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Palermo's Promise: Victims' rights and human trafficking

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Response to ATR Debate Proposition: 'Prosecuting trafficking deflects attention from much more important responses and is anyway a waste of time and money'

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Two hundred and forty months. Life without parole. Often, prosecutors in the United States measure their success in criminal trafficking cases by the long sentences meted out to the perpetrators. But prison sentences alone are not the appropriate measure.

The Trafficking Protocol declares, 'Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.'¹ Criminal prosecution, if done well, can serve this purpose. Indeed, U.S. law requires restitution for trafficking victims in federal prosecutions.² In cases that include restitution for trafficking victims, success is not counted only in months of imprisonment, but also in dollars awarded: USD 3,892,055 in restitution to four minor victims of sex trafficking;³ USD 916,635.16 for one worker held for 19 years in domestic servitude;⁴ USD 51,844.00 for one victim forced to labour in a restaurant.⁵

Advocates for trafficking victims are beginning to fight for these restitution orders for their clients. Their advocacy is beginning to show dividends. And thanks to the University of Michigan Trafficking Law Clinic, restitution awards for trafficking victims are not subject to taxation. The Clinic succeeded in convincing the US authorities to declare that criminal restitution for trafficking victims should not be subject to federal income tax.⁶

Why does this matter? Prosecutions can provide a mechanism for trafficking victims to rebuild their lives. Financial compensation obtained through criminal prosecution can catapult a trafficking victim forward on the path to survival. It can preempt the need for civil litigation. It can restore dignity to a trafficking victim unable to support his or her family. It can provide the financial wherewithal for a trafficking victim to thrive, not just survive. Funds obtained through restitution orders may be used to go to college, to buy a home, to purchase a car, to support family members at home. Prosecution with restitution takes a step beyond punishment and retribution.

Prosecution can be a form of restorative justice, returning through restitution the value of the labour stolen from trafficking victims. Victim-centred prosecution can holistically address the harms perpetrated by the traffickers. And in the US, advocates for trafficking victims have seen the transformative power of restitution. Long prison sentences are not enough.

Moreover, restitution through prosecution may serve another fundamental purpose: deterrence. While many traffickers view prison time with equanimity, federal prosecutors report that seizure of assets hits traffickers where it hurts. Restitution punishes these defendants, stripping traffickers of their ill-gotten gains. Prosecutions pave the way for assets to be returned to their rightful owners, the victims who earned the money.

The fight against human trafficking calls for a careful allocation of scarce resources. Critics of criminal prosecution often note that criminal proceedings are costly; their rewards are speculative; and victims are frequently compelled to participate as witnesses against their will and at great personal cost. Other critics point to the myopic prosecution focus on sex trafficking, to the detriment of labour trafficking victims. Still others lament the miniscule number of prosecutions: for example, in all of 2014, there were only 208 federal trafficking prosecutions brought in the US, of which just 18 were for forced labour.⁷ While these criticisms are valid, critics ignore the potential for empowerment of victims through prosecution. Some victims testifying against their traffickers gain confidence. Those supported

¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, (Trafficking Protocol) Article 6(6).

² 18 U.S.C. 1593.

³ *United States v. Lewis*, Case No. 09-cr-00213 (D.D.C.).

⁴ *United States v. Calimlim*, Case No. 04-CR-248 (E.D. Wis.).

⁵ *United States v. Train*, Case No. 14-CR-00025 (D. Minn.).

⁶ US Treasury Notice 2012-12, <https://www.irs.gov/pub/irs-drop/n-12-12.pdf>

⁷ US Department of State, *Trafficking in Persons Report 2015*, US Chapter, p. 353.

by skilled pro bono or NGO attorneys can regain a sense of power over their own lives. And, when courts order restitution, trafficking victims can finally recover the money that they are owed.

The key phrase above is, of course, *if done well*. In practice, the significant potential for restorative justice through criminal restitution is hamstrung by courts' failure to follow the law. Despite the fact that restitution is mandatory, that courts are required to order restitution under the law, U.S. federal courts rarely order restitution.⁸ Why?

This alarming fact may be explained, at least in part, by the false dichotomy between victim advocacy and criminal enforcement. Those providing social services may sometimes advocate for victims to opt out of the criminal justice system entirely, avoiding cooperation in a criminal case. The priority may be to seek social services and relief *exclusively* outside of court. But this approach leaves victims without representation or assistance during criminal proceedings. And while the best prosecutors take a victim-centred approach, others, as well as the judges overseeing the criminal cases, are frequently oblivious to their direct legal obligations to victims. The abysmal result is that defendants get to keep what they stole; victims remain penniless; and under-funded public-interest organisations are saddled with the costs of caring for victims.

Prosecuting trafficking is not just about punishing traffickers: it is also about securing victims' rights. The fact that prosecution does not yet fulfil this role in all cases should be viewed as a failure of *execution*. This failure can be addressed, at least in part, by enhanced training programmes aimed at building capacity of prosecutors to protect the full array of victims' rights, combined with improved legal representation of trafficking victims. The recent Justice for Trafficking Victims Act, passed by Congress with great fanfare in 2015, includes mandatory training for judges and prosecutors on mandatory restitution.⁹ The law also requires the federal government to use forfeited assets to pay restitution to victims.¹⁰

International treaties and conventions have long recognised the importance of compensating victims.¹¹ The United States Congress put the weight of the law behind this right when it required that federal courts order restitution to trafficking victims in the course of criminal proceedings. All that is left is for courts to follow the law. And when they do, criminal prosecutions will be the most effective—and not just the most promising—weapon in the arsenal against human trafficking.

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⁸ See generally: The Human Trafficking Pro Bono Legal Center and WilmerHale, 'When "Mandatory" Does Not Mean Mandatory: Failure to obtain criminal restitution in federal prosecution of human trafficking in the United States', The Human Trafficking Pro Bono Legal Center and WilmerHale, 2014.

⁹ Sections 114(c)(1)(B) & (C), Justice for Victims of Trafficking Act of 2015, Public Law No: 114–22 (05/29/2015).

¹⁰ Section 105(a), Justice for Victims of Trafficking Act of 2015, Public Law No: 114–22 (05/29/2015).

¹¹ See: Trafficking Protocol.