period and related arrangements and in another sense within the asylum system. The difference between viewing vulnerability as stemming from a past experience, a crime or violation that has happened in the past, compared to it stemming from existing or future harms greatly affects a victim's claim to legal residence.

The Norwegian system functions in a way that makes low threshold, temporary, arrangements of residence permits easily accessible for victims of trafficking while higher threshold, and potentially permanent, arrangements of residence permits require a need for a victim to claim the same need for this protection as any other applicant. The only exception can be found within the witness instruction, which is specifically applicable to victims of trafficking, although still depends on a range of unpredictable factors to function properly as a protection measure in practice. While focus and resources have been directed at measures presumed to be of importance in order to ensure their obligation of protecting and assisting victims of trafficking, such measures are criticised for not reflecting victim's lived experiences. As mentioned earlier, it has been stressed that the ability to provide assistance and protection, beyond providing for acute needs in a temporary time frame, is very limited within the Norwegian

framework<sup>182</sup>. A lack of permanent legal residence in Norway leaves many victims with a lack of resilience and increases the potential of them being re-victimized or re-trafficked.

While the application of the concept of vulnerability could be seen as a useful tool in providing access to specific measures of protection and assistance for victims of trafficking, the actual application of the concept within the implementation of laws into practice could potentially limit the protection measures available to those deemed most important to prioritize. As argued earlier through the use of Fineman's theory of vulnerability, specific experiences of heightened vulnerability requires specific action from the State aimed at reducing these vulnerability factors or at providing a person with resilience. Only by decreasing specific forms of vulnerability factors that enables exploitation to occur, and in understanding protection as un-conditional and long-term assistance, can re-trafficking or re-victimization be avoided. The recognition that some individuals face a higher risk of harm than others, and could be viewed as having particular vulnerabilities, is acknowledged within the existing immigration laws and regulations in Norway. This also applies specifically to those individuals who fall within the category of being a victim of trafficking. But the extent to which the various circumstances that render these individuals vulnerable, and the complex set of causes that originate, maintain or reinforce vulnerabilities in victims of trafficking, are being adequately addressed could be argued as lacking within the Norwegian framework. A lack of legal residence status could be viewed as a factor affecting the degree of vulnerability within the life situation of many trafficking victims. Those victims who are denied residence in Norway are often left to an unknown and insecure future, potentially leading to them being violated and/or exploited again in the future. This is pointed out as being a pressing issue within the existing system Norwegian authorities have established to protect victims. In practice the reality is that most victims of trafficking in Norway are either returned to their country of origin or to the first country they entered within the Schengen area due to the Dublin Regulations<sup>183</sup>. When a victim is returned through the Dublin system they will not get their cases reviewed by Norwegian authorities and are therefor essentially denied protection by the State of Norway<sup>184</sup>.

---

<sup>182</sup> ROSA (2019), p. 51.

<sup>183</sup> Ibid., p. 51.

<sup>184</sup> Ibid., p. 41.

In their article, focused on how female sex sellers are vulnerable, Brunovskis and Skilbrei stresses how it could be problematic if a State creates special provisions, mechanisms or policies based on the concern that some groups are particularly vulnerable if their conception of vulnerability is not seen as stemming from a structural issue. This could lead to solutions aimed at “fixing people” and not “fixing the problem”<sup>185</sup>. Brunovskis and Skilbrei point out how the Norwegian “(...) human trafficking policy framework has been criticised for failing to recognise and precisely address the structural conditions and class, race and gender inequalities that make exploitation possible, focusing instead on individual vulnerabilities and individual perpetrators of a crime”<sup>186</sup>. Less focus is being pointed towards victim’s actual situation and needs in terms of their socio-economic vulnerabilities, often leaving them particularly vulnerable when returned to their home countries<sup>187</sup>.

