

# MENDING THE PROTECTION AND PROSECUTION DIVIDE: LOOKING AT SAUDI ARABIA HUMAN TRAFFICKING FLAWS AND POSSIBILITIES

## I. INTRODUCTION

Despite its storied existence, public concern for human trafficking is only a recent phenomenon.<sup>1</sup> Growing demand for the protection of victims of both sex and labor trafficking has meant the relatively recent promulgation of anti-trafficking legislation, on a national and international scale.<sup>2</sup> At the global level, the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons promotes a three prong approach: prevention, protection, and prosecution.<sup>3</sup> Unfortunately, prosecution and protection are concepts at odds,<sup>4</sup> forcing policymakers to strike a balance, which typically encourages the former to the detriment of the latter.<sup>5</sup> At the crux of this tension is the concept of revictimization, also

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1. *Human Trafficking: Global Phenomena. Domestic Concern*, SAFE START CENTER, <https://safe.startcenter.wordpress.com/2012/01/11/human-trafficking-global-phenomena-domestic-concern/> (last visited Jan 6, 2016) (“Over the last several years, the topic of human trafficking—or modern day slavery as many advocates call it—has captured the attention and pulled on the heart strings of the American public.”)

2. International legislation was developed by the United Nations Convention against Transnational Organized Crime and brought into force in 2003. *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/treaties/CTOC/> (last visited Jan. 6, 2016). Many individual countries have promulgated national legislation as well. *See, e.g.*, Victims of Trafficking and Violence Protection Act, 22 U.S.C. § 7101 (2000) [hereinafter TVPA].

3. *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 25, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/25, Nov. 15, 2000, available at <http://www.osce.org/odihr/19223?download=true> [hereinafter “Palermo Protocol”]. “The Protocol takes a three-pronged approach to trafficking, known as the “three Ps”: (1) criminalizing and “P”rosecuting . . . (2) trafficking “P”revention programs and (3) aid (or “P”rotection) for victims of trafficking. States who are members of the Protocol have mainly focused on criminalization, and to a lesser extent aid. . . .” Megan Ross, *A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol*, 21 DUKE J. GENDER L. & POL’Y 325, 325 (2014).

4. *See generally* Ankita Patel, *Back to the Drawing Board: Rethinking as Available to Victims of Trafficking*, 9 SEATTLE J. SOC. JUST. 813, 823–24 (2011) (explaining that “lack of understanding of their rights and the process; fear of detention and deportation; continual influence and fear of traffickers; and psychological impacts from the trauma that they have experienced” are among the reasons why victims may not be willing to assist in prosecution efforts).

5. *See* Hussein Sadruddin et al., *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 405 (2005) (“The most vulnerable victims may be so severely traumatized that they are incapable of being credible witnesses, even if they have escaped or have been rescued from their servitude. For some survivors, retelling their story would lead to re-traumatization.”).

known as retraumatization or secondary victimization, which is “victimization occurring at different points in time” or trauma caused by reliving an event.<sup>6</sup> The unfortunate reality is that successful prosecution of traffickers requires the victims to testify during trial.<sup>7</sup> Counterproductively, victims’ embedded distrust of the judicial system, their fear of retaliation against themselves or their families, and the potential for retraumatization that can occur by reliving their experiences through testimony makes victim participation a problem. However, successfully combatting this crime requires both victim protection and prosecution of offenders.<sup>8</sup> The key is determining how these pieces fit together. The author posits that with adequate protection, victims will be properly incentivized to participate in the prosecution of their traffickers because the law will offer provisions to quell their fears above while encouraging such involvement. To better understand this dilemma in a real world setting, this Note examines the state of the human trafficking problem in Saudi Arabia in Part II. It reviews the human trafficking decree and other related legislation of Saudi Arabia, focusing on its lack of victim protection and prosecution provisions. Part III analyzes potential solutions to the lack of necessary protections, by reviewing provisions from countries all over the world. Finally, Part IV makes recommendations as to which of these provisions, if any, used successfully in other countries might be applicable in helping Saudi Arabia improve the condition of its current regulations.<sup>9</sup>

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6. Chantal Poister Tusher, Dissertation, *Revictimization: Advancing Theory and Method*, GEORGIA STATE UNIVERSITY (2007), available at [http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1027&context=psych\\_diss](http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1027&context=psych_diss). “Secondary victimization,” as it is also called, has been defined by one author as “negative social or societal reaction in consequence of the primary victimization and is experienced as further violation of legitimate rights or entitlements by the victim.” Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15.4 SOC. JUST. R. 313, 314 (Dec. 2002).

7. The nature of these cases illustrates that the victims are the primary witnesses to the crimes perpetrated by the offenders. This makes their testimony key evidence to proving the elements of the crime of human trafficking. “[A] victim is the most convenient source of information which is expected as he or she is the direct participant in the trafficking chain [and] can give all the relevant information during the investigation and trial processes and assist the state in prosecuting traffickers.” Jasna Vujin, *Human Trafficking in the Balkans: An Inside Report*, 4 INTERCULTURAL HUM. RTS. L. REV. 267, 299–300 (2009). See also Stacie Reimer Smith, *Underutilization of the T-Visa: Comparing the T-Visa to Similar Temporary Residence Programs Around the World*, 14 GEO. J. GENDER & L. 719, 740 (2013) (“According to some prosecutors, victim participation in the investigation and prosecution of their traffickers is arguably the most important element in successfully prosecuting a trafficker”)

8. See generally Palermo Protocol, *supra* note 3.

9. The Trafficking in Persons [TIP] Report [hereinafter TIP Report] itself makes broad recommendations for protecting victims. However, this Note seeks to expand from an American-centric view to find approaches from many global perspectives. Still, it would be irresponsible to

## II. HUMAN TRAFFICKING IN SAUDI ARABIA

Human trafficking occurs in Saudi Arabia, and yet its government has not made sufficient efforts to combat it.<sup>10</sup> Saudi Arabia is primarily a destination country for both men and women who are trafficked for “forced labor and, to a lesser extent, forced prostitution.”<sup>11</sup> The Trafficking in Persons Report (TIP Report), published by the United States State Department, notes that women from a variety of countries across Asia, Africa, and the Middle East face prostitution and illegal domestic servitude; foreign migrant workers being particularly vulnerable.<sup>12</sup> Saudi Arabia is now on the Tier Two Watch List,<sup>13</sup> which means that it has not fully complied with the Trafficking Victims Protection Act’s (TVPA) minimum standards and has a significant ascertainable number of victims, but is making significant efforts to do so.<sup>14</sup> However, the Saudi government is failing to provide evidence of increasing efforts to combat severe forms of trafficking, and has not made any commitments to taking

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ignore the U.S. priorities in correcting TIP protection and prosecution entirely. *See generally*, BUREAU OF PUBLIC AFFAIRS DEPARTMENT OF STATE. THE OFFICE OF WEBSITE MANAGEMENT, PROTECTION CHECKLIST U.S. DEPARTMENT OF STATE (2014), <http://www.state.gov/j/tip/rls/fs/2014/227665.htm> (last visited Jan 8, 2015).

10. The TIP Report is produced annually by the U.S. State Department. While it provides a fairly comprehensive source of information and can help NGOs identify certain issues globally, the report is also criticized. *See* Pardis Mahdavi, *Just the “TIP” of the Iceberg: The 2011 Trafficking in Persons Report (TIP) Falls Short of Expectations*, THE HUFFINGTON POST, Sept. 6, 2011, available at [http://www.huffingtonpost.com/pardis-mahdavi/just-the-tip-of-the-icebe\\_1\\_b\\_888618.html](http://www.huffingtonpost.com/pardis-mahdavi/just-the-tip-of-the-icebe_1_b_888618.html) (last visited Jan 8, 2016). *See also*, BUREAU OF PUBLIC AFFAIRS DEPARTMENT OF STATE. THE OFFICE OF WEBSITE MANAGEMENT, TRAFFICKING IN PERSONS REPORT 2015 (2015), <http://www.state.gov/documents/organization/245365.pdf> (last visited Jan. 8, 2016) (drawing conclusions about other nations’ anti-trafficking measures based on U.S. Law).

