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**Child trafficking from the perspective of Islamic law:  
a case study of Saudi Arabia**

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## **Abstract**

This thesis examines the legal responses to child trafficking in Saudi Arabia (SA). It primarily examines whether SA has created a legal response that accounts for all trafficked children regardless of the type of exploitation they experience and whether the enforcement of the law accurately reflects the law. SA's response has been influenced by, and created alongside, Islamic, international and regional responses. Therefore, the thesis examines SA's legal approach to child trafficking in light of the responses adopted on all three levels.

Given that SA is an Islamic State and that its legal system is based on Islamic law, the thesis examines the Islamic law framework in relation to child trafficking in order to determine whether there is support for the prevention and eradication of this crime according to international standards. Findings reveal that Islamic law opposes and prohibits trafficking in children and its related acts of exploitation. Therefore, it is clear that rules of international law and the principles of Islamic law are complementary to one another in effectively and comprehensively combating child trafficking. In relation to the protection aspect of child victims of trafficking, it is suggested that Islamic law can serve as an important vehicle for the enforcement of international human rights law in the Muslim world. Thus, recommendations are advanced to that effect.

An examination of the Islamic, international and regional approaches to the trafficking of children, in light of the legal responses and enforcement practices of SA, reveals that, although SA has developed anti-trafficking legislation, it fails to enforce the law in practice. The main conclusion reached is that there is a need for SA to improve its laws and enforcement practices against child trafficking in order to align itself to accepted standards at all three levels. The thesis also examines the legal responses, laws and practices of another Islamic jurisdiction, the United Arab Emirates (UAE), towards the trafficking of children. This is done in order to distil lessons, if any, for SA, from the UAE. The UAE was chosen as a case study for the comparative analysis because of the legal, cultural and religious similarities between SA and the UAE. The analysis of the UAE response to combat child trafficking presents a more progressive and successful approach in comparison with SA. The findings reveal that there are lessons which SA can learn from the UAE.

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## List of Abbreviations

Arab TIP Model Law:	Arab Model Law to Combat the Crime of Trafficking in Persons
Arab TOC Convention:	Arab Convention against Transnational Organised Crime
CEACR:	Committee of Experts on the Application of Conventions and Recommendations
CRC:	Convention on the Rights of the Child
ILO:	International Labour Organisation
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
DFWAC:	Dubai Foundation for Women and Children
GCC:	Gulf Co-operation Council
HRW:	Human Rights Watch
IOM:	International Organisation for Migration
IPEC:	International Programme on the Elimination of Child Labour
NCCHT:	National Committee to Combat Human Trafficking
OHCHR:	Office of the United Nations High Commissioner for Human Rights
OIC:	Organisation of Islamic Cooperation
SA:	Saudi Arabia
TIP:	Trafficking in Persons
UAE:	United Arab Emirates
UN TOC Convention:	United Nation Convention against Transnational Organised Crime
UN:	United Nations
UN.GIFT:	United Nations Global Initiative to Fight Human Trafficking
UNCHR:	United Nations Commission on Human Rights
UNGA:	United Nations General Assembly
UNHRC:	United Nations Human Rights Committee
UNICEF:	United Nations Children's Fund
UNODC:	United Nations Office on Drugs and Crime
UNTS:	United Nations Treaty Series
UPR:	Universal Periodic Review



## **Tables – National and International Laws**

### **Treaties and Other International Instruments**

1926 Slavery Convention 1926, LN Doc. 60 LNTS 253, 25 September 1926 (entered into force 9 March 1927)

1930 ILO, Forced Labour Conventions 1930 (No.29), 39 UNTS 55, 28 Jun 1930 (entered into force 1 May 1932)

1930 International Labour Organisation (C029) Forced Labour Convention 1930 No. 29, 53 UNTS 50, 11 October 1933 (entered into force 24 August 1934)

1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949, 96 UNTS 271, 21 March 1950 (entered into force 25 July 1951)

1972 ILO Constitution 1972, 22 June 1972, (entered into force 1 November 1974)

1973 ILO Convention concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297

1979 Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13, 18 December 1979 (entered into force on 3 September 1981)

1989 Convention on the Rights of the Child 1989, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990)

1999 International Labour Organisation (C182) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 No. 182, 38 UNTS 1207, 17 June 1999 (entered into force 19 November 2000)

2000 Convention against Transnational Organised Crime 2000, UN Doc. A/RES/55/25, 15 November 2000 (entered into force 29 September 2003)

2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000, 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002)

2000 The Protocol to Prevent Suppress and Punish Trafficking in Persons, especially Women and Children 2000, UN Doc. A/RES/55/25, 15 November 2000 (entered into force 25 December 2003)

Travaux Préparatoires of the Negotiation of the United Nations Convention Against Transnational Organised Crime and the Protocols Thereto, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000).

## **Regional Instruments**

Arab Charter on Human Rights (approved by the Arab League Decision No 270, Session 16 on 23 May 2004, entered into force on 15 March 2008).

Organisation of Islamic Cooperation Covenant on the Rights of the Child in Islam, adopted by the 32nd Islamic Conference of Foreign Ministers, held in Sana'a, Yemen in (23 June, 2005).

Arab Guiding Law on Human Trafficking (Arab Model Law to Combat the Crime of Trafficking in Persons) (approved by the Arab Ministers of Justice, Session 21, Decision No. 601, in Cairo, 9 November 2005, and by the Ministers of Interior, Session 23, Decision No. 473, in Cairo, 2006

Arab Convention against Transnational Organised Crime (approved by the Arab Ministers of Justice and Interior during their meeting in Cairo on 21 October 2010, entered into force on 5 October 2013)

## **National Laws**

### **SA's legislation pertinent to child trafficking**

Saudi Basic Law of Governance, Royal Decree No. A/91, 1<sup>st</sup> March 1992, (Published in Umm Al-Qura Gazette No.3397, 5<sup>th</sup> March 1992).

Slavery Ministerial Order in 6/11/1962, Published in Official Gazette of Saudi Arabia (Umm Al-Qura) Issue: No. 1944 of Year 1962.

Saudi Trafficking in Persons (Offences) Act, promulgated by Royal Decree No. M/40, 14 July 2009.

Saudi Anti-Cyber Crime Act Royal Decree No. M/17, 26 March 2007.

Ministry of Labour, Saudi Labour Regulation, Royal Decree, No. M/51, 28 October 2005.

Child Protection Act, Royal Order No. M/14, 26 November 2014.

Anti-begging Order No. 1/738 was issued by the Minister of Labour, 4 July 2004.

Camel Races Regulation, Royal Decree No. 13000, 17 April 2002.

## **UAE' Legislation Pertinent to Child Trafficking**

The Federal Law (9 /1976) on the Juvenile Vagrants and Delinquents 1976

The Federal Law (8/1980) on the Regulation of Labour Relations of the UAE 1980

The Federal Law (3/1987) on Penal Code 1987

The Federal Law (15/2005) on the Regulation of Camel Racing 2005

The Federal Law (51/2006) on Combating Human Trafficking Crimes 2006

The Federal Law (5/ 2012) on Combating Cybercrimes 2012

# Chapter One: Introduction

## 1.1 Background

The UN Special Rapporteur on TIP stated that: '[T]he world today is confronted with a huge human trafficking problem'.<sup>1</sup> This thesis was motivated by the fact that trafficking in persons is a 'vile and heinous violation of human rights' that affects not only adults but children as well (both male and female).<sup>2</sup> Trafficking in persons including children is recognised as one of the most serious crimes and it affects States all over the world,<sup>3</sup> including Islamic States. Millions of children have been trafficked and subjected to labour and sexual exploitation. They endure horrors and life-threatening conditions, sometimes simply for the amusement and popular sport of the wealthy.<sup>4</sup> In many parts of the world, they are engaged in activities that deny them their basic human rights; they are abused in various ways.<sup>5</sup> The trafficking process cuts off children from their families, transports them to unfamiliar destinations – even to other continents – to be used by others, usually to make money.<sup>6</sup> This is seen in commercial sexual exploitation, domestic servitude, agriculture, hazardous industrial work, begging, smuggling and even selling drugs and forced recruitment into armed conflict.<sup>7</sup> There are other situations, such as for sport (camel jockeys), in which the victims are used to satisfy the demands of those who take control of them in unfair ways.<sup>8</sup>

It is reported to be a crime which is 'growing at an alarming rate'<sup>9</sup> as '[m]illions of children are victims of trafficking and commercial sexual exploitation each year'.<sup>10</sup> Despite these

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<sup>1</sup> UNHRC, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report Submitted by Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy N Ezeilo' (20 February 2009) UN Doc A/HRC/10/16, 5.

<sup>2</sup> David A Feingold, 'Think Again: Human Trafficking' (*Foreign Policy*, 20 October 2009) 26.  
<<http://foreignpolicy.com/2009/10/20/think-again-human-trafficking/>> accessed 20 October 2015.

<sup>3</sup> Tomoya Obokata, 'Trafficking of Human Beings as a Crime Against Humanity: Some Implications' (2005) 54(2) *International and Comparative Law Quarterly* 445.

<sup>4</sup> ILO, *Combating Child Trafficking, Demand Side of Human Trafficking in Asia: Empirical Findings* (International Labour Office, 2006) 15. See also, Mohamed Y Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2002) 26(3) *Fordham International Law Journal* 721, 729.

<sup>5</sup> ILO (n 4).

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

<sup>9</sup> S Stoecker, 'The Rise in Human Trafficking and the Role of Organized Crime' (2000) 8(1) *Demokratizatsiya: The Journal of Post-Soviet Democratization* 129, 129.

<sup>10</sup> Jonathan Todres, 'Taking Prevention Seriously: Developing a Comprehensive Response to Child Trafficking and Sexual Exploitation' (2010) 43(1) *Vanderbilt Journal of Transnational Law* 3.

reports, there is an inherent difficulty in collecting reliable data capable of providing a true picture of the extent of the problem of trafficking in persons, including children. This is due to the hidden nature of the phenomenon. Notwithstanding, it has been estimated that every year about 600,000 to 800,000 persons are trafficked across borders<sup>11</sup> and this number rises to about 2 to 4 million when internally trafficked persons are included.<sup>12</sup> The Trafficking in Persons Report of the UN Office on Drugs and Crime (UNODC) in 2014 showed that victims of 152 different nationalities were trafficked and detected in 124 States worldwide.<sup>13</sup> The International Labour Organisation (ILO) has estimated that the minimum number of persons in forced labour, including sexual exploitation, as a result of trafficking at any given time, is 2.5 million.<sup>14</sup> With regard to child trafficking in particular, the exact number is unknown.<sup>15</sup> At best, approximate figures show that at least 1.2 million children are targeted by traffickers and transported domestically and internationally every year.<sup>16</sup>

Trafficking in children is a global phenomenon that takes place across all regions of the world. Middle Eastern States are no exception. It is reported that child trafficking is emerging as a serious problem in these States, thus exposing tens of thousands of children to increased vulnerability, exploitation and abuse.<sup>17</sup> The UNODC's Trafficking in Persons Report for 2012 shows that the Middle East is the area with the greatest flows of cross-border and transnational human trafficking.<sup>18</sup> Seventy per cent of the victims in this area originally come from other areas, comprising forty different nationalities from twenty States.<sup>19</sup> Almost two thirds of the victims discovered in Africa and the Middle East region are children, half of whom are exploited

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<sup>11</sup> Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006) 31; Carol S Brusca, 'Palermo Protocol: The First Ten Years after Adoption' (2011) 2(3) *Global Security Studies* 8, 10; Steward H Oppong, 'Human Trafficking Through Organized Crime' (2012) 2(20) *International Journal of Humanities and Social Science* 37, 37.

<sup>12</sup> Poppy A Lolo, 'Analysis of a Criminologist Regarding Human Trafficking as an Extraordinary Crime' (2016) 45 *Journal of Law, Policy and Globalization* 12, 12.

<sup>13</sup> United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons* (UN 2014) 5.

<sup>14</sup> ILO, 'A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (International Labour Conference, 93rd Session, Geneva, 2005) 46.

<sup>15</sup> Elizabeth Protacio-De Castro, *Integrating Child-Centered Approaches in Children's Work* (Save the Children 2009).

<sup>16</sup> K Schulte, 'Statistically Speaking: Child Trafficking, Current Concerns, and the United States' (2005) 25(4) *Children's Legal Rights Journal* 54.

<sup>17</sup> Krishna Belbase and others, 'Preventing Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options' (UNICEF Division of Policy and Planning 2007) 3.

<sup>18</sup> UNODC, *Global Report on Trafficking in Persons* (UN 2012) 7.

<sup>19</sup> *ibid* 13.

in forced labour.<sup>20</sup> In this regard, Al Mashhadani notes that poor economic conditions, natural disasters or simply the desire for a better life have impelled hundreds of thousands of children, women and men to become victims of human trafficking for the purposes of sexual exploitation and forced labour in the Middle East.<sup>21</sup>

One of the Middle Eastern States affected is Saudi Arabia (SA). Its response to child trafficking is the main focus of this thesis. SA is recognised as a destination State for child trafficking.<sup>22</sup> The sheer extent of this problem in SA has been highlighted by non-governmental organisations (NGOs) and international organisations such as UNICEF.<sup>23</sup> Available information indicates that each year tens of thousands of children from various States of origin, such as Yemen, Nigeria and Pakistan, are trafficked to oil-rich Gulf States including SA.<sup>24</sup> There is significant evidence which suggests that children trafficked into SA are exploited in many ways, including as camel jockeys, street beggars and sex workers.<sup>25</sup>

The US Department of State's Trafficking in Persons Reports have reported since 2001 that SA is deeply affected by human trafficking.<sup>26</sup> Similarly, the UN Committee on the Rights of the Child has raised concerns specifically in regard to the problem of child trafficking in SA. For instance:

... while noting that the domestic legislation prohibits the sale and trafficking of children and includes measures to protect children from all other forms of exploitation, abduction and abuse, the committee is concerned about the growing phenomenon of trafficking in children in the region, including reports of child trafficking during pilgrimages, and children crossing the border from Yemen.<sup>27</sup>

SA as a State is considered not to be adhering to the minimum standards of international law. Given this, an in-depth analysis of how relevant instruments are implemented in this jurisdiction is needed along with an assessment of the national action against trafficking in persons, especially children. The question of whether SA has lessons to learn, or whether the State requires improvement, can best be answered by examining other Islamic States. For this purpose, the United Arab Emirates (UAE) has been selected.

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<sup>20</sup> *ibid* 14.

<sup>21</sup> Akram Abdul Raziq Al Mashhadani, 'Human Trafficking Crimes' (Arab Administrative Development Organisation, 2013) 22.

<sup>22</sup> Belbase and others (n 17) 3.

<sup>23</sup> *ibid*.

<sup>24</sup> *ibid* 3.

<sup>25</sup> *ibid* 5.

<sup>26</sup> US Dept of State, 'Trafficking in Persons Report: June 2008'.

<sup>27</sup> Committee on the Rights of the Child (CommRC), 'Concluding Observations: Saudi Arabia (SA)' CRC/C/SAU/CO/2 (17 March 2006) para 71.

## **1.2 Aims and objectives of the research**

With this in mind, the main aim of this thesis is to analyse the extent to which SA complies with international standards and how it implements effective measures against child trafficking. There are several key secondary objectives which are linked to this main objective:

- 1) To situate traditional slavery and modern day human trafficking in Islamic law and tradition.
- 2) To identify relevant international standards on trafficking in persons especially children.
- 3) To analyse the extent to which Islamic law accommodates, and is capable of accommodating, the relevant international standards.
- 4) To conduct an in-depth national case study of SA in its efforts to prevent and suppress child trafficking.
- 5) To undertake a comparative study of practices and laws of both the UAE and SA with a view to highlighting good practice which may be implemented in SA.
- 6) To make practical recommendations as to how SA can improve the current state of affairs.

In order to achieve the first objective, the thesis will explore how terms such as ‘slavery’ and ‘child trafficking’ are understood in Islam generally and Islamic law in particular. It will illustrate the perspective of the four schools of thought (Hanafi, Maliki, Shafi’i and Hanbali) with respect to child trafficking. The thesis will further analyse how the crime of child trafficking is categorised under the Islamic criminal justice system. The importance of the analysis of the Islamic perspective is based on the fact that the legal systems in many Islamic States, including SA and the UAE, rely primarily on Islamic law. Thus, a study of Islamic legal provisions and traditions which relate to child trafficking becomes significant. An understanding of Islam’s position on child trafficking and its related acts and elements can provide important avenues for the development of a comprehensive approach to combating trafficking in Islamic States – one which draws on and is grounded in the Islamic tradition, as well as in compliance with international law.

For the second objective, the thesis will examine international and regional perspectives on child trafficking. In order to do this, the thesis will examine the definition of human trafficking provided by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons

especially Women and Children, which is the major instrument for the discussion of trafficking in persons. States' obligations to prohibit and prevent human trafficking, and protect victims, will also be identified and examined. The thesis will also refer to States' obligations under various human rights instruments at the international and regional levels, especially the UN Convention on the Rights of the Child (CRC) and the Organisation of Islamic Cooperation (OIC) Covenant on the Rights of Children in Islam. Reference will then be made to the conformity of international law with Islamic law in relation to trafficking in persons.

Considering that the thesis provides a detailed examination of the Islamic framework in relation to child trafficking, it becomes necessary to examine whether and to what extent Islamic law implements international standards in Islamic States. This is what the third objective will address. This is particularly important because the domestic legal systems of both SA and the UAE rely primarily on Islamic law. In this sense, an analysis of both States' efforts to combat child trafficking will provide an understanding of the extent, if any, that Islamic law hinders the implementation of actions against child trafficking at the national level.

In pursuing the fourth objective, the thesis will provide a detailed examination of the efforts of SA under each element of the '3P' obligations established under the international and regional laws in order to determine the extent to which SA law is in compliance with international and regional standards. This thesis will investigate whether the particular school of thought that SA follows has any implications on its efforts against child trafficking. Finally, through this objective, the thesis will identify gaps and shortcomings in the current anti-trafficking framework in order to determine whether there is any need to establish an alternative approach to child trafficking in SA.

To achieve the fifth objective, the thesis will critically analyse the anti-trafficking efforts in the UAE. The thesis will also examine how effective the UAE has been in combating child trafficking with respect to its compliance with international standards whilst adhering to Islamic law. This will be done comparatively with SA, drawing out any lessons which can be transferred from the UAE into SA.

Based on the findings of the research, the thesis will provide a list of recommendations in order to improve the current anti-trafficking framework in SA.



### 1.3 Contribution to the current body of research

Trafficking in persons involves the movement of individuals, internally within one State or across international borders, for the purpose of exploitation.<sup>28</sup> At the international level, there is abundant literature which extensively covers human trafficking in general. Numerous academics such as Obokata,<sup>29</sup> Gallagher<sup>30</sup> and Scarpa<sup>31</sup> have covered the international approach to human trafficking in great detail and the international measures that are designed to protect and prevent people from being trafficked. They have also focused on the key issue of human rights violations which is an inherent part of the human trafficking process.

At the regional level, a review of the literature suggests that most of the studies involving human trafficking in the Middle East do not analyse child trafficking and how it is interpreted under Islamic law but rather point out how Islamic law is incompatible with international law in general and with human trafficking law in particular. The only piece produced on human trafficking in the Middle East was by Mattar.<sup>32</sup> This focuses on provisions of laws in Middle Eastern States influenced by Islamic law that do not adequately enforce international laws against human trafficking.

However, there is significantly less literature on child trafficking at the international and regional levels. In particular, there is a distinct lack of academic research on trafficking in SA. It can be argued that this has resulted in more children being exploited in this jurisdiction. It is noteworthy that most of the scant literature on child trafficking in SA is in Arabic.<sup>33</sup> This factor, coupled with the dearth of literature, points to the potential contribution of this research to extant literature.

In order to understand the Saudi legal system, which is based on Islamic law, and its response to child trafficking, it is important to examine the Islamic law sources and principles. From the Islamic perspective, academics have already written on the topic of Islamic law (also

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<sup>28</sup> As defined by Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000.

<sup>29</sup> Obokata (n 11).

<sup>30</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

<sup>31</sup> Silvia Scarpa, *Trafficking in Human Beings Modern Slavery* (Oxford University Press 2008).

<sup>32</sup> Mattar (n 4).

<sup>33</sup> For example, Al-Harbi K, *The Victims of Trafficking of Children* (Naif Arab University for Security Science Press 2010). Al- Royali, A, *Combat Child Trafficking* (Naif Arab University for Security Science Press 2012). Mattar, M, and others *International Efforts to Combat Human Trafficking* (Naif Arab University for Security Science Press 2010).

known as Shariah law), such as Ramadan,<sup>34</sup> El-Awa,<sup>35</sup> Kamali,<sup>36</sup> Baderin,<sup>37</sup> Peters<sup>38</sup> and Esmaeili<sup>39</sup>. They have written a detailed account of its primary sources, principles and objectives. In addition, understanding the Islamic criminal justice system is important in order to categorise the crime of child trafficking within the Islamic framework.<sup>40</sup>

Four distinctive schools of legal thought exist in the Islamic framework, each derived from a founder, namely: Hanafi, Maliki, Shafi'i and Hanbali. Commentators such as Zedan, and Khadduri and Liebesny identify that no uniformity of opinion exists on legal issues between them.<sup>41</sup> In analysing how Islamic States and Islamic laws comply with international standards for the prevention of child trafficking, protection of child victims and the prosecution of traffickers, it is noteworthy that the literature generally ignores the fact that a child is defined differently by some Islamic schools of thought and that economic exploitation has a different meaning for Islamic States than it might have under international standards.

Many academic commentators who have covered Islamic sources and principles have also written about the Islamic law position in relation to 'slavery'. Commentators such as Freamon,<sup>42</sup> Baderin,<sup>43</sup> Gordon<sup>44</sup> and Lewis<sup>45</sup> have already written about Islamic law condemning 'slavery'. For example, 58:3 of the Qur'an states that 'freeing of a slave' is a good deed and 4:36 tells us to be kind to slaves. Therefore, by extension the inherent prohibition extends to the situation of child trafficking, particularly when combined with other stipulated Islamic prohibitions against infliction of harm, child forced labour, abuse, torture and sexual exploitation. This research will show that, contrary to popular thinking, Islamic law addresses

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<sup>34</sup> Said Ramadan, *Islamic Law, its Scope and Equity* (MacMillan 1970).

<sup>35</sup> Mohamed S El-Awa, *Punishment in Islamic Law* (American Trust 1981).

<sup>36</sup> MH Kamali, *Principles of Islamic Jurisprudence* (Islamic Text Society 1991).

<sup>37</sup> Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003).

<sup>38</sup> Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge University Press 2005).

<sup>39</sup> Hossein Esmaeili, 'Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World' (2010) 26 Connecticut Journal of International Law 329.

<sup>40</sup> For instance, El-Awa (n 35). See also, Peters (n 38).

<sup>41</sup> For an in-depth historical analysis of the different schools of thought, see M Khadduri and HJ Liebesny, *Origin and Development of Islamic Law: Law in the Middle East* (Lawbook Exchange 1955). See also, Devin J Stewart, 'Shariah' in Gerhard Bowering and others (eds), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013); A Zedan, *Almadkhal Le Derasat AlShariah Al Islamiyah* (Dar Al-Ressalah 1969).

<sup>42</sup> Bernard K Freamon, 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence' (1998) 11 Harvard Human Rights Journal 21.

<sup>43</sup> Baderin (n 37).

<sup>44</sup> Murray Gordon, *Slavery in the Arab World* (New Amsterdam 1989) 225.

<sup>45</sup> Bernard Lewis, *Race and Slavery in the Middle East: An Historical Enquiry* (Oxford University Press 1990).

most of the contributing factors of child trafficking and strongly prohibits practices that do not accord with the spirit of the Islamic tradition. Consequently, the use of Shariah could lead to a harmonization of international standards of human rights with those being applied in Islamic States. There exists abundant literature, such as by Baderin,<sup>46</sup> Mayer<sup>47</sup> and Abiad,<sup>48</sup> on the question of whether Islamic law and international human rights are compatible, and whether Islamic States can comply with international human rights law while they still adhere to Islamic law.

However, there is still insufficient coverage on the issue of child trafficking in Islamic law and there is hardly any meaningful comparison between Islamic law in practice and international standards with respect to child trafficking. At the same time, there is also a shortage of literature that critically analyses the approach adopted by SA in combating child trafficking and scant literature on which school of thought is dominant within the legal system of SA and how this might affect its response to child trafficking. In a broad sense, the literature on SA's political structures is generally poorly developed and, as a result, of little value. In particular, information on the legal system is limited.<sup>49</sup> It is also worth mentioning that, although the rights of children in general appear to be well addressed in the literature,<sup>50</sup> there is very little focus on the rights of children in SA where many children are victimised as a result of human trafficking.

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<sup>46</sup> Mashood A Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010). See also, Baderin (n 37).

<sup>47</sup> Ann Mayer, *Islam and Human Rights, Traditions and Politics* (3<sup>rd</sup> edn, Westview Press 1999). See also, Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions, A Critical Assessment' (1998) 15 RIMO Recht van de Islam: Human Rights and Islam 25.

<sup>48</sup> Nesrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL 2008). See also, Nisrine Abiad and Farkhanda Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (BIICL 2010).

<sup>49</sup> The most comprehensive text in English on Saudi law is Frank E Vogel, *Islamic Law and Legal Systems: Studies Of Saudi Arabia* (Brill Academic 2000). However, there are a number of sources published in law journals such as Abdulaziz Al Fahad, 'Ornamental Constitutionalism: The Saudi Basic Law of Governance' (2005) 30 Yale Journal of International Law 375; Rashed Aba Namay, 'The Recent Constitutional Reforms in Saudi Arabia' (1993) 42 International & Comparative Law Quarterly 295; Ahmed Al Ghadyan, 'The Judiciary in Saudi Arabia' (1998) 13 Arab Law Quarterly 235. AM Al-Jarbou, 'Judicial Independence: Case Study of Saudi Arabia' (2004) 19 Arab Law Quarterly 5, 31. Hossein Esmaeili, 'On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System' (2009) 26(1) Arizona Journal of International and Comparative Law 1.

<sup>50</sup> For example, Masoud Rajabi-Ardeshiri, 'The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global' (2009) 17(3) International Journal of Children's Rights 475. See also, UNICEF and Al-Azhar University, 'Report on Children in Islam: Their Care, Development and Protection' (International Islamic Center for Population Studies and Research, Summary Version, 2005). See also, W Al-Ahmad, *Himayat Huquq Al-Tifl Fe Daw Ahkam Al-Shariah Al-Islmiyah Wa Al-Itifaqiyat Al-Dawliyah* (Al-Halabi Legal Publications 2009). Kamran Hashemi, 'Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on The Relevant UN Documentation' (2007) 29(1) Human Rights Quarterly 194, 205-206. Abiad and Zia Mansoor (n 48).

An important aspect of this thesis lies in the fact that it attempts to analyse legal frameworks on child trafficking within Islamic law by examining child trafficking in the Middle East, using SA as a case study. The aim is to facilitate a greater understanding of whether Islamic law is capable of implementing international standards related to child trafficking. Therefore and most importantly, this thesis builds on the existing body of research by looking at the Islamic law perspective on child trafficking and how it accommodates international standards by taking SA as a case study. Additionally, this thesis compares the efforts of SA with another Islamic jurisdiction, the UAE, since both States' legal systems are based on Islamic law. This will further an understanding of the proliferating problem of child trafficking even with national laws in place. The thesis attempts to comparatively discuss two legal systems (SA and the UAE) in three different legal areas (prohibition, protection and prevention) related to trafficking in children. This is where the significance and criticality of the study lies. By doing so, the thesis fills an important lacuna in the child trafficking discourse by examining Islamic, international and regional anti-trafficking frameworks and then evaluating the action, practices and response provided by SA within these frameworks. The extent of comparative analysis undertaken in the thesis therefore constitutes an original contribution to the body of research because this has not been attempted before in English or Arabic legal literature.

#### **1.4 Research questions**

In order to research the issues set out above, the following questions need to be answered:

- (a) How does Islamic law deal with issues of children's rights, slavery, exploitation and trafficking?
- (b) How is child trafficking categorised as a crime under Islamic law?
- (c) How do different Islamic schools of thought interpret child trafficking?
- (d) How effective has Islamic law been in adhering to international standards that seek to protect and prevent children from being trafficked?
- (e) What role do the differing Islamic schools of thought play in dictating Islamic law in SA?
- (f) To what extent do domestic measures to combat child trafficking in SA provide a comprehensive approach to combating the crime of trafficking?
- (g) How does the UAE approach the issue of child trafficking?

## 1.5 Research Methods

This legal research is undertaken to provide an insight into the legal responses to the crime of child trafficking at Islamic, international, regional and domestic levels. The focus throughout the thesis is on SA response to deal with the crime of child trafficking although it is also essential to discuss this within the context of Islamic, international and regional laws as they apply to SA.

In order to fully address the various research questions of this thesis, the study follows a research methodology that includes doctrinal legal research and a comparative legal method. Discussions on methodology begin with doctrinal analysis, which is regarded by McConville and Chui as ‘a black-letter approach’.<sup>51</sup> Doctrinal analysis is important in this study as it helps to illustrate how the legal principle of the anti-trafficking law is adopted variously at international and national levels. A comparative legal method is also important for the purpose of this study. It was adopted to analyse and compare legal perceptions and definitions of child trafficking to provide a better understanding of the subject studied.<sup>52</sup> Comparative legal research can ‘open a researcher’s mind to new ways of finding solutions to legal problems ... and confronts assumptions about how legal systems should operate’.<sup>53</sup> Comparative investigations and case studies from other States are used to try to give a better understanding of how other States have understood and responded to child trafficking, what their experiences have been, what problems they have encountered and how SA can learn from their experiences. Before explaining the research methodology used in this thesis, it is important to justify why the UAE was selected for comparison.

The UAE was selected for many reasons. Most importantly, it is significant for the purpose of this thesis to compare SA which subscribes to the Hanbali school with another State which follows a different school of thought as the researcher wants to compare and contrast whether different schools of thought have led to different responses to child trafficking. Another important reason is that the UAE was the first State in the Arab region to enact a trafficking law.

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<sup>51</sup> Michael McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 4.

<sup>52</sup> *ibid.* Also, according to Saha, the comparative method ‘is a discipline which incorporates the idea of comparison into its name and this alone suggests that its method is somehow special or distinguishable from what comes naturally’. Tushar K Saha, *Textbook on Legal Methods, Legal Systems & Research* (Universal Law Publishing 2010) 4-5. Also, this approach compares ‘between two or several more or less distinct and different legal “systems” or the laws of those systems on the same particular issues’. Pier G Monateri (ed), *Methods of Comparative Law: Research Handbooks in Comparative Law* (Edward Elgar 2012) 145.

<sup>53</sup> Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart 2011) 35.

Several national and international bodies and reports claim that the UAE has adopted a more progressive stance on trafficking in persons, that it has made significant efforts and achieved great progress, particularly when compared with other States in the region.<sup>54</sup> In addition, the UAE is especially relevant because it shares a similarity with SA in that both States are considered destination countries with respect to the issue of child trafficking. Furthermore, both States are parties to the same instruments related to child trafficking at regional and international levels. Finally, the legal systems in both States are based on Islamic law and they share the same culture and language. The commonalities between SA and the UAE have therefore motivated a comparative examination of their respective efforts in order to identify weaknesses and strengths. This analysis becomes more critical because it provides the basis to draw out and address the weaknesses in the SA system based on lessons learned from the UAE experience.

### **1.5.1 Doctrinal analysis**

This method concentrates on the currency of law which helps to establish principles and rules that include the substantive content of legal doctrine. Moreover, it is concerned with analysis of how legal doctrine has been developed and applied. In other words, the method offers in-depth analysis of legal reasoning and interpretation. This research method adopts analytical techniques that allow the researcher to deploy interpretative and legal reasoning skills in a strictly legalistic manner. Slater and Mason conclude that ‘the doctrinal analysis seeks to provide a detailed and highly technical commentary upon and systematic exposition of the content of legal doctrine. The doctrine is interpreted as if it is a separate, independent and coherent system of rules’.<sup>55</sup>

Primary sources at both national and international levels are central to doctrinal analysis and, as such, are of great importance to principles of legal disclosure and to interpreting and rationalising the meanings behind legal principles to provide obvious explanations of legal provisions. In this thesis, the main primary sources (or black letter law) will be the Qur’anic text

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<sup>54</sup> For example, UNHRC, ‘Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, UAE’ (21 March 2013) UN Doc A/HRC/23/13, para 17. See also, US Dept of State, ‘Trafficking in Persons Report: June 2014’ UAE.

<sup>55</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman 2007) 49.

and the Sunnah of the Prophet Mohammed. The goal is to provide subject-specific Islamic legal provisions which deal with the crime of child trafficking and its related acts and elements.

For the international law perspective, various primary sources in relation to child trafficking will be analysed, including:

1. Convention of the Rights of the Child (1989);
2. Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000); and
3. Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (2000).

For the regional law perspective:

1. Arab Model TIP Law to Combat the Crime of Trafficking in Persons (2006);
2. Arab Convention against Transnational Organised Crime (2010);
3. Arab Charter on Human Rights (2004); and
4. OIC Covenant on the Rights of the Child in Islam (2005).

For an insight into the national laws of SA, an analysis of the Saudi Trafficking in Persons (Offences) Act, promulgated by Royal Decree No. M/40 of 14 July 2009, will be undertaken. For an insight into the national laws of the UAE, an analysis of the Federal Law (No. 51/2006) on Combating Human Trafficking Crimes 2006 will be carried out.

Furthermore, there will be exposition and analysis from various secondary sources of law, for example, journal articles, textbooks and reports. Chapter three is based on an examination of material sources of law which include treaties and the *Travaux Préparatoires* as well as non-binding instruments at the international and regional levels such as literature produced by States, scholars and NGOs. The chapter is largely based upon an examination of human rights norms and principles developed and elaborated by the UN Charter mechanisms including Special Rapporteurs on Violence against Women, on the Sale of Children and on TIP; treaty monitoring mechanisms such as the Human Rights, CEDAW and CRC Committees; as well as the Arab Human Rights Committee reports. The jurisprudence established by these mechanisms is analysed to articulate human rights obligations imposed upon Member States including SA and the UAE.