In her article, on the protection of victims within the context of trafficking in human beings, Evelyn Probst highlights the importance of States having a comprehensive human-rights based approach, where the trafficked person is the central concern, when creating mechanisms to ensure the protection of trafficking victims<sup>188</sup>. Probst stresses that there should be an acknowledgement of the inherent vulnerability in the existing risks victims of trafficking face, and therefor also the importance of providing victims with substantial protection<sup>189</sup>. Probst understands *protection* in this context as being in the form of long term assistance<sup>190</sup> in that, “Victim’s protection should always include the prevention of further re-trafficking and other violations of human rights. Therefor vulnerabilities that led to the human trafficking in the first place have to be understood and decreased”<sup>191</sup>. Probst specifically points to the importance of victims obtaining a secure residence status and stresses how the absence of this, and the constant threat of deportation, hinders their recovery<sup>192</sup>. She concludes by stating that assistance for trafficked persons should be unconditional and based on an analysis of existing

---

<sup>185</sup> Anette Brunovskis and May-Len Skilbrei, ‘Individual or Structural Inequality? Access and Barriers in Welfare Services for Women Who Sell Sex’, In *Social Inclusion*, 2018, Volume 6:3, PP. 310-318, (hereinafter Brunovskis and Skilbrei (2018)), pp. 311-312.

<sup>186</sup> Ibid., p. 314.

<sup>187</sup> Ibid., pp. 314-315.

<sup>188</sup> Evelyn Probst, ‘Victim’s protection within the context of trafficking in human beings and European Union standards’, ERA, 2018, Volume 19, pp. 357-367 (hereinafter Probst (2018)), p. 358.

<sup>189</sup> Probst (2018), p. 360.

<sup>190</sup> Ibid., p. 380.

<sup>191</sup> Ibid., p. 362.

<sup>192</sup> Ibid., p. 363.

vulnerabilities, and that potential risks should be taken into consideration with the focus of prioritizing victim's need for long-term protection<sup>193</sup>.

Although some forms of assistance and protection for victims of trafficking is provided unconditionally in Norway, the legal residence status of non-nationals is not, this being a natural consequence of a State having restrictions within its immigration policy. As will be discussed further below, in the case of residence permits for victims of human trafficking, this restriction could also be seen as being strongly related to the fact that victim's protection in the form of residence permits is mostly administered through a criminal justice approach focused on the States obligation to prosecute traffickers.

#### 4.3 *The operationalization of the State's obligation to prosecute traffickers*

In Norway it is the Ministry of Justice and Public Security that governs and administers the field of anti-human trafficking efforts, entailing decision-making, prioritizations in policy and practice, and the shaping of general progression and developments within the field. It is important to look at how this focus on prosecution affects how victim's needs are addressed, and to what extent this approach is adequately providing stability and predictability for the individual victim allowing them to break the cycle of exploitation. Focusing on human trafficking as a form of organised crime, a criminal phenomenon that needs to be dealt with, is problematic when this comes at the expense of the protection of each victim as individuals. For example by a State utilizing restrictive migration regimes as a solution to this issue<sup>194</sup>. In dealing with the overall issue of human trafficking Norwegian authorities have been criticised for having a narrow focus on prosecution through its criminal justice approach, and with steering this focus towards the criminal act and the objective of punishing traffickers as a means to fight a criminal phenomenon. Generally, the criminal justice approach has been criticised for hindering the unconditional protection, stabilisation and recovery for victims and creating uncertainty and instability in terms of victim's legal residence status. By being put in a situa-

---

<sup>193</sup> Probst (2018), p. 365-366.

<sup>194</sup> Anette Brunovskis, 'Illuminating and blinding – The searchlight effect of human trafficking policies on anti-trafficking practice', 2019, Dissertation submitted for the PhD degree, University of Oslo, (hereinafter Brunovskis (2019)), p. 54.

tion where it is likely that they will deported victims are denied security in the form of long-term protection<sup>195</sup>.