11. TIP Report, *supra* note 9, at 295.

12. Men and women from countries in South Central Asia, the Middle East, and Africa, as well as many other countries voluntarily travel to Saudi Arabia as domestic workers or low-skilled laborers; many subsequently face involuntary servitude, experiencing nonpayment of wages, withholding of passports, confinement to the workplace, long working hours without rest, deprivation of food, threats, physical and sexual abuse, and restrictions on movement. *Id.* Saudi trafficking, particularly forced domestic servitude, has spread beyond its borders following Saudi nationals into other countries. *See, e.g.*, James Nye, *Saudi Arabian Princess Charged With Human Trafficking After a Domestic Slave at Her Orange County Condo Managed to Escape*, DAILYMAIL.COM, July 10, 2013, available at <http://www.dailymail.co.uk/news/article-2359893/Saudi-Arabian-princess-Meshael-Alayban-charged-human-trafficking-domestic-slave-escaped.html> (reporting on a Saudi Arabian princess in Southern California who was charged with human trafficking after her domestic slave escaped.)

13. TIP Report, *supra* note 9, at 295.

14. BUREAU OF PUBLIC AFFAIRS DEPARTMENT OF STATE. THE OFFICE OF WEBSITE MANAGEMENT, *Tier Placements* (2015), <http://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm> (last visited Jan 8, 2016) [hereinafter Tier Placements].

additional steps.<sup>15</sup> Part of this determination was due to insufficient regulations and enforcement related to prosecution of employers and protection of victims within Saudi Arabia's borders.<sup>16</sup> Not only is the lack of key provisions a problem, but recent changes to Saudi law may be contributing to the prevalence and severity of the trafficking.<sup>17</sup> The religious nature of the theocratic government presents additional challenges for trafficking victims,<sup>18</sup> and *Sharia* law contributes to a fear of the judicial system due to its strict application.<sup>19</sup>

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15. Prior to 2015 report, Saudi Arabia was a Tier Three country, meaning it failed to meet the minimum standards set forth by the TVPA and was not making significant efforts toward compliance. *Tier Placements*, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS (2014), <http://www.state.gov/j/tip/rls/tiprpt/2014/226649.htm>.

16. TIP Report, *supra* note 9, at 295 (“The government made some progress to prosecute offenders and protect trafficking victims. It reported increased efforts to prosecute and convict trafficking offenders; however, it did not proactively investigate and prosecute employers for potential labor trafficking crimes . . . [Additionally] authorities did not make systematic efforts to proactively identify trafficking victims among illegal foreign migrants, domestic workers who fled abusive employers, or women in prostitution.”).

17. OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT 334 (2014), <http://www.state.gov/documents/organization/226848.pdf> [hereinafter 2014 TIP REPORT] (“In July 2013, the Council of Ministers issued Decision No. 310 governing the work relationship between employers and domestic workers . . . . [This law] provides that domestic workers cannot refuse work if it is in their contract, which increased domestic workers’ vulnerability to forced labor.”); *but see* Council of Ministers Decision No. 310 on Domestic Workers and Their Employers, 7 *Ramadan* 1434 A.H. (July 15, 2013) art. 6(6) & 15, available at [http://nshr.org.sa/wp-content/uploads/2013/11/696\\_PDF.pdf](http://nshr.org.sa/wp-content/uploads/2013/11/696_PDF.pdf) [hereinafter “Decision 310”] (obligating domestic workers in Article 6(6) not to “refuse to work or leave their post without a valid reason,” but impliedly providing or referring to domestic worker right of contract rescission in Article 15 by mandating the employer pay for the domestic worker’s return to their home country when the domestic worker terminates for a “valid reason” (*sabab mashrua*)). *See also Saudi Arabia: Decision No. 310 of 1434 on Domestic Workers*, GULF LABOUR MARKETS AND MIGRATION, <http://gulfmigration.eu/decision-no-310-of-1434-on-domestic-workers/> (last visited Jan. 22, 2016) for an English language abstract of Decision 310.

18. *See generally About Saudi Arabia: Government*, ROYAL EMBASSY OF SAUDI ARABIA, <http://www.saudiembassy.net/about/country-information/government/> (last visited Jan. 22, 2016) (providing summary of the Saudi governmental structure as monarchy based on *Sharia* law). The religious nature of the leadership also presents unique methods of trafficking, such as when “women use the *Oumra* and *Hagi* (Moslem pilgrimages) as a pretext to go to Saudi Arabia and then to other Arab countries, where they are set to work. . . .” Khaled Ali Beydoun, *The Trafficking of Ethiopian Domestic Workers into Lebanon: Navigating through A Novel Passage of the International Maid Trade*, 24 *BERKELEY J. INT’L L.* 1009, 1026 (2006), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1327&context=bjil>. Because pilgrimage visas require women to travel with their husband or a male member of their unmarriageable kin, these visas are primed for abuse by men who can pretend to be the woman’s husband, while actually being her trafficker.

19. *Sharia* law considers prostitution a form of adultery, and the Saudi theocracy incorporates this idea strictly.

The relevant text is Surah XXIV:2, which states:

. . . as for the adulteress and the adulterer, flog each of them with a hundred stripes, and let not compassion with them keep you from (carrying out) this Law of God, if you believe in God and the last, and let a group of the believers witness their chastisement.

Mohamed Y. Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the*

In 2009, the Saudi government passed Royal Decree M/40 entitled the “Suppression of the Trafficking in Persons Act” (Decree M/40).<sup>20</sup> Decree M/40 contains sixteen articles defining trafficking and criminalizing certain acts and aggravating factors constituting Trafficking in Persons (TIP).<sup>21</sup> The law considers proper punishment to be “imprisonment for a period not exceeding fifteen years or a fine not exceeding one million riyals, or . . . both.”<sup>22</sup> All sentencing is subject to the application of aggravating factors, such as when the victims are women or children.<sup>23</sup> Finally, Article Fifteen provides a limited list of protections to be made available to the victims of trafficking.<sup>24</sup> However, the human rights situation with respect to human trafficking has still been criticized.<sup>25</sup> In fact, some found that the process denied any opportunity for relief.<sup>26</sup>

Other Saudi laws exacerbate the human trafficking problem. In July 2013, the Saudi Council of Ministers<sup>27</sup> passed a new law that regulates the

*Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *FORDHAM INT'L L.J.* 721, 736 (2002).

20. TIP Report, *supra* note 9, at 296; Suppression of the Trafficking in Persons Act, *promulgated* Royal Decree No. M/40, 21 *Rajab* 1430 A.H. (July 14, 2009) [hereinafter Decree M/40], *available at* [http://gulfmigration.eu/database/legal\\_module/Saudi%20Arabi/National%20Legal%20Framework/Anti-trafficking/1.2%20Anti-Trafficking%20in%20Persons%20Law\\_EN.pdf](http://gulfmigration.eu/database/legal_module/Saudi%20Arabi/National%20Legal%20Framework/Anti-trafficking/1.2%20Anti-Trafficking%20in%20Persons%20Law_EN.pdf).

21. *See, e.g.*, Decree M/40, *supra* note 20, arts. 1–2 & 4.

22. *Id.* art. 3.

