

The Right of Victims of Trafficking to Remedies: An Arab Regional Approach

A Presentation by

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I.

I am delighted to be with all of you in this MENA regional Consultation on the Right to an effective remedy for Trafficked Persons.

I participated in the first consultation in 2010 and I participated in the last consultation in 2013 so I am a witness to the whole process. Allow me, therefor, to recognize the good work of the Special Rapporteur, Ms. Joy Ngozi Ezeilo and happy 2014 to all.

II.

I will devote my presentation to the regional framework and an examination of the right to a remedy for a victim of trafficking requires us to take a look at:

- Regional Conventions
- An Arab Strategy
- And a Model Law – what I call the 'Soft Law'

III.

First, the Regional Conventions

The League of Arab State addressed the issue of human trafficking in three conventions:

1. The Arab Convention to Combat Information Technology Crimes of 2010:

Article 16 criminalizes trafficking in human beings as well as human organs, as crimes committed by the use of technology. That is why I like Article 7 of the Iraqi Law No 29 of 2012.

Article 7 makes it a crime to establish or manage a site on the internet for the purpose of human trafficking.

It also criminalizes a transaction regarding human trafficking through the internet. The punishment in both cases is imprisonment for not less than three years and a fine.

Of course, I have reservations regarding Article 8, which provides for the death penalty if the act of human trafficking resulted in the death of the victim.

2. The Arab Convention on Combating Transnational Organized Crime of 2012:

Article 11 calls upon States to take the necessary measures in their domestic laws to criminalize any act committed by an organized criminal group including the act of human trafficking (Article 11) and trafficking in human organs (Article 12).

Article 11 adopts the UN Protocol definition of human trafficking (Article 3).

3. The Arab Charter on Human Rights of 2004:

Article 9 prohibits trafficking in human organs and presumably trafficking for the use of "medical experimentation."

Article 20 prohibits "all forms of slavery and trafficking in human beings."

The Charter adopts a broad concept of human trafficking, including:

Trafficking for the purpose of prostitution as well as exploitation of prostitution of others

And pays special attention to the exploitation of children in armed conflict.

IV.

So what is the relation between these regional instruments and the international law of human trafficking?

Article 43 of the Arab Charter resolves any conflict between the Charter and any International Convention. It provides that:

"Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms... set forth in this international... human rights instruments which the States Parties have adopted or ratified...."

This means that:

- a. The UN Protocol on Human Trafficking supersedes the Arab Charter
- b. The international standards shall have supremacy over regional documents
- c. Article 9 and Article 10 of the Charter shall be read in accordance with Articles 6 and 7 of the UN Protocol on Trafficking

Therefore, although the Arab Charter does not explicitly refer to protection and assistance for victims of trafficking, these obligations may be inferred under Article 43 of the Charter, which refers to International Conventions. In this regard, the International Human Rights law has supremacy over the Protocol under Article 14 (the Savings Clause) of the Protocol itself.

V.

But, the Charter itself provides for the right to remedies that may apply to victims of human trafficking.

Article 13 states that everyone has the right to a fair trial.

Article 12 provides that everyone has the right to seek a legal remedy.

Articles 8 (2), 14 (7) and 19 (2) provides for the right to compensation.

Article 13 guarantees, to those without the requisite financial resources, legal aid to enable them to defend their rights.

Article 23 provides that each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as therein recognized are violated shall have an effective remedy.

VI.

The other relation that we have to consider is the relationship between International Law and domestic laws on human trafficking. Here is the status of anti-trafficking legislation in the Arab World:

- a. A group of countries have comprehensive laws on combating human trafficking. These include: Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Mauritania, Qatar, Syria, and United Arab Emirates
- b. A second group of countries have provisions in their criminal or penal codes explicitly covering human trafficking. These include: Lebanon and Algeria.

c. The third group of countries is in the process of drafting comprehensive laws. These include: Libya, Morocco, Palestine, Sudan, Tunisia, and Yemen.