The Norwegian authorities are being criticised for failing to acknowledge the need many victims have in terms of protection through residence permits, and could instead be seen as highly focused on returns, while only allowing a few victims to stay in its territory, mainly those who are of some value in a prosecution process. The existing system tends to focus on short-term solutions, providing protection conditionally and only for the timeframe the victim's presence is needed. The focus on only addressing the acute phase of a victim's needs maintain status quo in terms of the risk of victims being re-trafficked. Cooperation with the authorities gives no guarantees in that it might have both high gains and high costs, and it might not always be in the victim's best interest to cooperate. Nevertheless, it is often left as the only option in terms of obtaining access to protection through a residence permit<sup>196</sup>. Linking protection with prosecution therefor strongly affects the access victims will have to obtain a residence permit in practice.

There is a lack of substantial cases in Norway concerning human trafficking. It could therefor be problematic to depend on National Courts as a measure towards removing structural causes of human rights violations such as trafficking in that a Court's successes or failures in doing this is dependent on the cases they receive. If a Court receives few cases dealing with a specific human rights issue, or if the cases or applications they receive are too weak to ensure a verdict that would provide a victim with reparation, such judicial mechanisms will not be very effective. One example of this being cases where victims are not motivated to cooperate in building a strong case, or where victims fear the consequences or reprisals that would come of filing a complaint or testifying in Court. It is therefor argued that in order to ensure an effective protection of victims there is a need for non-judicial additional mechanisms to ensure this<sup>197</sup>. Generally speaking, cases that go to Court are the result of violations that have already happened, there is therefor a need for additional preventative mechanisms in efforts made towards solving a human rights issue<sup>198</sup>.

---

<sup>195</sup> Probst (2018), p. 363.

<sup>196</sup> Skilbrei and Brunovskis (2016) p. 18-19.

<sup>197</sup> De Shutter (2014), p. 809.

<sup>198</sup> Ibid., p. 849.

Through the use of the criminal justice approach the Norwegian authorities are criticised for demonstrating more consideration for their own interest than for that of the individual victim, and some criticism sees the approach as being unhelpful, non-considerate, and often leading to a lack of predictability for the victims in their life situation<sup>199</sup>. One example of this being the period of reflection, established as a solution with the objective of both securing the rights of victims (although only temporarily) while enabling the prosecution process. In practice this arrangement rarely functions as a mechanism that provides victims with enough resilience to last on a long-term basis. Seeing as most trafficking cases are either shelved, dismissed, or lacks enough evidence when a victim is not able to press charges or testify, it is problematic that residence permits are too dependent on the potential prosecution of traffickers. A victim's claim to long-term protection through the existing system is in practice solely tied to the authorities ability to build a criminal case, or their own ability to testify or witness. The result being that protection is mostly afforded to "ideal victims" with "prosecutable cases". Only those who are willing and able to cooperate with the authorities, and/or function as witnesses, are awarded advantages that other victims never get access to<sup>200</sup>. This factor is not only dependent on victims having useful information and/or willingness and ability to share that information but is also dependent on the State's capacity and resources in terms of investigating, building a case, and getting that case to the Courts<sup>201</sup>. Even if it might not always be in their best interest, the existing possibility of potentially being granted a permanent residence permit creates pressure on victims to cooperate<sup>202</sup>. Critics reacting to the existing practice found within the Norwegian framework argue that there is a need for an expansion of the foundation for residence permits for trafficking victims, and that this arrangement must include secession from the criminal justice objective. In other words, that a claim to a residence permit should not be dependent on a victim's, or the authorities', ability to prosecute traffickers<sup>203</sup>.

---

<sup>199</sup> Brunovskis and Skilbrei (2016), p. 21.

<sup>200</sup> Ibid., p. 16, 24.

<sup>201</sup> Ibid., p. 18.

<sup>202</sup> Brunovskis (2019), p. 4.

<sup>203</sup> ROSA (2019), p. 51.

#### 4.3.1 *The Norwegian criminal justice approach in relation to their international obligations*

Even though the Trafficking Convention has a strong focus on human rights, and widens the scope in terms of providing specific obligations for providing victims with residence permits, there are still limits to the practical implementation of these obligations on a national level. States will usually govern their migration regimes according to their own interest, and there is a tendency that residence permits are most likely granted to victims who are of some value to the State in terms of assisting in efforts towards prosecuting traffickers<sup>204</sup>. The Trafficking Convention Article 12 paragraph 6 stresses how assistance to victims should be made unconditional in terms of their willingness to act as a witness, however, in the Explanatory Report to the Convention it is pointed out how this is still dependent on national law. The State Party holds the power to regulate this internally, and may decide to grant residence permits only to victims who cooperate with the authorities, as allowed in Article 14<sup>205</sup>.

