

Some of the preconditions (procedural and/or other) in realizing remedies for human trafficking victims in the Jordanian legal system

A paper presented by

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Procedural preconditions in realizing the right to effective remedies

This paper is presented at the MENA Regional Consultation on the Right to an Effective Remedy for Trafficked Persons, presenting some of the procedural obstacles against obtaining remedies for the victims in criminal cases before Jordanian Courts. It intends to present some of the obstacles facing the demands for civil damages in a case before the courts; with the ‘Draft basic principles on the right to an effective remedy for trafficked persons (Annex 1)’ in mind.

Compensation in the Jordanian legal system:

The legal system in Jordan is considered a civil-law system, where the concept of remedy or compensation is different, to some extent, from the corresponding concept in a common-law system.

In the Jordanian Civil Code, there are several ‘sources of obligation’, i.e. reasons that establish a legal obligation to pay money, one of them is tort. The tortfeasor’s obligation to pay compensation (damages) to the victim is established when the three tort components exist and correlate: wrongdoing (intentional or unintentional), damage and causal relationship. In civil law, it doesn’t matter whether the wrongdoing is a simple innocent mistake or a heinous crime; all create the obligation to compensate if there are any damages.

Hence, in human trafficking crimes, the victim can claim compensation from the offender, if all three components were proven, even if the public prosecutor, for any reason, decides not to charge the offender. However, the victim's position becomes stronger if the offender was charged and brought to the criminal court through a criminal case.

First: Different sorts of remedy:

In a criminal law setting, remedies for crime victims are twofold, one that is provided by the State, like shelter, rehabilitation or medical care, whether physical or psychological; the other is provided by the court upon the request of the victim. **The first kind** of remedy is not well established in the Jordanian system, it is almost nonexistent for crime victims, although some services are being established in the past few years, for the victims of human trafficking crimes, after the issuance of the Anti-Trafficking Law no 9 for the year 2009 (like providing a shelter, or granting the victim temporary residence status).

The 'Draft basic principles on the right to an effective remedy for trafficked persons' provides for a good basis for remedy; the language of which addresses party States, who have the onus of providing and/or allowing for such remedy. Especially since most of the remedies referred to in many articles of this Draft are part of the State's domain rather than the judge's jurisdiction. For example, in the Jordanian system, only the State can provide the following: the responsibility (or ability) to facilitate access to remedies (art. 1(2)), facilitate the access to competent and independent authority for this purpose (art. 1(5)), the provision of legal, medical, physiological, social, administrative and other assistance necessary in seeking remedies (1(5)(b)) and the provision of a reflection period and a residence status (art. 1(5)(c), art. 7(b) & art. 8(a)).

The second kind of remedy is the one awarded by the court, based on a claim for civil damages from the victim. As will be presented later, such claim has some procedural preconditions; however, it is worth mentioning at this stage that the main condition herein is the victim's claim, neither the State nor the judge can award civil damages on their own accord, i.e. without such a claim from the victim.

Part 2 of the Draft, entitled '*Realizing the right to a remedy*', article 6 (b) provide that the State shall: "*ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice on any ground, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including their age, their status as victims of trafficking, their occupation or types of exploitation to which they have been subjected.*" It also provides in sub-article (c) that the States shall: "*give due consideration to individual circumstances of trafficked persons to ensure that*

remedies are centered on the empowerment of trafficked persons and full respect for their human rights. At a minimum, States should 'do no harm' and ensure that remedial proceedings are not detrimental or prejudicial to the rights of trafficked persons and their psychological and physical safety."

In addressing the victims of human trafficking, the State can commit itself to these articles, however, in a court case setting, the courts are independent and the State has no right to interfere in how they conduct their cases and/or rulings; in other words, no one is allowed to even try to influence the judge's conviction or ruling. Therefore, the State cannot force the judge to apply the above mentioned articles; of course, if adopted through legislation, the State can, in a sense, force the courts to apply them; however, some of the obligations therein are difficult to establish; for example, it will not be easy to prove that a judge applied some discriminatory treatment against a human trafficking victim. Culturally speaking, the rights of sex-workers, whether their work was by choice or they were coerced and trafficked thereto, are far from being accepted, let alone respected.

Recommendations:

The Draft did not take into consideration the different roles of the State and the court in realizing or awarding remedies to human trafficking victims; bearing in mind that the Jordanian legal system is not much different from other systems in the MENA Region.