VII.

International law – our UN Trafficking Protocol – has supremacy over national laws.

a. In some countries, International Conventions supersede national legislation. This is indoctrinated the preamble of the constitution of Morocco. This is Article 132 of the Constitution of Algeria.

b. In other countries, the International Convention has the same force as national laws. This is the case under Article 143 of the Constitution of Qatar; Article 121 of the Constitution of Bahrain; Article 147 of the Constitution of United Arab Emirates; Article 81 of the Basic Law of Saudi Arabia.

VIII.

However, national laws may provide for a more adequate and effective remedy than international law. In such a case, a remedy must be applicable regardless of the language or limitations of the international rule embodied in the Protocol.

Let me offer some examples:

1. The Principle of Non-Punishment:

Although the UN Protocol on Trafficking treats the trafficked person as a victim, it does not specifically provide for the principle of non-punishment.

a. Article 21 of the Egyptian Law provides that the victim shall not be criminally or civilly liable for any of the crimes of human trafficking as long as the crime occurred or was directly related to being a victim.

b. An identical provision appears in Article 4 of the Qatari law.

Additionally, Article 25 of the law of Qatar specifically exempts a victim from all penalties stipulated in Law No. 4 of 2009 regarding violations of entry, residency and Kafala laws by aliens.

c. The law of Lebanon, on the other hand, does not follow this 'causation' model. Instead, it applies the rule in case of 'duress'. Article 586 (8) of the Criminal Code of Lebanon provides that 'a victim shall be except from punishment if s(he) was compelled to commit acts punishable by law or if s(he) violated the conditions of residency or work.

d. Finally, the Law No. 9 of 2009 of Jordan provides that the public prosecutor shall have the authority not to pursue investigation or prosecution of a victim of trafficking for any of the crimes stipulated in the trafficking law.

However, the authority is discretionary and the law does not provide any guidance on when it should be exercised.

e. The Qur'anic legislation adopts a duress standard providing for the principle of non-punishment of a victim of a crime. In accordance with the Quran, Surah 24:33 "but force not your maids to prostitution when they desire chastity... but if anyone compels them, yet after such compulsion is Allah, oft-forgiving, most merciful [to them]."

2. A second example can be found in the right to a residency status. The Protocol calls upon States to consider granting victims of trafficking a right to stay in the country of destination. The legislative guide to the Protocol states that "there is no obligation to legislative measures relating to the status of victims...."

a. However, the right to seek residency is stipulated in Article 15(7) of the Saudi Arabian law that states that

"If the victim is a foreigner and it is necessary for him to stay in the Kingdom during the investigation procedures, the prosecution or the competent court would assess the matter."

b. Similarly, Article 7 of the Bahraini law calls for the formation of a "Committee for the Assessment of the Status of Foreigners who are Victims of Trafficking in Persons." The law authorizes the Committee to examine the needs of a victim for repatriation to his or her country of origin or for a job if the victim must remain in Bahrain for an extended period of time.

3. A third example is the right to compensation. The Protocol calls upon countries to ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Different legal systems adopt different models of compensation: no harm and no inflicting of harm and harm shall be removed.

a. The law of Jordan provides that a person "injured because of one of the crimes stipulated in this law may seek compensation in accordance with the general principles in the laws in force."

b. The law of Qatar provides in Article 10 that the Criminal Court with jurisdiction to decide a case of human trafficking shall also have jurisdiction to decide a civil action that may arise as a result of the criminal action.

c. The law of Lebanon provides for confiscation of assets of the crime of trafficking and using the proceeds to compensate the victim.

d. The law of Egypt provides for the establishment of a state fund "to assist victims of human trafficking and to provide financial assistance to the victims who have suffered harm resulting from any of the crimes stipulated in this law."

VIII.