Still, the Norwegian criminal justice approach has met criticism from GRETA. In their second evaluation of Norway GRETA points to Article 12.6 of the Trafficking Convention in questioning why Norwegian authorities have not shown any signs of improving their efforts in terms of providing assistance to victims unconditionally, stressing that the function of the reflection period is too focused in facilitating the prosecution of traffickers and that this should be removed as a main objective as it puts the victim and their needs in the background<sup>206</sup>.

#### 4.3.2 *Understanding vulnerability within the objective of prosecution*

The focus on prosecution sees victims as vulnerable in them being a person who has suffered due to a criminal act. The focus is therefore being put on addressing victims' needs in relation to this fact, in securing their acute needs and providing them with temporary residence permits in an effort towards increasing a victim's ability to cooperate for as long as this cooperation is needed from the authorities. With linking a victim's vulnerabilities to them being a victim of a crime, less focus is steered towards addressing what happens to a victim after a

---

<sup>204</sup> Gallagher (2006), p. 188.

<sup>205</sup> Trafficking Convention Explanatory Report, paragraph 169 & 170.

<sup>206</sup> GRETA (2017), p. 4.

process of prosecution ends. This leads to efforts aimed at preventing re-victimization and/or re-trafficking not being adequately addressed beyond securing a victim's cooperation. An alternative approach towards addressing victims needs lies in the understanding of protection as not only entailing protection for immediate harms, but in a broader sense that includes the need to reduce specific socio-economic vulnerabilities that could potentially enhance the risk of a victim re-victimized or re-trafficked and/or fall back into an exploitative situation<sup>207</sup>. For many victims their vulnerabilities, or need to migrate, existed before they were trafficked and will therefor exist after they are returned.

A consequence of the criminal justice approach is often that victims become instruments in the prosecution process, with more focus being put on how they can help the authorities with building a strong case than on the consequences this might have for their future trajectories. This approach might leave victims in particularly vulnerable situations, for example those who suffer from extreme trauma preventing them from cooperating<sup>208</sup>. There is a need to understand 'protection from harm' in a broader sense that also includes a need to address specific socio-economic vulnerabilities that could potentially enhance the risk of a victim being re-victimized or re-trafficked in falling back into an exploitative situation<sup>209</sup>.

#### 4.4 *Discussion and final remarks*

On a global scale, viewing human trafficking as a criminal justice issue has been positive in terms of establishing strong anti-human trafficking frameworks guiding the efforts on both an international and national level. However, this focus has also created specific prioritizations steered by State's interests. In terms of upholding their international obligations, specifically in relation to the three Ps, Norway could be seen as strongly influenced by the wording of the Trafficking Protocol where prosecution is mandatory while protection is mostly encouraged. The Norwegian authorities both present and give value to prosecution as also being a preventative and protective mechanism, however, many victims and victim's assistance agencies and

---

<sup>207</sup> Brunovskis and Skilbrei (2016), p. 14.

<sup>208</sup> Ibid., p. 18.

<sup>209</sup> Ibid., p. 14.

organisations experience this system as restrictive in terms of providing long-term protection to victims and in reducing the risk of re-trafficking and/or re-victimization.

In terms of addressing victims of trafficking as vulnerable the Norwegian anti-human trafficking framework could be seen as failing to acknowledge the importance of immigration status, both in terms of their understanding of how a person became a victim and further in their establishment of protection mechanisms. The implication of many victims being migrants is naturally leading residence permits to being a highly valued form of long-term protection<sup>210</sup>. There is a general lack of acknowledgement within the Norwegian system in terms of the value a residence permit could have for the protection of a victim in regards to their migration status, and that assisting victims with their recovery through temporary residence permits is not always a sufficient measure. There is a need for the Norwegian authorities to recognize the safety of victims of trafficking in a broader sense, this entails addressing factors that might lead to victims being re-trafficked, make sure that the trafficked person is allowed to both recover and stabilise from their experiences, and acknowledge the vulnerabilities that enables this form of exploitation and violation in reduce the risk of repetition<sup>211</sup>.