23. *Id.* art. 4.

24. The following procedures are taken during investigation or trial concerning the victim of the crime of trafficking in persons:

1. Inform the victim of his legal rights, using a language he can understand.
2. Avail the victim of the opportunity to set forth his status as a victim of trafficking in persons, as well as his legal, physical, psychological and social status.
3. Refer the victim to a specialist physician if he appears to be in need for medical or psychological care or if he requests such care.
4. Admit the victim to a medical, psychological or social rehabilitation center if so necessitated by his medical or psychological condition or age.
5. Admit the victim to a specialized center if he needs shelter.
6. Provide police protection for the victim if necessary.
7. If the victim is a non-Saudi and there is a need for him to stay or work in the Kingdom during investigation or prosecution, the Public Prosecution or competent court shall have the discretion to decide upon such matter.

*Id.* art. 15.

25. *See, e.g.*, *Global: Flawed Policies Expose Migrants to Abuse*, HUMAN RIGHTS WATCH, Dec. 11, 2010, <http://www.hrw.org/news/2010/12/11/global-flawed-policies-expose-migrants-abuse>; *Saudi Accepts 181 Human Rights Reform Proposals*, MUSLIMVILLAGE.COM, Mar. 23, 2014, <http://muslimvillage.com/2014/03/23/51500/saudi-accepts-181-un-human-rights-reform-proposals/> (stating Saudi accepted recommendations from UN regarding human trafficking reforms).

26. Human Rights Watch, *supra* note 25.

27. The Council of Ministers “is responsible for drafting and overseeing implementation of the internal, external, financial, economic, education and defense policies as well as the general affairs of the State.” *About Saudi Arabia: Council of Ministers System*, ROYAL EMBASSY OF SAUDI ARABIA,

relationship between employers and their domestic workers.<sup>28</sup> Many remain skeptical of the actual possibility of more prosecutions and, therefore, victim protection.<sup>29</sup> The Saudi government also requires foreign citizens with work or residency permits to obtain an exit visa before leaving the country.<sup>30</sup> While withholding passports is illegal, it is rarely enforced.<sup>31</sup> These combined practices have presented problems in the labor trafficking context because employers are an integral part of obtaining an exit visa, thus, many victims find themselves trapped.<sup>32</sup>

At the very least, the Saudi law prohibits trafficking in persons and criminalizes the type of conduct described above.<sup>33</sup> However, a lack of enforcement is a barrier to successfully prosecuting under these laws.<sup>34</sup> Additionally, the lack of sufficient protections is not only failing to incentivize prosecution of offenders, but victims are also susceptible to being prosecuted.<sup>35</sup> While the U.S. State Department makes recommendations for each country based on their achievement of U.S. developed minimum standards, the remainder of this Note will look to

[http://www.saudiembassy.net/about/country-information/government/council\\_of\\_ministers\\_system.aspx](http://www.saudiembassy.net/about/country-information/government/council_of_ministers_system.aspx) (last visited Jan. 23, 2016).

28. Decision 310, *supra* note 17.

29. The government passed a related law in August 2013 criminalizing domestic violence and abuse, including that perpetrated against domestic workers. These laws in conjunction do not per se eliminate the threat of human trafficking and danger to these domestic workers. 2014 TIP Report, *supra* note 17, at 334 (“Though the domestic worker law sets maximum working hours and requires direct payment of wages into bank accounts, it also provides that domestic workers cannot refuse work if it is in their contract, which increased domestic workers’ vulnerability to forced labor.”); Madawi Al-Rasheed, *Maid in Saudi Arabia*, AL-MONITOR, Jul. 17, 2013, available at <http://www.al-monitor.com/pulse/originals/2013/07/humantrafficking-saudi-arabia-al-rasheed.html> (“It is difficult to see how this law will change the conditions of vulnerable women domestic workers as this special type of employment seems to be the most susceptible to abuse which takes place in the confines of the private sphere.”)

30. *Saudi Arabia*, U.S. PASSPORTS & INTERNATIONAL TRAVEL, Nov. 21, 2014, available at <http://travel.state.gov/content/passports/english/country/saudi-arabia.html> (“Foreigners holding Saudi work and/or residency permits require exit visas to depart Saudi Arabia.”)

31. Council of Ministers, Decision No. 166 of 2000 (Oct. 9, 2000); TIP Report, *supra* note 9, at 296 (“[T]he Council of Ministers’ Decision 166 of 2000 prohibits the practice of withholding workers’ passports as a separate, lesser offense; however, the government did not report efforts to enforce this decision despite the Ministry of Labor (MOL) publicly reiterating in March 2015 that such acts are in violation of labor law.”)

32. TIP Report, *supra* note 9, at 295 (“Due to Saudi Arabia’s requirement that foreign workers obtain an exit visa from their employers to legally leave the country, some are forced to work for months or years beyond their contract term.”)

33. Decree M/40, *supra* note 20.

34. TIP Report, *supra* note 9, at 296. While in the last year, the Saudi government has shown some improvement in its law enforcement efforts, it has neglected certain types of investigations and has focused on reactive enforcement as compared to proactive. *Id.* at 295–96.

35. “Officials continued to arrest, detain, deport, and sometimes charge migrants found to be illegally in the country, including individuals who may be unidentified trafficking victims.” TIP Report, *supra* note 9, at 295–96.

provisions from nations across the globe for successful approaches to the protection and prosecution dilemma, in an effort to find plausible amendments that would bolster Saudi's current laws.

### III. BEST PRACTICES IN RESOLVING THE PROTECTION AND PROSECUTION DISCORD

While no country has developed a perfect solution to human trafficking, there are a variety of helpful provisions implemented by others that could be added to Saudi Arabia's anti-trafficking efforts. The following discussion will only address some of the possible best practices. This Note will focus on five categories of options for Saudi Arabia to consider incorporating into their current law: immunity, residency, privacy protections, civil society activities, and restitution.

#### A. *Immunity for Victims*

The first question any TIP law must contemplate is how it will integrate victim protection with prosecution. This is usually a question of immunity; whether a nation will provide protection from prosecution for victims from any crimes committed while under the traffickers control and whether that immunity is conditional. Immunity is a key barrier to enabling prosecution because many victims are too afraid of incarceration to come forward or participate in judicial proceedings.<sup>36</sup> Some countries, like Moldova, the Dominican Republic, or the Kyrgyz Republic, will only provide such protection for victims who cooperate with the law enforcement officials and testify against their traffickers in prosecution.<sup>37</sup>

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Non-Punishment of Victims of Human Trafficking Victims of human trafficking may be compelled to commit criminal offences as a result of their trafficking and exploitation. . . . The increasing prevalence globally of human trafficking for enforced criminality also exposes victims of trafficking to committing a multitude of offences such as, but not limited to, theft, pick-pocketing, drug trafficking, cannabis cultivation and fraud. It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities.

*Trafficking in Persons Platform: Non Punishment*, INTERNATIONAL ASSOCIATION OF PROSECUTORS, available at <http://www.iap-association.org/TIPP/Articles/Non-Punishment> [hereinafter IAP].