### 1.5.2 Comparative legal method

Objectively speaking, comparative law in itself represents a legal scientific discipline and not a branch of law.<sup>56</sup> Gutteridge argues that a legal system does not possess legal standards, does not hold a normative legal regulation objective and has no societal association or issues of regulation.<sup>57</sup> Thus, comparative law is simply a ‘critical legal comparison’ of the various international legal frameworks, and ‘critical legal comparison’ is a chief feature of comparative law.<sup>58</sup> ‘Critical legal comparison’ basically indicates a comparison between the legal systems of multiple States. It indicates the scientific similarities in these legal systems as well as their contrasting features. Various attempts have been made in the comparative judicial system to describe the idea of comparative law. Comparative law in the comparative juridical system is said to be composed of two styles:<sup>59</sup>

1. Being part of the specific juridical scientific discipline, comparative law is said to comprise scientific information. This refers to the primary ideas of comparative law together with a comparative legal method seen in the majority of international legal systems.<sup>60</sup>
2. Being a specific academic discipline, comparative law comprises all the thematic sections studied by law students.

The aim of comparative law is to promote the comparative law method with the help of legal phenomenon. There are three sectors to which comparative law is applied as a means of research:<sup>61</sup>

1. Comparative law, as applicable to a comparative legal method that deals with legal procedures that pertain in particular to comparative legal aspects. Comparative law is applicable in the studies and reviews of various legal procedures (legal institutions, legal norms, legal systems) under the comparative legal aspect. Therefore, comparative law simply deals with studying and recognising local laws of different States. This is why it is common to view the comparative legal studies of different States, such as SA and the

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<sup>56</sup> Blerton Sinani and Klodi Shanto, ‘Methods and Functions of Comparative Law’ (2013) 2 Acta U Danubius Jur 25, 25.

<sup>57</sup> Harold Cooke Gutteridge, *Comparative Law* (Cambridge University Press 1946) 1-2.

<sup>58</sup> Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (Oxford University Press 1998) 2.

<sup>59</sup> Sinani and Shanto (n 56) 26.

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid* 28.



UAE, within this system. Moreover, this method is also applicable for a comparative analysis of the different regulations for similar legal activities in different States, cases, and times.

2. The dogmatic legal method. This comprises assessment, recognition, explanation and precise detection of the legal literature seen in laws and systems. This method employs the use of contemporary methods of legal explanations, with special emphasis on verbal, rational, methodical, historical and teleological explanations.<sup>62</sup>
3. The historical legal method. In this method, comparative law is used to study the evolution of legal traditions over the passage of time. It also focuses on understanding the development of legal systems from the beginning of time.<sup>63</sup> It helps to understand the birth of legal systems and their development in a historical and a particular socio-economic context.

In summary, comparative studies usually evaluate legal findings and notions (such as the meaning of child trafficking) that arise from multiple legal systems in order to provide a fruitful analysis of the issue concerned.<sup>64</sup> They help to determine, explain and apply legal notions that the international and national settings are required to use.<sup>65</sup> This method expands outside the normal investigations and assesses practical legal processes, such as the expansion or regulations of substantive law.<sup>66</sup>

In this thesis, the focus is on the comparative legal method in order to study the definition of child trafficking in the national and international laws with regard to SA and the UAE and to study legal insights on this issue. The most effective way of carrying out this study was to first analyse the legal system of SA with regard to child trafficking, carry out the same process for the UAE system, and then compare the two. In this way, the researcher was able to identify the shortcomings in the SA system and then make suggestions by using the elements from the UAE system.

A comparative legal method has been used in this study because both SA and the UAE are Islamic States and members of the main international instruments designed to combat

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<sup>62</sup> Radomir Llukij, *Metodologija prava (Methodology of Law)* (Beograd 1979) 109-113.

<sup>63</sup> Yi Shin Tang, *The International Trade Policy for Technology Transfers: Legal and Economic Dilemmas on Multilateralism Versus Bilateralism* (Kluwer Law International 2009) 17.

<sup>64</sup> Salter and Mason (n 55) 3.

<sup>65</sup> *ibid* 24.

<sup>66</sup> Alexander Charles Kiss, 'Comparative Law and Public International Law' in William E Butler (ed), *International Law in Comparative Perspectives* (Sijhoff & Noordhoff International 1980) 41-48.

trafficking in persons – the UN TOC Convention and its Trafficking Protocol. Therefore, making use of this method essentially allows the researcher to recognise and assess the issue of child trafficking in the context of human trafficking as seen in the law of SA and to attempt to resolve this issue by analysing similar problems and how they are dealt with in the law of the UAE. This research uses the comparative approach mainly by comparing SA anti-trafficking legislation and internationally accepted best standards stated in the Trafficking Protocol, and then by comparing SA anti-trafficking legislation and other laws in States within the same regions and similar legal systems that deal with the topic of child trafficking, such as the UAE. Such comparisons are significant because they help to close loopholes in the Saudi law through the adoption of good practices and appropriate means used in these legal instruments. Additionally, the adoption of such practices may fill the gaps in the efforts to address the crime of child trafficking under Saudi law. Such comparisons are important because they will enable the researcher to evaluate the situation of the crime of child trafficking and suggest possible reforms wherever possible.

The comparative analysis in chapters four and five on the national case studies of SA and the UAE respectively will be done by examining legislations, governmental documents and academic sources from the jurisdictions and using them throughout the discussion of this study. Sources include relevant legislation, policies, official documents and reports of States; UN and NGOs reports; articles in scholarly journals; a number of studies issued by governments in the region; and the ILO's Committee of Experts observations and direct requests. In addition, reports of the UN Special Rapporteur on TIP, based on official missions to the region, are used, as well as the US government's annual Trafficking in Persons Report and Human Rights Watch reports. In addition to the mentioned resources, a number of international organisational online databases were accessed and were deemed of great importance for the analysis and interpretation of primary sources. These were useful in terms of providing an overall representation of the global trafficking statistics, existing relevant laws and measures being undertaken at various stages. All of these reports will provide the relevant empirical data necessary for understanding the problem of child trafficking in SA and the UAE.

### **1.5.3 Methodological challenges**

In SA, there is a lack of a transparent system for recording and publishing court rulings. Unlike other Islamic jurisdictions, SA also lacks a legal precedent system (a system of recording

and reporting judicial opinions and outcomes). In the absence of such a precedent system and the public unavailability of court decisions, it can be difficult to predict the manner in which international and regional instruments will be applied domestically in the Saudi legal system. It can also be noted that cases involving children are often held in private sessions, with access to them for members of the public often prohibited. In the absence of publicly available court records of children cases, it can be difficult to reach conclusions as to the reality and shortcomings of the national application of anti-trafficking legislation. Another important factor is that judges in SA have broad discretionary authority. In addition to the lack of codified substantive civil and criminal codes, this may lead to inconsistencies in the attitude of courts towards children and therefore it can be difficult to generalise practices and reach definitive conclusions based on a single or a number of court cases. In relation to child trafficking cases in particular, it is worth highlighting that there have not been many cases (until November 2016, only one case of child trafficking had been ruled on in a Saudi court) since the enactment of the anti-trafficking Act in 2009.

However, this weakness is mitigated by looking at other materials. In particular, the Saudi government reports submitted to the international committees, especially to the CRC and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as the summary records of the Saudi government meetings.<sup>67</sup> Other sources are the Universal Periodic Review (UPR) of the UN Human Rights Council and its sessions, during which governments can recount the actions they have taken to improve human rights in their States and fulfil their human rights obligations. All these documents are especially relevant as SA has submitted reports and appeared before the Council and has addressed the issue of human trafficking including children, particularly underscoring the legislative efforts made to date. At the national level, the government has produced official reports which are also important in order to address such challenges for instance, the Saudi Human Rights Commission reports<sup>68</sup> and annual reports published by the SA Ministry of Justice.<sup>69</sup>

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<sup>67</sup> See for example, Summary Record of the 688<sup>th</sup> Meeting of the CRC: Saudi, UN Doc CRC/C/SR.688 (24 October 2001) para 2.

<sup>68</sup> Saudi Human Rights Commission, Standing Committee to Combat Crimes of Trafficking in Persons, 'Annual Report, 2011'.

<sup>69</sup> Saudi Ministry of Justice, Research Center, *Majmouat Al-Ahkam Al-Qadaih* (Riyadh, 2015).

## **1.6 Structure of the thesis**

The thesis is divided into six chapters.

### **Chapter 1: Introduction**

The thesis begins with an introduction to human trafficking as a global problem and then narrows the focus to child trafficking. This includes an examination of statistics and the States affected, one of which is SA. This chapter provides a detailed background and rationale, including the research methodology and organisation/presentation of the study. The research questions which will be considered in the thesis are also introduced.

### **Chapter 2: Islamic Law Framework in Relation to Child Trafficking**

This chapter discusses the Islamic legal provisions and traditions related to slavery, economic and sexual exploitation, children's rights and how Islamic law addresses child trafficking. An examination is also made of the four schools of thought – the Hanafi, Maliki, Shafi'i and Hanbali – in respect of these areas. The chapter considers the Islamic legal system from the perspective of the sources, principles and provisions that may best be utilised in understanding, addressing and combating child trafficking. This involves understanding the nature of the crime of trafficking under the Islamic criminal justice system and what protections and safeguards are provided for its victims within the Islamic law framework.

### **Chapter 3: International and Regional Anti-Trafficking Framework**

This chapter analyses international and regional laws on child trafficking. The chapter starts by examining the international framework relating to the subject. A detailed analysis of the definition of trafficking in persons under the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children is provided. The chapter further explores certain human rights obligations and standards that have been imposed upon States. While a wide variety of obligations exist, this chapter focuses on certain key obligations imposed upon all States irrespective of their status as States of origin, transit or destination. These include obligations to prohibit and prevent child trafficking, and protect child victims. The chapter further examines the level of compatibility of international human rights law with Islamic law on human trafficking, and how regional instruments in the Middle East have responded to child

trafficking. Moreover, it identifies States' obligations under regional instruments and compares them with international standards.

#### **Chapter 4: Child Trafficking in SA**

This chapter provides an explanation of SA's interpretation of Islamic law and introduces the school of thought followed in the State. In addition, the chapter examines SA's response to child trafficking and determines its level of compliance with Islamic, international and regional standards. It critically analyses how effective SA has been in tackling child trafficking and whether it meets its international and regional obligations as explored in the previous chapters.

#### **Chapter 5: Child Trafficking in the UAE**

This chapter focuses on the incidence of child trafficking in the UAE, the Islamic legal tradition that operates in the State, and the national legal responses with respect to the crime of child trafficking. The chapter will examine how effective the national laws of UAE have been with respect to tackling the problem of child trafficking. This will be done in comparison with the efforts made by SA. The chapter further analyses UAE national law with regard to child trafficking to determine the extent of conformity with international and regional standards.

#### **Chapter 6: Conclusion and Recommendations**

This chapter summarises the findings of previous chapters and highlights the main differences and similarities between the enforcement of the national laws of SA and the UAE with respect to child trafficking. The chapter analyses whether these are effective whilst also comparing these laws with international and regional laws. This chapter draws upon the findings of chapter five regarding the UAE's approach to child trafficking and analyses whether it is more or less effective in tackling this crime. The chapter then concludes by providing recommendations for SA.

## **Chapter Two: Islamic Law Framework in Relation to Child Trafficking**

### **2.1 Introduction**

Although the international legal framework on child trafficking provides guidelines for States to follow, its domestic implementation is required in order for anti-child trafficking laws to function on a domestic level. This chapter therefore examines the Islamic legal system, which is the basis of SA and UAE laws. This analysis is done by drawing from the sources, principles and provisions of Islamic law which then provides a basis for understanding, addressing and combating child trafficking. In order to do this, the chapter elaborates on the comprehensive theory of Islamic legal principles for the prohibition of the crime of human trafficking and associated acts and means, and the protection of victims of trafficking. This requires an understanding of the nature of the crime of trafficking under the Islamic criminal justice system and what protections and safeguards are provided for victims within the Islamic law framework.

This chapter is divided into four parts. The first part deals with Islamic law, its sources and schools of interpretation. The second part focuses on the Islamic criminal justice system and identifies the crime of trafficking in persons within this system. The third part highlights the Islamic position on the institution of slavery and how Islamic law views the sale of children and child exploitation. The fourth part explores the various rights of children in Islamic law in order to identify the protection measures that are applicable to child victims of trafficking within this framework.

Several conclusions are made at the end of the chapter. The main conclusion reached is that even though there is no explicit text in the main sources of Islamic law regarding the prohibition of child trafficking, there is a clear prohibition on many of the acts and elements that constitute this crime. In addition, within the Islamic law framework there is a comprehensive set of protection measures which can be applied to any child victims, including children who are victims of trafficking. This suggests that the Islamic law framework which exists in Islamic States to combat child trafficking is well-equipped to support and supplement the implementation of the international anti-trafficking framework.

## 2.2 Islamic law and its sources

The message of Islam was revealed to the Prophet Mohammed (PBUH)<sup>1</sup> in 610 CE in Makkah city. This message was both religious and ethical, and was a continuation of the previous monotheistic religions<sup>2</sup> as it was the same message sent down to Abraham, Moses and Jesus.<sup>3</sup> It promoted the oneness of God ‘who has neither a son nor a father, categorically from the idols worshipped by the Arabian tribes’.<sup>4</sup> Islam was also created to remedy the inhuman practices in Arabian society and initiate new laws for all Muslims to adhere to.<sup>5</sup> It has been argued that God sent down the message of Islam to establish peace and order and to promote human welfare, as noted in the Qur’an: ‘We have already sent Our messenger with clear evidence and sent down with them the Scripture and the balance that people may maintain (their affairs) in justice.’<sup>6</sup>

The purpose of Islamic law is summarised in the Qur’an: ‘For He commands them what is just and forbids them what is evil; he allows them as lawful what is good and prohibits them from what is bad. He releases them from their heavy burdens and from the yokes that are upon them.’<sup>7</sup> Islamic law is also known as Shariah, an Arabic term meaning ‘the way to be followed’,<sup>8</sup> which refers to the law of God.<sup>9</sup> For the purpose of the discussion in this chapter, it is important to differentiate between two important terms, Shariah and *fiqh*,<sup>10</sup> as they are not synonymous. The former refers more to the sources of Islamic law which are divine in nature and immutable<sup>11</sup> while the latter refers more to the methods of applying that law, that is, the understanding and the

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<sup>1</sup> The abbreviation ‘PBUH’ stands for ‘Peace Be Upon Him’. Muslims generally say this in veneration of the Prophet Mohammed whenever his name is mentioned.

<sup>2</sup> According to Hallaq, Islam was to represent ‘a purer form of the otherwise corrupted versions of Christianity and Judaism’. See Wael Hallaq, *Shariah: Theory, Practice, Transformations* (Cambridge University Press 2009) 31.

<sup>3</sup> Qur’an, 14:1, ‘Alif, Lam, Ra. This is a Book which has been revealed to you, [O Mohammed], that you might bring mankind out of darkness into the light by permission of their Lord-to the path of the Exalted in Might, the Praiseworthy.’

<sup>4</sup> Wael Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-fiqh* (Cambridge University Press 1999) 31.

<sup>5</sup> *ibid* 8.

<sup>6</sup> Qur’an, 57:25.

<sup>7</sup> Qur’an, 7:157.

<sup>8</sup> Cherif Bassiouni and Gamal M Badr, ‘The Shariah: Sources, Interpretation and Rule-Making’ (Spring/Summer 2002) 1 *UCLA Journal of Islamic & Near Eastern Law* 135.

<sup>9</sup> M Khadduri and HJ Liebesny, *Origin and Development of Islamic Law: Law in the Middle East* (Lawbook Exchange 1955) 105.

<sup>10</sup> The word ‘*fiqh*’ is an Arabic term meaning ‘deep understanding’ or ‘full comprehension’. Technically, it refers to the science of Islamic law extracted from detailed Islamic sources; it does not include the beliefs or faiths that are part of Islamic Law. See Islam Web, Fatwa centre, ‘Meaning of Shariah and *fiqh*’ (Fatwa No 15620, 22 April 2002).

<sup>11</sup> Said Ramadan, *Islamic Law, its Scope and Equity* (MacMillan 1970) 36. See also AAB Philips, *The Evolution of fiqh: Islamic Law and the Madh-hab* (IIPH 1988) 1-4.

interpretation derived from Shariah (through human effort). This contrasts with Shariah as it may change according to time and circumstances.<sup>12</sup>

For a proper understanding of the discussion of this chapter, it is important to highlight that the overall objective of Shariah is to ensure the welfare of human beings in the present and the future,<sup>13</sup> and to foster obedience to God.<sup>14</sup> Al-Ghazali adds that Shariah preserves for mankind the five essential elements of their well-being, namely, religion, human life, intellect, offspring and property.<sup>15</sup> These five essential elements are considered ‘necessities’ (*daruriyyat*) which must be protected.<sup>16</sup> These rights are the most fundamental rights protected in Islam, thus justifying them as its main objective. Furthermore, in general, Shariah is considered a legal institution and a normative framework which contains rules and regulations that cover all aspects of a Muslim’s life.<sup>17</sup> As such, Islam is regarded as both a religion and a legal institution.<sup>18</sup>

Having introduced the nature and purpose of Islamic law, this chapter considers its sources: the Qur’an and the Sunnah. The Qur’an is the principle source of Shariah, which is supplemented by the Sunnah. While the Qur’an is the controlling source, both constitute the primary sources of Islamic law. However, they both require interpretation. In fact, many of the Prophet’s Hadiths interpret some of the Qur’anic verses. For example, the Qur’an obliges Muslims to pray and the Sunnah explains in detail how to pray: how many bows to perform, how many prostrations and so forth. However, after the Prophet’s death, the need for a continuing process of interpretation of the Qur’an became more acute. This led to the development of supplementary sources of law to apply whenever the two primary sources were silent on a given question or when they were, or appeared to be, ambiguous or inconsistent. Thus, the majority of

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<sup>12</sup> Ramadan (n 11) 36. See also, Philips (n 11) 1-4.

<sup>13</sup> Abu Ishaq Al-Shatibi, *Al-Muwafaqat*, vol 2 (Dar Ibn Affan 1997) 9.

<sup>14</sup> K Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 27.

<sup>15</sup> Although it has not been mentioned in these exact words in the Qur’an or the Sunnah, it is agreed by all Muslim jurists by way of deduction from all the judgments in the Islamic legal sources: Mohammed Al-Ghazali, *Al-Mustafa Min Ilm Al-Usul* (Al-Matbah Al-Amiriyyah 1904) 287, 288. See also Matthew Lippman, ‘Islamic Criminal Law and Procedure: Religious Fundamentalism v. Modern Law’ (1989) 12(1) Boston College International and Comparative Law Review 44.

<sup>16</sup> All of the obligations and prohibitions of Islamic law were designed for the achievement of this end: Mohamed S El-Awa, *Punishment in Islamic Law* (American Trust 1981) 114. See also Al-Ghazali (n 15) 287, 288.

<sup>17</sup> SS Ali, ‘Teaching and Learning Islamic Law in a Globalized World: Some Reflections and Perspectives’ (2011) 61(2) Journal of Legal Education 207.

<sup>18</sup> D Weissbrodt, J Fitzpatrick and FC Newman, *International Human Rights: Law, Policy and Process* (LexisNexis 2009) 239, 240.



Islamic jurists have agreed that there are four sources of Islamic law, namely, the Qur'an, the Sunnah, *ijma* and *qiyas*.<sup>19</sup> The role of each source is explained in turn below.

## **2.2.1 Primary sources**

### **2.2.1.1 The Qur'an**

Literally meaning 'the recitation', the Qur'an is the first and primary source of Shariah and rightly regarded as the 'Word of God (Allah)'. Its authoritativeness is unequivocal:<sup>20</sup> 'The revelation of the Book is from Allah, the Exalted in Might, the Wise.'<sup>21</sup> The Qur'an was revealed by Allah to the Prophet Mohammed through the Angel Gabriel.<sup>22</sup> The verses of the Qur'an were revealed over twenty years to the Prophet, and it was not until the last year before his death in 632 CE that he arranged 6,239 verses into 114 chapters of varying length.<sup>23</sup> Some of its verses cover legal aspects. However, the Qur'an is not a code of law.<sup>24</sup> Legal verses contained in the Qur'an cover family and inheritance law, legal relations and religious obligations, and crime and punishment.<sup>25</sup> The legal provisions that derive directly from the Qur'an are the highest in the hierarchy of legal norms; they are immutable and cannot be contradicted or modified by rules derived from any of the other Shariah sources.<sup>26</sup>

### **2.2.1.2 The Sunnah**

The Sunnah is the second main source of Islamic law after the Qur'an. It means the 'path' taken by the Prophet himself and it contains an outline of the actions, explanations and sayings (Hadiths) of the Prophet.<sup>27</sup> The Imam Al-Shafi'i, founder of the Shafi'i school, wrote that:

The Sunnah of the Prophet is of three types: first is the Sunnah which prescribes the like of what God has revealed in his book; next is the Sunnah which explains the general principles of the Qur'an and clarifies the will of God; and last is the Sunnah where the Messenger of God has ruled on matters on which nothing can be found in the Book of God.<sup>28</sup>

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<sup>19</sup> M Abu Zahra, *Crime in the Islamic Jurisprudence: Al-Jarimah wa Al-Uqab Fi Al-fiqh Al-Islami* (Dar Al-Fikr Al-Arabi 1998) 212.

<sup>20</sup> M Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2013) 61.

<sup>21</sup> Qur'an, 45:2.

<sup>22</sup> Ahmad von Denffer, *Ulum Al-Qur'an* (The Islamic Foundation 1989) 17.

<sup>23</sup> The longest chapter is Al-Baqarah which consists of 286 verses and the shortest chapter is Al-Kawthar consisting of 3 verses only: Bassiouni (n 20) 61.

<sup>24</sup> Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 35.

<sup>25</sup> MH Kamali, *Shariah Law: An Introduction* (OneWorld 2008) 16.

<sup>26</sup> Bassiouni and Badr (n 8) 151.

<sup>27</sup> Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton University Press 2008) 24.

<sup>28</sup> MH Kamali, *Principles of Islamic Jurisprudence* (Islamic Text Society 1991) 64.

Therefore, the Sunnah helps to explain the Qur'an whilst also providing additional rules and guidance for Muslims, as noted in the Qur'an: '[We sent them] with clear proofs and written ordinances. And We revealed to you the message that you may make clear to the people what was sent down to them and that they might give thought.'<sup>29</sup> The Prophet holds a prominent position within Islam as he is regarded as being the last noble and beloved messenger. Therefore, followers are encouraged to emulate his conduct. It is stated in the Qur'an: 'O you who have believed, believe in Allah and His Messenger.'<sup>30</sup> There are many collections detailing the Sunnah which are used as consultative texts to settle matters that arise in the lives of followers, for example, with regard to slavery, which will be discussed in detail later. According to Kamali, the Qur'an stipulates the importance of obedience to the teachings of the Prophet;<sup>31</sup> this is evidenced in various verses of the Qur'an such as, 'But no, by your Lord, they will not [truly] believe until they make you, [O Mohammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission.'<sup>32</sup>

The Sunnah are reported in works known as Hadiths,<sup>33</sup> which was the custom of the Prophet. They were compiled after the death of the Prophet as guiding principles in addition to the Qur'an.<sup>34</sup> It is useful at this point to clarify that the Qur'an and the Sunnah provide clear guidance on the fundamentals of Islam, such as moral values, practical duties and other devotional matters. However, the general rule is that if on any occasion a problem arises and there are any inconsistencies between a verse of the Qur'an and Sunnah, it is the Qur'an that is the most important and authoritative source of Shariah as it is the 'only source of theological and legal prescriptions and proscriptions'.<sup>35</sup> Therefore, the Qur'an prevails because of its 'indubitable authenticity' in Islamic law.<sup>36</sup> The Prophet said: 'I have left amongst you that to which if you

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<sup>29</sup> Qur'an, 16:44.

<sup>30</sup> Qur'an, 4:136.

<sup>31</sup> Kamali (n 28) 63.

<sup>32</sup> Qur'an, 4:65.

<sup>33</sup> A hadith is a narration of the Sunnah, a narration of the Prophet's saying, actions and approvals.

<sup>34</sup> SS Ali, *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (UNIFEM 2006) 9.

<sup>35</sup> Bassiouni (n 20) 64.

<sup>36</sup> Baderin (n 24) 36. See also Kamali (n 28) 59.

hold fast you will never go astray after me: the Book of Allah and my Sunnah.’<sup>37</sup> This Hadith indicates clearly the supremacy of the Qur’an and the Sunnah over all other sources.<sup>38</sup>

## 2.2.2 Secondary sources

### 2.2.2.1 *Ijma* (juristic consensus of opinion)

*Ijma* is the third source of Islamic law. It can be defined as the unanimous agreement reached by Muslim scholars on any legal judgment regarding a particular situation or incident during any period after the Prophet Mohammed’s death.<sup>39</sup> As Freamon pointed out, *ijma* is often used as a confirmatory method of the law, especially when there is no definitive answer in the Qur’an and the Sunnah.<sup>40</sup> There is considerable evidence on the validity of *ijma* within the primary sources of Islamic law, for example, the Prophet states that, ‘my community will never agree upon an error’.<sup>41</sup> Imam Al-Shafi’i stated that ‘the Prophet’s order that man should follow the Muslim community is proof that *ijma* of the Muslim is binding’.<sup>42</sup>

The four schools of thought hold *ijma* to be ‘a valid source of laws’, especially with ‘the unanimity of the Companions of the Prophet’. It was through *ijma* that Abu Baker Al-Siddiq was selected to be the ‘rightly guided caliph’ after the death of the Prophet.<sup>43</sup> In practice, even if it is impossible nowadays to achieve consensus amongst all Muslims, there is nevertheless the possibility to achieve *ijma* within specific States and Islamic communities, for example, through a number of existing Islamic unions, such as the OIC,<sup>44</sup> which is the second largest inter-governmental organisation in the world after the United Nations with a membership of 57 States spread over four continents.<sup>45</sup> There is also the international Islamic Fiqh Academy established in 1981 in Jeddah, SA<sup>46</sup> and the European Council for Fatwa and Islamic Research established in

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<sup>37</sup> Hadith, Imam Malik, Al-Muwatta, tradition vol 2, 899, No 1594.

<sup>38</sup> I Abdul-Haqq, ‘Islamic law: An Overview of its Origin and Elements’ (1996) 1 Journal of Islamic Law 21.

<sup>39</sup> M Jubair, ‘Criminal Law in Islam: Basic Sources and General Principles’ in T Mohammed and others, *Criminal Law in Islam and the Muslim World: A Comparative Perspective* (Institute of Objective Studies 1996) 46.

<sup>40</sup> Bernard K Freamon, ‘Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence’ (1998) 11 Harvard Human Rights Journal 21.

<sup>41</sup> Hadith, Tirmidhi, No 2167.

<sup>42</sup> Imam M al-Shafi’i, *Ar-Risalah Fi Usul al-fiqh* (Dar Tyabah Press 1998) 253.

<sup>43</sup> Bassiouni (n 20) 268.

<sup>44</sup> The Organisation was established upon a decision of the historical summit that took place in Rabat, Morocco on 25 September 1969 as a result of the criminal arson of Al-Aqsa Mosque in occupied Jerusalem.

<sup>45</sup> OIC website <[www.oic-oic.org/home.asp](http://www.oic-oic.org/home.asp)> accessed 10 October 2015.

<sup>46</sup> The International Islamic Fiqh Academy <<http://www.fiqhacademy.org.sa/>> accessed 10 October 2015.

1997 in Dublin, Ireland.<sup>47</sup> Parliament or as it is called in Islamic law, the Council of Shura, remains the best place in modern society to practice *ijma*. Therefore, decisions emerging from these bodies should be considered as *ijma* for particular States or regions.

#### 2.2.2.2 *Qiyas* (legal analogy)

*Qiyas* is the fourth source of Islamic law. It can be defined as the process of taking an established ruling from Islamic law and applying it to a new case by virtue of the fact that the new case shares the same essential reason for which the original ruling was initially applied.<sup>48</sup> *Qiyas* is a method that Muslim jurists use to derive a ruling for new cases not addressed by the Qur'an, the Sunnah or *ijma*.<sup>49</sup> The validity of *qiyas* is evident from the following example. Omar ibn Al-Khattab, the Prophet's Companion, once wrote to Judge Abu Mussa Al-Ashary. He advised him to 'use analogies, make use of precedents and similar cases, and seek judgments which you consider to be closest to the truth and the most likely to earn the good-pleasure of Allah'.<sup>50</sup>

The secondary sources of Islamic legal processes were found in Islam in its early periods and were applied to new cases not specifically covered by the provisions of the primary sources of Islamic law.<sup>51</sup> As Baderin notes, both methods, *ijma* and *qiyas*, 'facilitated the adequate interpretation and application of those two [Qur'an and Sunnah] sources to suit the different and changing circumstances of human life'.<sup>52</sup>

To summarise the sources of Islamic law, when the main sources are consulted and/or referred to, the Qur'an is the word of God and so the primary source of reference. The Sunnah is the second source and never contradicts the Qur'an. *Ijma* is the third source and is used whenever there are any differences which have not been clarified by the Qur'an and Sunnah. Finally, *qiyas* is the fourth source. It applies the principles in the Qur'an and Sunnah to a similar situation which is not provided for in the two main sources.

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<sup>47</sup> The European Council for Fatwa and Islamic Research <<http://e-cfr.org/new/>> accessed 10 October 2015.

<sup>48</sup> W Al Ajaji, *Al-qiyas* (Al-Imam Islamic University Press 2001) 216.

<sup>49</sup> A Zedan, *Almadkhal Le Derasat AlShariah Al Islamiyah* (Dar Al-Ressalah 1969) 168.

<sup>50</sup> Imam Mohammed Ibn Al-Qayyim, *Ealam al-Muaqain ar-Rabb al-Alamin* (Dar Al-Kutob al-Almiyyah 1991) 85.

<sup>51</sup> Baderin (n 24) 37.

<sup>52</sup> Baderin (n 24) 37.

### 2.3 The concept of *Ijtihad* and the Islamic schools of thought

Whilst the Prophet delivered and completed the Islamic message, and revealed the sources of Shariah, he also introduced the method of independent legal reasoning (*ijtihad*).<sup>53</sup> Thus, legal methods of Islamic law are used as a vehicle ‘by which the jurists would transport the Shariah into the future’.<sup>54</sup> According to Qadri, ‘the jurists are emphatic in saying that though God has given us a revelation, He also gave us brains to understand it; and he did not intend to be understood without careful and prolonged study’.<sup>55</sup> Therefore, these careful measures help Muslims understand how to go about their daily lives and ensure their actions do not violate the provisions of the Qur’an or the Sunnah.<sup>56</sup> In this regard, Ramadan stated that:

[T]he invariable rules of Islamic law are only those prescribed in the Shariah (Qur’an and Sunnah), which are few and limited. Whereas all juridical works during more than thirteen centuries are very rich and indispensable, they must always be subordinated to the Shariah and open to reconsideration.<sup>57</sup>

With the expansion of Islam from Arabia to the rest of the world, Shariah became increasingly absorbed by different cultures and as a result *ijtihad* was needed to answer new questions and problems that constantly arose.<sup>58</sup> Due to this, around 500 schools of thought appeared.<sup>59</sup> However, by the third century of Islam these schools had either disappeared or merged.<sup>60</sup> From 1300 AD onwards, only four schools existed.<sup>61</sup> These different schools of legal thought developed around ‘key figures’ in specific areas that were under Islamic rule.<sup>62</sup> They are the Hanafi school (named after Abu Hanifa); the Maliki school (named after Malik Ibn Anas); the Shafi’i school (named after Mohammed Al-Shafi’i); and the Hanbali school (named after Ahmad Ibn Hanbal).<sup>63</sup> It is important to note that these four schools are not considered as sects

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<sup>53</sup> *Ijtihad* is, according to Bassiouni, the product of an effort, usually intellectual. It refers to a process of legal interpretation based on the progressive development of law where analogy can never be used in order to address an issue not previously addressed. It is the legal technique used to update theological and legal developments. ‘This technique was formally “closed” by Muslim scholars in the 12<sup>th</sup> century to the great detriment of the development on [Shariah], but nothing prevents its reopening, as has been the de facto case in many Muslim countries since the late 19<sup>th</sup> century.’ Bassiouni (n 20) xv.

<sup>54</sup> Baderin (n 24) 37.

<sup>55</sup> AA Qadri, *Islamic Jurisprudence in the Modern World* (Taj Co 1986) 199.

<sup>56</sup> *ibid* 199.

<sup>57</sup> Ramadan (n 11) 36.

<sup>58</sup> Kamali (n 28).

<sup>59</sup> Baderin (n 24) 37-38.

<sup>60</sup> *ibid* 37-38.

<sup>61</sup> For an in-depth historical analysis of the different schools of thought, see M Khadduri and HJ Liebesny, *Origin and Development of Islamic Law: Law in the Middle East* (Lawbook Exchange 1955).

<sup>62</sup> Feldman (n 27) 26-27.

<sup>63</sup> Devin J Stewart, ‘Shariah’ in Gerhard Bowering and others (eds), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 498.

and their purpose was not to create a new approach or to change the spirit of Islam. Rather, they are all ways to understand Shariah and interpret the texts in order to derive rulings from the sources of Islamic law.<sup>64</sup> Each of these schools depends primarily on the verses of the Qur'an and the Sunnah for the source of its knowledge.<sup>65</sup> The differences, however, lie in the perspective of the jurists. The four schools treat the secondary sources differently, specifically in the extent to which *ijma* and *qiyas* are used in order to solve legal disputes. Due to these different opinions of the four schools, many Islamic States today have different laws and a different understanding of human rights. The four schools are considered in turn below.