Within the Norwegian framework victim's access to assistance, and to attaining specific forms of legal residencies, is being partially conditional on their cooperation with the authorities and/or their ability to testify in criminal proceedings or a potential trial. The Norwegian human trafficking framework is therefor being argued as lacking in its efforts towards providing victims with predictable and long-term forms of protection. As has been demonstrated in the previous sections, the Norwegian authorities have received criticism for weighing the scale within the anti-human trafficking framework towards ensuring that their own interest are maintained, the cost of this being that the protection of victims is not being prioritized or secured adequately.

The Norwegian Government's Granavolden political platform, created in 2019, addresses the issue of residence permits for victims of trafficking as a response to recent critique of the ex-

---

<sup>210</sup> Brunovskis and Skilbrei (2016), p. 20.

<sup>211</sup> Probst (2018), p. 360, 367.

isting approach<sup>212</sup>. The Granavolden platform uses the term ‘a sustainable immigration policy’ in presenting their objective of continuing to have a restrictive and responsible immigration policy while also ensuring due process<sup>213</sup>. One of the main objectives is still pointed out as being to intensify efforts towards prosecution, while also securing a comprehensive arrangement for victims<sup>214</sup>. The Granavolden Platform indicates that the government does not see a need for a radical shift or expansion of the existing immigration regulations regarding victims of trafficking. While the platform mentions that the government wants to expand the foundation for residence permits for victims of trafficking<sup>215</sup>, it provides no general indication of a move away from the criminal justice approach and what this ‘expansion of foundations for residence permits’ entails is not further explained.

When following Fineman’s argumentation, a responsive state is ethically obligated to respond to vulnerabilities through providing individuals, or the vulnerable subject, with the resources needed to gain resilience and the opportunity to address these vulnerabilities appropriately. In other words, a state is responsible for lessening the disadvantages of the vulnerable subject as a means of protection. One example of this resilience could be in the form of granting a person a legal residence permit. Through a vulnerability framework the State of Norway could be argued as not providing adequate resilience for victims of trafficking residing in their territory, to whom it may be argued they owe a responsibility. Along the same lines Kohn argues that if vulnerability is viewed as the result of a relationship between a victim and their environment it could be conceptualized as a trigger demanding protection from the State. When an individual lacks the ability to protect him or herself from harm, in not being able to reduce the risk of re-exploited or re-trafficked, it argues for a State’s responsibility to provide this protection, for example in the form providing legal residence permits as a means to both support conditions that would allow for recovery and avoid the occurrence of re-trafficking or re-exploitation of victims.

---

<sup>212</sup> A Political platform for the Norwegian Government, formed by the Conservative Party, the Progress Party, the Liberal Party and the Christian Democratic Party, Granavolden, 17. January 2019 (hereinafter Granavolden platform (2019)).