37. Mohamed Y. Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 INTERCULTURAL HUM. RTS. L. REV. 249, 264 (2006); CRIMINAL CODE art. 165(4) (Mold.), available at <http://www.qub.ac.uk/slavery/?page=countries&category=5&country=139> (“(4) The victim of trafficking in human beings shall be exempted from criminal liability for any crimes committed by him/her in relation to this procedural status.”); CRIMINAL CODE art. 124 (Kyrg.), available at <http://www.qub.ac.uk/slavery/?page=countries&category=1&country=91> (“A person that became a trafficking victim shall be exempted from criminal liability for actions

This method of incentivization is criticized on the premise that protection should be available to all human trafficking victims, regardless of their ability or desire to participate in the prosecution of their traffickers.<sup>38</sup> Under the same reasoning, prosecuting these victims should not be permitted to provide them with the protection they deserve.<sup>39</sup> Conversely, in a country like Saudi Arabia with a pervasive lack of prosecution, a provision like this could enable prosecutors to get access to their key witnesses.<sup>40</sup>

However, in Saudi Arabia, the problem with prosecution is more closely linked to enforcement. The Country's officials have the tools at hand but are not successfully commencing prosecutions.<sup>41</sup> This would suggest that a lack of victims coming forward might not be the primary reason for lacking prosecutions of human trafficking perpetrators in recent years. This approach might not be ideal for Saudi Arabia. Instead, the government should consider providing blanket immunity that is not conditional. With the fear of incarceration removed, law enforcement may have better luck finding victims willing to come forward.<sup>42</sup> With immunity

considered criminal offences if such person assists law-enforcement bodies in identifying and making criminally liable of trafficking organizers, executors and participants.”); LAW NO. 137-03 REGARDING ILLEGAL TRAFFICKING OF MIGRANTS AND TRADE IN PERSONS art. 8 (Dom. Rep.), *available at* <http://www.qub.ac.uk/slavery/?page=countries&country=51&category=2> [hereinafter D.R. TIP Law] (“8.- If the victim or object of smuggling or trafficking, working or provided with reasonable certainty the identity of the organizers of the activity or provide data for harvest, may, by order of the prosecutor reasoned, be excluded from persecution criminal action.”).

38. IAP, *supra* note 36 (“That [victims] ought to be offered protection against their criminalisation for committing such act is well recognised in international and domestic law and guides. The principle of non-punishment of victims is affirmed in a number of international standards, including legally and politically-binding instruments.”).

39. In fact, prosecuting the victims is an example of the legal system working against its designed purpose. These people were forced into what some call modern day slavery; Traditional ideas of intent indicate that when you are not in control, you should not be held accountable for your actions. These vulnerable victims came under the control of another person. *Duress*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“The use or threatened use of unlawful force—usu. that a reasonable person cannot resist—to compel someone to commit an unlawful act. Duress is a recognized defense to a crime, contractual breach, or tort.”). Moreover, these victims have suffered immensely and blaming them for any wrongdoing during this period only serves to re-traumatize victims and reinforce any existing fear of authority and the judiciary.

40. This is based on the assumption that the prosecution is barred primarily by the lack of victim cooperation.

41. 2014 TIP Report, *supra* note 17, at 333 (noting that the Government is stifled by a lengthy and time-consuming bureaucratic process and relies on victims to self-report violations). Decree M/40, *supra* note 20.

42. One example of a law with blanket immunity is Jamaica’s legislation. TRAFFICKING IN PERSONS (PREVENTION, SUPPRESSION AND PUNISHMENT) ACT (2007) § 8 (Jam.) (“Where a person provides evidence that he is a victim he shall not be liable to prosecution for any offence against the laws relating to immigration or prostitution, that is a direct result of the offence of trafficking in persons committed against him.” [hereinafter Jamaican TIP Law].



for prosecution secured, Saudi Arabia would have addressed one of the two main concerns of victims who fear accusing their traffickers: fear of incarceration and fear of being deported.

### *B. Right to Residency*

A relatively common provision in TIP legislation involves a victim's right to residency, whether temporary or permanent. Most countries,<sup>43</sup> like the United States, condition a victim's permanent residency on their cooperation in the prosecution of their trafficker.<sup>44</sup> This approach has been embraced by the European Union.<sup>45</sup> Going even further than most, Belgium will assess permanent residency based on the quality of the information provided by the victim during the investigation and

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43. As of the writing of this Note, the author has been unable to find a country that does not condition permanent residency in some way.

44. TVPA, *supra* note 2. A T-Visa is available to victims of human trafficking in the United States under relatively restrictive conditions. U.S. Citizen and Immigration Services, *Victims of Human Trafficking: T Nonimmigrant Status*, Oct. 11, 2011, <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status>. Other countries, including but not limited to Portugal, The Netherlands, and France also predicate residency on participation in investigation. See also ACT N.º 23/2007, DECREE-LAW N.º 368/2007 (Port.) <https://dre.pt/application/dir/pdf1sdip/2007/07/12700/42904330.pdf>; Stacie Reimer Smith, *Underutilization of the T-Visa: Comparing the T-Visa to Similar Temporary Residence Programs Around the World*, 14 GEO. J. GENDER & L. 719, 736 ("In Portugal, in general a victim has to participate in the investigation of her trafficker but there may be an exception 'if special circumstances related to the victim's (or to his/her family) security, health, family situation or vulnerability' exist.") *Residency Regulation Human Trafficking*, NETHERLANDS IMMIGR. & NATURALISATION SERV., <https://ind.nl/EN/organisation/themes/human-trafficking/residency-regulation-human-trafficking> ("The residency regulation means in short that the victim or the witness of human trafficking can report the human trafficking to the police (or can cooperate otherwise in the criminal investigation or prosecution by police and Public Prosecution) after which the IND grants the victim or witness reporting it a temporary residence permit for the duration of the criminal investigation and prosecution. This concerns a residence permit on temporary humanitarian grounds.").

45. "After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

- (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and
- (b) whether he/she has shown a clear intention to cooperate and
- (c) whether he/she has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2(b) and (c).

Council Directive 2004/81, 2004 O.J. (L 261) 19 (EC) <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0081>. Abram L. Seaman, *Permanent Residency for Human Trafficking Victims in Europe: The Potential Use of Article 3 of the European Convention As A Means of Protection* Dorsey & Whitney Student Writing Prize in Comparative and International Law, 48 COLUM. J. TRANSNAT'L L. 287, 298 (2010).

prosecution.<sup>46</sup> Permanent Residency allows a victim to start a new life and avoid the conditions that led to his or her victimization in the first place. Most countries put fewer restrictions on a victim's access to temporary residency than they do on permanent residency visas.<sup>47</sup>

There is a distinction between a country granting temporary and permanent residency. Temporary residency clearly aligns with a government's desire to condition this residency on the duration of an investigation or prosecution of the victim's trafficker. Some countries will grant temporary residency regardless of participation in the trafficking investigation.<sup>48</sup> Italy, which falls into this category, offers temporary residence permits in one of two ways: to victims who participate in judicial proceedings or those who agree to get help from social services.<sup>49</sup> The Netherlands, while offering a recovery period longer than most countries, only provides social services to victims during their temporary stay, not work permits.<sup>50</sup> Countries' provisions can also extend beyond simple contingency residency policies. Canada has provisions to

46. "[I]n Belgium, potential trafficking victims are given 45 days to decide whether or not to assist." If they do, they are granted temporary residency. Based on that cooperation, the victim may possibly seek permanent residency however those applications are "judged on factors including the significance of the information provided against their trafficker and the degree to which the victim has adapted to Belgian society, assuming they have been in Belgium for more than two years." Seaman, *supra* note 45, at 298.

47. *See, e.g.*, Canada allows for temporary permit holders to apply for permanent visas only after an immigration officer considers "whether it is safe and possible for the victim to return home, whether the victim is willing to participate in the investigation of her trafficker or is necessary to the investigation" and will in the end make a determination as to whether this is the best course of action for the victim as compared to the relative ease of obtaining permanent residency. Reimer Smith, *supra* note 7, at 733. Italian immigration officials investigate whether the victim has fully integrated into society and has successfully found work or schooling. The Italian government additionally requires an integration program. *Id.* at 733–35.