### 2.3.1 Hanafi

This was the first school of thought, and was founded by Imam Abu Hanifa who was born in Kufa, Iraq in 699 CE.<sup>66</sup> He was one of the most highly acclaimed scholars of his day. His teachings followed a new approach known as *ray/shura*, which means subjective decision-making. His method was based on the use of *ijma* and *qiyas*.<sup>67</sup> Despite this new method of thinking, Abu Hanifa essentially depended on the Qur'an and the Sunnah. He would present an issue or problem for his students to solve through consultation, discussion and in-depth analysis.<sup>68</sup> Once they reached a consensus on a given issue, which could take weeks, the decision was recorded.<sup>69</sup> In modern times, this school has spread across Central Asia, the Anatolian Peninsula and India.<sup>70</sup> In the Arab world today, Iraq and Syria predominantly follow this school.<sup>71</sup>

### 2.3.2 Maliki

The Maliki school is the second of the Islamic schools of jurisprudence. It was founded by Imam Malik Bin Anas who was born in Madinah (the city of the Prophet Mohammed) in 713 CE.<sup>72</sup> He was well-known as a great scholar of Hadiths. The school differs from the other three

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<sup>64</sup> Zedan (n 49) 130.

<sup>65</sup> Baderin (n 24) 38.

<sup>66</sup> Zedan (n 49) 130.

<sup>67</sup> *ibid* 131.

<sup>68</sup> *ibid* 132.

<sup>69</sup> Philips (n 11) 64; see also Zedan (n 49) 132.

<sup>70</sup> Stewart (n 36) 498.

<sup>71</sup> Khadduri and Liebesny (n 61) 69.

<sup>72</sup> Zedan (n 49) 136.

schools of thought in the sources it uses for the derivation of rulings. In addition to the four sources of Islamic law, the school uses the practices of the people of Madinah as an additional source for how Shariah should be applied.<sup>73</sup> Malik's most important work in Islamic law was entitled Al-Muwatta, which is a code of law based on the legal practice that was operating in Madinah. His work covers various areas, ranging from prescribed rituals of prayer and fasting to the correct conduct of business relations.<sup>74</sup> This legal code is supported by some 2,000 Hadiths attributed to the Prophet. Some Muslim scholars assert that this work is the most authentic compilation of Hadiths.<sup>75</sup> The Maliki school became very influential throughout North Africa and sub-Saharan Africa. In the Arab world, it extended over Libya, Tunisia, Algeria and Morocco.<sup>76</sup>

### 2.3.3 Shafi'i

The Shafi'i school is the third school of Islamic jurisprudence. It was founded by Imam Mohammed Al-Shafi'i who was born in Gaza, Palestine in 767 CE.<sup>77</sup> He was an expert on the Hanafi and Maliki schools.<sup>78</sup> Again, the four sources of Islamic law are the basis of this school. However, it differs from the other schools of thought in that the consensus of the Muslim community as well as legal reasoning through the use of *qiyas* are the main features.<sup>79</sup> Its founder authored many books; amongst his more famous works is a book on Islamic jurisprudence entitled Al-Risalah Fi Usul Al-Fiqh in which he defined the principles of *qiyas* from the texts and established the criteria for their application.<sup>80</sup> It had a great impact on Islamic *fiqh* and this led to him being named the father of Islamic jurisprudence.<sup>81</sup> In modern times, this school has its base in States such as Malaysia, in East Africa and in certain areas of India and Pakistan.<sup>82</sup> In the Arab world, it is found in Egypt and Yemen.<sup>83</sup>

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<sup>73</sup> ibid 137.

<sup>74</sup> ibid 139.

<sup>75</sup> R Dio, *Shariah: The Islamic Law* (Taha 1984) 144.

<sup>76</sup> Khadduri and Liebesny (n 61) 69.

<sup>77</sup> Zedan (n 49) 140.

<sup>78</sup> Dio (n 75) 71.

<sup>79</sup> Zedan (n 49) 141.

<sup>80</sup> ibid 142; see also I Al Faruqi and L Al Faruqi, *The Cultural Atlas of Islam* (Free Press 1986) 276.

<sup>81</sup> Zedan (n 49) 141.

<sup>82</sup> M Ruthven, *Islam: A Very Short Introduction* (Oxford University Press 2000) 121.

<sup>83</sup> Zedan (n 49) 142.

### 2.3.4 Hanbali

The Hanbali school is the fourth school of Islamic jurisprudence. It was founded by Imam Ahmad Bin Hanbal who was born in Baghdad in 780 CE.<sup>84</sup> He was a student of both Imam Al-Shafi'i and Imam Abu Yusuf (one of the leading students of Abu Hanifah).<sup>85</sup> This school differs from the other three schools in that it places far more emphasis on the Qur'an and the Sunnah where these contain clear statements. Therefore, Hanbali is less favourably disposed towards *ijma* and *qiyas*, at least where these distort statements in the primary sources.<sup>86</sup> The most well-known work of Imam Ahmad is entitled Al-Musnad and contains about 40,000 Hadiths.<sup>87</sup> Because of this, some scholars consider him a traditionalist more than a jurist, particularly when his school is compared with the other three schools.<sup>88</sup> As such, his followers 'have been considered more as collectors of tradition rather than as lawyers proper'.<sup>89</sup> The Hanbali school gained adherents mainly in SA and Qatar.<sup>90</sup>

In short, in modern life, *ijtihad* is an important concept for the application of Islamic law, especially as many developments unique to the present period fall under its remit. Moreover, the importance of *ijtihad* is apparent in cases where there are no sources in Islamic law which can be applied to a particular case. More importantly, the role of *ijtihad* may be regarded as crucial in the absence of criminal law, especially when considering that there are no specific articles centred on criminalising a given behaviour. However, *ijtihad* must still complement the essential work of Muslim scholars whose role is to assess cases based on the sources of Islamic law in order to reflect the constantly evolving norms of society.

## 2.4 Crime and punishment in Islamic law

Before discussing the Islamic legal system and how it classifies crimes, it should be noted that Islamic law is similar to other laws because it considers certain human behaviour as unacceptable and criminal in nature, and certain punishments are decided upon for these criminal acts. However, since Shariah is religious law, some of the laws of punishment also have a

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<sup>84</sup> *ibid.*

<sup>85</sup> *ibid* 143.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> NJ Coulson, *The History of Islamic Law* (Edinburgh University Press 1964) 67.

<sup>90</sup> Stewart (n 63) 498.



‘vertical’ dimension in that they relate to reward and punishment in the Hereafter.<sup>91</sup> As noted in the Qur’an:

These are the limits [set by] Allah, and whoever obeys Allah and His Messenger will be admitted by Him to gardens [in Paradise] under which rivers flow, abiding eternally therein; and that is the great attainment<sup>92</sup> ... And whoever disobeys Allah and His Messenger and transgresses His limits - He will put him into the Fire to abide eternally therein, and he will have a humiliating punishment.<sup>93</sup>

Therefore, ‘[a]ll Muslims and all administrators who claim to be Muslim have to accept, recognise and enforce all rights sanctioned by God’.<sup>94</sup> The sanction is thus fulfilled by God. In Islam, ‘if they fail to enforce them or violate them while paying lip service to them, the verdict of the Qur’an is unequivocal’.<sup>95</sup> The Qur’an emphasises that: ‘And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers’; further, ‘those who are the wrongdoers’; and ‘those who are the defiantly disobedient’.<sup>96</sup> Therefore, there is a clear obligation upon Islamic States to implement and enforce Islamic laws and regulations in their national laws.

#### 2.4.1 Types of offences in Islamic law

In Islamic jurisprudence, crime is the commission of ‘an act which is prohibited and for which there is punishment for such commission or omission of an act which is required and for which there is a punishment for such omission’.<sup>97</sup> According to this definition, there is no offence unless there is a punishment for it. Abu Zahra defines a crime as ‘an act or conduct whereby a person first, breaks the law, and second, infringes upon the rights of others, in the religious context it is called “a sin”’.<sup>98</sup> In general, Shariah has formulated different punishments for all criminal offences and these must be implemented by an Islamic judge, where each punishment is specifically imposed for certain misdeeds. In a more precise sense, jurists have divided crimes into three different categories depending on the offence: first, prescribed punishment crimes (*hudud*); second, crimes of retaliation (*qisas*), those expressly identified in the Qur’an or the Sunnah and having prescribed punishments; and third, discretionary crimes

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<sup>91</sup> R Peters, *Crime and Punishments in Islamic Law* (Cambridge University Press 2005) 30. See also Zedan (n 15) 38.

<sup>92</sup> Qur’an, 4:13.

<sup>93</sup> Qur’an, 4:14.

<sup>94</sup> AA Mawdudi, *Human Rights in Islam* (The Islamic Foundation 1980) 16.

<sup>95</sup> *ibid* 16.

<sup>96</sup> Qur’an, 5:44, 45, 47.

<sup>97</sup> A Owdah, *At-Tashri Al-Jinai Al-Islami* (1<sup>st</sup> edn, Dar Al-Katab Al-Arabi) 1/66.

<sup>98</sup> Abu Zahra (n 19) 26.

(*tazir*), crimes whose punishment is not specified in the Qur'an or the Sunnah and is therefore left to the discretion of the judge. According to Justice Iqbal, 'there are three possible spheres for legislative activity in a Muslim State':

1. To enforce laws which have specifically been laid down in the Qur'an and Sunnah;
2. To bring all existing laws into conformity with the Qur'an and Sunnah; and
3. To make laws as subordinate legislation which do not violate the Qur'an and Sunnah.<sup>99</sup>

In this sense, a judge's power is limited by his obligation not to order a penalty which is not permitted by Islamic law.

#### 2.4.1.1 *Hudud crimes*

These are defined as 'fixed, mandatory punishments that are based on the Qur'an and the Sunnah'.<sup>100</sup> No judge can change or reduce the punishment for this type of crime. Therefore, if one of these offences is found to have been committed, and the court finds the offender guilty, the punishment to be meted out is determined by Shariah. This is because a *hudud* crime is defined as a violation of the right of Allah.<sup>101</sup> According to the main sources of Islamic law, there are six offences recognised under this category:<sup>102</sup>

1. *zina* (illegal sexual intercourse and fornication), for which the punishment is 100 lashes or stoning to death if the perpetrator is married (adultery).<sup>103</sup>
2. *qathf* (false accusation of adultery), for which the punishment is 80 lashes.<sup>104</sup>
3. *sariqah* (theft), for which the punishment is amputation of the right hand.<sup>105</sup>
4. *hirabah* (highway/armed robbery), for which the punishment is amputation of the right hand and left foot.<sup>106</sup>
5. *riddah* (apostasy or renouncing Islam), for which the punishment is death.<sup>107</sup>
6. *shurb al-khamr* (drinking alcohol or intoxicating drinks), for which the punishment is 40/80 lashes. The penalty for alcohol drinking which was 40 lashes was introduced in the Prophetic

<sup>99</sup> Justice Javed Iqbal, *The Concept of State in Islam* (Iqbal Academy 2000) 24.

<sup>100</sup> Peters (n 91) 53. See also Zedan (n 49) 45.

<sup>101</sup> Baderin (n 24) 81. See also El-Awa (n 16) 1.

<sup>102</sup> W Al-Zuhily, *Al-fiqh Al-Islami wa Adalatha* (2<sup>nd</sup> edn, Dar Al-Fikr Letebah wa At-Twzia 1985) 193. See also Zedan (n 49) 45-46.

<sup>103</sup> Qur'an, 24:2.

<sup>104</sup> Qur'an, 24:4.

<sup>105</sup> Qur'an, 5:38.

<sup>106</sup> Qur'an, 5:33.

<sup>107</sup> Hadith, M Al-Bukhari, Sahih Al-Bukhari, No 3017.

tradition, during the Prophet's lifetime. However, under the rule of ibn Al-Khattab (the Prophet's Companion) the punishment was increased to 80 lashes.<sup>108</sup>

Abu Zahra identifies the purpose of *hudud* punishments as a way of preventing other people from committing the same offence. It serves as a lesson for the public to resist the temptation to commit forbidden crimes.<sup>109</sup> Peters also confirms this and points out that 'fixed penalties must be carried out in public in order to deter others from committing the same offence'.<sup>110</sup> Further, Al-Hageel justifies *hudud* punishments by suggesting that:

[They] prevent bloodshed; they prevent life from being wasted; they protect people's honour from being violated and their lines of descent from becoming confused; they keep money from being lost, wasted or consumed in an unjust way; they prevent religion from becoming an object of ridicule; and they preserve people's minds from imbalance and even death.<sup>111</sup>

It is worth noting that Islamic law has a strict requirement of evidence. This is in order to ensure that criminal convictions and punishments are imposed only in cases in which there is certainty of guilt. Due to this, *hudud* punishments are rarely applied.<sup>112</sup> For example, adultery must be proven by four male Muslim eyewitnesses (they must see the actual act and their testimonies have to be identical) or four confessions.<sup>113</sup> If one of the witnesses gives different information, the witnesses may face *qathf* punishment, as mentioned above. In regard to the confession, according to Hanafi and Hanbali schools, it should be made four times, and if the accused has admitted the offence once or twice only, his confession becomes invalid.<sup>114</sup> It should be noted that, in case there is doubt about the guilt of a *hudud* crime because there is no confession or not enough witnesses to a crime, the crime might be treated as a *tazir* (discretionary punishment) crime.<sup>115</sup> Doubt will result in nullification of *hudud* punishments according to a Hadith of the Prophet.<sup>116</sup>

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<sup>108</sup> The Shafi'i and Hanbali schools followed the Prophet's tradition and punished the drinking of alcohol with 40 lashes, Al-Shafi'i, *Al-Umm*, vol 6, 281; Hanafi and Maliki school endorsed the example of Omar, 80 lashes, Muhammad Al-Sarakhsi, *Al-Mabsut*, vol 9, 295. Hadith, Sahih Muslim, No 3281.

<sup>109</sup> Abu Zahra (n 19) 260.

<sup>110</sup> Peters (n 91) 31.

<sup>111</sup> S Al-Hageel, *Human Rights in Islam and their Applications in SA* (King Fahd National Library 2001) 153.

<sup>112</sup> Because of such requirements, all four schools, the Hanafi school in particular, suggest that it is nearly impossible for a thief or fornicator to be sentenced unless he wishes to be and confesses: El-Awa (n 19) 126.

<sup>113</sup> El-Awa (n 16) 126, 127.

<sup>114</sup> Ibn Qudama, *Al-Mughni* (Dar Al-Kitab Al-Arabi 1987) 8/191.

<sup>115</sup> El-Awa (n 16) 97.

<sup>116</sup> 'Nullify the hudud if there is doubt and lift the death penalty as much as you can'. Hadith, Tirmidhi, No 1425. In another Hadith, the Prophet said, 'If the judge makes a mistake in amnesty it is better than a mistake in punishment'. Hadith, Tirmidhi, vol 3, Book 15, No 1424

#### 2.4.1.2 *Qisas* crimes

*Qisas* crimes are those punishable by *qisas* (retaliation), the law of parity or equality, or by *diyah* (compensation).<sup>117</sup> According to the Qur'an, 'And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous'.<sup>118</sup> However, the right to enforce the *qisas* punishment is held exclusively by the closest heirs of the victim.<sup>119</sup>

*Qisas* crimes have been divided into five categories:

1. Murder;
2. Voluntary killing (similar to intentional killing);
3. Involuntary killing;
4. Intentional bodily injury or other types of physical harm; and
5. Unintentional bodily injury or other types of physical harm.<sup>120</sup>

These crimes are defined both in the Qur'an and the Sunnah and both establish two types of sanction: *qisas* and *diyah*.<sup>121</sup> In Islamic law, as long as both parties agree, especially the party seeking retribution, *qisas* can be replaced by *diyah* with the approval of the court.<sup>122</sup> It should be noted that this flexibility does not aim to ease the punishment of *qisas* but presents a choice to those involved who for certain reasons are reluctant to carry out *qisas*; *diyah* thus becomes the alternative.<sup>123</sup> Therefore, the Islamic criminal justice system combines the concepts of 'restorative justice' and 'retributive justice' in terms of the appropriate punishment. In this regard, the former seeks to ensure that the victim or the victim's family is able to achieve some level of reparation for the harm caused by the crime.<sup>124</sup> The latter allows for some measure of institutionalised revenge or the feeling that the crime committed was punished in a way that reflects culpability.<sup>125</sup>

In comparison, *hudud* and *qisas* have almost the same meaning; both are punishments prescribed by Allah. However, the rights contained in *hudud* are different from the rights found in *qisas*. In implementing the *hudud* punishment, the rights of Allah are stressed, whereas in

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<sup>117</sup> M Haleem and others, *Criminal Justice in Islam: Judicial Procedure in the Shariah* (IB Tauris 2003) 96.

<sup>118</sup> Qur'an, 2:179.

<sup>119</sup> *Qisas* may be ruled out if the victim (or his heir) does not demand it; the relative of the victim may then ask for compensation or may forgive the offender: El-Awa (n 19) 75.

<sup>120</sup> El-Awa (n 16) 74.

<sup>121</sup> Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana Publications 1999) 103.

<sup>122</sup> El-Awa (n 16) 75.

<sup>123</sup> Zedan (n 49) 46.

<sup>124</sup> *ibid* 46.

<sup>125</sup> *ibid*.

administering *qisas*, the rights of human beings are emphasised. For example, the punishments for offences like robbery, *zina*, intoxication and apostasy are imposed by Allah and are to be fully implemented without giving any right to anyone to make any alterations, reductions or additions, and definitely not to withhold the punishment of *hudud*.<sup>126</sup> That may be contrasted with *qisas*, which even though it is determined by Allah and its implementation is an obligation, it remains the right of human beings; the final decision on its execution rests with the one seeking the punishment of *qisas*. Should the seeker of a *qisas* punishment pardon the murder or the injury, then the *qisas* punishment is invalidated. It is also permissible for the parties, the offender and the one demanding *qisas* punishment to replace *qisas* punishment with *diyah* since *qisas* is the right of human beings.<sup>127</sup>

#### 2.4.1.3 *Tazir* crimes

Unlike the two categories above, *tazir* crimes are not prescribed by the Qur'an or Sunnah. As such, they include all offences for which Shariah does not fix a penalty.<sup>128</sup> A few of the *tazir* crimes are mentioned in the Qur'an and Sunnah but without specific punishments.<sup>129</sup> Owdah defines them in this way: 'disciplinary punishment for a crime for which no specific *hudud* punishment is prescribed nor any form of expiation'.<sup>130</sup> Notably, Islamic law sources broadly describe offences but leave the specific details of those offences to be decided by the human legislation represented by the government:<sup>131</sup> 'O you who have believed, obey Allah and obey the Messenger and those in authority among you'.<sup>132</sup> Therefore, *tazir* crimes are within the discretion of the ruler who is in charge of maintaining public order and public safety.<sup>133</sup> In this regard, Zedan points out that in applying discretionary sanctions there are important elements that should be taken into consideration, for example, the gravity of the crime and its circumstances, the offender's record, and the extent of damage to society caused by such a

<sup>126</sup> As noted earlier, since God legislated the forbidden deeds in the Qur'an, their punishments are projected to be His exclusive rights: see M Al-Sarakhsi, *Al-Mabsut*, vol 9, 155.

<sup>127</sup> Baderin (n 24) 83.

<sup>128</sup> Bassiouni (n 121) 212.

<sup>129</sup> Such as *riba* (unlawful interest) and bribery. Qur'an, 2:188. 'And do not consume one another's wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].' And Qur'an, 2:275 'But Allah has permitted trade and has forbidden interest.'

<sup>130</sup> Owdah (n 97) 79.

<sup>131</sup> Kamali (n 25) 187.

<sup>132</sup> Qur'an, 4:59.

<sup>133</sup> R Fazlur, *Islam* (2<sup>nd</sup> edn, Chicago University Press 1979) 345. See also El-Awa (n 19)100.

crime.<sup>134</sup> It should be noted that discretionary sanctions are formed on the basis of achieving justice, enjoining the offender and protecting the interests of the community.<sup>135</sup> The range of punishments that may be imposed under this category is almost unlimited, from a reprimand to the death penalty, including imprisonment, banishment, fines and other.<sup>136</sup> Furthermore, *tazir* punishments are also applied to acts that do not meet the strict requirements of *hudud* or *qisas*. For example, *tazir* punishments may be imposed for criminal acts that are normally punished by *hudud* but because of insufficient evidence or doubt the *hudud* punishment is replaced by *tazir*.<sup>137</sup> The aim of *tazir* punishment is, firstly, to correct and reform the offender and, secondly, to serve as a deterrent to others.<sup>138</sup> In contrast, *hudud* and *qisas* punishments encompass retribution as well as deterrence.<sup>139</sup>

To sum up, it appears that Islamic philosophy holds that a harsh punishment serves as a deterrent to serious crimes that harm individual victims or threaten to destabilise the foundation of society. In addition, Islamic penal policy exists not to create opportunities for crime and then to punish the offender but to eliminate the very root cause of crime. As El-Awa has pointed out, ‘Islamic law possesses a unique concept of punishment, a concept which in a sense cares very little for the criminal and his reform, and concentrates on preventing the commission of the offences’.<sup>140</sup>

## 2.4.2 Child trafficking crime and its punishment in Islamic law

It is submitted that Islam provides a complete system for regulating every aspect of human life; the rules, obligations, injunctions and prohibitions laid down by, or derived from, the main sources of Islamic law as well as its secondary sources produce a complete framework of the Islamic community.<sup>141</sup> With regard to its criminal justice system specifically, as noted above, all forbidden or sinful acts, even if they do not constitute *hudud* offences, homicide or bodily harm, are punishable under Islamic law.

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<sup>134</sup> Zedan (n 94) 45.

<sup>135</sup> *ibid*.

<sup>136</sup> All schools of thought allow capital punishment only for repeat offenders and for serious crimes such as manslaughter, espionage and sorcery.

<sup>137</sup> El-Awa (n 16) 97.

<sup>138</sup> Peters (n 91) 101.

<sup>139</sup> J Walker, ‘The Rights of the Accused in Saudi Criminal Procedure’ (1992-1993) 15 *Loyola International & Comparative Law Journal* 867.

<sup>140</sup> El-Awa (n 16) 134.

<sup>141</sup> *ibid* 135.

This raises the question of how Islamic law would categorise the crime of child trafficking. In this respect, it should be noted that the crime of trafficking in persons including children is not defined or mentioned explicitly in the Islamic law sources and in particular in the Qur'an or the Sunnah. Based on the earlier analysis concerning the types of criminal offences in Islamic law, it can be concluded that this modern crime is classified as a *tazir* crime since this category includes all offences for which Shariah does not fix a penalty. This means that because there is no specific penalty under Shariah for the crime of human trafficking, the punishment is left to the judge's discretion so the punishment prescribed for such an act may differ from one Islamic State to another. It is worth highlighting that, in spite of the discretion granted to Muslim judges in this regard, they are required to pronounce the most appropriate penalty to suit such an offence, taking into consideration two important elements. The first element is that, with regard to the penalty, the main purpose of *tazir* punishment is to reform the offender and safeguard the public interest by preventing further crimes.<sup>142</sup> The second element is that, with respect to the crime itself, child trafficking 'should be recognised not only as a crime against the State but as a crime against the individual that poses a threat to human security'.<sup>143</sup> Al-Hageel, whilst explaining the strictness of Islamic law in prohibiting theft and armed robbery, points out that these offences potentially 'endanger people's position, their honour and their lives', and as a consequence of these offences people's 'lives will become bitter and hardly worth living, since the thief is like a wild animal that may savage anyone it encounters'.<sup>144</sup> The above analogy can be extrapolated to child trafficking crimes. This is because it involves similar threats which endanger children's lives and threaten the security of every society in general. In support of this, the president of the World Islamic Science and Education University, Abdul Nasser, notes that crimes of trafficking in persons, if organised and conducted on a large-scale, can be treated as highway robbery offences and consequently *hudud* punishment should be applied.<sup>145</sup> The above statement suggests that certain aspects of child trafficking could be interpreted as *hudud* offences and therefore punishment should be applied accordingly. Al-Murad also comments that sanctions are strongly connected to the criminal act. In this sense, if the victims lose their lives during their

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<sup>142</sup> Peters (n 91) 66.

<sup>143</sup> Mohamed Y Mattar, 'Human Security or State Security? The Overriding Threat in Trafficking in Persons' (2006) 1 Intercultural Human Rights Law Review 249.

<sup>144</sup> Al-Hageel (n 111) 166.

<sup>145</sup> Hani Hazaimah, 'Religious Leaders Support Battle against Human Trafficking' Jordan Times (5 July 2011) <<http://www.coexistencejordan.org/en-us/mediacorner/religiousleaderssupportbattleagainsthumantra.aspx>> accessed 10 July 2015.

journey or after they arrive at their destinations then *qisas* can be extended and applied.<sup>146</sup> As noted in the Qur'an: 'And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous'.<sup>147</sup> The next section examines how the Islamic law framework addresses the child trafficking crime and its related exploitative acts.

## **2.5 Islamic law perspective on child exploitation**

### **2.5.1 Slavery**

Slavery was widely practised in pre-Islamic societies in the seventh century.<sup>148</sup> It was considered to be a good source of labour and people made large profits out of this trade.<sup>149</sup> Furthermore, the practice of engaging in sexual relations in exchange for payment was common at that time.<sup>150</sup> Slaves were exploited, mistreated and did not have any rights.<sup>151</sup> However, even after the advent of Islam, slavery continued. Although some scholars view slavery as an intrinsic part of Islam, many others dispute this position.<sup>152</sup> In order to understand the Islamic perspective in this regard, relevant evidence from sources of Islamic law needs to be examined. In doing so, it becomes clear that there is no direct injunction prohibiting slavery. Having said this, it should be noted that neither the Qur'an nor the Sunnah contains any provisions that authorise, advocate, encourage or support slavery.<sup>153</sup> On the contrary, many verses of the Qur'an urge the Prophet and all Muslims to free their slaves.<sup>154</sup>

In a narrow sense, Islamic law addressed the issue of slavery in three ways. Firstly, Islamic law recommended and encouraged the freeing of slaves, something that could be done in a number of ways. The Qur'an explicitly states that freeing a slave is one of the ways to expiate specific sins. For instance: 'God will not take you to task for a slip in your oaths, but he will take you to task for such bonds as you have made by oaths, whereof the expiation is to feed ten poor

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<sup>146</sup> Mohammed Al-Murad, *Combat Human Trafficking* (Naif Arab University for Security Science Press 2005) 81.

<sup>147</sup> Qur'an, 2:179.

<sup>148</sup> Baderin (n 24) 86.

<sup>149</sup> Khaled Mustafa Fahmy, *The Legal System to Combat Trafficking in Persons – in Light of the Law No. 64 of 2010, International Conventions and Arab Legislations* (Dar Alfekar Al-Jamei 2011) 44.

<sup>150</sup> Hani Al-Sobki, *Trafficking in Persons Crimes – in the light of Islamic, International Law and Some Arab Legislations* (Dar Alfekar Al-Jamei 2010) 30.

<sup>151</sup> Baderin (n 24) 86.

<sup>152</sup> W Smith, *Islam and the Abolition of Slavery* (Oxford University Press 2006); see also Freamon (n 40) and Baderin (n 24) 87.

<sup>153</sup> Baderin (n 24) 86; also, Leonardo Bernard, 'A New Look at Human Rights Through the Eyes of Islam' (2007) 25 Singapore Law Review 75, 85 and 86.

<sup>154</sup> Qur'an, 90:11-12-13.



people with the average of the food you serve to your families, or to clothe them, or to set free a slave.’<sup>155</sup> The Prophet said: ‘[W]hosoever frees a Muslim slave, Allah will save all the parts of his body from the (Hell) fire as he has freed the body-parts of the slave’.<sup>156</sup> Finally, from the perspective of Islamic jurisprudence, in the twelfth century CE one of the leading Hanafi texts on Islamic law stressed that: ‘*Al-Itaq*, or manumission of slaves, is recommended by the Prophet.’<sup>157</sup> Based on this, it seems reasonable to argue that Islam encourages and supports the freeing of slaves.

Secondly, after the introduction of Islam, Muslims were instructed on how to treat slaves kindly and fairly. For instance, the Qur’an implores believers to ‘[w]orship Allah and associate nothing with Him, and to parents do good, and to relatives, orphans, the needy, the near neighbor, ... and those whom your right hands possess. Indeed, Allah does not like those who are self-deluding and boastful’.<sup>158</sup> The Prophet himself emphasised that:

... your slaves are your brothers whom Allah has placed under your authority. Thus, he who has his brother under him, must feed him what he eats, clothe him with that which he wears. And he should not burden him with that which is beyond their capacity: and if you burden them then help them.<sup>159</sup>

This illustrates that Islam required people to treat slaves humanely and kindly which is in complete contrast to the practice in the pre-Islamic period.

Thirdly, Islamic law requires every master to give his slave a contractual option to work towards earning his freedom.<sup>160</sup> Moreover, in order to enhance and guarantee the slave’s eventual freedom, every Muslim with the financial capacity to do so was expected to pay the owners of slaves who became Muslim in order to free them. The Qur’an states: ‘Those your right hands own who seek emancipation, contract with them accordingly, if you know some good in them, and give them of the wealth of God that He had given you.’<sup>161</sup> This led the German Orientalist, Adam Metz, to describe emancipation as a principle of Islam. He stated that Islam provides a benefit to slaves because it gives them the right to buy their freedom as an alternative way in case of non-payment by their owners, and the right to operate independently and do the

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<sup>155</sup> Qur’an, 5:89.

<sup>156</sup> Hadith, M Al-Bukhari, Sahih Al-Bukhari, vol 3, No 693.

<sup>157</sup> Burhan Al-Din Al-Marginani, *Hedaya* (CH Hamilton (tr), Dar Al-Ishaat 1989) 420.

<sup>158</sup> Qur’an, 4:36.

<sup>159</sup> Hadith, Sahih Muslim, No 4094.

<sup>160</sup> It is called *mukataba*, which is an agreement between a slave and his owner, enabling the slave to purchase his freedom.

<sup>161</sup> Qur’an, 24:33.

work they wanted.<sup>162</sup> Furthermore, Metz reported, a commendable custom in Islam was that before his death an owner should free his slaves.<sup>163</sup>

Lastly, after the introduction of Islam, enslavement of any free people became prohibited.<sup>164</sup> According to the Prophet, ‘Allah says, I will be against three persons on the Day of Resurrection: ... one who sells a free person (as a slave) and eats his price ...’.<sup>165</sup> Based on this Hadith, many Muslim scholars hold the opinion that any trade involving free persons is prohibited. This means that all the regulations and instructions provided by Islam pertain only to those who are already in slavery. In this regard, Baderin emphasises that, ‘while Islam had, on one hand, endured the practice due to social factors of that period, it at the same time promoted its gradual abolition on the other’.<sup>166</sup> An American Islamic jurist explained as follows:

[T]he institution of slavery is a system of ownership that Islam did not invent but found fully established and not possible to instantly abolish, so it rather encouraged its elimination in steps, with incentives ... ; it encouraged the freeing of slaves by the tremendous reward from Allah Most High; and it materially helped slaves to purchase their freedom by providing the money to do so from zakat funds.<sup>167</sup>

In this respect, Lewis notes that ‘the Qur’anic legislation brought two major changes to ancient slavery which were to have far-reaching effects. One of these was the presumption of freedom; the other, the ban on the enslavement of free persons except in strictly defined circumstances’.<sup>168</sup> In addition, many scholars have argued that Islam actually supported the abolition of slavery since only prisoners of war can be enslaved, and that according to Qur’an, 47:4, prisoners of war were to be set free for ransom or as a favour. The door for future slavery was thus closed by the Qur’an forever.<sup>169</sup> In this sense, slavery should now be considered

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<sup>162</sup> A Metz, *Islamic Civilization in the Fourth Century AH or the Renaissance of Islam*, vol 1 (5<sup>th</sup> edn, Dar Al-Ketab Al-Arabi 1947) 308. See also Murray Gordon, *Slavery in the Arab World* (New Amsterdam 1989) 41.

<sup>163</sup> Metz (n 162) 308.

<sup>164</sup> Except captivity due to war although even in this case general incentives as well as exhortation facilitated an environment for freeing the slaves. War captives were given the option of emancipation if they could offer literacy to a number of people in the Muslim community. See also Gordon (n 162) 24 and Bernard Lewis, *Race and Slavery in the Middle East: An Historical Enquiry* (Oxford University Press 1990) 5.

<sup>165</sup> Hadith, Abu Huraira, Sahih Al-Bukhari, vol 3, Book 34, No 430.

<sup>166</sup> Baderin (n 24) 87. Also in a recent fatwa published on the *Islam.online.net* website, in regard to ‘the kidnapped children who were sold in slave market’ the Fatwa Committee replied, ‘Islam views slavery realistically where it was a system found in all parts of the earth, Islam worked to clear people from it until customs and international laws come to prevent slavery in the world today’: Islamic Fatwa <<http://www.islamonline.net/fatwa/arabic/fatwaDisplay.asp?hFatwaiD=41120>> accessed 20 August 2016.

<sup>167</sup> Freamon (n 40) 43.

<sup>168</sup> Lewis (n 164) 5. One could only become a slave in two circumstances: 1) by being born to slave parents, or 2) by being captured in war. The latter was soon restricted to infidels captured in a jihad. These reforms seriously limited the supply of new slaves, see Lewis (n 174) 6.