<sup>213</sup> Ibid., Chapter 1: Introduksjon

<sup>214</sup> Ibid., Chapter 4: Justis, beredskap og innvandring

<sup>215</sup> Ibid., Chapter 4: Justis, beredskap og innvandring

Within the Norwegian immigration system we find specific forms of protection, such as the witness instruction, being granted to victims of trafficking on the grounds of them being vulnerable to the risk of harm because they have witnessed. Vulnerability in this sense is seen as a result of a person witnessing and being vulnerable to retaliation because of this, not as a result of a person being trafficked to begin with, nor does it specifically address other vulnerability factors that might heighten the risk of a person being re-trafficked in the future, regardless of having acted as a witness or not. Fouladvand and Ward defines a victim of trafficking as a vulnerable subject experiencing forms of heightened vulnerability, in acknowledging that some individuals are more vulnerable than others in that they face an increased risk of exposure to specific harms. In this view a victim should not be viewed as passive and in need of rescue, but calls for a need to address vulnerabilities as factors that caused exploitation to occur and provide protection that would eliminate or at least reduce the risk of exploitation to re-occur. Particular types of situational vulnerability, such as a lack of legal residence status, creates a need for a particular type of protection, such as providing victims with legal residence permits. A state having hostile or strict immigration policies contradicts this. Similarly, Probst argues that a State needs to take into account the fact that not all victims of trafficking have been moved across state borders against their will and address the underlying reasons for why a victim of trafficking might have wanted to migrate to begin with<sup>216</sup>. From this view, vulnerability is seen as something more than needing rescue from past harms, but also what led to them being harmed in the first place. Also within this view of vulnerability is an acknowledgement that these harms might also threaten a person's future if not provided with the resilience to avoid it.

A victim of human trafficking is seen as having a distinct vulnerability in the sense of the law, as is demonstrated both within Norwegian criminal law and immigration legislation where the act of 'human trafficking' and a 'victim of human trafficking' are operational categories, with the latter defining a person as someone who has a claim to specific forms of protection through residence permits<sup>217</sup>. A person who has been identified by the system as being a victim of human trafficking is eligible for specific types of residence permits regulated by Norwegian immigration law and regulation. Some, such as: the period of reflection, renewed temporary residence permit and witness instruction are established as special measures for

---

<sup>216</sup> Probst (2018), p. 363.

<sup>217</sup> Brunovskis (2016), p. 6, 8.

this group of applicants. Other types of residence permits found within §28 (Asylum) and §38 (strong humanitarian considerations) of the Immigration Act are on paper eligible for all applicants, although §38 mentions foreign nationals who have been a victim of human trafficking specifically in its section (d). However, most if these forms of protection are only temporary and when applying for a permanent residence permit, for example through the asylum system, an applicant who is a victim of human trafficking will have to apply for protection on the same grounds as any other applicant. Particular vulnerabilities related to a person being recognized as a victim of trafficking is not necessarily sufficient in building a claim to a need for protection through the asylum system. This is problematic seeing as many victims have already gone through the process of reflection and renewed residence permits, as previously discussed leaving many victims in a state of heightened vulnerability with the risk of harm through stigmatization and/or retaliation from their former exploiters, often leaving asylum as their only option towards obtaining a legal residence status.

In order for a trafficking victim to be granted legal residence through an immigration arrangement outside of the regulations that are intended specifically for them they must be defined as having a need for protection within this scope. To be granted asylum, as an example, would therefore be an acknowledgment of a person needing protection. However, this system does not view a person as a victim of trafficking, but as a person in need of asylum based on the factors imbedded within the Immigration Act §28. The same could be said in terms of a victim of trafficking seeking residence due to strong humanitarian considerations, found within the Immigration Act §38, although this provision mentions victims of trafficking, in practice it only applies to the most grave cases of violation and exploitation. When comparing the existing arrangements of residence permits available for victims of trafficking it is clear that they hold both different objectives and ways of evaluating a need for protection. While the Immigration Act §28 and §38, and to an extent the Immigration Regulation §8-4, clearly acknowledges a persons need for protection in the present and future, the arrangements found within the Immigration Regulation 8-3§ is mostly focused on violation and exploitation that has occurred in the past, and is constructed around ensuring a successful criminal justice process, and could therefore be seen as lacking a substantial acknowledgment of a victim's need for a more permanent form of protection from harm.

## 5 Chapter 5: *Conclusion*

While building on the existing foundations for residence permits, including law, regulations, instructions and circulars, this thesis has presented an analysis addressing the conception and application of vulnerability within the practical implementation of residence permits as a form of protection applicable to victims of trafficking residing in Norway. It has been discussed how the different arrangements within the Norwegian immigration system demonstrates distinct understandings of vulnerability in regards to an applicant's need for a residence permit, and how these different understandings create different foundations determining the validity of an applicants claim.