48. *Id.* at 731. ("Canada offers a temporary residence permit (TRP) to victims of human trafficking. Victims are not required to testify against their traffickers to gain temporary or permanent residency status."); *Help and Protection for Victims*, CANADA DEP'T OF JUST., <http://www.justice.gc.ca/eng/cj-jp/tp/help-aide.html> ("Citizenship and Immigration Canada (CIC) can help protect victims of trafficking by securing their immigration status with a special temporary resident permit (TRP). A TRP provides legal immigration status in Canada to potential victims and may be issued for up to 180 days. . . . Victims of trafficking who receive a TRP are eligible for health-care benefits and trauma counselling, and may also apply for a work permit."). Additionally, Canada does not require participation in prosecution or a fee for an initial temporary residency permit or work permit. *Id.*

49. LEGISLATIVE DECREE N° 286, Art. 18 (It.) Reimer Smith, *supra* note 7, at 734 ("The Article 18 temporary residence permit 'applies to foreign citizens in situations of abuse or severe exploitation where their safety is seen to be endangered as a consequence of attempts to escape from the conditioning of a criminal organization or as a result of pursuing criminal action against the traffickers.'").

50. This reflection period provides a time for victims to consider whether they wish to participate in proceedings. Proceedings are tolled during this time. Also, victims are not permitted to obtain work permits, but are given access to other protections, such as, social services, medical aid, and shelter. Reimer Smith, *supra* note 7, at 737–38.

complement its fairly lenient temporary residency permits. The types of protections it offers to victims who assist in prosecution<sup>51</sup> are not only helpful as a complement to their residency provisions, but are strong legislative measures in their own right.

These goals are interesting in the case of Saudi Arabia. Most likely, the conditions in the victims' country of origin in some way contributed to their victimization.<sup>52</sup> However, given the current regime in Saudi Arabia, it would be presumptive to assume that victims would want to remain as permanent residents.<sup>53</sup> The current TIP law in Saudi Arabia does no more than mention the possibility of temporary residency, with no hint an option for permanent status.<sup>54</sup>

Saudi anti-trafficking efforts could benefit from a more detailed and comprehensive approach to residency options for victims. By following the Canadian approach, which offers unconditional temporary residency,

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51. For example, the Canadian government provides a support person during particularly vulnerable victim's testimony, measures to exclude the public from the case, and obstacles to victim identification. *Id.* at 732.

52. Countries of origin for many trafficking victims in Saudi Arabia include: Bangladesh, India, Sri Lanka, Nepal, Pakistan, the Philippines, Indonesia, Sudan, Ethiopia, Kenya, Burma, and Yemen. 2014 TIP Report, *supra* note 17, at 332. Many of these countries are considered third world countries, such that extreme poverty and/or conflict contributes to their re-victimization upon deportation from Saudi Arabia and return to their home countries. See U.N. ODC, Toolkit to Combat Trafficking in Persons, *Addressing the Root Causes of Trafficking*, available at [http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296\\_tool\\_9-2.pdf](http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_9-2.pdf); see also *Countries of the Third World*, NATIONS ONLINE, [http://www.nationsonline.org/oneworld/third\\_world.htm](http://www.nationsonline.org/oneworld/third_world.htm) (providing listing of countries as third world countries based on a number of categories including political rights and civil liberties, gross national income, human development, poverty, and press freedom); Katherine Almqvist Knopf, *Renewed Conflict in Sudan*, COUNCIL FOREIGN RELATIONS (Mar. 2010), available at <http://www.cfr.org/sudan/renewed-conflict-sudan/p21678>; Insight on Conflict, *Pakistan: Conflict Profile*, PEACE DIRECT (Mar. 2014), available at <http://www.insightonconflict.org/conflicts/pakistan/conflict-profile/>; *Effects of Poverty in India: Between Injustice and Exclusion*, POVERTIES.ORG (June 2013), <http://www.poverties.org/poverty-in-india.html>.

53. The Saudi government is a theocracy, which follows a strict version of Sharia law. Toni Johnson, Mohammed Aly Sergie, *Islam: Governing Under Sharia*, COUNCIL OF FOREIGN RELATIONS, July 25, 2014, available at <http://www.cfr.org/religion/islam-governing-under-sharia/p8034> ("The Hanbali school, Islam's most orthodox which spawned the Wahhabi and Salafi branches, is embraced in Saudi Arabia and by the Taliban."); Many are critical of this interpretation, namely Wahhabism, of Sharia law as too rigid and strict presenting terrorism and human rights implications. *Analysis Wahhabism*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/saudi/analyses/wahhabism.html> ("Strict Wahhabis believe that all those who don't practice their form of Islam are heathens and enemies. Critics say that Wahhabism's rigidity has led it to misinterpret and distort Islam, pointing to extremists such as Osama bin Laden and the Taliban."). *Arab Political Systems: Baseline Information and Reforms*, CARNEGIE ENDOWMENT INT'L PEACE, Mar. 6, 2008, <http://carnegieendowment.org/2008/03/06/arab-political-systems-baseline-information-and-reforms> (refer to the section on Personal Liberties for relevant discussion).

54. Decree M/40, *supra* note 20, Art. XV ("7. If the victim is a non-Saudi and there is a need for him to stay or work in the Kingdom during the investigation or prosecution, the Public Prosecution or the competent court shall have the discretion to decide upon such matter.").

but restricts permanent residency, Saudi Arabia would be able to quell victims' immediate fears and see to their protection and welfare. At the same time, it would be able to use prosecution participation as an incentive to those victims who feel they are safer and freer from re-victimization by staying in the Kingdom indefinitely. While issuing a new royal decree may be difficult,<sup>55</sup> the government could issue guidelines or some other less formal mode of interpretation indicating what exactly the "prosecution or competent court" should consider in making residency determinations.<sup>56</sup> In particular, provisions that supply counseling with temporary residency would move to quell fears and provide support for victims to avoid revictimization in the courtroom.

### *C. Privacy of Victims in the Courtroom and Beyond*

Not all provisions incentivizing prosecution while focusing on victim protection are as broad in scope as the right to residency. Many countries have found smaller measures within the context of judicial proceedings that help to prevent re-traumatization and ensure the safety of those victims that choose or participate in prosecution. "Trafficking victims are often reluctant to cooperate in a criminal investigation, due to fear of retaliation by the trafficker, distrust of law enforcement, or a lack of viable alternatives to their trafficking situation."<sup>57</sup> Some countries, like the Dominican Republic, provide general protections allowing for victim privacy and legal representation,<sup>58</sup> where others like Canada, are more explicit in the specific protections granted to victims aiding in prosecuting

55. The King has the discretion to approve (or not) recommendations from either legislative body. Abdullah F. Ansary, *A Brief Overview of the Saudi Arabian Legal System*, GlobaLex (July 2008), available at [http://www.nyulawglobal.org/globalex/Saudi\\_Arabia.htm](http://www.nyulawglobal.org/globalex/Saudi_Arabia.htm) ("Each minister has the right to propose a draft law or regulation related to the affairs of his ministry. [To approve a decision] two-thirds of those members who are in attendance must agree to adopt it . . . the decisions of the Council of Ministers, including those related to the approval of legislative proposals and amendments, are not considered to be final unless the King approves them."). This makes suggesting making amendments a very precarious situation.

56. Decree M/40, *supra* note 20, Art. XV ("7. If the victim is a non-Saudi and there is a need for him to stay or work in the Kingdom during the investigation or prosecution, the Public Prosecution or the competent court have the discretion to decide upon such matter.").