<sup>169</sup> Bernard (n 153) P.86.

prohibited by Islamic law.<sup>170</sup> In summary, it is evident that the Islamic sources are largely against slavery, and most importantly, they greatly support the practice of manumission. It is also worth noting that the concept of slavery contradicts the great emphasis placed by Islam on each person serving God alone.<sup>171</sup> Further, as discussed above, such practice clearly violates the overall objective of Shariah.<sup>172</sup>

Having examined the historical aspect of slavery in Islam, it is useful to show the Muslim world's position today. Slavery has been abolished in all Islamic States, with Mauritania being the last one to do so in 1980. Moreover, most Islamic States have ratified the international instruments on the prohibition of slavery and the slave trade.<sup>173</sup> The majority of Islamic States, regardless of the school of thought they follow, explicitly prohibit slavery in their constitutions. For example, the Pakistani Constitution prohibits slavery and all forms of forced labour;<sup>174</sup> the Constitution of Sudan states that 'everyone shall be free and no one shall be held in slavery or servitude or degraded, or tortured';<sup>175</sup> the Iraqi Constitution states that 'forced labour, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited';<sup>176</sup> and the Kuwait Penal Code prohibits the practice as well.<sup>177</sup> Islamic scholars agree that there can be no higher consensus on the abolition of slavery than this State practice of all Islamic States, regardless of the school of thought they follow, none of which will officially sanction the practice of slavery today within its jurisdiction.

In a broad sense, these examples demonstrate that, although there is no explicit or direct text in the sources of Islam to prohibit slavery, what is significant is that, on the basis of the above evidence, there is a common understanding in the Muslim world today on the prohibition of slavery, namely that such practices contradict the basic principles of Islam. In this sense, it can be concluded that the prohibition of slavery is compatible with Islamic law. For the purpose of this thesis, this apparent Islamic consensus on the prohibition of such practices is very important

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<sup>170</sup> Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman 1994) 83-89.

<sup>171</sup> All human beings are referred to as servants or slaves (*ibad*) of Allah and can thus not be the slaves of other human beings at the same time: Baderin (n 24) 87.

<sup>172</sup> To preserve for mankind the five essential elements of their well-being, namely, religion, human life, intellect, offspring and property.

<sup>173</sup> Baderin (n 24) 87.

<sup>174</sup> Pakistan Constitution (1973) art 11.

<sup>175</sup> Sudan Constitution (1998) art 20.

<sup>176</sup> Iraqi Constitution (2005) art 37.

<sup>177</sup> Kuwait Penal Code No 16 (1960) art 185.

as it can, and should, be applied to criminalise different forms of new slavery practices – in this case child trafficking which may occur for the purpose of slavery or practices similar to slavery. Having said this, it should be noted that the prohibition of slavery itself is not sufficient as grounds for the prohibition of all forms of exploitation. Therefore, most of the common forms of child exploitation and how Islamic law addresses them will be considered in the following paragraphs, namely, selling, buying and kidnapping children; child forced labour; and child sexual exploitation.

### 2.5.2 Kidnapping, enslaving and selling children

According to the Prophet, ‘it is absolutely prohibited to deal unlawfully in a Muslim’s blood, property or honour’.<sup>178</sup> Islamic law holds all human beings to be owned solely by God. It thus prohibits any possibility of the sale of another human being. Moreover, in Islamic law, stealing, kidnapping and selling children is considered ‘corruption on earth’ and is prohibited and requires severe punishment.<sup>179</sup>

The opinion of the four schools of thought in this regard can be identified as follows:

1. The Hanafi school considers that the human being is honoured in Islam, even a nonbeliever, and treating them like inanimate objects is not permissible.<sup>180</sup>
2. The Maliki school considers that human flesh is *haram* and what is *haram* cannot be sold or disposed of.<sup>181</sup>
3. The Shafi’i school considers the sale of a free person to be *haram* according to the abovementioned Hadith of the Prophet, ‘Allah says, I will be against three persons on the Day of Resurrection: ... one who sells a free person (as a slave) and eats his price’.<sup>182</sup>
4. The Hanbali school agrees with the Shafi’i school and shares the same view in this regard.<sup>183</sup>

As noted earlier, each of these schools uses different methods to interpret the texts of Islamic law. Yet, despite their different methods of interpretation, they all agree on the prohibition of selling, buying, kidnapping and enslaving persons. In this sense, it can be argued that it is not only the practice of holding slaves that is condemned by Islam but also the trade

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<sup>178</sup> Hadith, Abu Dawud, Sahih Al-Bukhari, No 7230.

<sup>179</sup> Qur’an, 5:33.

<sup>180</sup> Mohammad Amin, *Hasheat Ibn Abidin* (2<sup>nd</sup> edn, Dar Alfekar 1966) part 5, 58.

<sup>181</sup> Mohammed Ibn Rushd, *Bedat Al-Mujthed* (Dar Alfekar 1995) part 1, 96.

<sup>182</sup> Hadith, Abu Huraira; Sahih Al-Bukhari, vol 3, Book 34, No 430.

<sup>183</sup> Mansour bin Yunus Al-Bahooti, *Kashaf Al-Qinaa* (Dar Alfekar 1982) part 3, 156.

itself, that is, the buying and selling of slaves. This opinion is currently supported by many fatwas produced by Muslim scholars.<sup>184</sup> For instance, according to Sheikh Abdul Khalik, ‘such an act is a practice from pre-Islamic society, however, the person who steals and sells children, even from non-Muslim States, is a thief’.<sup>185</sup> Judge Sheikh Faisal Mawlawi<sup>186</sup> adds that:

... selling children into poverty is absolutely forbidden (*haram*) and we do not know a conflicting opinion to it. It rather has two sins: it is the sale of a free person, and this is prohibited in Islam, and it violates the rights of children, the most important of which is freedom, and that is also prohibited.<sup>187</sup>

He goes on to quote the Qur’an: ‘Kill not your children on a plea of want; We provide sustenance for you and for them’;<sup>188</sup> and, ‘There is no moving creature on earth but its sustenance is dependent on Allah’.<sup>189</sup> It may be concluded from the foregoing that according to the opinion of the four schools and the fatwas issued by Muslim scholars from various parts of the world, it is against Islamic law to enslave, kidnap, sell or buy any persons including children, even if the victims are non-Muslim, and even if their parents consent to the practice due to poverty. Despite the fact that human trafficking is not specifically mentioned in the Qur’an, it can be argued that some of its elements and related acts are clearly mentioned and condemned. Thus, it is established that States have an obligation to prohibit child trafficking, slavery and the slave trade because there is a general consensus on its prohibition under Islamic law.

### 2.5.3 Child labour exploitation

Before examining the specific topic of the Islamic perspective on child labour exploitation, it is useful to provide the general principles of labour within the Islamic law framework. Such principles are specifically relevant when discussing the violations of labour practices that might constitute exploitative labour under the crime of trafficking in persons including children. For example, based on Islamic law, if a person employs a worker, then he must fulfil his contractual obligations; the very foundation of a contract is a covenant, a pact between God and an individual. A contract in Islam is thus not merely a legal agreement between the contracting parties but it has a sacred nature: ‘O you who believe! Fulfil all contracts.’<sup>190</sup> The

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<sup>184</sup> A fatwa is a legal opinion given by a Mufti.

<sup>185</sup> Islam Online Fatwa <<http://fatwa.islamonline.net>> accessed 20 June 2015.

<sup>186</sup> He is the Vice President of the European Council for Fatwa and Research.

<sup>187</sup> Islam Online Fatwa <<http://fatwa.islamonline.net/571>> accessed 20 June 2015.

<sup>188</sup> Qur’an, 6:151.

<sup>189</sup> Qur’an, 11:6.

<sup>190</sup> Qur’an, 5:1.

Qur'an not only instructs believers to meet the conditions but also to avoid the temptation to circumvent the contract: and not to 'deprive people of their due'.<sup>191</sup> Furthermore, the Prophet recommended wages to be paid upon the completion of the agreed contract.<sup>192</sup> The Prophet said: 'Give the hired man his wages before his sweat dries'.<sup>193</sup> Additionally, when an agreement has been reached on work, compensation must be determined prior to entering into a contract.<sup>194</sup> Moreover, the Prophet teaches that Allah will 'be against three persons on the Day of Resurrection: ... and one who employs a labourer and gets the full work done by him but does not pay him his wages'.<sup>195</sup>

Having introduced the general Islamic framework on labour, it is now appropriate to shift the focus to a more specific analysis of the Islamic law perspective on child labour. Firstly, it should be noted that it is obligatory in Islam for the father to be responsible for all the expenses for the maintenance of a breastfeeding mother and child even if the couple is divorced.<sup>196</sup> Further, the Prophet said: 'Each one of you is a caretaker (*ra'iy*) and is responsible for those under his care', and, 'Allah will ask every caretaker (*ra'iy*) about the people under his care, and the man will be asked concerning the people of his household'.<sup>197</sup> More generally, the Prophet advises that: 'The most excellent dinar is one that a person spends on his family'.<sup>198</sup> Based on the above injunctions, Muslim scholars agree that Islamic law holds the father accountable for all maintenance expenses, ranging from food and clothing to shelter and education, until the child reaches an age at which he can work and live out of his own pocket. However, a daughter is entitled to be maintained until she gets married.<sup>199</sup> In this sense, under Islamic law, 'the duty to protect children is not only legal, but religious'.<sup>200</sup>

Secondly, it is worth noting that children under a specific age are not allowed to participate in or perform any type of hard and dangerous work under Islamic law. This instruction is recounted in the Sunnah:

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<sup>191</sup> Qur'an, 7:85.

<sup>192</sup> Hadith, Al-Mutaqqi Al-Hindi, No 9125.

<sup>193</sup> Hadith, Ibn Maajah, Sunan Ibn Maajah, No 2443.

<sup>194</sup> Hadith, Abdulrazaq Al-Sanani, No 15023. Hadith Sahih Al-Bkhari, No 2114.

<sup>195</sup> Hadith, Abu Huraira, Sahih Al-Bukhari, vol 3, Book 34, No 430.

<sup>196</sup> Qur'an, 2:233.

<sup>197</sup> Hadith, Sahih Al-Bukhari, No 853 and Sahih Muslim, No 1829.

<sup>198</sup> Hadith, Sahih Muslim, No 2180.

<sup>199</sup> W Al-Ahmad, *Himayat Huquq Al-Tifl Fe Daw Ahkam Al-Shariah Al-Islmiyah Wa Al-Itifaqiyat Al-Dawliyah* (Al-Halabi Legal Publications 2009) 27.

<sup>200</sup> Nisrine Abiad and Farkhanda Zia Mansoor, *Criminal Law and the Rights of the Child in Muslim States: A Comparative and Analytical Perspective* (BIICL 2010) 53.

Ibn Omar went to the Prophet when he was fourteen and wanted to join the army, the Prophet refused because of his young age. However, a year later, when he was fifteen, he went again to the Prophet for the same purpose. This time the Prophet allowed him to join the army.<sup>201</sup>

The statement shows that fifteen is the age which the Prophet accepted as appropriate for child labour.

Coercion, physical violence and child forced labour are strictly prohibited in Islamic law.<sup>202</sup> It is understood that children's physical vulnerability and mental immaturity render them unable to cope with harsh treatment or hard and dangerous work.<sup>203</sup> In practice, many Islamic States' domestic laws include a provision on this subject. Jordan's Constitution, for example, provides that 'compulsory labour may not be imposed on any person'.<sup>204</sup> Similarly, the Constitution of Turkey states that 'no one shall be forced to work; forced labour is prohibited'.<sup>205</sup> In a more general sense, it is worth noting that in Islamic law, humans are not expected to undertake hard tasks. This is clearly emphasised in the Qur'an: 'He has chosen you and has not placed upon you in the religion any difficulty';<sup>206</sup> 'Allah intends for you ease and does not intend for you hardship';<sup>207</sup> '[N]o person is charged with more than his capacity'.<sup>208</sup> Consequently, if Allah willed that no hardship should be suffered because of what he commands, then it follows that human beings are forbidden from inflicting harm and hardship on one another, especially on children.<sup>209</sup> As a result, it can be concluded that child forced labour is against Islamic principles. The existence of child labour and subsequent exploitative acts in an Islamic State today would mean that both the parents as well as the State had failed in their responsibilities under Islamic law and its principles. In practice, within the framework of Islamic law, any act or behaviour prohibited according to Shariah, in this case forced child labour, falls under the category of *tazir* crimes where punishment is not established by the Qur'an but is left to the discretion of individuals charged with ensuring public order and safety of society members.

An example of forced labour is begging. Children who have been trafficked are regularly forced into such an activity in the Muslim world today, especially in SA, as will be shown in the

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<sup>201</sup> Hadith, Sahih Muslim, No 1868. Also, Sahih Al-Bukhari, No 2521.

<sup>202</sup> Hadith, Sahih Muslim No 4329.

<sup>203</sup> UNICEF and Al-Azhar University, 'Report on Children in Islam: Their Care, Development and Protection' (International Islamic Center for Population Studies and Research, Summary Version, 2005) 5.

<sup>204</sup> Constitution of Jordan (1952) art 13.

<sup>205</sup> Constitution of Turkey (1982) art 18.

<sup>206</sup> Qur'an, 22:78.

<sup>207</sup> Qur'an, 2:185.

<sup>208</sup> Qur'an, 2:233.

<sup>209</sup> UNICEF and Al-Azhar University (n 203) 9.

following chapter. Therefore, it is necessary to discuss how begging is addressed in Islamic law. The Prophet stated that: ‘It is better for anyone of you to take a rope (and cut) and bring a bundle of wood (from the forest) over his back and sell it and Allah will save his face (from the Hell-fire) because of that, rather than to ask the people who may give him or not.’<sup>210</sup> This statement, as well as other statements below, is evidence regarding the respect which Islam accords to work and encouragement to work. The Prophet emphasises that: ‘Nobody has ever eaten a better meal than that which one has earned by working with one’s own hand.’<sup>211</sup> With respect to begging, many Muslim scholars have cited the Islamic ruling which states that:

[I]f a person has enough to meet his needs whether it is from his salary of a job, or from trade, or income from some property set aside as a *Waqf*<sup>212</sup> for his benefit by a relative, or real estate, or earnings from a craft such as carpentry or blacksmithing, or from farming and the like, it is *haram* for him to beg.<sup>213</sup>

In addition, ibn Taymiyya, one of the most prominent scholars of the Hanbali school, said that ‘begging is forbidden whether it is in the mosque or outside it, unless there is a real need for it. If necessary, one may beg in the mosque as long as one does not harm anyone and does not lie in begging, or disturb the people who are listening to the Friday *khutbah* (sermon), and one distracts them by one’s voice.’<sup>214</sup> The three other schools of thought adopt a similar perspective. This raises the question of when begging is permitted in Islam. Because Islam is known as the religion of mercy and charity, the answer is that there are specific cases in which begging is allowed. These cases are illustrated by the Hadith of the Prophet as follows:

Qubaisah Al-Hilali said: I am indebted for a reconciliation and came to the Prophet to beg him. The Prophet said to me, stay with us until *zakah* (Alms) come to us, and then I give it to you. Then, He said, O Qubaisah, begging is prohibited except for one of the three reasons: a man who is indebted for a reconciliation until he is released, then he must cease begging, a man who suffers a blight that took his property, he is permitted to beg until earning a living, and a man who suffers poverty, he is permitted to beg until earning a living, Other than these, begging, O Qubaisah is something interdictive.<sup>215</sup>

All of this is significant as it clearly demonstrates that begging is in breach of Islamic law and cannot be permitted except in the case of a pressing need and for limited reasons and times.

<sup>210</sup> Hadith, Sahih Al-Bukhari, vol 3, Book 34, No 286.

<sup>211</sup> *ibid.*

<sup>212</sup> Literally, *waqf* means to stop, contain or to preserve. In Shariah, a *waqf* is a voluntary, permanent, irrevocable dedication of a portion of one’s wealth – in cash or kind – to Allah. Once a *waqf*, it never gets gifted, inherited, or sold. It belongs to Allah and the corpus of the *waqf* always remains intact. The fruits of the *waqf* may be utilized for Shariah compliant purposes. See UAE General Authority of Islamic Affairs and Endowments <<http://www.awqaf.ae/Waqf.aspx?Lang=EN&SectionID=13&RefID=857>> accessed 20 July 2016.

<sup>213</sup> Islam Online Fatwa <<http://fatwa.islamonline.net>> accessed 20 June 2015.

<sup>214</sup> Fiqh Al-Sunnah <[http://www.iiu.edu.my/deed/lawbase/fiqh\\_us\\_Sunnah/vol2/fsn\\_vol2.html](http://www.iiu.edu.my/deed/lawbase/fiqh_us_Sunnah/vol2/fsn_vol2.html)> accessed 20 June 2015.

<sup>215</sup> Hadith, Imam Ahmad, No 20078. (*zakah* is the amount payable by a Muslim on his net worth as a part of his religious obligation; it is paid mainly for the benefit of the poor and the needy).



Based on this, many Muslim scholars agree that the money collected by a beggar without a pressing need is *haram* and it is as unlawful as robbery and abduction. In fact, it is more unlawful as it requires lying, pretending weakness, the use of illicit means, and most importantly, recourse to people rather than to Allah<sup>216</sup> which contradicts the basic principles of Shariah. Consequently, it can be argued that forcing a child to beg constitutes an act that is forbidden in Islamic law since there is no real need on the side of the perpetrator as he simply seeks a profit by abusing and exploiting the child. More importantly, it frequently involves physical violence, harm and deception of the child victims, which is also against Islamic principles. The above analysis shows that child economic exploitation, which is one of the end purposes of child trafficking, is clearly prohibited in Islamic law. In terms of punishment, although the main sources of Islamic law (i.e. Qur'an and Sunnah) do not mention the human trafficking crime specifically, and therefore the offence is categorised under *tazir*, it can be argued that some aspects of trafficking (e.g. robbery and abduction) may fall under other categories of the Islamic criminal justice system.

#### 2.5.4. Child sexual exploitation

As noted earlier, under Islamic law, *zina* is clearly prohibited and is also coupled with severe punishment as it falls under the category of *hudud* crimes. Additionally, an act of prostitution is considered a form of sexual exploitation by Islamic law and it is therefore prohibited.<sup>217</sup> Forced prostitution is similarly forbidden, as explicitly indicated in the Qur'an:

But force not your maids to prostitution when they desire chastity, in order that you may make a gain in the goods of this life, But if any one forces them, then after their compulsion Allah will be Forgiving and Merciful to them.<sup>218</sup>

Based on this Qur'anic verse, sexual exploitation for profit is also prohibited. In addition, the Prophet reportedly 'prohibited taking the earnings of a soothsayer and the money earned by prostitution'.<sup>219</sup> In practice and based on the provisions of Islamic law, many Islamic States have

<sup>216</sup> Muhammad Ibn Qayyim al-Jawziyyah, *Madarij Al Salikin* (Dar Al Fikr 1995) part 2, 232.

<sup>217</sup> Mohamed Y Mattar, 'International Efforts to Combat Human Trafficking' (Naif Arab University for Security Science Press 2010) 471. According to the Kuwaiti delegation: 'external sex was prescribed by Islamic law, and sex with a minor under 18 years of age was considered a crime, even with the girl's consent': CommRC, see para 2 of Summary Record of the 489<sup>th</sup> Meeting: Kuwait (2 October 1998) CRC/C/SR 489.

<sup>218</sup> Qur'an, 24:33.

<sup>219</sup> Hadith, Sahih Al-Bukhari, No 439.

clearly criminalised prostitution, its means and its related acts in their national laws, for instance, the Criminal Code of Bahrain<sup>220</sup> and the Omani Penal Code.<sup>221</sup>

From the above two significant principles are identified: first, sexual exploitation is clearly and strongly prohibited within the main sources of Islamic law and there is a general consensus among the four different schools of thought in this respect. Secondly, this prohibition can be extended to include the crime of child trafficking when it is specifically for the purposes of sexual exploitation. In this respect, Al-Murad notes that anyone who facilitates, directs or participates in child trafficking for sexual purposes deserves the same harsh punishment as the trafficker.<sup>222</sup> Al-Shahrani adds that sexual exploitation is prohibited in Islam and if an exploiter or trafficker today exploits and forces their victims into such acts, their offence should be punished adequately, the profits they made from it are considered illegal and *haram*, and they should be punished accordingly and appropriately.<sup>223</sup> In this sense, legal systems at the national level should consider all aspects, acts and elements surrounding the crime of child trafficking and punish perpetrators accordingly, taking into consideration that, despite the fact that there is no explicit reference in the Qur'an to human trafficking, certain aspects of the crime should be or could be interpreted as *hudud* or *qisas* offences.

So far, this chapter has presented the Islamic law perspective regarding the prohibition and criminalisation aspect of the crime of child trafficking as well as its resulting exploitative practices, namely, slavery, selling or buying and kidnapping children, forced labour and sexual exploitation of children. It can be concluded that there is consensus among Islamic jurists from the four different schools of thought regarding the prohibition of these acts. This is based on their understanding and interpretation of the main sources of Islamic law.

It might be argued that, despite the existence of Islamic law and its principles, child exploitation for different purposes is prevalent in a number of Islamic States.<sup>224</sup> However, as observed by Mattar, although such practices may have been carried out in Islamic States in the past and in the present, they nonetheless were and continue to be inconsistent with the primary

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<sup>220</sup> Bahrain Penal Code (1976) ch 3 (Immorality and Prostitution), art 325.

<sup>221</sup> Omani Penal Code (16 February 1974) ch II, art 221.

<sup>222</sup> Al-Murad (n 146) 179.

<sup>223</sup> *ibid* 216.

<sup>224</sup> Myada O El-Sawi, 'Beyond the "tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39(2) Georgia Journal of International and Comparative Law 391, 403.

sources of Islamic law.<sup>225</sup> It should be noted that, '[a]ll Muslims and all administrators who claim to be Muslim have to accept, recognise and enforce all rights sanctioned by God'.<sup>226</sup> The sanction is thus fulfilled by God. In Islam, 'if they fail to enforce them or violate them while paying lip service to them, the verdict of the Qur'an is unequivocal'.<sup>227</sup> The Qur'an emphasises that: 'And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers'; further, 'those who are the wrongdoers'; and 'those who are the defiantly disobedient'.<sup>228</sup> Therefore, there is a clear obligation upon Islamic States and individuals to implement and enforce Islamic laws and regulations, thus fulfilling their obligations under Islamic law.

## 2.6 Children's rights in Islamic law

Having illustrated the Islamic law perspective in relation to the prohibition of child trafficking and exploitation, the discussion now shifts to examine the second important element in the framework for fighting child trafficking, namely, protection measures. This part will identify the relevant children's rights within the Islamic framework and how they might be applied to the trafficked victims.

According to a joint report by UNICEF and Al-Azhar University, 'the concept of child protection cannot be fulfilled unless we confront all forms of abuse, violence and exploitation that deny children – or only threaten to deny them – the basic rights of sufficient parental care, education, healthcare, enjoyment of recreation and sports and freedom of expression and thought'.<sup>229</sup> Islamic law affirms in the Qur'an and the Sunnah the following rights for all children: life, freedom, healthcare, education, a family, human dignity, security and peace, and the right to protection from all sorts of cruelty, physical abuse or punishments.<sup>230</sup> In addition, Islamic law provide for a protected environment for children; this is particularly important to the discussion of this chapter. Child victims of trafficking often come from abusive family environments where they are physically or psychologically mistreated, which may force a child out of the house to seek a better life. As a result, they will be vulnerable to trafficking and

<sup>225</sup> Mohamed Y Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law' (UNODC, 2010) 7.

<sup>226</sup> AA Mawdudi, *Human Rights in Islam* (The Islamic Foundation 1980) 16.

<sup>227</sup> *ibid* 16.

<sup>228</sup> Qur'an, 5:44, 45, 47.

<sup>229</sup> UNICEF and Al-Azhar University (n 203) 7.

<sup>230</sup> *ibid*.

certainly easy targets for traffickers. Therefore, special protection and assistance is required to safeguard the best interests of the child. As mentioned previously, the main sources of Islamic law recognise the need for special protection of children due to their vulnerable nature. Contrary to the treatment that children receive at the hands of traffickers, Islam instructs that children should live in a safe and protected environment, free from abuse and violence. The Qur'an describes children as the 'comfort of our eyes'.<sup>231</sup> Further, the Prophet said: 'Each one of you is a caretaker (*ra'iy*) and is responsible for those under his care', and, 'Allah will ask every caretaker (*ra'iy*) about the people under his care, and the man will be asked concerning the people of his household'.<sup>232</sup> The Prophet declared the principles that must be observed and the rights that must be guaranteed for all humans during his famous Farewell Sermon: 'O People, just as you regard this month, this day, this city as Sacred, so regard the life and property of every Muslim as a sacred trust.'<sup>233</sup> The purpose of Islamic law as noted in the Qur'an is the following: 'For He commands them what is just and forbids them what is evil; he allows them as lawful what is good and prohibits them from what is bad. He releases them from their heavy burdens and from the yokes that are upon them.'<sup>234</sup> Accordingly, the overall objective of Shariah, which must always be kept in mind in both its interpretation and application, is the promotion of welfare and the prevention of harm. Further, one of the important principles under Islamic law relating to the protection of victims' rights is the collective cooperation against oppression and violation of human rights. It is clearly expressed in many of the Qur'anic verses, for example, 'And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, "Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper?"'.<sup>235</sup> The following is another example:

And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly.<sup>236</sup>

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<sup>231</sup> Qur'an, 25:74.

<sup>232</sup> Hadith, Sahih Al-Bukhari, No 853 and Sahih Muslim, No 1829.

<sup>233</sup> Hadith, Sahih Al-Bukari (12/191).

<sup>234</sup> Qur'an, 7:157.

<sup>235</sup> Qur'an, 4:75.

<sup>236</sup> Qur'an, 49:9.

These broad principles and concepts can be extended and utilised by Islamic States at the national level to enhance the protection of child victims of trafficking. Therefore, these general principles are significant in the discussion of this part. There are many verses in the Qur'an and the Sunnah that remind parents, societies and States about their responsibilities towards children; various aspects of them are applicable to child victims of trafficking. Therefore, the following paragraphs will first define the term 'child' within the Islamic framework, and then identify and analyse relevant rights which can be applied within the context of the protection of trafficked children.

### **2.6.1 Definition of the term 'child'**

As this thesis focuses on children, it is important to understand how Islamic law defines the term 'child'. It is understood that in Islam the step from being a minor to reaching maturity is a physical one, that is, it occurs when the boy or girl shows signs of sexual maturity.<sup>237</sup> Islam does not specify the age of the child and leaves it to the discretion of States to decide. It is important at this stage to analyse how Islamic law addresses the issue of the age of the child in order to understand what constitutes full age. In Islamic law, the concept of maturity can be measured in two ways: firstly, the physical signs of maturity, that is, puberty;<sup>238</sup> and secondly, attainment of full age as with full legal age comes all the rights and responsibilities, among which is legal and religious responsibility.<sup>239</sup> It should be noted that there are different interpretation among the Islamic jurists of the four schools of thought in this regard, taking into consideration that in Islamic sources childhood is not strictly specified by age.<sup>240</sup>

In a general sense, the majority of Islamic scholars and researchers have set the age of puberty at fifteen on average for both boys and girls.<sup>241</sup> This was concluded from the Sunnah, according to the Hadith mentioned earlier of ibn Omar who went to the Prophet when he was fourteen and wanted to join the army.<sup>242</sup> In a narrow sense, the Hanafi school considers eighteen to be the end of childhood for boys and seventeen for girls on the basis that girls reach maturity earlier.<sup>243</sup> The Maliki and Shafi'i schools agree that the end of childhood is marked by the onset

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<sup>237</sup> Abiad and Mansoor (n 200) 57.

<sup>238</sup> Qur'an, 24:59.

<sup>239</sup> Zainah Al-Midhar, 'Human Rights of Women and Children under the Islamic Law of Personal Status and Its Application in Saudi' (2008) 5 Muslim World Journal of Human Rights 6.

<sup>240</sup> *ibid.*

<sup>241</sup> Al-Ahmad (n 199) 14.

<sup>242</sup> Hadith, Sahih Muslim, No 1868. Also, Sahih Al-Bukhari, No 2521.

<sup>243</sup> Al-Ahmad (n 199) 13.

of puberty and specify it to be a maximum of eighteen years and a minimum of fifteen years for both genders.<sup>244</sup> The Hanbali school indicates that the particular age of fifteen years is set as the legal term of adulthood if there is no doubt about the physical signs of puberty.<sup>245</sup> However, if these physical signs can be proved, then an earlier age may be accepted although nine years is the lowest limit.<sup>246</sup>

As can be observed, Islam individualises children and allows for the fact that children reach maturity at different ages. However, this is problematic as it is obvious that signs of puberty may occur early or may be delayed. Disagreement over the age that grants a child legal, religious and criminal responsibilities means that Islamic States are in conflict with the provisions of international law, in particular with CRC Article 1 which states that a child is anyone below the age of eighteen. Therefore, in practice it becomes necessary to fix some age limits in the Muslim world. The following chapters will examine how Islamic States, including SA and the UAE, have defined the term ‘child’ at the national level and will evaluate their laws’ compliance with relevant international standards in this regard.

## **2.6.2 Protection measures**

One of the most important rights guaranteed by Islamic law is the child’s right to life. According to the Qur’an, ‘whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely.’<sup>247</sup> Before the advent of Islam, pre-Islamic society regarded the birth of girl babies as a shame and, according to the Qur’an, buried them alive in different ways.<sup>248</sup> The prohibition on female infanticide by Islam in early Islamic society is regarded as a landmark for the Islamic discourse on the rights of the child.<sup>249</sup> Another pre-Islamic practice was to kill unwanted children that could not be provided for. Islam also abolished this inhuman practice.<sup>250</sup> Based on all of the above injunctions, there is clear consensus among Islamic jurists on the

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<sup>244</sup> *ibid.*

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid* 14.

<sup>247</sup> Qur’an, 5:32.

<sup>248</sup> Qur’an, 16:58.

<sup>249</sup> Qur’an, 81: 8-9. See also Masoud Rajabi-Ardeshiri, ‘The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global’ (2009) 17(3) International Journal of Children’s Rights 475.

<sup>250</sup> Qur’an, 17:31.

sacredness of human life and the obligation on the ruling authority of the State to protect the right to life of every individual, including children.<sup>251</sup>

Another important provision that is also applicable to victims of trafficking is the right to protection from all sorts of cruelty and inhumane treatment. It is the right of a child under Islamic law, particularly given their vulnerable nature, to be protected from any mistreatment, whether mental or physical.<sup>252</sup> As noted in the Qur'an, 'Allah does not charge a soul except [with what is within] its capacity',<sup>253</sup> and so a child's vulnerable nature should always be borne in mind when imposing a duty upon a child. The Prophet said: 'He is not of us who is not affectionate to the children, and does not respect the elderly'.<sup>254</sup> Furthermore, Shariah forbids any attack by any method on the human body, including smacking or other forms of corporal harm or sexual assault.<sup>255</sup> According to the Prophet, '[t]here should be neither harming, nor reciprocating harm'.<sup>256</sup> In this sense, children's safety from all types of exploitation, abusive, inhumane and degrading treatment is a guaranteed right and it is the duty of parents, society and the State to safeguard it. This is an important right protected under Islamic law for children who are victims of trafficking.

Furthermore, as noted in the Qur'an, it is the duty of every Muslim to help the needy and provide them with assistance and protection, and to enjoin good and forbid evil.<sup>257</sup> Such a provision is also supported in the Sunnah as, according to the Prophet: 'Whosoever removes the pain and trouble of another believer, Allah will remove his trouble on the Day of Judgment'.<sup>258</sup> A famous Hadith states that, 'Whosoever makes things easier for a poor and a needy person, Allah will make things easier for him in this world as well as in the Hereafter'.<sup>259</sup> Based on this, it can be said that States are obliged to protect the life, health and dignity of the child, taking into consideration the fact that trafficked victims are forced into trafficking and surely during this process some or all of these rights will be violated. Victims' rights to all forms of assistance and support are also guaranteed under Islamic law.

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<sup>251</sup> M Al-Ghazali, *Huquq Al-Insan Bayn Taleem Al-Islam wa Ial'n Al-Umam Al-Mutahidah* (Dar Al-Dawah 1993) 245.

<sup>252</sup> Al-Ahmad (n 199) 30.

<sup>253</sup> Qur'an, 2:286.

<sup>254</sup> Hadith, Al-Turmathi, No 1920.

<sup>255</sup> UNICEF and Al-Azhar University (n 203) 9.

<sup>256</sup> Hadith, Ibn Majah, No 32.

<sup>257</sup> Qur'an, 3:104.

<sup>258</sup> Hadith, Abu Hurayrah, Sahih Muslim, No 36.

<sup>259</sup> Hadith, Sahih Muslim, No 2699.

The principle of non-punishment under Islamic law should be highlighted. Evidence of this principle was given in an earlier quoted Qur’anic verse ending: ‘... but if any one forces them, then after their compulsion Allah will be Forgiving and Merciful to them’.<sup>260</sup> This means that the victim of such an act who was forced to perform this crime (in this case, *zina*) will not be held criminally responsible. In addition, the Prophet said that: ‘Allah forgives any nation the unintentional wrongdoings and forgetting or what they are forced to do’.<sup>261</sup> Therefore, in practice, it is necessary for Islamic States to take into full consideration this Qur’anic verse. This will enable them to identify the victims of sexual exploitation and enforce the principle of non-liability. Furthermore, based on this, it can be said that States should also extend such a provision to include the unintentional involvement of trafficked victims in any unlawful activities as long as they were forced to perform such an act. In addition, Islamic law recognises the right to compensation, which is considered a basic principle in Shariah law. The importance of such a provision is to achieve justice as recommended by the Prophet.<sup>262</sup> According to one of the Prophet’s Hadith, he who causes harm should repair such harm.<sup>263</sup> This can also be applied to trafficked victims; and States should also ensure that victims are compensated for all the harm they experienced during the process of trafficking.

Finally, one of the most important rights guaranteed by Islamic law is non-discrimination and the right to equality. The Qur’an provides as follows: ‘O Mankind, indeed, We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted.’<sup>264</sup> Undoubtedly, the application of the non-discrimination provision in providing equal rights to foreign victims, Muslim and non-Muslim, will result in better compliance with international standards in the Muslim world. More details on this issue will be provided in chapter four. Therefore, Islamic States should ensure the implementation of this provision in practice in order to meet their obligations under Islamic law. In summary, according to the above mentioned Qur’anic verses and the Sunnah of the Prophet, Islamic States should not only prohibit child trafficking but also assist and provide protection for its victims.