Through an evaluation of the role of the State, in terms of what their responsibilities are and how they execute their obligations, it could be determined how prioritizations are being balanced when a State weighs its own interest against the interest of others. In the context of anti-human trafficking efforts in Norway these prioritizations are highly focused on prosecuting traffickers and maintaining a sustainable immigration policy framework. Although there are mechanisms within the Norwegian immigration system created specifically with the objective of facilitating the process of providing residence permits for victims of trafficking, many of these are built on a view of vulnerability as a factor of the past and not the present or future. In other words, this system is not adequately considering a victim of trafficking's need for obtaining legal residence in Norway as a permanent form of protection from harm, for example protection from the potential risk of a person being re-trafficked if returned. In light of the Granavolden platform and the Norwegian government's expression of wanting to expand the existing conditions for residence permits for victims of trafficking, there is a conspicuous lack of transferability in terms of implementation of measures that would allow this expansion to occur in practice.

The existing conflict between the government and their critics could be argued to stem from a tension between what the latter argue that victims of trafficking *should* have a claim to in terms of protection and what victims have access to within existing national law, regulation and practice, representing how far the Norwegian authorities feel the *need* to stretch their efforts towards protecting victims of trafficking. The Norwegian immigration system acknowledges that victims of trafficking are particularly vulnerable and in need of specific services

and measures addressing this vulnerability. Still, there is a gap between victim's actual needs in terms of addressing their vulnerabilities related to immigration status and the protection mechanisms that are accessible to ensure this in practice. Although specific forms of temporary residence periods could potentially be an introductory path for a victim in terms of obtaining a permanent residence period, for example through the witness instruction arrangement, most often this is not the case. For victims, cooperation with the authorities might not necessarily be in their best interest and often comes through a form of pressure, in this being their only option in terms of obtaining a legal residence permit. The existing system is created to provide a short-term solution in ensuring victims residence in Norway for a restricted period, or as long as their cooperation is needed, and less focus is being placed on what implications this process might have on the victim's lives as a result. With this it could be argued that the Norwegian authorities are not providing the vulnerable subject, exemplified as a victim of human trafficking, with enough resilience to reduce the risk of future harm.

## Bibliography

Anette Brunovskis, 'Illuminating and blinding – The searchlight effect of human trafficking policies on anti-trafficking practice', 2019, Dissertation submitted for the PhD degree, University of Oslo

Anette Brunovskis and May-Len Skilbrei, 'Individual or Structural Inequality? Access and Barriers in Welfare Services for Women Who Sell Sex', In *Social Inclusion*, 2018, Volume 6:3, PP. 310-318

Anette Brunovskis, 'Special rights within universal welfare: Assistance to trafficking victims in Norway', In *Journal of Comparative Social Work*, 2016, Vol. 11:1, PP. 5-37

Anette Brunovskis and May-Len Skilbrei, 'Two Birds with One Stone? Implications of Conditional assistance in victim protection and prosecution of traffickers', In *Anti-Trafficking Review*, Issue 6, 2016, pp. 13-30

Anette 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', 2012, written for Fafo on commission from the Nordic Council of Ministers

Anette Brunovskis, May-Len Skilbrei and Marianne Tveit, 'Pusterom eller ny start? Evaluering av refleksjonsperioden for ofre for menneskehandel', Fafo report 2010:45

Anne T. Gallagher, 'Two Cheers for the Trafficking Protocol', In *Anti-Trafficking Review*, Issue 4, 2015, pp. 14-32

Anne T. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway' In *Virginia Journal of International Law*, Volume 49, no. 4, 2009, pp. 789-848

Anne T. Gallagher, 'Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage', Chapter 14 in "The theory and Practice of International Criminal Law", Author: Michael Scharf, Editor: Leila Sadat, 2008, Chapter 14, pp. 397-430

Anne T. Gallagher, 'Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2006 European Convention and Related Instruments', In *European Journal of Migration and Law*, Volume 8, 2006, pp. 163-189

Bruce L. Berg and Howard Lune, 'Qualitative Research Methods for the Social Sciences' 2012, Eight Edition, Pearson, United States

CETS 197, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' Warsaw 16. V. 2005

Council of Europe Convention on Action against Trafficking in Human Beings, CETS 197 Warsaw, 16.V. 2005

Directorate of Immigration RS 2013-014, 'Oppholdstillatelse for utlendinger som antas å være utsatt for menneskehandel (refleksjonsperiode mv.)'