57. Amy Farrell, Jack McDevitt, Rebecca Pfeffer, Stephanie Fahy, Colleen Owens, Meredith Dank & William Adams, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases: Executive Summary*, NAT'L INST. JUST. (Apr. 2012), at 7, available at <http://www.in.gov/icw/files/412592-State-and-Local-Human-Trafficking-Cases.pdf>.

58. D.R. TIP Law, *supra* note 37, art. 9 ("9 - The State, through appropriate institutions, protect the privacy and identity of the trafficked persons, providing for the confidentiality of proceedings court. It will provide legal assistance to trafficked persons, so that their opinions and concerns to be presented and considered during the criminal proceedings against offenders and / or dealers.").

their traffickers.<sup>59</sup> Jamaica offers, and in some instances makes mandatory, that certain portions of the proceedings are held *in camera*.<sup>60</sup> These types of protections allow for the fulfillment of government goals in prosecuting perpetrators while also protecting the anonymity of victims.

These practices are not limited to the courtroom, necessarily. El Salvador uses its witness protection program to make sure that those who desire to and qualify for participation are protected under the program.<sup>61</sup> The agency is responsible for making quick decisions about who is qualified for the program, instituting protection measures, such as, voice distortion in the courtroom, and preventing releases of images or data

59. See discussion, *supra* note 51. Canadian Criminal Code, R.S.C. 1985, c. C-46 at 486.2(2), available at <http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html> (“Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of.”).

60. Salvador A. Cicero-Domínguez, *Lessons from the Road: Ecuador, Jamaica, and Other Efforts to Combat Trafficking in Persons in the Americas*, 31 N. ILL. U. L. REV. 521, 551 (2011).

1111. In any proceedings involving a victim who-

(a) is a child;

(b) has been traumatized by the experience of exploitation;

(c) is mentally or physically challenged; or

(d) is a person against whom was committed any of the offences set out in-

(i) section 76 of the Offences Against the Person Act (which relates to buggery); or

(ii) sections 3, 4, 5, 8, 9, 10, 13, 15 and 17 of the Sexual Offences Act (which relate to rape, grievous sexual assault, sexual touching, sexual grooming, sexual intercourse with person under sixteen, indecent assault and abduction), the Court shall order that such proceedings be held in camera.

Jamaican TIP law, *supra* note 42.

61. The El Salvadoran “[r]egulation states that requests for protection that meet all the requirements must be evaluated as soon as possible; if a positive decision is made on the application, protection measures are decided in the following five days (*ibid.*, Art. 17)”. Immigration and Refugee Board of Canada, *El Salvador: Crime and State Efforts to Combat Crime; State Protection Programs for Victims and Witnesses; Requirements to Access Programs; Statistics on Granted and Refused Applications for Protection; Duration and Effectiveness of These Programs* [SLV104089.E] (2012), [http://www.ecoi.net/local\\_link/222846/330316\\_en.html](http://www.ecoi.net/local_link/222846/330316_en.html) (last visited Feb. 9, 2015). The development of these types of protections stems from El Salvador’s history as “one of the most violent countries in Central America.” Randal C. Archibold, *Homicides in El Salvador Dip, and Questions Arise*, N.Y. TIMES, Mar. 24, 2012, available at [http://www.nytimes.com/2012/03/25/world/americas/homicides-in-el-salvador-drop-and-questions-arise.html?\\_r=0](http://www.nytimes.com/2012/03/25/world/americas/homicides-in-el-salvador-drop-and-questions-arise.html?_r=0). Moreover, it is notorious for witness retaliation. *Id.* Even though the law was not designed specifically for victims of human trafficking, these policies have played an important role in filling the gap in specific TIP laws that provide such measures allowing the country to achieve positive results and impacts for victims willing to testify against their traffickers without a change in their current TIP laws. Cicero-Domínguez, *supra* note 60, at 534.

regarding victims or witnesses.<sup>62</sup> The TVPA also allows for witness protection.<sup>63</sup>

Similar to the residency provisions, current Saudi protections of privacy and other issues that arise during prosecution are broad and general, merely requiring the police to provide protection “if necessary.”<sup>64</sup> These provisions do little to assure victims of their protection during judicial proceedings. If the government seeks to encourage prosecution, it should specify in its law exactly what services will be offered. The easiest place to start would be to follow Jamaica’s lead and require certain proceedings to be held in camera. This merely changes a procedure and does not seek additional aid from non-profit services.<sup>65</sup> Witness protection would clearly be a big step forward in assuring the safety and privacy of those who testify, but this program would be much larger in scale and likely to influence other categories of crimes, and is, therefore, a secondary step in improving Saudi Arabia’s TIP legislation.<sup>66</sup> The lack of specificity in the current law leaves too much discretion for judges to properly encourage victims to participate in prosecution because their safety and privacy would remain at risk.

#### *D. Civil Society Activity*

Anti-trafficking efforts are immensely supported by an active civil society ranging from local to global operations.<sup>67</sup> Non-Governmental Organizations (NGOs) play an important role in connecting victims to a whole host of social services as well as advocating for victims’ rights. On an international scale, the U.N. Protocol calls for the active involvement of

62. The protection of images and data related to those testifying is so strong in fact that the judge would be committing a crime by releasing such information of those enrolled in the program. *Id.*

63.

Thus, for the purpose of allowing the application of the 1982 Victims and Witness Protection Act to trafficking in persons, the TVPA recognizes trafficking as an organized criminal activity and as a serious offense. At the same time, in most of the European countries that have witness protection laws the criteria for application of such programs are so strict that victims of trafficking can rarely meet the standard.

Mattar on Human Security, *supra* note 37, at 265.

64. Decree M/40, *supra* note 20, art. 15.

65. The next section will elaborate why this is beneficial.

66. Saudi Arabia does not currently have any kind of witness protection program. Caitlin Dewey, *Saudi Arabia Launches Powerful Ad Campaign Against Domestic Violence*, WASH. POST, May 1, 2013, available at <http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/01/saudi-arabia-launches-powerful-ad-campaign-against-domestic-violence>.

67. *List of Organizations that Combat Human Trafficking*, WIKIPEDIA, available at [http://en.wikipedia.org/wiki/List\\_of\\_organizations\\_that\\_combat\\_human\\_trafficking](http://en.wikipedia.org/wiki/List_of_organizations_that_combat_human_trafficking).

civil society to meet the needs of victims.<sup>68</sup> Some countries will specifically encourage collaboration with NGOs to assist their citizens that are trafficked in other countries.<sup>69</sup> Others may lack legal provisions for addressing this issue but supplement the deficiency with a thriving civil society that can press the government for change.<sup>70</sup> An active civil society in this field can also provide benefits directly to the government.<sup>71</sup> These types of provisions are important to prosecution in addition to protection because NGOs are often able to provide legal assistance or at least explain victims their legal rights, in addition to providing basic services like shelter and counseling.<sup>72</sup>

Unfortunately, “[t]he Saudi Arabian [TIP] law is . . . silent as to any role for NGOs.”<sup>73</sup> Moreover, civil society, while prevalent in the country, is often government affiliated.<sup>74</sup> This is a significant problem with respect

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68. Palermo Protocol, *supra* note 3, art. 6.3, art. 9.3 (regarding prevention of trafficking), Art. 10.2 (regarding training of law enforcement and other government officials). Mattar on Human Security, *supra* note 37, at 276 (“The Protocol also provides that “policies, programmes and other measures established in accordance with [Article 9] shall, as appropriate include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.”).