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<sup>260</sup> Qur’an, 24:33.

<sup>261</sup> Hadith, Ibn Majjah, No 39.

<sup>262</sup> *ibid.*

<sup>263</sup> Zedan (n 49) 48.

<sup>264</sup> Qur’an, 49:13.



## 2.7 Prevention measures

Given that there is no direct or explicit reference to trafficking in persons including children in the main sources of Islamic law, the general Islamic law framework can be applied to prevent and combat such crime. In general, prevention is a basic principle in Islamic law; most of the provisions discussed throughout this chapter have emphasised this. A well-known Islamic saying is that ‘prevention is better than cure’. The Prophet states: ‘Do not harm yourselves or others.’<sup>265</sup> Furthermore, in Islamic law there is a general principle about the importance of cooperation, as noted in the Qur’an: ‘[a]nd cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty’.<sup>266</sup> Surely, these general principles can be interpreted and extended to develop a comprehensive prevention strategy, bearing in mind the discussion above that child trafficking, its means and related exploitative acts are clearly against the principles of Islamic law. Therefore, Islamic States, regardless of their status in relation to child trafficking, origin, transit or destination, are obliged under Islamic law to cooperate in order to reduce the demand of child trafficking and prevent their exploitation and suppression, as well as to educate the general public on the danger of this crime. There is no doubt that cooperation at all levels, for example, with other Islamic States, religious leaders, civil society and NGOs will help in the fight against child trafficking in the Muslim world.

It is worth noting that, within the Islamic law framework, the general principle of Shariah is that it prohibits specific practice and outlines how to prevent it. The best example to illustrate this is begging. Islam both as a religion and law prohibits this practice, as clearly shown by the abovementioned Hadith of Qubaisah, and it also provides how to prevent it. This is through the enforcement of *zakah*,<sup>267</sup> which is an obligation on rich people towards the poor and most vulnerable. According to the Sunnah:

When the Prophet sent Muaaz to Yemen he said to him: call them to witness that there is no God but Allah and that I am the Messenger of Allah. If they obey, tell them that Allah orders them to pray five times in the day and night. If they obey, tell them Allah orders them to pay alms from their money that is taken from their rich people and paid to their poor people.<sup>268</sup>

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<sup>265</sup> Hadith, Sahih Al-Bukhari, No 10.

<sup>266</sup> Qur’an, 5:2.

<sup>267</sup> One of the five pillars of Islam.

<sup>268</sup> Hadith, Sahih Muslim, No 114.

Further, in the Qur'an it is stated that: 'Take, [O, Muhammad], from their wealth a charity by which you purify them and cause them increase, and invoke [Allah's blessings] upon them. Indeed, your invocations are reassurance for them. And Allah is Hearing and Knowing.'<sup>269</sup> Therefore, *zakah* is an obligation not only on States but also on every Muslim individual. Moreover, according to the Prophet, 'The Head of State is the guardian of him who has nobody to support him'.<sup>270</sup> This is significant in reducing the demand for children who are trafficked for begging purposes. Certainly, the enforcement of such a provision at the national level will reduce the demand for victims exploited through begging as well as any other purposes and this will contribute to the eradication of such crimes if both States and individuals meet their obligations under Islamic law. Demand reduction is one of the key factors for the successful prevention of child trafficking.

Economic exploitation is one of the end purposes of child trafficking. Ending this type of exploitation will contribute to the eradication of child trafficking. The Qur'anic rule in employer/employee relationships generally is clearly stated in the Qur'an – 'deal not unjustly and you shall not be dealt with unjustly'.<sup>271</sup> The following verses serve as the basis for non-exploitation, fairness and humane treatment for workers. According to the Qur'an: 'So fulfill the measure and weight and do not deprive people of their due and cause not corruption upon the earth after its reformation. That is better for you, if you should be believers.'<sup>272</sup> Moreover, the Qur'an states that: 'Woe to those who give less in measure and weight. Those who, when they receive from Men demand full measure; But when they have to give by measure or weight, give less than due.'<sup>273</sup> The prevention of exploitation is clearly provided for by the Islamic law main sources, and Islamic States and individuals are obliged to implement this in practice.

Education is considered one of the main factors of a successful child trafficking eradication strategy. The importance of education and awareness is emphasised in many parts of the Qur'an and in the Sunnah of the Prophet Mohammad and there is consensus amongst the schools of Islamic jurisprudence that education is absolutely obligatory. The first word in the Qur'an revealed to the Prophet was 'read', thus emphasising the importance of reading and

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<sup>269</sup> Qur'an, 9:103.

<sup>270</sup> Hadith, Sahih Muslim, No 867.

<sup>271</sup> Qur'an 2:279.

<sup>272</sup> Qur'an, 7:85.

<sup>273</sup> Qur'an, 83: 1-3.

learning.<sup>274</sup> Moreover, the Qur'an states that 'Allah will raise those who have believed among you and those who were given knowledge, by degrees'.<sup>275</sup> In addition, according to the Prophet, '[a] father gives his child nothing better than a good education'.<sup>276</sup> In this sense, Baderin notes that, 'under Islamic law, the populace have a right to know and to be informed of everything of benefit to them, not only for the hereafter but for their welfare in this world as well'.<sup>277</sup> This can be extended to educate child victims of their rights and all services to protect them, as well as to educate the general public and raise their awareness of the causes and gravity of and threats posed by child trafficking crimes. This duty is not restricted to States alone; NGOs and religious bodies also have an important role to play in that regard and should be encouraged by the States to do so. This is noted in the Qur'an: 'There should be among you (O believers), a group (of the learned and sincere persons) who should call (the people) towards goodness, bid (them) to the good and forbid (them) from the evil – they are the successful people'.<sup>278</sup> It seems reasonable to conclude that Islamic States, in particular destination ones, should recognise that education is an important factor that can be used in order to inform and educate the general public and raise their awareness. Therefore, States should ensure the inclusion of such measures in their trafficking prevention strategies.

All of the abovementioned provisions are significant as they demonstrate that within the Islamic law framework measures that can facilitate the eradication of child trafficking already exist.

## 2.8 Conclusion

Based on the evidence presented above, including provisions from the authentic and primary sources of Islamic law, as well as the interpretation of the four different Islamic schools of thought in relation to these sources, it is clear that there is a broad and comprehensive foundation which outlines a robust prohibition of the acts of child trafficking and which condemns its means, elements and subsequent exploitative purposes. This chapter has attempted to develop a comprehensive Islamic framework that addresses the problem of trafficking in

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<sup>274</sup> Qur'an, 96:1-5.

<sup>275</sup> Qur'an, 58:11.

<sup>276</sup> Hadith, Al-Turmathi, No 4977.

<sup>277</sup> Mashood A Baderin, 'Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 Netherlands Quarterly Human Rights 329, 336.

<sup>278</sup> Qur'an, 3:104.

persons by focusing specifically on children. It has provided an overview of the Islamic legal system; an analysis of how Islamic law classifies the crime of child trafficking; and a discussion on the Islamic position with regard to the institution of slavery and exploitation, whether economic or sexual. It is true that many forms of exploitation still exist in the Muslim world. However, such acts are in clear violation of Islamic principles and law. Therefore, they should be condemned and punished, based on authoritative Islamic legal texts. In summary, it seems reasonable to conclude that Islamic States have a religious obligation to prevent child trafficking and protect its victims. Therefore, the Islamic law framework in relation to child trafficking could contribute to and support the global efforts to fight against this practice. On that basis, it is submitted that Islamic States are equipped to fully, adequately and effectively implement these principles.

Consistent with the difficulties faced by other legal systems, the application of Islamic law in Islamic States has some gaps and uncertainties and, as such, there is some room for interpretation. In the discussion of *tazir* crimes above, under which might fall some of the offences related to child trafficking, it was observed that this category has discretionary punishments which leaves room for leniency. An added complication can also be found in the lack of a clear definition for the notion of a ‘child’ which might cause confusion in practice. Consequently, in order to conduct a fair analysis of the child trafficking laws of SA and the UAE in this thesis, it is essential to examine how the interpretation and application of Islamic law in the two States both enables and constrains them. Further, it is important to determine the extent to which Islamic laws, theories and philosophy are misinterpreted or correctly interpreted by both States.

The following chapter explores the international and regional framework in relation to child trafficking in order to identify and understand States’ obligations regarding the criminalisation and prevention of child trafficking as well as the protection of its victims within these frameworks.

## **Chapter Three: International and Regional Anti-Trafficking Framework**

### **3.1 Introduction**

Having presented the Islamic framework in relation to child trafficking and how such a crime is addressed and classified under the Islamic criminal justice system in the previous chapter, the thesis will now examine the international and regional anti-trafficking frameworks. The primary aim of this chapter is to examine the international and regional legal instruments aimed at suppressing and preventing the phenomenon of child trafficking. Examination of these provisions is crucial because these are the important benchmarks against which to analyse the effectiveness of the SA response in the next chapter. Therefore, this chapter considers provisions contained within each legal instrument in order to identify and analyse States Parties' obligations in relation to the prohibition, protection and prevention of child trafficking.

This chapter will examine the most important instrument on human trafficking in modern times, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) which is attached to the United Nations Convention against Transnational Organised Crime (UN TOC Convention). As child trafficking also entails a human rights dimension, the relevant human rights treaties will also be explored with a view to clarifying obligations imposed upon States. Finally, the chapter will explore the relevance of regional standards in the Middle East.

The main conclusion reached is that there are many instruments at both levels, international and regional, that can be used in developing, implementing and evaluating trafficking responses and strategies at the national level. Some of the instruments specifically strengthen the protection of the human rights of child victims of trafficking. Therefore, Member States have clear and explicit obligations within the international and regional frameworks to fight against child trafficking and protect its victims. Furthermore, the analysis of this chapter reveals that both international and regional laws are in compliance with Islamic law. Therefore, it can be stated that Islamic law supports the global action to combat child trafficking.

### **3.2 The relationship between Shariah and international law**

Within the Muslim world, there is the well-known criticism of international law being a 'Western' or 'occidental' project, inextricably mired in its history of imperialism and

colonialism.<sup>1</sup> However, Al-Khasawneh argues that Shariah law and traditions ‘are neither foreign to international law nor are they different from western conceptions of law’.<sup>2</sup> This is because of its role in the history of the creation of international law. Islamic legal concepts and principles present an invaluable source of information as to what international rules mean and how they can be developed further.<sup>3</sup> An example of this is how Shariah can be of great assistance to international courts in the area of environmental law, specifically in the avoidance of harm – the classic obligation of ‘due diligence’.<sup>4</sup> Attempts to use Shariah law in such a manner were made by Judge Weeramantry in the *Gabcikovo-Nagymaros* case when the ICJ adopted a more evolving view of environmental law and recognised the right to sustainable development. Judge Weeramantry argued that ‘the Court could have identified more specific elements of the right by looking at principles espoused by different legal systems, including those adopted in the Islamic legal system’.<sup>5</sup> In commenting on this case, Al-Khasawneh states that Judge Weeramantry’s use of Shariah falls within the general argument that the Court ought to use comparative methods to induce from western and non-western legal systems basic principles accepted around the world. He therefore engaged with Shariah law as a source of information and inspiration.<sup>6</sup>

Weeramantry acknowledged the fact that Islamic scholars are pioneers in the early development of international law: ‘[W]ithin two centuries of the foundation of Islam there were already commentators and lecturers on Islamic international law ... Al-Shaybani’s extensive treatise is perhaps the most detailed early work, while Shafi’i’s *Kitab al-Umm* contains an

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<sup>1</sup> Maria Luisa Frick and Andreas Th Muller (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Brill 2013) 10; also, Ebrahim Afsah, ‘Contested Universalities of International Law: Islam’s Struggle with Modernity’ (2008) 10 *Journal of the History of International Law* 259.

<sup>2</sup> Frick and Muller (n 1) 39.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*, in Shariah law, the main rule applicable in environmental disputes is the Prophet Mohammed’s proclamation: ‘there shall be no damage and no infliction of damage’. Based on this, each individual is entitled to benefit from a common resource to the extent of his need, so long as he does not violate, infringe, or delay the equal rights of other members of the community. Therefore, shared resources are to be used in a manner that is consistent with common good. If harm is unavoidable for the achievement of certain benefit, then the rule is: ‘the avoidance of harm has primacy over the acquisition of benefit’. An individual can benefit from the enjoyment of a common resource only if the injury is limited. If the injury is considerable and especially if it is as great as the potential benefit would be, then the use of the resource cannot be allowed.

<sup>5</sup> Frick and Muller (n 1) 41.

<sup>6</sup> *ibid.* 39. Also, Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411, 433; also, Mashood A Baderin, ‘Religion and International Law: Friends or Foes?’ (Research Paper No. 4/2010, Reprinted from *European Human Rights Law Review*, issue 5, 2009) 657; Abdul Ghafur Hamid and Khin Maung Sein, ‘Islamic International Law and the Right of Self-Defense of States’ (2009) 11 *JEAIL* 1, 100.

exposition of numerous principles of international law'.<sup>7</sup> It is generally acknowledged that among the most important contributions of Islamic international law were its definitive rules on prisoners of war, protection of civilian populations, limitations of belligerent activities and reprisals, asylum, pardon, safe conduct, diplomatic immunity, negotiations and peace missions.<sup>8</sup> According to Al-Khasawneh, a common history of the Islamic and the Western world has contributed to the development of contemporary international law and as a consequence contemporary international law cannot be labeled as exclusively 'Western'.<sup>9</sup> In fact, 'it would not be an exaggeration to contend that international law is an outgrowth of the law that developed between the Western Christian, Byzantine Orthodox and Islam'.<sup>10</sup>

However, part of the Western misrepresentation of Shariah is that it 'had no system of international law, no respect for treaties, no concept of human rights and no regard for the rights of neighbouring States'.<sup>11</sup> It is worth noting that, from the Islamic perspective, the faithful observance of treaties is one of the basic principles of the Islamic international law. The Qur'an states that, 'And fulfill the covenant of Allah when you have taken it, [O believers], and do not break oaths after their confirmation while you have made Allah, over you, a witness. Indeed, Allah knows what you do'.<sup>12</sup> Scholars have shown that the principle of *pacta sunt servanda* (good faith in contractual obligations) is paramount in the Islamic legal tradition, 'because it is God who is the witness of all contracts'.<sup>13</sup> It follows that when signing international treaties, Islamic States are expected to ensure that all of their contractual obligations are clearly set out because contracts are considered sacred.<sup>14</sup>

The OIC, which has 57 members, regards itself as 'the collective voice of the Muslim world [which aims] ... to safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony among various people of the world'.<sup>15</sup> The OIC Charter's Preamble refers not only to the 'noble Islamic values of unity and fraternity' and 'the

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<sup>7</sup> CG Weeramantry, *Islamic Jurisprudence: An International Perspective* (St Martin's Press 1988) 130.

<sup>8</sup> Hamid and Sein (n 6) 69.

<sup>9</sup> Frick and Muller (n 1) 33.

<sup>10</sup> *ibid* 33.

<sup>11</sup> Hamid and Sein (n 6) 68.

<sup>12</sup> Qur'an, 16:91; also, 23:8, 11.

<sup>13</sup> Nistrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (BIICL 2008); EJ Powell and SM Mitchell, 'The International Court of Justice and the World's Three Legal Systems' (2007) 69(2) *The Journal of Politics* 397.

<sup>14</sup> Abiad (n 13) 102.

<sup>15</sup> The OIC is the second largest inter-governmental organisation after the UN.

unity and solidarity among the member States’ but also to the ‘commitment to the principles of the United Nations Charter, the present Charter and international law’ as well as to ‘human rights and fundamental freedoms, good governance, rule of law, democracy and accountability in member States in accordance with their constitutional and legal systems’. The references to Islamic law, the UN, international law in the same document show that, as a matter of principle, the Member States of the OIC do not have a problem in combining Islamic values with the concept of international law. Article 2(7) OIC Charter explicitly establishes that the Member States must ‘uphold and promote, at the national and international levels, good governance, democracy, human rights and fundamental freedoms, and the rule of law’.<sup>16</sup> In practice, these Islamic States, members of the OIC, have joined the United Nations and adhered to various international treaties. They are now part and parcel of the international community and do comply with contemporary international law together with their non-Muslim counterparts.<sup>17</sup>

It is significant at this stage to examine the legal nature of international treaties in Islamic jurisdictions in order to understand how international law is implemented and incorporated at the national level. In general, implementation of international conventions is based on a State’s subscription to either monist or dualist theories in international law.<sup>18</sup> In monist States, international standards are automatically implemented into domestic legal system. These States have a legislature which plays a constitutional role in ratifying treaties. Domestic affairs of the State are regulated pursuant to international law, which takes supremacy over national law.<sup>19</sup> This means that no specific national legislation is needed. An example of this is the practice adopted by Egypt. Article 151 of its Constitution states that all agreements ratified by the President and approved by Parliament will automatically become part of domestic law immediately after publication in the Egyptian Gazette. Accordingly, Article 151 ensures that all international treaties and conventions, if ratified by the President and approved by Parliament, supersede any conflicting domestic legislation. Similarly, in Morocco, according to Article 31 of its Constitution, international treaties duly incorporated by publication in the Official Bulletin become an integral part of domestic law. The provisions of the international treaties ratified become an internal part of the internal public order from which no derogation is admissible. Its

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<sup>16</sup> OIC Charter, art 2(7).

<sup>17</sup> Hamid and Sein (n 6) 70.

<sup>18</sup> Abiad (n 13).

<sup>19</sup> *ibid.*



provisions have ipso facto legislative and statutory effect in both public and private law. It is the settled judicial practice of the Moroccan Supreme Court that when there is a contradiction between a domestic law and international law, the latter prevails, provided that it has been published in the Official Bulletin.<sup>20</sup>

In contrast, in dualist States, treaty provisions must be transformed into national law through legislation. Dualist theory distinguishes between the system of international law and national law, neither of which can per se create or invalidate the other. For instance, Article 37(2) of Bahraini Constitution provides that international treaties must be promulgated by national law to be valid. Similarly Article 70 of the Saudi Basic Rule provides that, 'Regulations, Treaties, International Conventions, privileges and amendments therefore are approved by a Royal Decree'.<sup>21</sup> According to this article, an international convention should be issued in the form of a Royal Decree, otherwise it will not be effective and binding at the national level or recognised by the Saudi law courts.<sup>22</sup> However, it is significant to note that, in the event that international law conflicts with Islamic law, SA is obliged by its religious allegiance to adhere to Islamic law.

### **3.3 The compatibility of Shariah with international human rights instruments**

In Western and Islamic States, human rights have become a matter of debate and controversy.<sup>23</sup> However, the perception of human rights within the context of the application of Shariah has often been negative.<sup>24</sup> Many individuals consider the international human rights conventions, 'which were drafted in Western States, to be based on ideals that have roots in Christianity and Western history', and therefore they should be rejected.<sup>25</sup> Islamic States view the West as being unethical, immoral, and unduly biased towards the religious, cultural, and political

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<sup>20</sup> See for example, Moroccan Supreme Court Decision No 49 (1 October 1976) and No 5 (3 November 1972) and No 162 (3 August 1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 21 June 1993).

<sup>21</sup> Saudi Arabia Basic Law of Governance (1 March 1992) Royal Order No A/91, Umm Al-Qura Gazette No 3397, art 70.

<sup>22</sup> SNSHR, 'Conformity of the Saudi Rules and Regulations with the Conventions on Basic Human Rights' (Report, 2009).

<sup>23</sup> Heiner Bielefeldt, 'Western versus Islamic Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights' (2000) 28(1) Political Theory 90, 114.

<sup>24</sup> Shihanah Azzaz, 'Ijtihad: An Effective Mechanism of Upholding International Human Rights with Islamic Law' (2008) 4(1) JISPI 21.

<sup>25</sup> Jumana Shehata, 'Islam and Human Rights: Revisiting the Debate' 1(1) Arab Insight 73, 87. Also Abdullahi Ahmed An-Na'im, 'Islamic Law, International Relations, and Human Rights: Challenge and Response' (Summer 1987) 20(2) Cornell International Law Journal 333.

aspects of Islam itself, and they have the impression that the idea of international human rights is a conspiracy against the Islamic religion.<sup>26</sup> Based on this point of view, some Islamic States justify their reservations, to the CEDAW for example, by arguing that this is a Western attack on Islamic States as it secularises Muslim women and fails to take into account the particularities of Islamic cultures, by which family law is regulated in Islamic States.<sup>27</sup> Due to such opinions, there is a stereotypical perception of Shariah as a system which is considerably discriminatory against women, and therefore Shariah has often attracted criticism by human rights advocates as being the main reason behind violations of human rights.<sup>28</sup>

It can be observed that, in participating in the international human rights objectives of the UN, Islamic States have entered reservations on the grounds of Shariah when ratifying international human rights treaties. Also, in their periodic reports to UN human rights treaties many Islamic States have referred to Islamic law in their arguments.<sup>29</sup> This has sent a message to the world – especially non-Islamic States – that Islamic law is incompatible with international human rights, and therefore human rights are not realisable within the dispensation of Islamic law. Regrettably, reservations entered by Islamic States are not only excessive but they are often broadly worded and not defined, in language such as ‘so far as it is incompatible with the provisions of Islamic Shariah’<sup>30</sup> or ‘inasmuch as it conflicts with the provisions of Islamic Shariah’<sup>31</sup> or ‘in case of contradiction between any terms of the Convention and the norms of Islamic law, the kingdom is not under an obligation to observe the contradictory terms of the Convention’.<sup>32</sup> This type of general reservation entered by Islamic States is problematic as it ‘creates an inbuilt ambiguity, thus making it difficult to locate their scope and effect with any sense of precision’.<sup>33</sup> This led a large number of signatory states, including Austria, Denmark,

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<sup>26</sup> Mashood A Baderin, ‘Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States’ (2004) 22 *Netherlands Quarterly of Human Rights* 329, 336. Also, An-Na’im (n 27) 335; see also, Mohamed Elewa Badar, ‘Islamic Law (Shari’a) and the Jurisdiction of the International Criminal Court’ (2011) 24 *Leiden Journal of International Law* 411, 413.

<sup>27</sup> Shehata (n 25) 87.

<sup>28</sup> Azzaz (n 24) 21, see also, Bielefeldt (n 23) 102.

<sup>29</sup> For instance, Sudan’s 2<sup>nd</sup> Periodic Report on the ICCPR (13 March 1997) UN Doc CCPR/C/75/Add. 2; see also, SA’s Initial Report on the CRC (29 March 2000) UN Doc CRC/C/61/Add. 2.

<sup>30</sup> Reservation to CEDAW by Bahrain.

<sup>31</sup> Reservation to CEDAW by Kuwait.

<sup>32</sup> Reservation to CEDAW by SA.

<sup>33</sup> Malcolm N Shaw, *International Law* (5<sup>th</sup> edn, Cambridge University Press 2003) 133.

Germany, Ireland and Sweden,<sup>34</sup> to file objections to the Saudi reservation, for instance, by citing Article 19(c) of the Vienna Convention on the Law of Treaties<sup>35</sup> and the parallel provision in the CRC,<sup>36</sup> and finding the Saudi reservation ‘unlimited in scope and undefined in character’ and therefore ‘inadmissible’.<sup>37</sup> Some scholars have not hesitated to criticise such a reservation as effectively ‘constituting a total absence of ratification’<sup>38</sup> or of even ‘making a legal nonsense of ratification’.<sup>39</sup> Because of this, the human rights committees have continually encouraged Islamic States to review and withdraw all their reservations, especially since they are concerned that the broad nature of the reservations might affect the implementation of the rights and would raise questions about the compatibility of the provisions of the conventions.<sup>40</sup> For example, The CRC Committee stated the following with regard to SA’s reservation:

7. The Committee notes the information that the reservation which consists of a general reference to religious law and national law without specifying its contents, is mainly a precautionary measure and does not hamper the State Party’s implementation of the Convention. But the Committee reiterates its concern that the general nature of the reservation allows courts, governmental and other officials to negate many of the Convention’s provisions and this raises serious concerns as to its compatibility with the object and purpose of the Convention.
8. The Committee reiterates, in the light of Article 51, paragraph 2, of the Convention, its previous recommendation that the State party review the general nature of its reservation with a view to withdrawing it, or narrowing it, in accordance with the Vienna Declaration and Plan of Action of the World Conference on Human Rights of 1993.<sup>41</sup>

Given the above, it is significant to critically analyse reservations entered by Islamic States in order to evaluate the international human rights compatibility with Shariah. For instance in respect to reservations to the CRC, it is noted that fifteen Islamic States have made specific

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<sup>34</sup> This objection was entered on 2 October 2001 by Ireland in response to the reservation entered by SA to the CEDAW: ‘The government of Ireland is of the view that a reservation which consists of a general reference to religious law without specifying the content thereof and which does not clearly specify the provisions of the convention to which it applies and the extent of the derogation there from, may cast doubts on the commitment of the receiving state to fulfil its obligation under the convention. The government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law.’

<sup>35</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Article 19(c) provides that: ‘A State may, when signing, ratifying, accepting or acceding to a treaty, formulate a reservation unless ... the reservation is incompatible with the object and purpose of the treaty.’

<sup>36</sup> Convention on the Rights of the Child 1989 (signed 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art 51(b) provides that: ‘A reservation incompatible with the object and purpose of the present Convention shall not be permitted.’

<sup>37</sup> UNCHR (20 March 2003) Fifty-ninth session, Item 14(d) of the Agenda, UN Doc E/CN.4/2003/NGO/260, 3.

<sup>38</sup> William A Schabas, ‘Reservations to the Convention on the Rights of the Child’ (1996) 18 Human Rights Quarterly 472, 478.

<sup>39</sup> Jenny Kuper, ‘Reservations, Declarations and Objections to the 1989 Convention on the Rights of the Child’ in JP Gardener (ed), *Human Rights as General Norms and a State’s Right to Opt Out* (BIICL 1997) 108.

<sup>40</sup> CommRC, ‘Consideration of Reports, Initial Periodic Report of States Parties due in 1993: Jordan’ (26 November 1993) UN Doc CRC/C/8/Add.4.

<sup>41</sup> CommRC, ‘Concluding Observations: SA’ (17 March 2006) UN Doc CRC/C/SAU/CO/2.

reservations to different provisions of the CRC while nine States have formulated general reservations.<sup>42</sup> The majority of the specific reservations appear to be directed at two areas of the CRC, the first of these are the provisions relating to freedom of religion of the child which are contained in Article 14 and to which 12 Islamic States have formulated specific reservations.<sup>43</sup> However, LeBlanc has observed that Article 14:

... does not, it must be emphasized, affirm the right of a child to choose or change his or her religion 'but' refers simply to the obligation of the States parties to 'respect' the right of the child to freedom of religion, which is qualified by the rights and duties of parents and guardians in providing direction to the child in exercising this right.<sup>44</sup>

Therefore, according to LeBlanc, Islamic States which entered reservations against Article 14 'either misinterpreted the article or simply did not want to leave anything to chance'.<sup>45</sup> The second area relates to the provisions of the CRC dealing with adoption that are contained in Articles 20 and 21 and to which nine Islamic States<sup>46</sup> have formulated specific reservations in relation to one or the other of these two articles. It should be noted that reservations by Islamic States with regard to adoption are unnecessary since Article 20(3) of the CRC recognises *kafalah* and Article 21 expressly refers only to States that 'recognise and/or permit' the system of adoption so it does not apply to any Islamic State that does not recognise the system of adoption. It is worth highlighting that, although Islamic States did enter reservations to the CRC, they generally believe that 'the provisions set forth in the CRC are in conformity with the teachings of Islamic law concerning the need to fully respect the human rights of the child'.<sup>47</sup> They acknowledge the general compatibility of the CRC with Islamic legal and cultural norms of ensuring the best interests of the child and because of this level of positive understanding all Islamic States ratified the CRC. Furthermore, some Islamic States which had previously entered reservations to the CRC reviewed and withdrew their reservations. An example of this can be

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<sup>42</sup> CRC (n 36) art 20(3) – the Kafalah of Islamic law; UN, 'Declaration and Reservations to the UNCRC' <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11&chapter=4&lang=en&title=UNTC-publisher=#EndDec](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en&title=UNTC-publisher=#EndDec)> accessed 20 June 2014.

<sup>43</sup> With the exception of Bosnia Herzegovina, Egypt and Turkey.

<sup>44</sup> Lawrence J LeBlanc, 'Reservations to the Convention on the Rights of the Child: A Microscopic View of the State Practice' (1996) 4 *International Journal of Children's Rights* 357, 368.

<sup>45</sup> *ibid.*

<sup>46</sup> Excluding Algeria, Bosnia Herzegovina, Iraq, Malaysia, Morocco and Turkey.

<sup>47</sup> This can be inferred from the general statement by the UAE during the drafting of the CRC that: 'The provisions of the draft Convention contradict neither the principles of Islamic law nor the provisions of the Provisional Constitution of the UAE' in Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Springer 1992) 50. Also, in its 2000 report, SA noted that it adopted the CRC 'because the provisions set forth in the CRC are in conformity with the teaching of Islamic law concerning the need to fully respect the human rights of the child'.

seen in the case of Egypt which had previously entered reservations to the CRC with respect to Articles 20 and 21.<sup>48</sup> However, in 2003, the government of Egypt withdrew its reservation to both articles. Following the withdrawal, the committee praised Egypt and noted with satisfaction that there were different interpretations of some aspects of the application of Shariah and that Egypt had adopted an attitude consistent with the spirit of human rights in that regard.<sup>49</sup> Egypt's withdrawal thus demonstrates that Shariah is not inherently divergent from human rights and that it is actually reconcilable.

Having said this, it is evident that conflicts and tensions between Shariah and international human rights are primarily around two areas. Firstly, Shariah criminal law, including corporal punishment such as flogging and amputation of limbs, penalties that, from the standpoint of international human rights, must be rejected as cruel and degrading. Secondly, Women's rights, especially the principle of equality in rights for men and women. Both areas raise tension between Islam and international human rights.<sup>50</sup>

In regards to criminal punishment under Islamic law, one can hardly deny that the relationship between Islam and human rights, in this area specifically, is complicated and raises a number of issues which are worth exploring. Although there are certain offences common to all civilized nations of the world, the punishments prescribed for them may differ in each State. Most Islamic States are viewed as being non-progressive, especially with respect to their national legal systems and implementation of criminal laws.<sup>51</sup> To illustrate this, as noted in chapter two, Islamic law prescribes *hudud* for certain offences, *qisas* for other offences and *tazir* for certain others. *Qisas* and *tazir* are variable punishments and within the discretion of the victim of the offence (or the heirs) and the judge (or State) respectively. It is worth noting that an Islamic State's conformity with an international standard of punishment in crimes attracts *qisas* or *tazir* punishment under Shariah depending on the political will of a particular State. As stated previously, the crime of child trafficking is categorised under a *tazir* offence.

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<sup>48</sup> 'Since Shariah is one of the fundamental sources of legislation in Egyptian positive law, the government of the Arab Republic of Egypt expresses its reservation with respect to all the clauses and provisions relating to adoption in the said convention, and in particular with respect to the provisions governing adoption in articles 20 and 21 of the convention.'

<sup>49</sup> CommRC, 'Consideration of Reports, Concluding Observations, 2001: Egypt' (21 February 2001) UN Doc CRC/C/15/Add.145.

<sup>50</sup> Bielefeldt (n 23) 103; Frick and Muller (n 1) 30; Azzaz (n 24) 39.

<sup>51</sup> El-Awa (n 6) 413. See also Javaid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Hart 2005).

In a narrow sense, the tensions with international human rights law are essentially in respect of *hudud* punishments which are fixed and invariable as long as the crime is fully established as provided by Shariah. As shown in chapter two, *hudud* punishments are prescribed for six offences under Islamic criminal law. In this respect it is significant to note that Shariah has a strict requirement of evidence and this is in order to ensure that criminal convictions and punishments are imposed only in cases in which there is certainty of guilt. For example, adultery must be proven by four male Muslim eyewitnesses (they must see the actual act and their testimonies have to be identical) or four confessions.<sup>52</sup> If one of the witnesses gives different information, the witnesses may face *qathf* punishment. In regard to the confession, according to Hanafi and Hanbali schools, it should be made four times, and if the accused has admitted the offence once or twice only, his confession becomes invalid.<sup>53</sup> It should be noted that, in case there is doubt about the guilt of a *hudud* crime because there is no confession or not enough witnesses to a crime, the crime might be treated as a *tazir* crime.<sup>54</sup> Doubt will result in nullification of *hudud* punishments according to a Hadith of the Prophet.<sup>55</sup> Due to all of this, *hudud* punishments are rarely applied.<sup>56</sup>

Despite this, from the perspective of international human rights law, Mayer has argued that these punishments are inconsistent 'with modern penological and modern human rights norms'.<sup>57</sup> The prohibition of torture as well as cruel, inhuman or degrading treatment is enshrined in many international conventions, such as Articles 1 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>58</sup> However, from the Islamic perspective, El-Awa has pointed out that while the considerations of social utility are based on the theories of punishment in the Western penal system, 'in Islamic law the theory of punishment

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<sup>52</sup> El-Awa (n 6) 126, 127.

<sup>53</sup> Ibn Qudama, *Al-Mughni* (Dar Al-Kitab Al-Arabi 1987) 8/191.

<sup>54</sup> El-Awa (n 6) 97.

<sup>55</sup> 'Nullify the hudud if there is doubt and lift the death penalty as much as you can'. Hadith, Tirmidhi, No 1425. In another Hadith, the Prophet said, 'If the judge makes a mistake in amnesty it is better than a mistake in punishment'. Hadith, Tirmidhi, vol 3, Book 15, No 1424.