Evelyn Probst, 'Victim's protection within the context of trafficking in human beings and European Union standards', ERA, 2018, Volume 19, pp. 357-367

Forskrift 15. Oktober 2009 om utlendingers adgang til riket og deres opphold her (Utlendingsforsikriften)

Granavolden Political Platform: 'A Political platform for the Norwegian Government, formed by the Conservative Party, the Progress Party, the Liberal Party and the Christian Democratic Party', Granavolden, 17. January 2019

GRETA, 'Report Concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Norway', Second Evaluation Round, Published 21. June 2017

IM 2014-004, 'Asylavdelingens håndtering der søkere er mulige ofre for menneskehandel'

KOM, 'Rapport fra Koordineringsenheten for ofre for menneskehandel – 2018' yearly report, Published June 2019

Lov 15 mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (Utlendingsloven)

Lov om Straff 1. oktober 2015 (Straffeloven)

May-Len Skilbrei, 'Kvalitative Metoder – Planlegging, Gjennomføring og Etisk Refleksjon' 2019, 1st edition, Fagbokforlaget, Oslo

May-Len Skilbrei, 'Moving Beyond Assumptions? The Framing of Anti-Trafficking Efforts in Norway', Chapter 10 in *Transnational Migration, Gender and Rights Advances in Ecopolitics*, 2012, Emerald Group Publishing Limited, Volume 10, pp. 211-227

Martha A. Fineman, 'Vulnerability and Inevitable Inequality', In *Oslo Law Review*, Volume 4, No. 3, 2017, pp. 133-149

Martha A. Fineman, 'The Vulnerable Subject and The Responsive State', *Emory Law Journal*, Volume 60, No. 2, 2010, pp. 251-276

Martha A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Conditions', In *Yale Journal of Law & Feminism*, Volume 20, Issue 1, 2008, pp. 1-23

Ministry of Justice and Public Security GI-31/2010 'Instruks om Oppholdstillatelse til vitner i sak om menneskehandel mv.'

Nina A. Kohn, 'Vulnerability Theory and the Role of Government', In *The Yale Journal of Law and Feminism*, 2014, Vol. 26:1, PP. 1-28

Olivier De Schutter, 'International Human Rights Law', (2014) Second Edition, Cambridge, Cambridge University Press

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

ROSA, 'Årsrapport 2018', yearly report, published April 2019

Shahrzad Fouladvand and Tony Ward, "Human Trafficking, Vulnerability and the State", In *The Journal of Criminal Law*, 2019, Vol. 83(1), pp. 39-54

Silje Sønsterudbråten, 'Bistand og beskyttelse til ofre for menneskehandel – Tverretatlig samarbeid i Oslo og Bergen', Fafo report 2013:01

The Norwegian Government's Plan of Action against human Trafficking, 'Regjeringens handlingsplan mot menneskehandel' Published November 2016, by The Norwegian Ministry of Justice and Public Security

Todd Landman, 'Studying Human Rights', 2006, Routledge, London and New York

#### Referenced Websites/Links:

Official website of the Norwegian Police Department, accessed 10.01.2020:

[www.politiet.no/rad/menneskehandel/slik-jobber-politiet-for-a-bekjempe-menneskehandel/](http://www.politiet.no/rad/menneskehandel/slik-jobber-politiet-for-a-bekjempe-menneskehandel/)

Online news article, NRK, accessed 10.01.2020:

<https://www.nrk.no/ostlandssendingen/mener-regjeringen-svikter-ofre-for-menneskehandel-1.14700062>

Online news article, Dagsavisen, accessed 10.01.2020:

<https://www.dagsavisen.no/debatt/regjeringen-svikter-ofrene-1.1583632>