These laws also provide for some rules that, for our purposes, I consider "Best Practices:"

a. For instance, the law of Oman enhances the victim's access to justice by providing for exemption of the fees of a civil action that she files asking for compensation for the harm suffered as a result of the exploitation.

b. A second example is found in the law of Lebanon, which defines a victim as a person who suffers and harm and explicitly states that this status is not contingent upon the crime of human trafficking or whether the criminal was identified, arrested, tried charged or penalized.

c. A third example is article 23 of the law of Egypt, which, in a unique article provides that in all phases of investigation or trial, victims must be identified and classified according to their nationality, age, etc.

d. A fourth example is a list of laws that includes those of Saudi Arabia, Bahrain, Jordan and Qatar which enhance the penalty of the trafficked person is a female. This is considered, under these laws, as an aggravated circumstance.

e. A fifth example is the law of Syria which recognizes a role for civil society. It states that "the concerned authorities shall take measures to ensure providing victims of trafficking the appropriate protection... in cooperation, whenever necessary, with official institutions, popular organizations, trade unions and NGOs that are concerned with the issue.

f. That is why I like Article 19 of the Syrian law, which provides that:

"In all cases where there is no provision in this legislative decree, the relevant substantive rules in the laws and international conventions in force in Syria shall be observed."

These are binding laws and conventions; one must also refer to 'soft law' that may serve as 'guides' in the area of combating human trafficking in the Arab World.

One is the Model Law which was adopted in 2012, amending the Model Law of 2006 which limited itself to criminalization and punishment.

The Model Law, which serves as a guide, follows the UN Protocol definition of trafficking in persons; however it adds the following forms of exploitation:

- a) begging
- b) conducting scientific experiments
- c) "and any other form of exploitation that is legally criminalized"

1. The law of Egypt adds removal of human tissues.
2. The law of Iraq adds "sale" in addition to exploitation as the purpose of human trafficking.
3. The law of Qatar adds exploitation of children in pornography.
4. The law of Saudi Arabia adds "begging" and "subjecting a person to medical tests."
5. The law of Syria provides for a very general definition of "illegal acts and purposes."
6. The law of Djibouti does not provide for a definition or illustrations of "exploitation."
7. The law of Lebanon expands exploitation to include "forced involvement in terrorist attacks" and the "compulsory recruitment of children in armed conflict."

And the Model Law, Article 19 abolishes the statute of limitations providing that "criminal activities involving crimes of human trafficking that are mentioned in this law shall not be subject to a limitation."

In chapter five, Articles 27-36 the Model Law covers protection of victims, particularly so in an expansive provision in Article 30. The Model Law provides for various rights for victims of trafficking including medical care, physical assistance, personal freedom, right to identity, right to information, right to be heard in court, right to legal assistance and right to temporary residency status.

The Model Law also provides for the principle of non-punishment for the crime of human trafficking (Article 27) and related trafficking offenses (Article 28). The Model should provide a guide for parliamentarians in countries that are in the process of drafting a law on combating human trafficking.

The other soft law is the Arab Strategy. The Arab Strategy addresses the protection of victims in the fourth focus area, including:

- a) incorporating protection of victims in states laws, policies and programs
- b) Early identification of victims of trafficking
- c) Exemptions for victims from court fees and attorneys' fees

and guaranteeing their right to compensation for harm as well as engaging and cooperating with NGOs and other elements of civil society in adopting and implementing these protective measures.

The strategy lists eight focus areas in total. One is the protection of victims, as mentioned. Another key reference within the strategy is made to increasing “the role of religious institutions in raising awareness about the dangers of trafficking in persons and its various dimensions, while highlighting the role of divine law (Sharia) in prohibiting it.”

I believe that in this part of the world, where the three major religions of the world exist so profoundly – Judaism, Christianity and Islam - religious teaching provides us with the principle that Ms. Joy, the Special Rapporteur, would like to emphasize: "protection the victims of human trafficking. They are vulnerable and they are entitled to rights including their right to remedies."

Thank you.