<sup>56</sup> Because of such requirements, all four schools, the Hanafi school in particular, suggest that it is nearly impossible for a thief or fornicator to be sentenced unless he wishes to be and confesses: Mohamed S El-Awa, *Punishment in Islamic Law* (Springer 1982) 126.

<sup>57</sup> AE Mayer, 'A Critique of An-Na'im Assessment of Islamic Criminal Justice' in T Lindholm and K Vogt (eds), *Islamic Law Reform and Human Rights: Challenges and Rejoinders* (Nordic Human Rights Publications 1993) 37.

<sup>58</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, arts 1 and 16.

is based on the belief in the divine revelation contained in the Qur'an and the Sunnah'.<sup>59</sup> *Hudud* punishments are thus classified as the rights of God. They are prescribed as punishment for violating divine injunctions that protect public interest and are therefore not remissible. Al-Mawardi has pointed out that *hudud* are 'deterrent punishments prescribed by God to prevent Men from committing what He forbade'.<sup>60</sup> For the above reasons, Muslim jurists hold that their severity cannot be questioned.<sup>61</sup>

For the purpose of this thesis, the conflict between criminal punishments under Islamic law and the prohibition of cruel, inhuman and degrading punishments under international human rights law can be addressed from two aspects. The first one concerns the punishments of non-*hudud* offences. Since the State has discretion under Islamic law to impose less harsh punishment for non-*hudud* offences, Islamic States can thus effectively exercise that discretion in cognizance of their international human rights law obligation. The second aspect concerns the *hudud* offences which are specifically prescribed by direct injunctions of the Qur'an. An-Na'im has observed in this respect that 'in all Muslim societies, the possibility of human judgment regarding the appropriateness or cruelty of a punishment decreed by God is simply out of the question', and that 'neither Islamic re-interpretation nor cross-cultural dialogue is likely to lead to their total abolition ... as a matter of Islamic law'.<sup>62</sup> The above clearly demonstrates that questioning *hudud* punishments is considered as questioning the divine wisdom underlying them and impugning the divinity of the Qur'an. For the purpose of this thesis, the conclusion to draw is that, on certain issues (e.g. *hudud* punishment) international human rights may not be fully realised in Islam, but in the case of human trafficking (*tazir* punishment) there is no problem between international human rights and Shariah.

Women's rights are the second issue to be discussed here. Islamic States acknowledge the compatibility between CEDAW and Shariah. For instance, SA signed and ratified the convention in 2000 and the Saudi delegation assured that there was no contradiction in substance between the convention and Shariah: 'the Kingdom has a conviction that Shariah is compatible with the general core principles of the CEDAW Convention'. However, SA entered a reservation 'as a

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<sup>59</sup> El-Awa (n 6) xi.

<sup>60</sup> A Al-Mawardi, *Al-Ahkam Al-Sultaniyyah* (1386 AH).

<sup>61</sup> El-Awa (n 6) 2; Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 80.

<sup>62</sup> Abdullahi A An-Na'im, (ed), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (University of Pennsylvania Press 1992) 35-36.

precautionary measure against any unforeseen interpretation of the Convention that might contradict Shariah.<sup>63</sup> Specifically, it submitted reservations to Article 9(2), stating that its nationality laws do not recognise equal rights of mothers to transmit nationality to their children, that is, to Article 9 paragraph 2.<sup>64</sup> It is interesting to note that this reservation cannot be considered to be strictly based on Shariah because nationality has little, if anything, to do with religion.<sup>65</sup> Could it then be concluded that Shariah as law has had no impact on the failure of SA to meet the international human rights standards articulated by CEDAW? According to the Saudi delegation statement, this seems to be the case and this is also confirmed by Entelis who stated that human rights principles regarding women as expressed in CEDAW are consistent with the fundamental tenets of Islamic law.<sup>66</sup> Many Muslim scholars argue that the Qur'an embodies the same basic principles as many international documents on human rights; with reference to CEDAW in particular, it is important to emphasise that Islamic law is not a barrier to its implementation at the domestic level.<sup>67</sup>

The example of the legislative reforms in some Islamic States, for instance, Morocco's personal status code of 2004 clearly illustrates this compatibility between the CEDAW and Shariah. King Mohammed VI in his speech to the Moroccan Parliament in 2003 clarified the amendment of the State's domestic law. Among its key reforms which included the guarantee that men and women are equal before the law, he emphasised that women rights are justified by the Sunnah. This states that 'only an honourable man will honour them (women); and only an ignoble man will humble them'. He added the abolition of forced guardianship over adult women

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<sup>63</sup> CommEDAW, Pre-session working group, Fortieth session, 14 January-1 February 2008, Responses to the list of issues and questions contained in document number CEDAW/C/SAU/Q/2, A.H. 1428 (2007) 2.

<sup>64</sup> Mr. Al-Sfayan, a member of the Saudi delegation to the United Nations concerning consideration of reports submitted by States parties under Article 18 of the CEDAW, stated that since domestic law did not provide for dual nationality, a Saudi woman who married a foreign man would be obliged to give up her own nationality if she took his. The reservation to Article 9, paragraph 2 of the Convention was made in order to prevent Saudi children from acquiring dual nationality, which, as everyone knew, could create social problems, such as in matters relating to marriage and divorce. However, the child of a Saudi woman who decided to take her husband's nationality could apply for Saudi nationality later in life. CommEDAW (fortieth session, Summary record of the 816th meeting held at the Palais des Nations, Geneva, 17 January 2008) CEDAW/C/SR.816, 3.

<sup>65</sup> The United Nations Human Rights Treaties, Reservations, Declarations, Objections and Derogations, CEDAW, SA <<http://www.bayefsky.com/docs.php/area/reservations/state/151/node/3/treaty/cedaw/opt/0>> accessed 20 February 2018.

<sup>66</sup> Joelle Entelis, 'International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights Regarding Women's Equality and Islamic Law' (1996) 20 Fordham Int'l LJ 1251, 1305.

<sup>67</sup> Khaliq Urfan, 'Beyond the Veil? An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah' (1995) 2 Buffalo Journal of International Law 1, 47.



in Morocco was also justified by a fresh reading of the Qur'an's provisions.<sup>68</sup> King Mohammed VI made sure to emphasize that reforms were in conformity with Shariah principles and stated that:

It is necessary to be mindful of the tolerant aims of Islam, which advocates human dignity, equality and harmonious relations, and also to rely on the cohesiveness of the Maliki rite and on *ijtihad*, thanks to which Islam is a suitable religion for all times and places. The aim is to draw up a modern Family Law which is consistent with the spirit of our glorious religion.<sup>69</sup>

This approach taken by Morocco illustrates the great potential for human rights reform within Shariah where there is a will to undertake such efforts of reform.<sup>70</sup> The inherent flexibility of Shariah which encompasses different legal tools such as *ijtihad* creates room for interpretation and adaptation to changes of context and circumstance, as noted in the previous chapter. In short, it seems that harmonisation with international human rights is possible under Shariah through the use of *ijtihad*.<sup>71</sup>

Positively activating the inherent mechanisms of Shariah and interpreting it in order to reform the law is also possible even in a State like SA which has commonly followed a more traditional and conservative approach in its interpretation and application of Islamic law. For example, recent activism in SA has lifted the ban on the prohibition of Saudi women driving a car.<sup>72</sup> It seems that the ban was a result of traditions and not religion. This is also noted by Wynn who observed that most of the rules that impinge on the rights of women are informal and traditional in SA.<sup>73</sup> This demonstrates that 'custom and culture' are among the reasons behind the

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<sup>68</sup> According to the Constitution of Morocco, 'Islam is the religion of the State' and the King is regarded as the 'defender of the Faith'. This accord the King a central position for the observation of both Islam and the Constitution.

<sup>69</sup> King Mohammed VI, (Speech to members of the Moroccan Parliament, 10 October 2003).

<sup>70</sup> Similar legislative reforms can be also seen in law No.1 of 2000 in Egypt concerning the women's right to divorce; Article 18 of the Tunisian Code of Personal Status 1956 concerning the abolition and criminalisation of polygamous marriage; and the reform of rape law in Pakistan through the Protection of Women (Criminal Law Amendment Act of 2006). These reforms within Islamic States, from different Islamic schools of thought, demonstrate the potential of a State's legislature to bring about reforms within the framework of Shariah, which also accommodate international human rights standards.

<sup>71</sup> Evidence of *ijtihad* as a valid method within Shariah is found in the Sunnah. Once the Prophet asked one of his companions named Muaaz Ibn Jabal, when he deployed the latter as a judge to Yemen, as to what would be his source of law in deciding cases. Muaaz replied: 'I will judge with what is the book of God (Qur'an)', the Prophet then asked: 'and if you do not find a clue in the book of God?' Muaaz answered: 'then with the Sunnah of the Messenger of God'. The Prophet asked again: 'and if you do not find a clue in that?' Muaaz replied: 'I will exercise my own legal reasoning'. The Prophet was reported as being perfectly satisfied with these answers by Muaaz which signified an approval by the Prophet.

<sup>72</sup> Harriet Alexander, 'SA to Allow Women to Drive in Major Milestone for Country' (26 September 2017) <<http://www.telegraph.co.uk/news/2017/09/26/saudi-arabia-allow-women-drive/>> accessed 20 February 2018.

<sup>73</sup> Lisa Wynn, 'Marriage Contracts and Women's Rights in SA' in Asifa Quraishi and Frank Vogel (eds), *The Islamic Marriage Contract* (Cambridge University Press 2008) 106.

failure of some Islamic States to effectively implement international human rights norms, particularly in areas related to women's rights.<sup>74</sup>

As further recognition of the potential of legislative reforms within Shariah, the CEDAW Committee 'requested the UN, and the Commission on the status of women, to promote or undertake studies on the status of women under Islamic laws and customs in particular on the status and equality of women in the family on issue such as marriage, divorce, custody and property rights and their participation in public life of the society, taking into consideration the principle of *ijtihad* in Islam'.<sup>75</sup>

In summary, it seems that Shariah cannot be held responsible for Islamic States relinquishing their obligations under the international human rights conventions. Faath and Mattes point out that most of the human rights violations that they have analysed in North Africa do not show specifically 'Islamic' features.<sup>76</sup> For this reason, the focus needs to be directed to other areas in order to understand the main reasons behind the poor human rights records in the majority of the Islamic States. As noted above, Islamic States' reservations to the key international human rights treaties are in general unnecessary or irrelevant to Shariah. This is also noted by Mayer who says that Islamic law does not necessarily dictate reservations by Islamic States to human rights conventions especially, as in the case of the CEDAW and the CRC.<sup>77</sup> According to Abiad, the impact of Shariah appears minimal when put in the broader context of human rights practices in Islamic States.<sup>78</sup> This is because, generally speaking, it is the governments of Islamic States that are largely responsible for human rights abuses.<sup>79</sup> It is worth noting that at the end of a seminar on human rights in Islam held in Kuwait in 1980, jointly organised by the International Commission of Jurists, the University of Kuwait and the Union of Arab Lawyers, the conclusion, *inter alia*, was that:

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<sup>74</sup> SA was the only Islamic State where women are prohibited from driving cars based on extended interpretations of protecting public morality and the dignity of women. Answering questions from Committee members during the consideration of its initial report on the CRC, Saudi's representative, Mr. Al-Nasser, confirmed that 'there was no religious text prohibiting a woman from driving a car' but that 'the scholars (in SA) had established general principles designed to protect the stability of society and to preserve its norms and traditions'. He further stated that: 'When the majority were in favour of a change in existing traditions, the rules would be amended to reflect that change'. Summary Record of the 688 Meeting of the CRC: SA (24 October 2001) UN Doc CRC/C/SR. 688, para 2.

<sup>75</sup> Decision 4 of the CommEDAW, 6<sup>th</sup> Session in the Work of CEDAW, *Reports of the CommEDAW, Volume II 1986-1987* (UN 1990) 296.

<sup>76</sup> Cited in Bielefeldt (n 23) 102.

<sup>77</sup> Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions, A Critical Assessment' (1998) 15 RIMO. Recht van de Islam: Human Rights and Islam 25.

<sup>78</sup> Abiad (n13) 90.

<sup>79</sup> *ibid*.

It is unfair to judge Islamic law by the political systems which prevailed in various periods of Islamic history. It ought to be judged by the general principles which are derived from its sources ... Regrettably enough, contemporary Islamic practices cannot be said to conform in many aspects with the true principles of Islam. Further, it is wrong to abuse Islam by seeking to justify certain political systems in the face of obvious contradictions between those systems and Islamic law.<sup>80</sup>

It is essential for Muslims to understand that although international human rights emerged from the West, their fundamental basis exists within Shariah.<sup>81</sup> The CRC Committee has asserted that 'the universal values of equality and tolerance [are] inherent in Islam'.<sup>82</sup> Dame Mary Robinson, the former UN High Commissioner for Human Rights, pointed out during a symposium on Human Rights in Islam in Geneva in 2002 that:

No one can deny that at its core Islam is entirely consonant with the principle of fundamental rights, including human dignity, tolerance, solidarity and equality. Numerous passages from the Qur'an and saying of the Prophet will testify this. No one can deny, from a historical perspective, the revolutionary force that is Islam, which bestowed rights upon women and children long before similar recognition was afforded in other civilizations.<sup>83</sup>

Finding such roots of human rights within Islam counters the claim that the concept of human rights is a Western one that should be rejected. Even if international human rights are Western in their origins, the Qur'an expressly instructs Muslims to cooperate with others to attain the common good for all.<sup>84</sup> In this regard, Baderin notes that

Certainly, with good faith "everything can be discussed", including the areas of tension between religion and international law. This becomes even easier where we first acknowledge and accentuate the many areas of common ground between the two systems. That is where this author's main contribution in this field has been, with research outputs promoting and emphasising the possibility of a harmonistic relationship between international law, international human rights law and Islamic law, particularly in Muslim states.<sup>85</sup>

In the discussion of this topic, the question of cultural relativism is relevant. Islamic States do acknowledge the universality of human rights but often contend that '(t)here was a need to develop current human rights concepts with reference to the humanitarian values enshrined in the various religions, civilizations and cultures of the world'.<sup>86</sup> An-Naim affirms

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<sup>80</sup> International Commission of Jurists, 'Human Rights in Islam' (Report of a Seminar held in Kuwait, December 1980) 7.

<sup>81</sup> Qur'an, 16:90 For further analysis on the existence of human rights principles within Islam see Mashood Baderin, 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 The International Journal of Human Rights 72.

<sup>82</sup> CommRC, 'Concluding Observations: Egypt' (21 February 2001) UN Doc CRC/C/15/Add.145, para 6; 'Qatar' (6 November 2001) UN Doc CRC/C/15/Add. 163, para 9; 'SA' (22 February 2001) UN Doc CRC/C/15/Add. 148, para 6.

<sup>83</sup> Cited in Frick and Muller (n 1) 444-445.

<sup>84</sup> Qur'an, 5:2 'And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty'.

<sup>85</sup> Baderin (n 6) 658.

<sup>86</sup> Baderin (n 26) 329.

that: ‘Any concept of human rights that is to be universally accepted and globally enforced demands equal respect and mutual comprehension between rival cultures’.<sup>87</sup> Baderin also argues that human rights ‘cannot be interpreted without regard to the cultural differences of people’.<sup>88</sup> To illustrate this case, the best example is the Islamic headscarf. This head cover for Muslim women is viewed in some Western States such as France as a hindrance to human rights and as constituting a violation of women’s rights. In Saudi culture, however, the case is totally different. Muslim women who voluntarily observe the headscarf rule do not view it as a violation of women’s rights at all as it represents complete observance of Islamic injunctions. Besides, the majority of women who wear it in SA do so with conviction. The Saudi Foreign Minister at the World Conference of Human Rights in 1993 acknowledged that the principle and aims of human rights were universal in nature but their application needed to consider ‘the diversity of societies, taking into account their various historical cultural and religious backgrounds and legal systems’.<sup>89</sup>

Although cultural relativism is conditioned by a combination of historical, political, economic, social, cultural and religious factors, ‘whatever definition or understanding is ascribed to human rights, the bottom line is the protection of human dignity’.<sup>90</sup> In essence, both Islam and international law aim to protect human dignity. The protection and enhancement of the dignity of human beings has always been a principle of Islamic political and legal theory. As the Qur’an states, ‘And We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what We have created, with [definite] preference’.<sup>91</sup> In the words of Al-Alusi, one of the major commentators on the Qur’an in Arabic, human dignity, nobility, and honour have been gratuitously conferred on the entire humankind: ‘the believers among them and the non-believers, the pious and the sinners alike’.<sup>92</sup> There is perhaps no civilization in today’s world that would not subscribe to that concept.<sup>93</sup> The Project on Religion and Human Rights, based in New York, has come to the conclusion that ‘there are elements in virtually all religious traditions that support peace,

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<sup>87</sup> An-Naim AA, ‘What Do we Mean by Universal’ (1994) Index on Censorship 120.

<sup>88</sup> Mashood A Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003) 27.

<sup>89</sup> Riyadh Daily, ‘Islam Guarantee Rights, Says Saud’ (17 June 1993).

<sup>90</sup> Baderin (n 88) 27-29.

<sup>91</sup> Qur’an, 17:70.

<sup>92</sup> Al-Alusi, *Ruh Al-Maani Fi Tafsir Al-Qur’an Al-Azim*, vol 15 (Dar Al-Kutb Al-Elmaih, 1415 AH) 117.

<sup>93</sup> Baderin (n 88 ).

tolerance, freedom of conscience, dignity and equality of persons, and social justice’.<sup>94</sup> In practice, this is evidenced by the fact that many regional organisations have adopted different regional human rights treaties in recognition of the noble ideals of international human rights, such as the Council of Europe,<sup>95</sup> the Organisation of American States,<sup>96</sup> the Organisation of African Unity<sup>97</sup> and the League of Arab States.<sup>98</sup> According to Henkin, the adoption of such treaties confirms ‘[t]he acceptance of the human rights idea by virtually all States and societies’ of the contemporary world ‘regardless of historical, cultural, ideological, economic or other differences’.<sup>99</sup> Bielefeldt has stressed in this regard that:

[Human rights] do not pretend to serve as a transhistoric yardstick, for measuring cultures and religions generally [and] ... are not, and should not be presented as, an international civil religion ‘but be presented as shedding’ new light on the self-perception of cultural and religious communities because, the principle of human dignity, which has roots in many cultures, serve as the foundation for human rights.<sup>100</sup>

By linking the above discussions to the topic of this thesis, two points should be highlighted. Firstly and most importantly, children rights under the CRC are generally compatible with Shariah and realisable within the principles of Islamic law. This is significant as the Special Rapporteur on TIP has recognised that the CRC is the main reference on the subject of trafficked children.<sup>101</sup> The CRC provides a comprehensive framework for the protection of the rights and dignity of children as well as for their empowerment, therefore, it should be considered in its entirety, as a tool for understanding and responding to the trafficking and related exploitation of children. The compatibility between Islam and the provisions of the CRC is also strengthened by the fact that an Islamic covenant for the rights of children has been drafted by the OIC and signed by all Islamic States which is almost identical to the CRC;<sup>102</sup> examination of its provisions will be provided throughout this chapter. The second important point from the above discussion is that, as emphasised by Lansdown, the CRC ‘has achieved the

<sup>94</sup> John Kelsay and Sumner B Twiss (eds), *Religion and Human Rights* (Project on Religion and Human Rights 1994) 116.

<sup>95</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

<sup>96</sup> American Convention on Human Rights (adopted 22 November 1969) OASTS No 36.

<sup>97</sup> African Charter on Human and People’s Rights (adopted 27 June 1981) OAU Doc CAB/LEG/67/3 rev 5; (1982) 21 ILM 58.

<sup>98</sup> Arab Charter on Human Rights (adopted 15 September 1994).

<sup>99</sup> Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981) 1.

<sup>100</sup> Bielefeldt H, ‘Muslim Voices in the Human Rights Debate’ (1995) 17 Human Rights Quarterly 587, 616.

<sup>101</sup> UNCHR, ‘2004 Report of the Special Rapporteur on TIP’ UN Doc E/CN.4/2005/71, 20.

<sup>102</sup> For example, Article 18 of the OIC Child Covenant regarding child labour is an exact copy of Article 32 of the CRC. Further, Article 17(2) of the OIC Covenant reflects Article 35 of the CRC.

unprecedented record of becoming a virtually universally accepted human rights treaty'.<sup>103</sup> All Islamic States have ratified the CRC. Although some of them made reservations, these reservations are not directly related to child trafficking and do not affect action against this crime. Given the fact there are no reservations with respect to child trafficking amongst Islamic States, one can surmise that Islamic States recognise that Islamic law supports and complements international action against child trafficking. Having addressed the relationship between Shariah and international human rights law, the focus now will be directed to the international instruments that directly relate to child trafficking.

### **3.4 International legal frameworks for child trafficking**

#### **3.4.1 The UN TOC Convention and its Trafficking Protocol**

In order to identify and understand Member States' obligations, the following part will analyse the human trafficking definition. In order for the crime of child trafficking to be tackled, it is vital that the offence is clearly legally defined. This clarity is necessary to assist in the effective implementation of legislation which provides for the prosecution of traffickers, the protection of victims and provisions aimed at the prevention of the phenomenon. The following section analyses and compares child trafficking definitions contained in two main anti-trafficking instruments the Trafficking Protocol at the international level and the Arab TIP Model Law at the regional level.

##### **3.4.1.1 Definition and the element of consent**

The first internationally agreed definition of trafficking in persons was introduced by the Trafficking Protocol in December 2000. According to Article 3, 'trafficking in persons' means:

- (a) The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

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<sup>103</sup> G Lansdown, 'The Reporting Process under the Convention on the Rights of the Child' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 113. Also Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions: A Critical Assessment' (1998) 15 *Recht van de Islam* 25.

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.<sup>104</sup>

There are three important elements in this definition of trafficking. The first is the *actus reus* or main conduct of trafficking, that is, recruitment, transportation, transfer, harbouring or receipt of persons. The second element refers to the means used to commit those acts, which are ‘threats or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’.<sup>105</sup> This is also part of the *actus reus* of this crime. Thirdly, the purposes of those acts relate to the reasons why people are trafficked. The three elements need to be present in order for an act to be categorised as trafficking in persons, specifically as the trafficking of an adult. This general definition of trafficking in persons is supplemented by a couple of provisions relating to children:

- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age.<sup>106</sup>

The inclusion of these provisions means that the Trafficking Protocol ‘[n]ot only does take into account children’s special vulnerability but it also makes it easier for law enforcement agencies and prosecutors to provide evidence to ensure that child traffickers are punished’.<sup>107</sup> This is because the definition of child trafficking does not take into consideration the issue of consent. In this sense, the Trafficking Protocol considers the trafficking of children as a special case where coercion or force does not need to be present for the child to be regarded as trafficked. It is also noted that the Trafficking Protocol clearly define the term ‘child’ as any person under the age of eighteen. This is in complete contrast to the Islamic understanding as explored in the previous chapter. Islam does not specify the age of the child and leaves it to the discretion of States to decide, and because of this there is disagreement over the age that grants a child legal, religious and criminal responsibilities among the four Islamic schools of thought.

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<sup>104</sup> Art3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25. As of November 2015, there were 169 State Parties and 117 signatories to the Trafficking Protocol.

<sup>105</sup> *ibid* art 3(a).

<sup>106</sup> *ibid* art 3.

<sup>107</sup> H Van de Glind and J Kooijmans, ‘Modern-Day Child Slavery’ (2008) 22 *Children & Society* 156.

However, there is no reason in Islamic main sources that prevent Islamic States from complying with international standards in this regard and provide the same definition of the term ‘child’.

It has been observed that before this Protocol came into existence, the definition of trafficking in persons varied among States and NGOs.<sup>108</sup> Therefore, it is vital that there is now an agreed legal definition of trafficking; this was provided for the first time by Article 3, Trafficking Protocol. Thus, the development of this definition has been seen as a positive step forward in tackling this problem. In this respect, Gallagher states that:

By incorporating a common understanding of trafficking into national legislation, state parties will be able to cooperate and collaborate more effectively than ever before. Common definitions will also assist in the much-needed development of indicators and uniform data collection procedures.<sup>109</sup>

Furthermore, in comparison with the previous instruments, such as the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others in 1949,<sup>110</sup> McSherry and Kneebone note the development of the Trafficking Protocol as a positive step that extends the crime beyond sexual exploitation:

[T]he definition of ‘trafficking in persons’ in the UN Protocol makes a significant step away from previous definitions that linked trafficking offences solely with the provisions of sexual services. By including the terms ‘forced labour or services, slavery or practices similar to slavery, servitude or the removal of organ’, the definition emphasizes that exploitation may take on a variety of forms other than prostitution.<sup>111</sup>

It can be observed that the Protocol’s understanding of trafficking has been widely adopted, either explicitly or implicitly, across the international community. Since 2000, the majority of States, including SA and the UAE, have adopted comprehensive anti-trafficking laws that support and reflect the internationally agreed definition.<sup>112</sup> At the same time, several regional treaties on trafficking have been developed and provide definitions that also support the key elements of the definition in the Protocol. For instance, in 2006 the League of Arab States<sup>113</sup> drafted the Arab TIP Model Law,<sup>114</sup> and in 2010 it also adopted the Arab TOC Convention,<sup>115</sup>

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<sup>108</sup> Janice G Raymond, ‘The UN Trafficking Protocol’ (2002) 25(5) Women’s Studies Intl Forum 491, 494-495.

<sup>109</sup> Anne T Gallagher, ‘Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis’ (2001) 23 Human Rights Quarterly 975, 1004.

<sup>110</sup> Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (adopted 2 December 1949, entered into force 25 July 1951) 96 UNTS 271.

<sup>111</sup> B McSherry and S Kneebone, ‘Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights’ (2008) 12(1) International Journal of Human Rights 69.

<sup>112</sup> UNODC, ‘Global Report on Trafficking in Persons’ (February 2009) 22.

<sup>113</sup> Founded on 19 March 1945, the League of Arab States is the oldest existing international organisation in the world, predating even the creation of the United Nations by seven months. The League includes twenty-two Arab States.

<sup>114</sup> Arab Guiding Law on Human Trafficking, (9 November 2005) (Arab TIP Model Law).



both of which set out a definition of human trafficking which is identical to one contained in Article 3 of the Trafficking Protocol. In comparison to the Trafficking Protocol, the Arab TIP Model Law adds extra forms of exploitation, including begging, conducting scientific experiments and any other forms of exploitation that are legally sanctioned.<sup>116</sup> It includes the same provision regarding the consent of the victim, namely the irrelevance of the victim's consent to exploitation. Most importantly, it defines child as 'a person under eighteen years of age'. It is interesting to note that, from the Islamic perspective as noted above, despite differences of perception in relation to the maturity of a child, there is a consensus on the definition of 'child' for the purpose of human trafficking. This means that Islamic law supports international actions against child trafficking. In addition, this confirms the conclusion reached in the previous chapter that there is nothing in the Islamic law sources to prevent Islamic States from specifying the age of majority. The use of the definition contained in Article 3 of the Trafficking Protocol by the League of Arab States and the majority of Islamic States is significant as it represents and reinforces an international consensus regarding the definition of human trafficking. A major strength of the definition in Article 3 of the Trafficking Protocol is that it assists in the avoidance of contradictory definitions of trafficking which could potentially undermine the global action against human trafficking.

Regionally, the Arab TIP Model Law defines many of the terms used within it, and most of them are identical to the relevant international instruments. For instance, Article 1(3) provides a definition of an 'organised criminal group',<sup>117</sup> Article 1(4) defines 'transnational crime',<sup>118</sup> and both are the same as the definitions provided by the UN TOC Convention.<sup>119</sup> In addition, Article 1(11) defines 'forced labour',<sup>120</sup> which reflects the ILO Forced Labour Convention No 29.<sup>121</sup> Similarly slavery is defined in Article 1(12),<sup>122</sup> which reflects the definition of slavery contained

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<sup>115</sup> Arab Convention against Transnational Organised Crime (approved 21 October 2010, entered into force 5 October 2013) (Arab TOC Convention).

<sup>116</sup> Arab TIP Model Law (n 114) art 1(2).

<sup>117</sup> *ibid* art 1(3).

<sup>118</sup> *ibid* art 1(4).

<sup>119</sup> art 2(a) and (c), Convention Against Transnational Organised Crime (adopted 15 November 2000, entered into force 29 September 2003) UN Doc A/RES/55/25 (UN TOC Convention). As of November 2015, there were 186 State Parties and 147 signatories to the UN TOC Convention.

<sup>120</sup> Arab TIP Model Law (n 114) art 1(11).

<sup>121</sup> ILO Convention No 29 of 1930 concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932) art 2.

<sup>122</sup> Arab TIP Model Law (n 114) art 1(12).

in the Slavery Convention 1926.<sup>123</sup> Therefore, it remains the accepted definition of slavery in both international and regional laws. The Arab TIP Model Law goes a step further than the Trafficking Protocol by defining ‘sexual exploitation’ in Article 1(9) as:

the use of a person, male or female, to satisfy the desires of others in any way, or engage in any acts of rape or crimes of a sexual nature, or exploited in the production practices of graphics, images, scenes, pornographic movies or to perform any work or performance of a sexual nature.<sup>124</sup>

In practice, some Arab States, such as Bahrain, have copied the Trafficking Protocol definition in their anti-trafficking laws.<sup>125</sup> Others, such as Egypt, have followed the Arab Model Law and expanded on the types of exploitation, and have also clearly indicated that both internal and international trafficking are included under their laws.<sup>126</sup> This suggests that the different schools of thought in Islam as explored in chapter two have no significant implications when formulating the offence of trafficking.

Gallagher has argued that States are not required to reproduce the fairly complex international legal definition as set out in the Trafficking Protocol and other international trafficking instruments. However, certain core features of the international definition would need to be included to satisfy the obligation of criminalisation.<sup>127</sup> She emphasised that ‘a law that did not distinguish between trafficking in adults and children, that only criminalised trafficking for sexual exploitation or only criminalised trafficking in women and children would not meet the international legal standard’.<sup>128</sup> She also referred to two other important features of the international definition: first, ‘that definition does not require that exploitation actually take place’; and second, ‘the consent of the victim does not alter the offender’s criminal liability’.<sup>129</sup> The following chapters will examine how SA and the UAE define child trafficking at the national level and analyse its compatibility with international standards.

A final and important question to discuss in this section is whether crossing international borders is a necessary requirement in the definition of trafficking or whether it is possible for a child to be trafficked within a State. During the drafting process, for some advocates crossing a national border was a crucial element of the definition. They claimed that crossing the border

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<sup>123</sup> Slavery Convention (25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

<sup>124</sup> Arab TIP Model Law (n 114) art 1(9).

<sup>125</sup> Bahrain Law No 1 of 2008, Law with Respect to Trafficking in Persons.

<sup>126</sup> Art 2 adds ‘begging and subjecting a person to medical tests’: Egypt Law No 64 of 2010 (Law Regarding Combating Human Trafficking).

<sup>127</sup> Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 374.

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

places the victim in an unfamiliar milieu where she or he may be culturally and linguistically isolated, denied legal identity or access to justice or faced with other barriers which increase their vulnerability to abuse and exploitation.<sup>130</sup>

On the other hand, others argue that, although some sort of physical movement or transport is required, crossing borders of any kind should not be a necessary element to define the crime of trafficking; the harm to victims can be the same whether they are moved a few miles across national borders or many miles within national boundaries.<sup>131</sup> However, as pointed out by Coomaraswamy, the most important issue in this regard is that victims are moved or transported to an unfamiliar environment where they are disconnected from family, community and friends, and denied access to support, services and justice.<sup>132</sup> This is because these conditions increase trafficked victims' marginalisation and the risk of abuse, exploitation, violence or discrimination by third parties (traffickers, states or police), regardless of whether the movement is across or within national borders.<sup>133</sup>

According to Article 4 of the Trafficking Protocol,<sup>134</sup> the scope of the Protocol is limited to crimes committed by an organised criminal group and also requires a transnational element to bring the offence under the UN TOC Convention.<sup>135</sup> Definitions of both terms are provided by the UN TOC Convention. Article 2 states that:

[O]rganised criminal group shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>136</sup>

Further, Article 3(2) provides that, for the purpose of this Convention:

[T]he offence is transnational in nature if:

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (d) It is committed in one State but has substantial effects in another State.<sup>137</sup>

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<sup>130</sup> A Stewart, 'Report from the Roundtable on the Meaning of Trafficking in Persons: A Human Rights Perspective' (1998/1999) 20(1) Women's Rights Law Reporter 14.

<sup>131</sup> Global Alliance Against Trafficking in Women, Foundation Against Trafficking in Women and International Human Rights Law Group, 'Human Rights Standards for the Treatment of Trafficked Persons' (January 1999) 3.

<sup>132</sup> UNCHR, 'Report by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy' (27 January 2000) E.CN4/2000/68/Add.3, 9.

<sup>133</sup> *ibid* 9.

<sup>134</sup> Trafficking Protocol (n 104) art 4.

<sup>135</sup> *ibid* art 4.

<sup>136</sup> UN TOC Convention (n 119) art 2(a).

<sup>137</sup> *ibid* art 3(2).