Second: The meaning of, or the difference between: restitution, compensation and satisfaction:

In Common law systems, there is a specific meaning for different sorts of remedies awarded to crime victims: restitution, compensation and satisfaction; all of which, in many cases, can be awarded by a judge; as presented earlier, the same does not apply to Civil law systems. First, a judge cannot award all of these remedies, second, there is no difference between the three sorts of remedies, either in law or in language; all three terms: restitution, compensation and satisfaction have the same meaning, albeit, satisfaction is a bit different in language, it is not much different in law.

In Jordan as in most Civil law systems, the components of remedy are: actual loss, loss of profit and damages. For example, if a human trafficking victim is receiving some sort of medical treatment, all what a judge can do, if convinced, is to force the perpetrator to pay the fees for this treatment, after they are established; in most cases, the victims have to pay the cost of their treatment first and wait for a significant time before such cost is reimbursed. This, obviously, puts the victim in a vulnerable status.

Recommendations: it is preferable to have an article that defines the meaning of the terms used in the draft, and the technical legal differences between them. Especially the terms used in article 1(4): remedy, damages, restitution, compensation, recovery and satisfaction.

Third: Some obstacles against claiming civil damages for human trafficking crimes:

As presented earlier, apart from the remedies provided by the State, if any, the only manner by which human trafficking victims can be accorded any remedies is through a lawsuit. This can take place via a civil case or a criminal case; for example, if any of the human trafficking offences was committed and the perpetrator was identified and connected to this offence, then the victim's right for civil damages is established, whether the perpetrator was or was not brought to court. If the perpetrator(s) was not prosecuted (for example, if the crime was not serious or the perpetrator cooperated with the police), the victim can always seek civil damages from the perpetrator before the civil court. If the perpetrator was persecuted and referred to a criminal court, then the victim has a choice of two: either submits for civil damages before the criminal judge, or wait until there is a final (irrevocable) ruling, and then base his/her demands for civil damages before the civil court basing his claim on the criminal court's ruling.

However, if the victim decides to seek civil damages, there are many obstacles that face him/her; bearing in mind that, from the outset, the majority of the victims are not usually Jordanian nationals, and, most likely, disempowered and do not speak Arabic.

(1) The victim's awareness of the right to claim civil damages

The victim must be aware of his/her right to apply for civil damages; otherwise, they will not be able to make their claims; here, article 9(b)(ii) of the Draft is applicable. It is worth mentioning here that all court rulings in human trafficking offences in Jordan did not award any civil damages, this means that either the victims did not make such claims, mainly because they are not aware that they have this right, or afraid of making the demand; or that they decided to make their claims before a civil court, which is less likely.

(2) The problem of evaluating civil damages

Before submitting a claim for civil damages, the claimant must make the serious decision of how much will he/she asks for? If he/she decides to follow the advice of some lawyers by asking for a symbolic sum (to pay the least amount of court fees, as will be seen later), the risk here is that the judge might not take this claim seriously, or, in his ruling, he might choose the lower estimate provided by expertise. If the victim asks for a large

some, this might be frowned upon by the judge, who prefers to view civil damages as a remedy not another punishment, hence, might not be sympathetic with a vindictive or greedy victim.

The problem of deciding how much to claim for is more serious than giving the wrong indication to the judge, the question asked here is how could the effects of a serious crime such as human trafficking be measured? What price tag can be put on the violation of human rights and human dignity? This is not merely a sarcastic question; in the Jordanian legal system, there is no experience on how to measure the breach of human dignity in general, let alone the grave effects of human trafficking.

(3) The choice between the criminal court and civil courts

The next question that comes after deciding on how much to ask for, is the question of whether to submit the claim for civil damages before the criminal or the civil court?

If a criminal case is brought against the perpetrator before a criminal court, then the one representing the rights of the victim(s) will be the public prosecutor, the victim cannot have a lawyer to present his case; the only way for the victim to be represented, by a private attorney, in a criminal case is to submit a claim for civil damages. This can only be done during the period in which the public prosecutor is presenting his evidence and advocacy, once the prosecutor submits his final pleadings, no other claims can be submitted.

The victim can choose whether to submit the claim for civil damages during the period of the public prosecutor's pleadings or can wait after a final and irrevocable court ruling is passed by the court; after which, his/her representing attorney can file a civil case before civil court demanding civil damages from the perpetrator. Obviously, one of the advantages of choosing to claim civil damages during the criminal case is to save time, bearing in mind that the victim's stay in Jordan might be limited; another advantage is that the judge in a criminal court has more experience and power to examine evidence in proving a case. However, most lawyers prefer that civil damages claims are to be made independently from the criminal case and submitted in separate case before civil courts; it is perceived that the civil judge will have the exclusive role of evaluating the damages and will not be occupied with the criminal aspects of the case, compared to the judge in the criminal court; in addition, the civil judge is perceived to be more experienced in evaluating civil damages and will give this role sufficient time, as opposed to the judges in criminal courts who usually pass their sentences in a relatively shorter period. One of the negative aspects of submitting the civil damages claim independently before a civil court is time, the victim will have to wait until a final and irrevocable court sentence is awarded before filing for a civil case; this means waiting the same period of time, or usually more, during which the sentence in the criminal case was passed and became