69. Clara A. Dietel, “Not Our Problem”: Russia’s Resistance to Joining the Convention on Action Against Trafficking in Human Beings, 32 SUFFOLK TRANSNAT’L L. REV. 161, 170–71 (2008) (“The government of the Kyrgyz Republic also directs its embassies and consulates abroad to work with NGOs and law enforcement agencies to assist Kyrgyz citizens who may have been exploited and wish to return home.”). Duean Wongsu, *Traficord and Its Participation in the Promotion of Human Rights to Counter Human Trafficking in Thailand*, 31 WIS. INT’L L.J. 501, 518 (2013) (discussing multiple efforts that have been established by government and NGOs working in conjunction with each other, particularly within the context of the Traficord Project which is working in Northern Thailand to conquer human trafficking in this region.).

70. Cicero-Domínguez, *supra* note 60, at 534. (“For example, in Ecuador, which still lacks an effective legal framework to protect victims, there is an established history of civil society demanding respect for their human rights. Authorities are therefore attune with requests framed in this context.”).

71.

The NGOs can serve as the “eyes and ears” of the government in monitoring trafficking abuses. In turn, the government would be better able to help the victims and to assess the scope of the problem. Last year, the Russian government provided grants to three anti-trafficking NGOs while two local governments signed agreements with NGOs creating a victim referral system.

Dietel, *supra* note 69, at 185–86.

72. See, e.g., *How HT Pro Bono can Help*, THE HUMAN TRAFFICKING PRO BONO LEGAL CENTER, <http://www.htprobono.org/our-work/what-we-do/> (last visited Feb. 13, 2015); see also Siddharth Kara, *Designing More Effective Laws Against Human Trafficking*, 9 NW. U. J. INT’L HUM. RTS. 123, 48 (2011) (“NGO’s play a crucial role in this area from the standpoint of advising victims of their rights and options relating to both criminal and civil law claims.”).

73. Mohamed Y. Mattar, *Human Rights Legislation in the Arab World: The Case of Human Trafficking*, 33 MICH. J. INT’L L. 101, 127 (2011); Decree M/40, *supra* note 20.

74. Although there are hundreds of civil society organizations working in various fields in Saudi Arabia, the vast majority of them are government-affiliated, and there are few, if any, truly independent organizations. Civil society remains underdeveloped, due in large part to a restrictive legal framework that limits organizations’ activities and funding and a lack of expertise in establishing

to addressing human trafficking concerns because in countries where the legal system is failing victims, civil society can provide the necessary care and an organized means of promoting change within the government. In the case of Saudi Arabia, where the NGOs are in fact “GOs”, the movement loses out on the healthy competition and drive between the two groups.<sup>75</sup> Despite the current lack of a civil society free from governmental affiliation or control, these organizations could still provide important victim services.<sup>76</sup> However, due to the unique tie to the government any organization established is prevented from the second of their main functions: advocacy. Therefore, in Saudi Arabia, it is unlikely that directly incorporating civil society provisions into the law would be a practical vehicle for providing victim support while encouraging prosecution.

#### *E. Victim Restitution*

In incentivizing victims to participate in the criminal trial against their traffickers, restitution and/or asset forfeitures involve a different motivating factor than the other proposed best practices: money. The sad truth is that most victims who escape their trafficker are left impoverished compounding their economic difficulties, as services, beyond those provided pro bono, cost money. Providing restitution to victims puts them in a position to access the resources they need. Particularly within the context of this paper and the potential for retraumatization of victims, if they can use any restitution to seek counseling and therapy; they can lessen the threat of testifying against one’s trafficker.<sup>77</sup> Victims have the

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effective and sustainable institutions. INCL LLC Middle East/North Africa Regional office, *NGO Law Monitor: Saudi Arabia*, THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, updated Dec. 12, 2015, available at <http://www.icnl.org/research/monitor/saudiarabia.html>.

75. In fact, advocacy organizations such as those in other countries that can lobby for certain rights are prohibited in Saudi Arabia. Civil society in Saudi is only legally comprised of charities or missionary organizations. Severe restrictions, beyond those creating a barrier to free speech and advocacy, are placed on these groups such that their range of activities is limited, and they have a minimum membership requirement of Saudi citizens and communications with regional or international groups requires prior approval by the Ministry of Social Affairs. Further “the receipt of foreign funding is prevented in practice”. *Id.*

76. Unfortunately, it seems that there are no NGOs operating within Saudi Arabia. Instead all such victim services fall under the responsibility of the Human Rights Commission. This “national mechanism for implementing the Trafficking in Persons (Offences) Act” conducts follow up with victims, particularly with respect to residency concerns. National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Saudi Arabia, U.N. Doc. A/HRC/WG.6/17/SAU/1 (Aug. 5, 2013), available at [http://ap.ohchr.org/documents/alldocs.aspx?doc\\_id=22440](http://ap.ohchr.org/documents/alldocs.aspx?doc_id=22440).

77. Another way that the TVPA attempts to help victims in post trafficking recovery is the creation of a means for victims to attain restitution in criminal proceedings and damages in civil



option of seeking damages in civil cases against their traffickers, which could prove to be more useful.<sup>78</sup>

Most countries have provisions that provide an opportunity for victims to receive such financial awards. The United States, under the TVPA, requires full restitution for the actual amount of the victim's losses.<sup>79</sup> Restitution can provide vast benefits to victims allowing them to receive:<sup>80</sup> "lost wages for the period they were trafficked; medical expenses; physical and occupational rehabilitation; [and] counseling expenses."<sup>81</sup> Jamaica's TIP law additionally provides for the forfeiture of the perpetrator's assets.<sup>82</sup>

litigations. Certainly, awards of money would help victims obtain better and more consistent treatment for PTSD. Angela A. Jones, *Post-Traumatic Stress Disorder and Victims of Human Sex Trafficking: A Perpetuation of Chronic Indignity*, 4 INTERCULTURAL HUM. RTS. L. REV. 317, 332 (2009).

78. "It should be noted that victims of human trafficking should also be encouraged to file civil claims against their offenders, where jurisdictions allow. Such claims can help provide a better result for the claimant, particularly due to the lower evidentiary burden and the greater focus on damages as a remedy, which are far more useful to a victim of human trafficking than solely sending the offender to prison and/or providing anemic economic penalties or restitution." Kara, *supra* note 72, at 47 n.154.

79.

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

TVPA, *supra* note 2, § 1593. The formula itself is fairly extensive allowing for several different calculations and accepting the higher value. Meg Garvin, Sarah LeClair, *Ensuring Full Restitution for Trafficking Victims: Case Studies Compel a Call to Action*, NAT'L CRIME VICTIM LAW INST. (Nov. 2013), at 7, available at <https://law.lclark.edu/live/files/16052-ncvlivlrestitution-for-trafficking-victims---call> (Notably, Section 1593 expressly defines the "full amount of the victim's losses" to *also include* either the offender's ill-gotten gains or the value of the victim's labor as guaranteed under the Fair Labor Standards Act (FLSA), "*whichever is greater*.").

80. The following list of services is often provided by civil society actors. WIKIPEDIA, *supra* note 67.

81. Tahseen H. Mutlag, Erin Kulpa, Jennifer Stark, Zorica Travar, & Evelyn Y. Wu, *Best Practices in Human Trafficking Law*, NAT'L ASSOC. OF ATTORNEYS GENERAL (June 2011), available at <http://www.naag.org/publications/naagazette/volume-5-number-9/best-practices-in-human-trafficking-law.php>.

82. The Jamaican TIP Law, § 6, "Restitution," states:

6.-(1) Where a person is convicted of the offence of trafficking in persons the court may order that person to pay restitution to the victim.