In other words, the scope of the Trafficking Protocol explicitly excludes the types of trafficking offences that take place within only one country. It also neglects the more informal arrangements where private individuals rather than organised criminal groups facilitate trafficking.<sup>138</sup> Private individuals will either intend to exploit the child themselves or deliver them to other persons knowing that they are subsequently going to be exploited. It is important to state that the requirement of a transnational element does not necessarily mean that the child has to be moved across external borders. For instance, where the child is exploited in one State but a substantial part of the preparation, planning, direction or control takes place in another State, this will be sufficient to satisfy the requirement of a transnational element.<sup>139</sup>

Because of the narrow scope and the limited criminal methodology of the Trafficking Protocol, and in order not to completely exclude national trafficking from the scope of the Convention and its Protocol, the Legislative Guide for the Implementation of the Trafficking Protocol clarified that neither transnationality nor involvement of an organised criminal group should be made an element of domestic offences: ‘In domestic law, the offences established in accordance with the Convention and its Protocols must apply equally, regardless of whether the case involves a transnational element or is purely domestic.’<sup>140</sup> Further, in this regard, Jordan recommends that:

[D]omestic legislation should go further than the Trafficking Protocol and include all domestic and cross-border trafficking and should punish individual traffickers as well as organized criminal groups. Trafficking within some countries is as serious as, or more serious than, cross-border trafficking.<sup>141</sup>

This view is also supported by the Special Rapporteur on TIP.<sup>142</sup> All of this suggests that anti-trafficking legislation at the national level should cover both purely domestic and cross-

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<sup>138</sup> Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006) 24. Also, it is worth noting that, according to the HRW Reports, there is evidence of the involvement of relatives, friends, acquaintances, individual agents or brokers who were involved in trafficking. HRW, *Owed Justice: Thai Women Trafficked into Debt Bondage in Japan* (Human Rights Watch 2000).

<sup>139</sup> UN TOC Convention (n 119) art 3(2)(b).

<sup>140</sup> UNODC, ‘Legislative Guides for the Implementation of the UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’ (UNODC 2004) 10.

<sup>141</sup> AD Jordan, ‘The Annotated Guide to the Complete UN Trafficking Protocol’ (Report, International Human Rights Law Group 2002) 14. In this respect, according to the Special Rapporteur on TIP during her visit to Egypt, ‘the incidence of internal trafficking is much higher than transnational trafficking’: see UNHRC, ‘Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on TIP, Ngozi Ezeilo’ (15 April 2011) UN Doc A/HRC/17/35/Add.2.

<sup>142</sup> The Commission on Human Rights appointed a Special Rapporteur on TIP in 2004. UNCHR (n 101) 26. See also, Sigma Huda, ‘Addendum, Mission to Bosnia and Herzegovina’ (2005) UN Doc E/CN.4/2006/62/Add.20-2.

border child trafficking crimes, and traffickers – regardless of whether they are part of an organised criminal group or acting individually – should be punished under the law. At the regional level, it is worth noting that unlike the Trafficking Protocol the Arab Model TIP Law clarifies its scope of application so that there are no doubts that it applies to every form of trafficking in persons, whether national or transnational. Positively, the majority of the Arab States follow this approach and covered all forms of trafficking in their anti-trafficking legislation while considering the two conditions as aggravating circumstances. Examples of this approach can be seen in SA and the UAE anti-trafficking laws.

To summarise the human trafficking definition section, it is noted that, although the Trafficking Protocol recognises all people as potential victims of trafficking, as its title suggests it places special emphasis on the conditions of children. According to the definition, three key elements are identified: the actions element; the achievement of their consent through improper means (the means); and their final exploitation (the purpose). If one of these elements is missing, it is not possible to consider the problem as trafficking in adult persons. By contrast, the definition of child trafficking does not take into consideration the issue of consent, so the movement of a child followed by his/her exploitation is enough to be considered as child trafficking. According to the agreed definition, trafficking is now acknowledged as a process of moving people within and between States.<sup>143</sup> There is a common understanding of the meaning of human trafficking at international and regional levels. The Protocol's definition is framed sufficiently to fight any new form of exploitation that in the future might constitute one of the three necessary elements of the offence and it also incorporates a wider range of potential victims and perpetrators. This thesis, therefore, adopts the Protocol's definition throughout this study.

In comparing this with the Islamic law framework, Islamic States' obligations to prohibit the crime, punish its perpetrator and protect its victim were clearly provided by the Qur'an and the Sunnah, as shown in chapter two. It concluded that there is a general consensus among the four Islamic schools of thought on the prohibition of the crime of child trafficking and its related crimes. From this conclusion, it can be said that Islam as both religion and law supports the international action against human trafficking. In practice, this is supported and strengthened by

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<sup>143</sup> Despite the requirement of a transnational nature of any offence established under the Convention and its supplementary Protocols, Art 34.2 of the TOC Convention, requires each state party to adopt a trafficking offence in its domestic law, independently of its transnational nature.

a number of facts. First, most Islamic States are States Parties to the main international instruments against trafficking (i.e. the Trafficking Protocol). A survey of the records of ratification of the UN TOC Convention and the Trafficking Protocol shows that, to date, 50 out of the 57 member States of the OIC, regardless of the school of thought they follow (Hanbali, Maliki, Shafi'i or Hanafi), have ratified both documents.<sup>144</sup> Secondly, at the regional level, a number of recent regional instruments as well as previously established human rights documents which were adopted in the Muslim world, have all condemned and prohibited human trafficking and provided for the protection of its victims, for example, Article 11 of the Arab TOC Convention<sup>145</sup> and Article 17 of the OIC Child Covenant.<sup>146</sup> Finally, at the national level, today the majority of Islamic States have enacted anti-trafficking legislation which utilises the exact definition of trafficking provided by the Trafficking Protocol, for instance, Article 1 of the Saudi TIP Act of 2009 and the UAE TIP Law of 2006. It is also important to note that Islamic States' constitutions require that national legislation must be in compliance with the main sources of Shariah.<sup>147</sup> In this case, the fact that anti-trafficking legislation has been enacted using the international standards as guidance signifies that both Islamic as well as international laws in relation to the prohibition of trafficking are compatible. This is also observed by Mattar: 'rules of international law and the principles of Islamic law are complementary to each other in effectively and comprehensively combating trafficking in persons'.<sup>148</sup> Therefore, and based on the above, Islamic States today are obliged not only under international law but also under Islamic law to prevent human trafficking and protect its victims. El-Sawi pointed out that: 'Muslim nations, more than ever, have reason – even a religious obligation – to prevent human trafficking, protect

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<sup>144</sup> UN Trafficking Protocol, 'Status of Ratification' <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en)> accessed 20 July 2017.

<sup>145</sup> Arab TOC Convention (n 115) art 11.

<sup>146</sup> OIC Covenant on the Rights of the Child in Islam (adopted 23 June 2005) art 17.

<sup>147</sup> For example, SA Basic Law, art 1 'SA is a sovereign Arab Islamic State with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution': Basic Law of Governance. Also, see the Iraqi Constitution 2005 which contains a similar provision in art 2: 'Islam is the official religion of the State and is a foundation source of legislation: A. No law may be enacted that contradicts the established provisions of Islam'. That type of provision may be contrasted with, for example, the Constitution of the State of Kuwait 1962 which provides in art 2 that: 'The religion of the State is Islam and Islamic Law shall be a main source of legislation'.

<sup>148</sup> Mohamed Y Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law' (2010) UNOV/DM/CMS/EPLS 1, 7.

its victims, and prosecute its perpetrators’.<sup>149</sup> The next sections examine in detail the provisions of the UN TOC Convention and the Trafficking Protocol in the light of Islamic law to determine their scope of compatibility. The 3P obligations will be analysed, followed by an Islamic law perspective in respect to each element. Reference will be made to the main sources of Shariah, namely the Qur’an and Sunnah, as well as the OIC Child Covenant. The practices of relevant Islamic States are also cited for necessary illustration.

### **3.5 Prohibition, prosecution and punishment**

#### **3.5.1 Prohibition at the international level**

Having explored the definition and the scope of application at international and regional levels, it is now necessary to examine the core obligations, also known as the ‘3P’ obligations, contained in both instruments. This part will consider the first obligation which prohibits and prosecutes child trafficking. It is widely considered that criminalisation of trafficking is a crucial element of a comprehensive response to human trafficking at the national level.<sup>150</sup> Further, this provision has been described as ‘a central and mandatory obligation of all State Parties to the Trafficking Protocol’.<sup>151</sup> States Parties which fail to fully and effectively criminalise trafficking are therefore failing to comply with their obligations with regard to protecting victims of trafficking and preventing further trafficking.<sup>152</sup>

Article 5 of the Trafficking Protocol makes it an obligation to prohibit trafficking. A similar provision is provided by the Arab TIP Model Law in Article 3(1). Both documents also extend to criminalising other acts, such as attempts, secondary participation and directing others to commit trafficking in persons crimes.<sup>153</sup> In this regard, the *Travaux Préparatoires* explained that some States intend the reference to the attempt to commit an offence to include both preparative acts and unsuccessful attempts.<sup>154</sup> In addition to the prohibition of trafficking itself, States are obliged to prohibit other relevant crimes associated with trafficking by the UN TOC

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<sup>149</sup> Myada O El-Sawi, ‘Beyond the “tiers” of Human Trafficking Victims: Islamic Law’s Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law’ (2011) 39(2) *Georgia Journal of International and Comparative Law* 391, 410.

<sup>150</sup> Gallagher (n 109) 371.

<sup>151</sup> UNODC (n 140) 10, part 2, para 36.

<sup>152</sup> Gallagher (n 109) 371.

<sup>153</sup> Trafficking Protocol (n 104) art 5(2). Arab TIP Model Law (n 114) art 5.

<sup>154</sup> UNODC, ‘Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime on the Works of its First to Eleventh Sessions’ (3 November 2000) UN Doc A/55/383, 70.

Convention which are commonly used to support transnational organised crime activities:<sup>155</sup> participating in organised criminal groups,<sup>156</sup> money laundering,<sup>157</sup> corruption<sup>158</sup> and obstruction of justice.<sup>159</sup> Similarly, the Arab TOC Convention contains the exact obligations in its Articles 22 and 23.

It should be noted that there are no provisions on the liability of legal persons in the Trafficking Protocol. However, according to Article 1 of the Protocol, the provisions of the UN TOC Convention shall apply, *mutatis mutandis*, to the Protocol, and the offences established in accordance with the Protocol shall be regarded as offences established in accordance with the Convention. In this respect, the measures contained in the Convention also have to be applied to human trafficking.<sup>160</sup> Thus, for example, the extension of the measure on the criminal, civil or administrative liability of legal persons contained in Article 10 of the UN TOC Convention is very important in the fight against traffickers who may act through legal persons established as companies, corporations, employment and travel agencies, and other institutions. Additionally, the liability of legal persons is without prejudice to the criminal liability of the natural persons who have committed the offences.<sup>161</sup> Finally, each State Party is obliged to ensure that the legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.<sup>162</sup> At the regional level, in line with Article 10 of the UN TOC Convention, Article 23 of the Arab TIP Model Law recognises corporate liability.<sup>163</sup>

Sanctions are an essential element of a comprehensive response to human trafficking in order to ensure the effectiveness of the criminal justice system. States have a clear obligation to impose sanctions under both international and regional laws. It is a requirement of the UN TOC Convention that offences established under that instrument and, by extension, the Trafficking Protocol, are liable to sanctions that take into account the gravity of the offences and give due regard to deterrence.<sup>164</sup> Article 2(b) of the UN TOC Convention defines serious crime as ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four

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<sup>155</sup> Gallagher (n 109) 978.

<sup>156</sup> UN TOC Convention (n 119) art 5.

<sup>157</sup> *ibid* art 6.

<sup>158</sup> *ibid* art 8.

<sup>159</sup> *ibid* art 23.

<sup>160</sup> UNODC (n 140) 272-5.

<sup>161</sup> UN TOC Convention (n 119) art 10(3).

<sup>162</sup> *ibid* art 10(4).

<sup>163</sup> *ibid* art 23.

<sup>164</sup> *ibid* art 11(1).



years or a more serious penalty'. In a similar vein, UN treaty bodies have repeatedly called on Member States to appropriately punish those who engage in human trafficking crimes,<sup>165</sup> for example, the CEDAW Committee has urged States Parties to ensure that they 'punish traffickers in accordance with the gravity of their crimes'.<sup>166</sup> Having said this, unfortunately neither the trafficking instruments nor the relevant human rights treaties set a fixed threshold for the imposition of appropriate sanctions. Therefore, it is crucial to understand what the effective and proportionate sanction is for those individuals who have trafficked and exploited minors.

Referring to human rights committees' interpretation of the sanction provision can facilitate a better understanding of this issue. For instance, the CEDAW Committee commended the UAE TIP Law as it provides for severe sanctions of imprisonment, including imprisonment for life in certain cases (including where the victim is child).<sup>167</sup> In addition, the Special Rapporteur on TIP praised the same legislation for inclusion of the provision on the confiscation of assets of persons found guilty of human trafficking.<sup>168</sup> The CRC Committee applauded the sanction provision of the TIP Law of Bahrain as it provides that punishment for the crime of human trafficking may also, in addition to the criminal sanctions, involve noncustodial sanctions for traffickers, such as monetary sanction and closure of an establishment used to carry out trafficking crimes.<sup>169</sup> Therefore, it can be concluded that these types of penalties are recommended and considered appropriate. On the other hand, it is significant to highlight that if penalties are set very high they do not satisfy the effective and proportionate standard. For instance, some Muslim scholars called for the imposition of the death penalty in order to serve the purpose of deterrence of Islamic criminal punishment, and they argued that it is the most proportionate punishment.<sup>170</sup> Their argument is based on the fact that child trafficking is

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<sup>165</sup> CommEDAW, 'Concluding Observation to Lebanon' (8 April 2008) UN Doc CEDAW/C/LBN/CO/3, para 29. See also UN Committee on CRC, 'Concluding Observation on Niger' (18 June 2009) UN Doc CRC/C/NER/CO/2, para 77. CommEDAW, 'Concluding Observation: Morocco' (8 April 2008) UN Doc CEDAW/C/MAR/CO/4, para 23.

<sup>166</sup> OHCHR, 'Concluding Comments of the CommEDAW: Morocco, (Fortieth session, 14 January-1 February 2008) CEDAW/C/MAR/CO/4, para 23. Also, CommEDAW, 'Concluding Observations on the Combined Second and Third Periodic Reports of the UAE' (24 November 2015) CEDAW/C/ARE/CO/2-3, para 32.

<sup>167</sup> CommEDAW, 'Concluding Observations on the First Periodic Reports of the UAE' (18 January-5 February 2010) CEDAW/C/ARE/CO/1, para 2.

<sup>168</sup> UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on TIP, Joy Ngozi Ezeilo, Addendum, Mission to the UAE' (22 February 2013) UN Doc A/HRC/23/48/Add, para 62.

<sup>169</sup> Article 2 Bahrain Law No 1 of 2008, Law with Respect to Trafficking in Persons.

<sup>170</sup> Al-Shiekhali A, *Penalties of Human Trafficking Crimes in Islamic, Arabic, and International*

considered ‘corruption on earth’, which is prohibited in Shariah and requires severe punishment.<sup>171</sup> Additionally, Al-Murad added that sanctions are strongly connected to the criminal act. In this sense, if the victims lose their lives during their journey or after they arrive to their destinations then *qisas* can be extended and applied in this case.<sup>172</sup> This opinion is based on the Qur’an: ‘And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous’.<sup>173</sup> However, the death penalty is problematic, not just from a human rights perspective.<sup>174</sup> While Islamic law allows capital punishment, and international law does not yet categorically reject it, human trafficking experts, particularly in the area of criminal justice responses to trafficking, argued that it is unlikely that provision for such a sanction for child trafficking offences would easily meet the ‘effective and proportionate’ standard ‘given the complexity of the trafficking crimes, inevitable investigatory difficulties, and highly variable levels of complicity among offenders’.<sup>175</sup> In addition, Gallagher noted that ‘imposition of the death penalty may also be an obstacle to extradition under major extradition treaties’.<sup>176</sup> She added that ‘when considering whether penalties meet the generally accepted standard, it is important that States take into account the particularities of this crime-type’.<sup>177</sup> In respect of the Islamic perspective, it must be pointed out that, since States within the Muslim world have discretion under Islamic law to prescribe the *tazir* penalty, under which the human trafficking crime is categorised as noted in chapter two, Islamic States, as mentioned earlier, can thus effectively exercise that discretion in cognizance of their international human rights law obligations. This will result in better compliance of Islamic States and international laws in terms of an appropriate penalty for the crime of child trafficking.

In short, this thesis argues that one of the primary purposes of passing anti-trafficking laws is to strengthen criminal punishment so that sentences reflect the serious nature of the crime and make prosecutorial efforts worthwhile. Punishments therefore need to be consistent with the

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*Laws* (Alhalbi Legal Publications 2009) 55. See also, Mohammed Al-Murad, *Combat Human Trafficking* (Naif Arab University for Security Science Press 2005) 80-81.

<sup>171</sup> Qur’an, 5:33.

<sup>172</sup> Mohammed Al-Murad, *Combat Human Trafficking* (Naif Arab University for Security Science Press 2005) 81.

<sup>173</sup> Qur’an, 2:179.

<sup>174</sup> Mayer has argued that this punishment ‘is inconsistent with modern penological principles and modern human rights norms’. Mayer (n 57) 37.

<sup>175</sup> Anne Gallagher and Paul Holmes, ‘Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line’ (2008) 18(3) *International Criminal Justice Review* 318, 323.

<sup>176</sup> Gallagher (n 127) 396.

<sup>177</sup> *ibid.*

harm caused to victims and the benefits derived from the trafficking and related exploitation.<sup>178</sup> Inappropriately light sentences that do not reflect the harm or the benefits derived will hinder effective criminal justice responses and may contribute to the development of safe havens for traffickers in the State. Consequently, this will not offer victims protection from further harm.<sup>179</sup>

Unlike the UN TOC Convention and the Trafficking Protocol which do not refer to aggravated circumstances, at the regional level, the Arab TIP Model Law introduces a specific provision in this regard and it enhances the penalties in the following cases:

- (a) If the crime is committed using threats and/or weapons;
- (b) If the crime is committed by the spouse or one of the close relatives of the victim;
- (c) If the crime is committed or facilitated by a public official;
- (d) If the crime results in serious harm or permanent disability;
- (e) If the crime is committed against children or persons with special needs;
- (f) If the crime is committed by an organised criminal group;
- (g) If the crime is transnational in nature.<sup>180</sup>

The above shows that the penalty is increased when the victim is a child by virtue of Article 3(2)(e). Many of the Arab States follow this Model Law and a similar list of aggravating circumstances is included in their anti-trafficking laws.<sup>181</sup> Another important and positive provision that is also beyond the scope of the Trafficking Protocol is contained within Article 11 of the Arab TIP Model Law. It criminalises the use of services of victims of trafficking or any services that constitute a type of exploitation if the perpetrator was aware that the persons had been trafficked. In addition, the penalty is increased if the victim is a child.<sup>182</sup> Syrian anti-trafficking law follows this positive approach of criminalises the use of services of victims of trafficking.<sup>183</sup> It should be noted that such a provision provides a very good basis to counter the demand that lies behind trafficking, thus helping to prevent the crime as well.

From the above, it is evident that States' obligations to prohibit human trafficking are well established in international and regional laws. As can be seen, the Arab Model TIP Law and the Arab TOC Convention are, in general, in line with the international laws relevant to human

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<sup>178</sup> Gallagher (n 109) 395, see also, UNODC (n 140) part 1, 130.

<sup>179</sup> Gallagher (n 109) 392.

<sup>180</sup> Arab TIP Model Law (n 114) art 3(2).

<sup>181</sup> For example, art 4 of the Bahrain Law No 1 (n 125); art 6 of the Egypt Law (n 126); art 7 of the Jordan Law of 3 March 2009; art 15 of the Qatar Law No 15 of 2011 (Law Regarding Combating Human Trafficking).

<sup>182</sup> Arab TIP Model Law (n 146) art 11.

<sup>183</sup> Art 9(2) provides that 'anyone who has knowledge of the act of trafficking and benefits materially or morally from the services provided by the victim of trafficking shall be subject to imprisonment from six months to two years in addition to a fine'; Syrian Legislative Decree No 3 of 2010, Decree on the Crimes of Trafficking in Persons.

trafficking. However, it is also noted that regional instruments contain a number of important provisions which go beyond the scope of the Trafficking Protocol. This places Arabic States including SA in a position to make a comprehensive response to child trafficking at the national level.

From the Islamic perspective, Islamic Scholars drafted the OIC Covenant on the Rights of the Child in Islam in 2005 based on their understanding and interpretation of the main sources of Shariah.<sup>184</sup> It is the current codified charter of Islamic child rights and a legally binding document within the OIC States that have ratified it.<sup>185</sup> All Islamic States, regardless of the different schools of thought they follow, have ratified the OIC Child Covenant. According to Article 17(2), States shall take the necessary measures to protect the child from ‘all forms of torture or inhumane or humiliating treatment in all circumstances and conditions, or his/her smuggling, kidnapping, or trafficking in him/her’. This is clear evidence of the shared consensus on the prohibition of child trafficking at both levels, Islamic and international. In regards to the punishments, as noted earlier, this crime is categorised under the category of *tazir*. *Tazir* covers a variety of punishments that are within the discretion of the judge (or State). Under this category, judges are responsible for imposing appropriate penalties which should match the objectives of the Islamic criminal justice system as examined earlier. The next chapters will illustrate how Islamic States translate this into practice. Finally, Islamic States that have ratified the UN TOC Convention and the Trafficking Protocol have an obligation to prohibit trafficking, prosecute traffickers and impose appropriate sanctions under both laws.

### **3.5.2 Prohibition under international human rights treaties and labour conventions**

States’ obligation to prohibit child trafficking can also be inferred from a number of human rights treaties at both international and regional levels. In particular and for the purpose of this thesis, CRC<sup>186</sup> and its OP on Sale of Children<sup>187</sup> are worth exploring. In addition, some of the international labour conventions make direct reference to child trafficking so they will also be

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<sup>184</sup> OIC Child Covenant(n 146).

<sup>185</sup> It has a membership of 57 States spread over four continents.

<sup>186</sup> CRC (n 36). As of 23 October 2015, there were 196 States Parties.

<sup>187</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 39 ILM 1285 (CRC OP on Sale of Children). As of 23 October 2015, there were 171 States Parties.

examined. At the regional level, the Arab Charter on Human Rights is the oldest example of the positive steps that have been taken by the League of Arab States to address human trafficking.<sup>188</sup>

The obligation to investigate, prosecute and punish traffickers is clearly established by jurisprudence of international human rights law. One of the important case which touches upon these obligation is that of *Rantsev v Cyprus and Russia* handed down on 7 January 2010.<sup>189</sup> In this case,<sup>190</sup> the ECHR established that human trafficking as a form of modern day slavery is a violation of Article 4 of the European Convention on Human Rights,<sup>191</sup> and that Member States are required to meet certain positive and procedural obligations to provide effective mechanisms to protect individuals against human trafficking, investigate such crimes, and prosecute and punish the offenders.<sup>192</sup> In its deliberations, the Court opened up the prospect of a clearer understanding of the way to deal with the phenomenon of human trafficking and elevated the human rights approach above other considerations to combat such practice. The ECHR stated that:

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.<sup>193</sup>

The Court confirmed that Article 4 entailed a specific positive obligation on Member States to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour: 'In order to comply with this obligation, member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking.'<sup>194</sup> The Court observed that the provisions of both the Trafficking Protocol and European Trafficking Convention give a clear indication that the States parties are of the

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<sup>188</sup> Arab Charter (n 98).

<sup>189</sup> *Rantsev v Cyprus and Russia* (7 January 2010) ECHR App No 25965/04, 3, 53.

<sup>190</sup> Oxana Rantsev, who brought the case to the ECHR, was the father of a young Russian woman, who was trafficked from Russia to Cyprus under the false pretence of working as a dancer in a cabaret club; she was forced into prostitution, and found dead on the street in March 2001. The applicant alleged a violation of Article 4 of the European Human Rights Convention by both the Russian and Cypriot authorities in light of their failure to protect his daughter from being trafficked and their failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there.

<sup>191</sup> Article 4 of the European Human Rights Convention states that (1) No one shall be held in slavery or servitude; (2) No one shall be required to perform forced or compulsory labour.

<sup>192</sup> *Rantsev* (n 189) 3, 53.

<sup>193</sup> *ibid* para 282.

<sup>194</sup> *ibid* para 285.

view that only a combination of measures addressing all three aspects of prosecution, prevention and protection can be effective in the fight against trafficking in persons. It could be argued that *Rantsev* formulated new State responsibilities with respect to human trafficking and put those specific duties into the context of general State obligations in the field of human rights.

To start with the prohibition obligation under human rights, Article 35 of the CRC is the most important measure dealing with child trafficking. It requires States Parties to ‘take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form’.<sup>195</sup> The CRC Committee has regularly pronounced on trafficking related issues in its concluding observations on States Parties’ reports and has found that child trafficking directly violates Article 35 of the CRC. The CRC Committee clearly state that States must enact legislation to prohibit child trafficking and strengthen its efforts to investigate trafficking cases and ensure that perpetrators are prosecuted.<sup>196</sup> While the emphasis has been firmly on trafficking for sexual exploitation, the Committee has also recognised the phenomenon of trafficking for economic exploitation, including forced labour.<sup>197</sup> Under this provision, the CRC Committee, for instance, expressed concern about the hazardous situation of children involved in camel racing in Qatar.<sup>198</sup> Therefore, it can be said that the prohibition of child trafficking for any purpose is clearly established under the CRC.

The CRC OP on Sale of Children goes beyond the CRC in several respects. The Special Rapporteur on the Sale of Children, acknowledged that, ‘in most cases where there is a sale there is also trafficking involved’.<sup>199</sup> Articles 1 and 3 of the OP specifically oblige States Parties to prohibit the sale of children and exploitation and punish offenders with appropriate penalties, taking into consideration the gravity of the offences.<sup>200</sup> Article 2(a) of the Protocol gives the definition of the sale of children as ‘any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration’.<sup>201</sup> There are

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<sup>195</sup> CRC (n 36) art 35.

<sup>196</sup> For example, CommRC, ‘Concluding observations: SA’ (17 March 2006) UN Doc CRC/C/SAU/CO/2, para 72; Also CommRC, ‘Concluding observations: Bangladesh’ (27 October 2003) UN Doc CRC/C/15/Add.221, para 74(c).

<sup>197</sup> For example, CommRC, ‘Concluding observations: Malaysia’ (2 February 2007) UN Doc CRC/C/MYS/CO/1, para 95 (sexual exploitation, forced labour and adoption).

<sup>198</sup> CommRC, ‘Concluding observations: Qatar’ (2001) UN Doc CRC/C/111/59, paras 320 and 321.

<sup>199</sup> UNHRC, ‘Report of the Special Rapporteur on the Sale of Children, Child Prostitution, and Child Pornography, Ms. Ofelia Calcetas Santos’ (1999) UN Doc E/CN.4/1999/71, 5.

<sup>200</sup> CRC OP (n 187) art 3(3).

<sup>201</sup> *ibid* art 2(a).

various forms that this ‘consideration’ may take and it is not limited to monetary consideration. Other offences under this OP include the offering, delivering or accepting, by whatever means, of a child for the purpose of sexual exploitation, forced labour or the transfer of organs of the child for profit.<sup>202</sup> This means that States are obliged to deal with parents who agree to their child participating for example in camel racing, whether for a one-off payment, a regular payment, or some other benefit.

In regards to the prohibition of child forced labour in particular, which is one of the end purposes of child trafficking, the ILO has adopted some conventions that make direct reference to the fight against such practice, most importantly, the Forced Labour Convention No 29.<sup>203</sup> This was the first international document to articulate the definition of forced labour. It states that forced labour is: ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.<sup>204</sup> This is the same definition adopted at the regional level. Another important provision is Article 11(1) which provides that ‘only adult able-bodied males who are of an apparent age of not less than 18 and not more than 45 years may be called upon for forced or compulsory labour’.<sup>205</sup> Thus, the Convention clearly prohibits the forced labour of children. This is in line with international human right conventions discussed above; it is also in compliance with Islamic law shown in chapter two. In addition, Article 25 of this Convention obliges States Parties to:

... criminalise forced or compulsory labour, which shall be punishable as a penal offence, and it shall be an obligation on any Member State ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced.<sup>206</sup>

This Convention is therefore very important in the fight against child trafficking and exploitation. The ILO Committee of Experts on the Application of Conventions and Recommendations makes this point thus:

A crucial element of the definition of trafficking is its purpose, namely, exploitation, which is specifically defined to include forced labour or services, slavery or similar practices, servitude and several forms of sexual exploitation. The notion of exploitation of labour inherent in this definition allows for a link to be established between the Palermo Protocol and Convention No. 29, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour

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<sup>202</sup> *ibid* art 2(1)(a)(i).

<sup>203</sup> ILO Convention No 29 (n 121).

<sup>204</sup> *ibid* art 2(1).

<sup>205</sup> *ibid* art 11(1).

<sup>206</sup> *ibid* art 25.

provided under Article 2, paragraph 1, of the Convention. This conjecture facilitates the task of implementing both instruments at the national level.<sup>207</sup>

In addition to the Forced Labour Convention, the most relevant treaties adopted by the ILO in the field of child labour are the Convention No 138 concerning minimum age for admission to work,<sup>208</sup> and Convention No 182 concerning the elimination of the worst forms of child labour.<sup>209</sup>

According to Article 2 of the ILO Convention No 138, each State Party shall declare a minimum age for children to be admitted to work. The minimum age shall not be less than the age of completion of compulsory schooling and, in any case, no less than 15 years. Moreover, the Convention establishes a minimum age of 18, or, in some circumstances 16, for hazardous work, namely work that, ‘by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons’.<sup>210</sup> In general, this Convention has often been referred to in relation to the protection of child labourers from exploitation activities.<sup>211</sup>

The subsequent ILO Convention No 182 deals specifically with the abolition of the worst forms of child labour. Under this Convention, each State is required to take ‘immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency’.<sup>212</sup> The scope of the worst forms of child labour is provided by Article 3:

- (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflicts;
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.<sup>213</sup>

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<sup>207</sup> ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Eradication of forced labour: General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No 105)* (Geneva 2007) 41.

<sup>208</sup> Convention Concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO Convention No 138).

<sup>209</sup> Convention Concerning the Prohibition and Immediate Actions for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 38 ILM 1207 (ILO Convention No 182).

<sup>210</sup> ILO Convention No 138 (n 208) art 3(1).

<sup>211</sup> R Hodgkin and P Newell (eds), *Implementation Handbook on UN Convention of the Child* (UNICEF 1998) art 32, 427-431.

<sup>212</sup> ILO Convention No 182 (n 209) art 1.

<sup>213</sup> *ibid* art 3.



In contrast to the Minimum Age Convention, the Worst Forms of Child Labour Convention focuses on the prohibition and elimination of four main categories of child labour rather than setting a minimum age at which a child can work. Furthermore, not only does the ILO Convention No 182 explicitly include child trafficking, in Article 3(a), as one of the worst forms of child labour but, since child trafficking harms the health, safety or morals of children and hinders their education, it can also be considered one of the worst forms of child labour under Article 3(d). In this sense, child trafficking is not only the worst form of child labour in itself but it also supports the other worst forms. It is worth noting that the unconditional worst forms of child labour, as defined by the ILO Convention No 182, comprise both the sale of children as defined by the CRC OP on Sale of Children and child trafficking as defined by the Trafficking Protocol. Therefore, it can be said that the ILO Convention No 182 is the broadest international instrument dealing specifically with child labour exploitation, including, but not limited to, child trafficking and the sale of children for sexual or other forms of exploitation. This is important when adopting and amending national legislations relevant to child trafficking.

If Member States enforce the ILO Conventions properly, this should contribute effectively to eradicating all of the worst forms of child labour, which contain an element of forced labour, and will in turn lead to the prevention of child trafficking. Islamic law condemns all forms of forced labour and prohibit child exploitation as illustrated previously. Most importantly, the majority of Islamic States including SA and the UAE, regardless of the school of thought they follow, have ratified these conventions. This suggests that Islamic law does not oppose international action against child exploitation in particular or more generally against child trafficking.

In terms of the regional instrument, Article 10(2) of the Arab Charter on Human Rights is important as it obliges States to prohibit ‘forced labour, human trafficking for prostitution or sexual exploitation, the exploitation of others for prostitution and any other forms of exploitation, as well as exploiting children during armed conflicts’.<sup>214</sup> Although the Arab Charter does not explicitly use the term ‘human trafficking’ for forced labour, the article does make it clear that all forms of trafficking are prohibited. Therefore, the prohibition of all acts under Article 10 contributes effectively to the international and regional efforts to fight against human trafficking. Article 34(3) is another important provision in the Arab Charter, which prohibits

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<sup>214</sup> Arab Charter (n 98) art 10(2).

work that may be dangerous to the child. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age of employment.
- (b) Provide for appropriate regulation of the hours and conditions of employment.
- (c) Provide for appropriate penalties or other sanctions to ensure effective enforcement of this article.<sup>215</sup>

This article indicates that it should be read and interpreted in light of the relevant international standards and that it is in line with Article 32 of the CRC,<sup>216</sup> and Article 6(1)<sup>217</sup> and Article 7 of the ILO Convention No 182.<sup>218</sup> It is important to highlight that the Arab Charter itself does not contravene either Islamic or international law. This is evidenced by the Preamble of the Arab Charter,<sup>219</sup> and Article 43 of the Charter, which defines the relationship with international law in the following way:

Nothing in the present Charter shall be interpreted as impairing the rights and freedoms protected by the State Parties' own laws, or as set out in international or regional instruments of human rights that the State Parties have signed or ratified, including women's rights, children's rights and minorities' rights.<sup>220</sup>

Interestingly, following SA's ratification of the Charter, Turki Al-Sudayri, President of the Saudi Human Rights Commission, stated that such ratification 'constituted a major achievement as it clearly serves to realise a national benefit'. He stressed that the Charter's articles do not contravene domestic laws. Indeed, 'the Charter's articles are comprehensive and in harmony with the principles of Shariah and do not belittle any of the human rights provided for in international human rights treaties'.<sup>221</sup>

From the Islamic perspective, as shown in the previous chapter, Islamic law prohibits labour exploitation. This prohibition is supported by the Qur'an's general command that employers should 'fulfil the measure and weight and do not deprive people of their due and cause not corruption upon the earth after its reformation'.<sup>222</sup> Islam's condemnation of the

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<sup>215</sup> *ibid* art 34(3).

<sup>216</sup> CRC (n 36) art 32: 'States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'

<sup>217</sup> ILO Convention No 182 (n 209) art 6(1), 'Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour'.