final; in addition to the time needed for collecting damages through different legal channels, which are all time consuming. Hence, reaching the end result and realizing the claimed damages (if the victim was successful in his/her demands) is quite time consuming; here articles 5(c), 7(b), 8(a) and 9(b)(iv) of the Draft can play an important role in providing the State with the obligation to allow the victims legal stay to fulfill their demands. It is worth mentioning at this stage that Jordanian civil laws allow for the plaintiff, after filing the civil case, to leave the country, i.e. he/she does not have to stay in Jordan to follow up the case, the lawyer has this job and can always send him/her the money overseas; of course this assumes considerable trust in the attorney who is acting as an agent on behalf of the victim.

The choice between claiming civil damages before the criminal court or a civil court needs an expert legal opinion, which can only be provided through practicing lawyers and legal experts, one that the victim is not advised to do on his/her own. Such a decision can be made depending on the surrounding circumstances, the presiding judges and their previous case law and many other technical and legal details surrounding the case.

(4) Compulsory legal representation

According to the Jordanian Bar Association Law, most lawsuits or cases cannot be brought before Jordanian Courts without the presence of a licensed lawyer acting as a legal representative (agent) of the plaintiff (the defendant has the same obligation).

The lawsuits where the plaintiff can represent him/herself are limited; this applies when the lawsuit does not need advanced legal experience, or when the claims are, somewhat, insignificant; if, for example, before a first instance court the claimed civil damages were less than a thousand Jordanian Dinars.

Regardless of the amount claimed, cases claiming civil damages are perceived as needing legal expertise that can only be provided by licensed lawyers.

(5) Fees for courts and lawyers:

According to the law, most of the civil demands before civil courts must be equated with fees. Submitting the official receipt that proves paying the court fees is a procedural precondition, without which the case cannot be officially filed and cannot get a number.

The court fees start from 3% of the first 10,000 JD claimed, then 2% of the second 10,000 claimed, then 1% of the third 10,000 claimed, in addition to some other fees, as for example, the fees for submitting the agency contract, allowing the lawyer the power of attorney.

The lawyer can always ask for a waiver of the court fees, but such requests are very procedural, consume a significant additional amount of time and are not always

successful. Of course, once the damages are awarded (i.e. the case was a success), the court orders the defendant to reimburse the plaintiff the court fees; but this will only take place after the final and irrevocable sentence is passed by the court. In other words, the human trafficking victim seeking civil damages must pay the court fees in advance, on the hope of getting reimbursed later; needless to say that this puts a huge burden on the victims, who are, supposedly, already disempowered, especially economically.

Regarding the attorney fees, this depends on the agreement between the lawyer and the victim, which is usually full of legal technicalities and complications that put the client in an already disproportionate position. The fees can range from 10% to 25% from the amount claimed by the client. The Jordanian Bar Law puts a limit of 25% of the claimed amount, as the ceiling for the lawyers' fees, which is considerably high; it is worth mentioning here that, in some cases, some lawyers exceed that limit. Hence legal representation in human trafficking cases needs to be thoroughly legislated and closely monitored.

Recommendations: the Draft need to address the issue of legal representation of the victims of human trafficking thoroughly, where the NGOs, who provide legal assistance to the victims and who already work closely with the State, represent a good asset therein. However, this relationship need to be properly legislated, where clear guidance regarding the NGOs legal work is established, along with granting them more powers in their legal representation and allowing them access to State-provided remedies.

Another issue that needs addressing is the court fees, which, as presented earlier, create a serious obstacle against claiming civil damages for human trafficking crimes. Article 9(b)(iii) of the Draft provides that the party States have the obligation of addressing the obstacles facing trafficked persons in their pursuit of compensation, including “*free and qualified legal aid and representation.*” The obvious meaning of free here is seeking unpaid legal support, which can be provided by NGOs and pro bono lawyers; however, the term ‘*free*’ needs also to include court fees, not only free legal representation, hence, the Draft needs to address this issue and include court fees.

This is a short presentation of some of the procedural preconditions for claiming civil damages by the victims of human trafficking crimes; I hope they present some insight during the final version of the ‘Draft basic principles on the right to an effective remedy for trafficked persons.’