(2) Restitution shall compensate, where applicable, for any of the following-

- (a) costs of medical and psychological treatment;
- (b) costs of physical and occupational therapy and rehabilitation;
- (c) costs of necessary transportation, temporary housing and child care;
- (d) lost income;
- (e) attorney's fees and other legal costs;
- (f) compensation for emotional distress, pain and suffering;

These provisions allow for victims to recover financially. What they do not do is specifically link such restitution or damages to encouraging prosecution. However, there is a strong argument that at least an indirect link between the two, but more so a symbiotic relationship. Filing civil suits to recover monetary damages from their traffickers could introduce victims to the judicial system and awareness can be raised about the possibility and usefulness of their testimony. Furthermore, being so induced civilly, the victim has the opportunity to recognize that law enforcement and the judiciary are not entities to fear. Conversely, a successful criminal adjudication could have a positive effect on the victim's recovery in a civil suit.<sup>83</sup>

Saudi law is not bereft of these types of financial provisions. Article XI provides "[t]he relevant court may at all times confiscate private funds, luggage and tools that are used or prepared for use for committing a crime of trafficking in persons[sic] or gained after the crime is committed."<sup>84</sup> While the language in Saudi's law succeeds in punishing the offender, it lacks the benefits to the victim and to prosecutions. Article XI could be

(g) any other losses suffered by the victim which the court considers applicable.

(3) Restitution shall be paid to the victim-

(a) upon the conviction of the accused;

(b) as far as possible, from any property forfeited under section 7 or the proceeds thereof.

(4) The absence of the victim from the proceedings shall not prejudice the victim's right to receive restitution.; "Forfeiture", states:

7.-(1) All property of persons convicted of the offence of trafficking in persons that was used or obtained in the course of the crime, or benefits gained from the proceeds of the crime shall be liable to be forfeited to the Crown in the manner specified in the Schedule.

(2) Where any such property as described in subsection (1) is located in a foreign country it shall be subject to forfeiture to the extent that it can be retrieved by the Government of Jamaica.

Cited in Cicero-Domínguez, *supra* note 60, at 551.

83. According to American law, "Under the collateral estoppel doctrine, a guilty verdict in a criminal case may be used in a subsequent civil action . . . however, that guilty verdict only has a collateral estoppel effect on the guilty party and those who were his or her privies at the time of the criminal proceeding." Daniel Werner, *Civil Litigation on Behalf of Victims of Human Trafficking*, SOUTHERN POVERTY LAW CENTER, (2008), [http://www.splcenter.org/sites/default/files/downloads/splc\\_human\\_trafficking.pdf](http://www.splcenter.org/sites/default/files/downloads/splc_human_trafficking.pdf).

84. Decree M/40, *supra* note 20, art. IX. Read without considering any other statutory effects, this law solely allows for asset forfeiture. There is not claimed ability for trafficking victims to recover through restitution. The important distinction is that forfeited assets go to the state where as restitution is money owed to the victim.

made stronger by adopting provisions that entitle the victims to restitution or financial damages from within the assets forfeited—such an amendment is both beneficial and feasible.<sup>85</sup> The only barrier would be any difficulty in changing the law.<sup>86</sup>

#### IV. CONCLUSION

These suggested best practices show that nations all over the world are tackling this complex problem in different ways. However, the perfect solution remains elusive. Often victims are too fearful—of the judicial proceedings or reliving their trauma—to successfully participate in the prosecution of their traffickers.<sup>87</sup> In an ideal world, an availability of excellent victim services would provide victims with a better understanding of the system, defeat their fear of their perpetrator's control, and provide counseling services to ensure that victims were being treated for their PTSD to avoid any potential for retraumatization during trial. However, on the path to such provisions of victim services, for which it is arguable there will never be sufficient funding,<sup>88</sup> governments can and have imposed provisions within their TIP Laws to address the above problem.

Such options include decisions about immunity for victims, their residency options within the destination country, certain court proceedings that shield their testimony, the influence and participation of civil society, and the availability of restitution or civil recourse. If the Saudi government could or would implement all these options, then the state of trafficking within its borders could improve rapidly, however, such goals are

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85. Providing restitution does not cost the government any money, it only takes from the criminal and gives back to the victim what is owed. Moreover, providing restitution has the same incentivizing effects as discussed in this part of the Note. The only potential cost to the government is for their prosecutors to become educated on a new part of the law such that they can effectively pursue such avenues in their cases against traffickers.

86. Ansary, *supra* note 55. Again, the government is faced with a purely discretionary choice such that it is difficult to necessarily push for an amendment particularly from the inside. *Id.* Perhaps what is necessary is outside pressure.

87. “[O]btaining the victim’s assistance during the police investigation and the testimony during the subsequent court proceedings remains very difficult. An unconditional guarantee of the victim’s full cooperation is never assured because of the prospects of receiving permanent residence permit and the regular fear of reprisals and intimidation often influence the victims’ decision not to press charges. Cindy Braspenning, *Human Trafficking in the Netherlands: The Protection of and Assistance to Victims in Light of Domestic and International Law and Policy*, 1 INTERCULTURAL HUM. RTS. L. REV. 329, 341 (2006).

88. *See, e.g.*, David Crary, *Funds Lag for Sex Trafficking Victims*, DETROIT NEWS, Dec. 29, 2014, available at <http://www.detroitnews.com/story/news/local/michigan/2014/12/29/sex-trafficking-states-michigan-minnesota/21023547/>.

unrealistic. What is realistic would be revising their Royal Decree to include provisions that protect victims during trial or other court proceedings and correcting the availability for victim restitution. Both of these options only face barriers from the King and Council of Ministers.<sup>89</sup> Otherwise, these provisions are benefits without downsides; they remove locating additional funding from the issue.

Incorporating these two types of provisions into Saudi law is only addressing the low hanging fruit of the situation. What would be most instrumental in correcting Saudi's Decree would be making changes to immunity and residency options<sup>90</sup> recommended above.<sup>91</sup> By providing victims with some kind of immunity, while perhaps not *carte blanche*, the government has the opportunity to gain the trust of victims who would previously have never come forward for fear of being put in jail. In conjunction with a right to residency, at least temporarily, victims would be more apt to help with prosecution, as their safety (physical and mental) would not be at risk.

Victim participation is crucial to the prosecution of criminals in human trafficking cases. There may be witnesses but it is the victim that was present for the bulk of the crime and who can speak to the control he or she was subjected to, the harsh labor of the sexual violence and who was harmed in the process.<sup>92</sup> However, it is not fair to victims to be forced into participation in these trials to their well-being's detriment. Reliving such trauma is a real problem and big fear for victims of such serious offenses. They often remain in fear that getting involved with judicial proceedings will lead to their re-victimization whether in the courtroom or by their trafficker. Quelling these fears is the key to a functional anti-human trafficking system and legal scheme. Instituting some of the above best

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89. The barrier is that the process is not a democratic one. While the fundamental principles a state desires in its government is not being questioned, this type of government limits the ability of the public or of outsiders to put pressure on Saudi's leaders to provoke change. Therefore, it is a barrier in that the change needs to come from within the government.

90. TIP Report, *supra* note 9, at 296 (Recommending "significantly improve efforts to ensure that victims of trafficking are not punished for acts committed as a direct result of being subjected to human trafficking, such as, immigration violations, fleeing abusive employers, or engaging in prostitution").

91. *Id.* at 297 ("Few victims successfully pursued criminal cases against abusive employers due to lengthy delays in the immigration and justice system. Trafficking victims were reportedly given the option to remain in the country—either in protective custody or working for a new employer—during judicial proceedings, or they could request an immediate exit visa; these benefits were not linked to the successful outcome of a prosecution of their trafficker.").

92. See discussion, Vujin, *supra* note 7.

practices from around the globe could mean the movement of Saudi Arabia within the TIP Reports Tier system. More importantly, Saudi Arabia could see better protection for those trafficked within their borders and more successful prosecutions of those offending.

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