<sup>218</sup> *ibid* art 7(1) '1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.'

<sup>219</sup> Arab Charter (n 98) Preamble.

<sup>220</sup> *ibid* art 43.

<sup>221</sup> Turki ibn Khalid Al-Sudayri (Riyadh newspaper, issue No 14493, 28 February 2008).

<sup>222</sup> Quran, 7:85.

infliction of hardship or harm equally applies to the very difficult forms of work that are associated with forced labour. Consequently, child trafficking for the purpose of forced labour causing emotional or physical hardship, including sexual exploitation, is a prohibited labour practice under Islamic law. Article 18 of the OIC Covenant provides that: ‘Domestic regulations of every State shall fix a minimum working age, as well as working conditions and hours’.<sup>223</sup> This is in line with international human rights law discussed earlier.<sup>224</sup>

As can be seen, it is obvious that there is a common understanding and a general consensus at all levels – Islamic, international and regional – on the prohibition of child trafficking for any purposes. States’ obligation to prohibit child trafficking is clearly established under international and regional instruments.

### **3.6 Protection measures**

#### **3.6.1 Protection at the international level**

The second ‘P’ refers to protection of victims of trafficking. The Trafficking Protocol has three main purposes: firstly, ‘to prevent and combat trafficking, paying particular attention to women and children’;<sup>225</sup> secondly, ‘to protect and assist the victims of such trafficking, with full respect of their human rights’;<sup>226</sup> and finally, ‘to promote cooperation among States Parties in order to meet these objectives’.<sup>227</sup> Although these three objectives are of equal importance, the Trafficking Protocol mainly focuses on law enforcement rather than human rights.<sup>228</sup> Gallagher argues that the Trafficking Protocol adopts a comprehensive approach to address the three areas of prevention, prohibition and protection but its emphasis is directly on criminal justice aspects of trafficking.<sup>229</sup> Coonan and Thompson note that the Trafficking Protocol contains mandatory obligations in relation to criminalisation, investigation, prosecution and cooperation between national law enforcement authorities and border control, while it uses discretionary language in

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<sup>223</sup> OIC Covenant (n 146) art 18(2).

<sup>224</sup> CRC (n 36) arts 32, 34, 35 and 36.

<sup>225</sup> Trafficking Protocol (n 104) art 2(a).

<sup>226</sup> *ibid* art 2(b).

<sup>227</sup> *ibid* art 2(c).

<sup>228</sup> Sarah King, ‘Human Trafficking: Addressing the International Criminal Industry in the Backyard’ (2008) *University of Miami International and Comparative Law Review* 376. Elizabeth Defeis, ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons: A New Approach’ (2003/2004) 10 *ILSA Journal of International & Comparative Law* 485.

<sup>229</sup> Anne Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ (2006) 8 *European Journal of Migration and Law* 165.

relation to the protection of the rights and needs of trafficked persons.<sup>230</sup> Fitzpatrick points out that while several provisions of the Trafficking Protocol recognise trafficked persons as victims of human rights abuse, explicitly preserve their rights under international law, and suggest (albeit weakly) that States should meet the needs of trafficking victims for care, support and relief from deportation, the focus remains on crime control and deterrence of unlawful migration.<sup>231</sup> This was also noted by the Special Rapporteur on Violence against Women when she expressed her concerns about the lack of strong protection measures, specifically in relation to women, in the Trafficking Protocol:

... the first modern international instrument on trafficking is being elaborated in the context of crime control, rather than with a focus on human rights. This is a failure of the international human rights community to fulfil its commitment to protect the human rights of women.<sup>232</sup>

Even though this statement was made with reference to women victims, it also applies to all trafficking victims, including children. Despite this, from another perspective, Obokata and Scarpa highlight that the Trafficking Protocol's weak provisions regarding the human rights obligations of States should not be considered a disadvantage because international human rights law and other international mechanisms can supplement the Protocol in this respect.<sup>233</sup> A detailed overview of human rights instruments and the UN mechanisms and procedures relevant to child trafficking at international and regional levels will be provided later.

Protection provisions in the Trafficking Protocol are provided by Articles 6, 7 and 8. They provide protection to victims mainly in the context of criminal proceedings. Article 6(1), for instance, obliges each State to protect the privacy and identity of victims, in the first instance by making legal proceedings confidential.<sup>234</sup> This is because the appearance of victims' names in public could lead to revenge attacks from traffickers. According to Article 6(2), in appropriate cases States must provide information on relevant court and administrative proceedings and give assistance to enable the victim's views and concerns to be presented and considered at appropriate stages of criminal proceedings.<sup>235</sup> It should be noted that 'appropriate cases' are not

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<sup>230</sup> Terry Coonan and Robin Thompson, 'Ancient Evil, Modern Face: The Fight against Human Trafficking' (2005) 6 *George Town Journal of International Affairs* 46.

<sup>231</sup> Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: the Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2003) 24 *Michigan Journal of International Law* 1152.

<sup>232</sup> UNCHR (n 132) 7.

<sup>233</sup> Obokata (n 138) 164-65. Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 110.

<sup>234</sup> Trafficking Protocol (n 104) art 6(1).

<sup>235</sup> *ibid* art 6(2).

defined and it is not clear what falls within this category and who is deserving of protection according to the Trafficking Protocol. Consequently, it leaves a large margin of discretion to States. Article 6(3) requires States to consider implementing measures to provide for the physical, psychological and social recovery of victims. In particular, these should be: the provision of (a) appropriate housing; (b) counselling and information, especially with regard to victims' legal rights in a language that the victims of trafficking in persons can understand; (c) medical, psychological and material assistance; and (d) employment, educational and training opportunities.<sup>236</sup> In a similar vein, Arab TIP Model Law follows the Trafficking Protocol and provides similar provisions under Article 30. Some Arab States followed the Trafficking Protocol and the Arab Model Law precisely and others took steps to expand the rights of victims.<sup>237</sup>

In addition, each State Party to the Trafficking Protocol is encouraged to consider adopting measures to enable a victim to remain in its territory, either temporarily or permanently,<sup>238</sup> taking into consideration humanitarian and compassionate factors.<sup>239</sup> However, there is no indication as to what form these measures may take and, as States are only obliged to consider adopting these measures, the effect of Article 7 will vary between States and be based on their own national legislation. On the other hand, if victims of trafficking are to be returned to their country of origin, repatriation is one of their rights under Article 8. The *Travaux Préparatoires* clarified that 'permanent residence' not only means indefinite residence but also long term residence.<sup>240</sup> At the regional level, the Arab TIP Model Law provides the same provision in the same wording in Article 30(8). The following chapter will examine whether this provision conforms to Shariah or conflicts with it.

With regard to the victim's right to compensation, Article 6(6) provides for the possibility of obtaining compensation for damage suffered.<sup>241</sup> Although the earlier debates of the Trafficking Protocol pointed out the need to oblige Member States to adopt the use of

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<sup>236</sup> *ibid* art 6(3).

<sup>237</sup> For example, Bahrain Law (n 125) art 5(3) and (4); Syria Legislative Decree (n 183) art 15; Oman Law Royal Decree 126/2008 (Decree Promulgating the Law Combating Trafficking in Persons) (23 November 2008) art 5; Egypt Law (n 126) art 23.

<sup>238</sup> Trafficking Protocol (n 104) art 7.

<sup>239</sup> *ibid* art 7(2).

<sup>240</sup> The Interpretive Note on art 8 of the Protocol by the Ad Hoc Committee (n 56) paras 72, 388.

<sup>241</sup> Trafficking Protocol (n 104) art 6(6).

confiscated assets for the compensation of victims of trafficking,<sup>242</sup> it was omitted from the final text.<sup>243</sup> At the regional level, victims also have a right to seek compensation similar to the provisions provided by the Trafficking Protocol. However, in contrast to the Trafficking Protocol, Article 36 of the Arab TIP Model Law details this right; it provides for the establishment of a State fund in order to:

... assist victims of human trafficking' and to provide 'financial assistance to victims who have suffered harm resulting from any of the crimes stipulated in the law'. [In addition,] the proceeds of the fines sentenced for the crimes stipulated in the law, as well as the properties, objects, and means of transportation forfeited shall be allocated directly to the fund, which may also accept contribution, grants, and donations from governmental and non-governmental entities.<sup>244</sup>

In practice, the Egyptian anti-trafficking law adopted the same provision;<sup>245</sup> the law of Lebanon goes further and provides for confiscation of assets of the crime of trafficking and uses the proceeds to compensate the victim.<sup>246</sup>

Articles 6, 7 and 8 of the Protocol deal with the protection of victims, these provisions are to be read and implemented in conjunction with Articles 24 and 25 of the UN TOC Convention. Article 24 obliges States Parties to provide effective protection from potential retaliation or intimidation against witnesses in criminal proceedings who are to give testimony concerning offences covered by the Convention and, when appropriate, to their relatives and other persons close to them.<sup>247</sup> The Article also applies to victims insofar as they are witnesses. Under Article 25, States Parties are required to provide protection to victims of offences covered by the Convention, particularly against the threat of retaliation or intimidation.<sup>248</sup> They are also required to enable the views and concerns of victims to be presented and considered at appropriate stages of the criminal proceedings against offenders in a manner which is not prejudicial to the rights of the defence.<sup>249</sup> At the regional level, in terms of witness and victim protection, Article 36(1), (2) and (3) of the Arab TOC Convention reflects Articles 24 and 25 of the UN TOC Convention. This indicates that there is clear compliance with international law.

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<sup>242</sup> At the Second Session of the Ad Hoc Committee, Argentina proposed that this measure should be included in the Trafficking Protocol, UNODC (n 120) 10.

<sup>243</sup> Anne T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Human Rights Quarterly 975, 991.

<sup>244</sup> Arab TIP Model Law (n 114) art 36.

<sup>245</sup> Egypt Law (n 126) art 27.

<sup>246</sup> Lebanon Anti-Trafficking Law No 164 of 2011, art 586(10).

<sup>247</sup> UN TOC Convention (n 119) art 24.

<sup>248</sup> *ibid* art 25(1).

<sup>249</sup> *ibid* art 25(2)-(3).

However, it could be argued that this safety and security is limited to the duration of the trial. As a result, the witnesses are likely to be harmed, both before and after the trial, and after they leave the protection of the law. Thus, there is a need to ensure that the protection of these victims is long-lasting and sufficient. It is the responsibility of the Member State to safeguard the rights of the trafficked victims. Logically, after the victims have received protection from the government, they tend to gain confidence. As a result, they are able to make better decisions and also assist the authorities to punish the traffickers. Therefore, a form of trust is generated between the victim and the State.<sup>250</sup>

In comparing protection measures provided at an international and regional level so far, it can be noted that the two instruments offer almost the same provisions. However, the first provision of the protection chapter in the Arab TIP Model Law stands in contrast to the Trafficking Protocol as it requires States Parties to adopt the principle of non-punishment of trafficking victims for their involvement in unlawful activities on the grounds that they have been compelled to perform them.<sup>251</sup> This provision is based on the principles of Islamic law as shown in the previous chapter and is very important because if victims have no fear of being prosecuted for their illegal acts in the process of trafficking, the chances of their more frequent and effective cooperation with national authorities will increase and this would positively influence the national and international fight against traffickers more generally. An identical provision appears in Article 21 of the Egyptian,<sup>252</sup> and Article 4 of the Qatari,<sup>253</sup> anti-trafficking laws. It is worth mentioning that each State follows different Islamic schools of thought (Shafi'i and Hanbali respectively). However, both adopted the same Islamic principle of non-punishment of victims, and because it is one of the Islamic principles, it should be applied to all Islamic jurisdictions. Article 28 of the Arab Model Law specifically 'exempts a victim from punishments stipulated in the law with regard to the violations of entry, residency and work'.<sup>254</sup> Lebanon,<sup>255</sup> and the Qatari,<sup>256</sup> anti-trafficking laws adopts this model. Another important measure, Article 30, introduces a provision that deals specifically with the identification of the

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<sup>250</sup> Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking Who Give Evidence Against their Traffickers' (2002) 14(2) International Journal of Refugee Law 263, 269.

<sup>251</sup> Arab TIP Model Law (n 114) 27.

<sup>252</sup> Egypt Law (n 126) art 21.

<sup>253</sup> Qatar Law (n 181) art 4.

<sup>254</sup> Arab TIP Model Law (n 114) art 28.

<sup>255</sup> Lebanon Anti-Trafficking Law No 164 of 2011, art 586(8).

<sup>256</sup> Qatar Law (n 181) art 25.

victim, thereby going further than the Trafficking Protocol. Undoubtedly, the process of identification of the victim forms the basis of all the measures taken to combat human trafficking and ensure the protection of victims. It is argued that, 'by failing to identify trafficked victims correctly, States effectively and permanently deny victims the ability to realise the rights and protections to which they are legally entitled.'<sup>257</sup> It can be said that it is the responsibility of the government to formulate and implement practical and systematic identification strategies designed to fit multiple circumstances for trafficked victims.

Overall, it is observed that the protection provisions of the Arab TIP Model Law and the Arab TOC Convention are more detailed and include additional provisions compared with the Trafficking Protocol, which is more focused on the human rights of victims. Arabic States should consider following this guiding law when enacting or amending their anti-trafficking laws and ensure the implementation of such measures.

In the context of this thesis, there is a need to undertake more analysis with respect to specific protection measures for child victims of trafficking. As shown above, the only specific reference to this issue is contained in Article 6(4) of the Trafficking Protocol. This emphasises that, in granting assistance and protection to trafficking victims, special attention should be paid to children, especially for their housing, education and care. The wording of this provision is vague and unclear, its language has failed to indicate what is required and what is appropriate for child victims of trafficking, which has made it difficult to ascertain the precise nature of States' obligations under this provision. The same provision is also provided by Article 30(7) of the Arab TIP Model Law. The wording of both instruments is ambiguous and does not provide for mandatory protection of child victims. It is obvious that implementing these measures is in large part at the discretion of governments. It must be pointed out that, where individual States do not put these provisions in place, the victims feel unsafe, which makes the punishment of the traffickers difficult. The victims also tend to refrain from complaining to the authorities due to their lack of trust. As some scholars suggest, the best approach in combating the human trafficking is to strike a balance between a system wherein traffickers are criminalised and prosecuted, and victims are decriminalised and protected.<sup>258</sup> In 2004, the UN Commission on Human Rights appointed a

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<sup>257</sup> Gallagher (n 127) 282.

<sup>258</sup> Alexandra Amiel, 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 Buffalo Human Rights Law Review 27, 28; Fitzpatrick (n 231) 1165; UNCHR (n 132) 4.



Special Rapporteur on TIP, Sigma Huda, with a mandate to focus on the human rights aspects of victims of trafficking, especially women and children.<sup>259</sup> In her first report, she noted that human trafficking ‘represents the denial of virtually all human rights’.<sup>260</sup> The Report stated that the treatment of trafficking offences as gross violations of human rights creates a sound ground for holding States responsible for complying with their human rights obligations beyond the strict scope of the Trafficking Protocol.<sup>261</sup> Therefore, it is worth noting that the Trafficking Protocol has been supplemented by the Legislative Guide for the Implementation of the Trafficking Protocol.<sup>262</sup> While not legally binding, it intended to promote and facilitate the integration of a human rights perspective into anti-trafficking laws and interventions at all levels.

The appointment of a guardian is an important element in the protection of the rights and interests of child victims of trafficking, which the Trafficking Protocol is silent on, the accompanying Legislative Guide encourages States Parties to:

[Consider] appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interests of the child has been identified and implemented.<sup>263</sup>

In addition, the Trafficking Protocol does not specifically address the issue of child victims’ involvement in criminal proceedings. However, the Legislative Guide provides extensive guidance on this point. It requests States Parties to ensure that:

[D]uring investigation, as well as prosecutions and trial hearings where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interests of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. Children who agree to testify should be accorded special protection measures to ensure their safety.<sup>264</sup>

The Legislative Guide to the Trafficking Protocol recommends the relevant authorities to ‘take all necessary steps to trace, identify and locate family members and facilitate the reunion of

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<sup>259</sup> UNCHR, ‘Integration of the Human Rights of Women and Gender Perspective, Report of the Special Rapporteur on TIP, Sigma Huda’ (2004) E/CN.4/2005/171, para 1, 4.

<sup>260</sup> *ibid* para 9, 6.

<sup>261</sup> *ibid* para 17, 8.

<sup>262</sup> Legislative guides for the implementation of the Trafficking Protocol have been adopted in order to provide clearer guidance as to the meaning of the provisions. However, they cannot impose any legally binding obligations on any States, and as advised by the Legislative Guides, it will be up to the States and their political will to follow the advice provided. See UNODC (n 56).

<sup>263</sup> UNODC (n 140) part 2, para 65(a).

<sup>264</sup> *ibid* 10, para 65(b).

the child victim with his or her family where that is in the best interests of the child'.<sup>265</sup>

Moreover, it is very specific on the need for special care in the repatriation of child victims:

[I]n cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interests and, prior to the return, a suitable caregiver such as a parent, a relative, another adult caregiver, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him or her with appropriate care and protection. Relevant ... authorities ... should be responsible for establishing whether or not the repatriation of a child victim is safe and should ensure the process takes place in a dignified manner and is in the best interests of the child.<sup>266</sup>

The above shows that the Legislative Guide provides detailed measures in relation to child victims of trafficking. These measures are essential for child victims and they are largely in line with the accepted international as well as Islamic human rights. They may be considered as basic good practices for States.

In addition, the UNHCHR presented a set of Trafficking Principles and Guidelines (Recommended Principles and Guidelines on Human Rights and Human Trafficking) to the United Nations Economic and Social Council in July 2002.<sup>267</sup> These Principles and Guidelines aim at promoting and facilitating the integration of a human rights perspective into national, regional and international anti-trafficking laws, as well as reflecting careful analysis of the challenges of protecting the human rights of trafficking victims.<sup>268</sup> The Trafficking Principles and Guidelines, which consist of 17 Principles and 11 Guidelines, highlight the importance of protecting the human rights of trafficked persons when attempting to prevent trafficking, prosecute traffickers and protect the victims.<sup>269</sup> The Trafficking Principles and Guidelines challenge the common perception that trafficking is primarily a crime or migration matter. For example, Guideline 1 states that 'violations of human rights are both a cause and a consequence of trafficking in person'.<sup>270</sup> It stresses the primacy of human rights, which must 'be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims'.<sup>271</sup>

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<sup>265</sup> UNODC (n 140) 10, para 66.

<sup>266</sup> *ibid* 10, part 2, para 66.

<sup>267</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Commentary* (United Nations 2010) 15.

<sup>268</sup> *ibid*.

<sup>269</sup> UN HCHR to the Economic and Social Council, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) UN Doc E/2002/681 Add. 1.

<sup>270</sup> *ibid*.

<sup>271</sup> *ibid*.

It is obvious that the Trafficking Principles and Guidelines could also compensate the weak and discretionary protection provisions contained in the Trafficking Protocol and provide more effective and specific guidelines to address the rights and needs of children who are victims of trafficking. One of the important measures in relation to child protection contained in this document is Guideline 2. It stresses the importance of establishing reliable techniques to identify trafficking victims, it is noted that the Trafficking Protocol does not provide clear guidance on this measure. Another important measure, which the Trafficking Protocol is silent on, is the principle of non-punishment of victims. Principle 7 challenges the tendency to blame the victim and forbids the punishment of trafficking victims. In addition, Principle 8 requires States to protect victims from further exploitation and to provide them with physical and psychological care. Moreover, these provisions should not be conditional upon the trafficked victim's willingness to cooperate with law enforcement authorities.<sup>272</sup> With regard to child victims in particular, the Trafficking Principles and Guidelines request States Parties to 'ensure that children who are victims of trafficking are not subjected to criminal proceedings or sanctions for offences related to their situation as trafficked persons'.<sup>273</sup>

It could be argued that these Principles and Guidelines represent an important reference for States to combat trafficking as a human right abuse rather than simply a crime or migration issue. The Special Rapporteur on TIP emphasised their importance by stating that, 'the Guidelines and their implementation must be considered within the broader framework of the Protocol and other relevant conventions and treaties'.<sup>274</sup>

Following the example of the UNHCHR, in 2003 the United Nations Children's Fund (UNICEF), developed a set of Guidelines for Protection of the Rights of the Child Victims of Trafficking.<sup>275</sup> The Guidelines adopt the same definition of 'child trafficking' provided by the Trafficking Protocol. In relation to the child victims' rights, the UNICEF Guidelines provide detailed protection measures. For instance, they contain information on the function and responsibilities of guardianship in the context of the special needs of child victims of trafficking.<sup>276</sup> They also offer a list of measures with regard to the issue of child victims' involvement in criminal proceedings. Most importantly, they grant a 'reflection and recovery'

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<sup>272</sup> *ibid.*

<sup>273</sup> *ibid.*, guideline 8.3.

<sup>274</sup> UNCHR (n 101) [15].

<sup>275</sup> UNICEF, *Guidelines in the Protection of Child Victims of Trafficking* (UNICEF 2006).

<sup>276</sup> *ibid.* guideline 3.2.

period prior to the child making any decisions about his or her involvement in criminal proceedings; prioritising family reunion and return over criminal justice proceedings when such reunion/return is in the child's best interests; providing the child witness with legal representation and an interpretation service; and providing for alternatives to direct testimony that protect the child witness's identity, privacy and dignity, such as videos relays, closed hearings and witness concealment.<sup>277</sup> With regard to the repatriation of child victims of trafficking, according to the UNICEF Guidelines, a determination to this effect would need to be made on the basis of a comprehensive risk assessment.<sup>278</sup>

It is observed that, similar to the UN Trafficking Principles and Guidelines, the UNICEF Guidelines are also designed to promote the integration of a human rights perspective into anti-trafficking legislations. While not legally binding, both can be viewed as a tool which respects the special rights of child victims of trafficking. These measures are essential for child victims and they are largely in line with accepted international as well as Islamic human rights.

### **3.6.2 Protection under international human rights treaties and labour conventions**

As indicated earlier, international human rights treaties could also impose certain obligations in relation to the protection of trafficking victims' rights.<sup>279</sup> International human rights law generally supports a relatively higher standard of protection and support for trafficked children, a standard that takes into account their special vulnerabilities, rights and needs. The obligation to protect victims of trafficking, for example, can be inferred from a general duty to secure, ensure, or restore rights, and to provide remedies.<sup>280</sup> Perhaps the most significant advantage that a human rights approach offers is the ability to hold States accountable for how they treat their nationals and other individuals under their control.<sup>281</sup> Addressing child trafficking as a human rights issue has appeared in a variety of legal instruments of varying binding effect, at both international and regional levels. The discussion below demonstrates how the development of a human rights approach to trafficking has helped in setting much higher

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<sup>277</sup> *ibid* guideline 3.9.1.

<sup>278</sup> *ibid* guideline 3.7.

<sup>279</sup> Obokata (n 138) 391 and 396.

<sup>280</sup> *ibid*.

<sup>281</sup> Elizabeth Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40 *Stanford Journal of International Law* 32.

standards than those contained in the Trafficking Protocol, and thus formulated new State obligations with respect to child trafficking.

In the context of the protection of child victims of trafficking, Article 2 of the CRC is very important because it allows positive action to be taken in relation to particularly disadvantaged or vulnerable groups,<sup>282</sup> of which trafficked children are included. Furthermore, Article 3(1) emphasises the principle of acting in the ‘best interests of the child’. In General Comment No 6, the CRC Committee considered the application of the ‘best interests’ principle in the context of unaccompanied or separated children (a group that can be expected to include most if not all child victims of trafficking).<sup>283</sup> From the Islamic perspective, one of the main principles of the OIC Child Covenant is to ‘attach high priority to the rights, interests, protection, and development of children’.<sup>284</sup> Article 16 of the OIC Covenant provides for the care of a disabled child or one with special needs, including education, rehabilitation and training; providing medical, psychological, social and educational services to enable him/her to be integrated into society.<sup>285</sup> A trafficked child can be included under such group. Therefore, all rights are applicable to them.

There are a number of provisions that are directly relevant to the protection of child victim of trafficking, such as Articles 32, 34, 36 and 39. These provide protection to children from economic, sexual or any other kinds of exploitation, and further recognise the right of children to physical and psychological recovery and social reintegration in cases where they have been subjected to exploitation or abuse. Similar provisions are provided by the OIC Child Covenant. Articles 15, 17 and 18 provide for the same rights under the CRC. In this sense, Islamic States, which have all ratified the CRC, are not only under an international legal duty but also under a religious obligation to respect and ensure children rights guaranteed under both conventions. In broad sense, this demonstrates that the international instrument (CRC) and the regional instrument (OIC Covenant) are both compatible, in terms of child victims protection.

The CRC Committee, in the light of the abovementioned articles, has made many references to child trafficking in the recommendations and observations of its reports to States Parties. Among the comments in relation to the protection of victims, there are recommendations

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<sup>282</sup> CommRC, ‘General Comment No 5, General measures of implementation of the CRC’ UN Doc CRC/GC/2003/5.

<sup>283</sup> CommRC, ‘General Comment No 6’ UN Doc CRC/GC/2005/6, para 19-22.

<sup>284</sup> OIC Covenant (n 146) art 3(3).

<sup>285</sup> *ibid* art 16(2).

for States Parties to strengthen their efforts to identify the trafficking of children: '[e]stablish an effective screening process to identify child victims of trafficking; and ensure that they are neither detained nor deported and that they are provided with adequate recovery and social reintegration services and programmes'.<sup>286</sup> It is worth noting that such provisions are missing in the Trafficking Protocol.

The aforementioned General Comment No 6 on the treatment of unaccompanied and separated children who are outside their country of origin provides important guidance which is relevant to child victims of trafficking.<sup>287</sup> To begin with, unaccompanied children are those children 'who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so'.<sup>288</sup> Similarly, separated children are the ones 'who have been separated from both parents, or from their previous legal or customary primary caregivers, but not necessarily from other relatives'.<sup>289</sup> The Committee has clearly recognised in this general comment that child trafficking is one of many dangers faced by unaccompanied or separated children, and that this crime is a threat to the fulfilment of their right to life, survival and development. The Committee continues by stating that 'the appointment of a competent guardian who considers and implements the best interests of an unaccompanied or separated child is essential',<sup>290</sup> and urges the States to appoint one accordingly.<sup>291</sup> Further, CRC General Comment No 6 provides that:

[I]n developing policies on unaccompanied or separated children, including those who are victims of trafficking ... States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country.<sup>292</sup>

This provision, which is missing in the Trafficking Protocol, recognises that victims of human trafficking require protection rather than prosecution due to their unwilling involvement in criminal activities. As noted in the previous chapter, this is also one of the basic principles of Islamic law.

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<sup>286</sup> CommRC, 'Concluding Observations: Oman' (24 June 2009) UN Doc CRC/C/OPSC/OMN/CO/1, para 30; CommRC (n 282) para 96.

<sup>287</sup> CommRC, 'General Comment No. 6, in Notes by the Human Rights Treaty Bodies' (8 May 2006) UN Doc HRI/GEN/1/Rev.8, 407.

<sup>288</sup> *ibid* 411, 7.

<sup>289</sup> *ibid* 8.

<sup>290</sup> CommRC (n 283) para 21.

<sup>291</sup> *ibid* para 33.

<sup>292</sup> *ibid* para 62.

Moving on to the protection provisions contained in the CRC OP on Sale of Children, it requires States to adopt appropriate measures to protect the rights and interests of child victims at all stages of the criminal justice process under Article 8, which include:

- (a) Recognising the vulnerability of child victims and adapting procedures to recognise their special needs, including their special needs as witnesses;
- (b) Informing child victims of their rights, their role and the scope timing and progress of the proceedings and of the disposition of their cases;
- (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- (d) Providing appropriate support services to child victims throughout the legal process;
- (e) Protecting, as appropriate, the privacy and identity of child victims;
- (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf from intimidation and retaliation;
- (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.<sup>293</sup>

The OP on Sale of Children requires that appropriate training, in particular legal and psychological training, be given to people who are to work with child victims of trafficking and exploitation.<sup>294</sup> In addition, States must take all feasible measures to provide all appropriate assistance to victims.<sup>295</sup> States must also provide adequate procedures to victims in order to enable them to claim, without discrimination, compensation for damages from those legally responsible.<sup>296</sup>

Considering the above analysis, it is evident that the wide gaps in the Trafficking Protocol, with respect to protection and assistance to child victims of trafficking, can be filled by the CRC and its OP on Sale of Children provisions, and States Parties' implementation of these measures is monitored by the Committee of the CRC, unlike the Trafficking Protocol which does not have an independent monitoring mechanism at moment. Consequently, these instruments can contribute effectively towards improving the standard of protection contained in the Trafficking Protocol and monitor States' compliance with its provisions.

The standards developed by the ILO conventions supplement those of the human rights conventions discussed above and therefore they may contribute to shape the protection framework to which the victims of child trafficking are entitled. This is especially as the aim of the ILO Minimum Age Convention is to protect children from abuse and exploitation. This

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<sup>293</sup> CRC OP on Sale of Children (n 187) art 8.

<sup>294</sup> *ibid* art 8(4).

<sup>295</sup> *ibid* art 9(3).

<sup>296</sup> *ibid* art 9(4).

Convention has often been referred to in relation to the protection of child labourers from exploitation and hazardous activities.<sup>297</sup> In addition, under Convention No 182, States Parties shall design and implement programmes of action to eliminate child engagement in the worst forms of child labour.<sup>298</sup> Article 7 is important as it not only obliges States to prohibit these practices but also to implement measures for the prevention and protection of children. States Parties shall adopt measures to prevent the worst forms of child labour, taking into consideration the important role of education, provide assistance to remove children from a condition of exploitation and guarantee their rehabilitation and social integration.<sup>299</sup> States Parties shall also ensure access to free basic education and, whenever possible, to vocational training of all the children illegally employed in the worst forms of child labour. They shall identify those children who are at risk and take into special consideration the situation of girls.<sup>300</sup>

The Committee of Experts on the Application of Conventions and Recommendations (ILO Committee),<sup>301</sup> which monitors the implementation of ILO instruments, has made important observations with regard to the ‘3P’ obligations that specifically relate to child trafficking and exploitation. In respect to victims’ protection, for example, the Committee expressed its concern regarding Oman’s ‘lack of assistance provided to child victims of trafficking, and asked the government to take measures which include repatriation, family reunification and support for former child victims of trafficking, in cooperation with the child’s country of origin’.<sup>302</sup> The Committee also asked Bahrain to strengthen its efforts in providing the necessary and appropriate direct assistance for the identification and removal of child victims of trafficking, and for their rehabilitation and social integration.<sup>303</sup> These comments show some example of relevant protection obligations imposed upon States under the ILO Conventions

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<sup>297</sup> Rachel Hodgkin and Peter Newell (eds), *Implementation Handbook on UN Convention of the Child* (UNICEF 1998) art 32, 427-431.

<sup>298</sup> ILO Convention No 182 (n 209) art 6.

<sup>299</sup> *ibid* art 7(2)(a) and (b).

<sup>300</sup> *ibid* art 7(2)(c), (d) and (e).

<sup>301</sup> ILO Constitution (adopted 1 April 1919, entered into force 28 June 1919) art 22 states that: ‘Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.’

<sup>302</sup> ILO, ‘Direct Request (CEACR): Oman’ (adopted 2009)

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2310578](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2310578)> accessed 2 April 2015.

<sup>303</sup> ILO, ‘Direct Request (CEACR): Bahrain’ (adopted 2010)

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2333962](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2333962)> accessed 7 May 2015.



analysed above. It is clear that the ILO conventions' obligation in relation to child victims' protection complements the Trafficking Protocol.

Having identified States' obligations under international human rights treaties, it is now useful to turn the focus to the relevant instrument at the regional level. Although the Arab Charter on human rights does not explicitly refer to protection and assistance for victims of trafficking, it contains a number of provisions that can be applied in these cases. For instance, the right to life;<sup>304</sup> the right to liberty and security;<sup>305</sup> the right to privacy;<sup>306</sup> and Article 12 provides that everyone has 'the right to seek a legal remedy before courts of all levels'.<sup>307</sup> The Charter also provides for the right of victims to compensation.<sup>308</sup> Another important provision regarding the child's best interests is provided by Article 33(3).<sup>309</sup> The Arab Committee established under the charter, which monitors the implementation of the charter among State Parties, has expressed its concerns in relation to action against human trafficking and the protection of its victims. For example, it stressed the importance of victims' protection and the need to amend the Anti-Trafficking Law No 51 of 2006 of the UAE to include a comprehensive protection framework for victims of trafficking.<sup>310</sup> It can be observed that the Arab Charter incorporates the international standards, for instance, Article 33 reflects Article 8 of the CRC OP on Sale of Children.<sup>311</sup> This shows that there is no conflict between international law and regional law when it comes to child trafficking. In this sense, it appears that children rights are protected under both international and regional human rights standards. Therefore, States must meet their obligations and ensure that such rights are guaranteed at the national level for all child victims, including those victims of human trafficking.

To summarise the protection section, it is observed that international human rights treaties as well as regional ones clearly complement the provisions of the Trafficking Protocol aimed at child victims' protection. Additionally, it is also clear that there are not conflict between international law and regional law when it comes to child trafficking. It is also noted that both

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<sup>304</sup> Arab Charter (n 98) art 5.

<sup>305</sup> *ibid* art 14.

<sup>306</sup> *ibid* art 2.

<sup>307</sup> *ibid* art 12.

<sup>308</sup> *ibid* art 8(2).

<sup>309</sup> *ibid* art 33(3).

<sup>310</sup> AHRC, 'Concluding Observations: UAE' (Session 5, 21-26 December 2013) para 14.

<sup>311</sup> CRC OP (n 187) art 8(3).

are in compliance with Shariah. Therefore, Islamic States should fully implement their provisions.

### **3.7 Prevention measures**

#### **3.7.1 Prevention at the international level**

In addition to prohibition and punishment of child trafficking and the protection of its victims, the Trafficking Protocol details preventive measures. Chapter III of the Trafficking Protocol contains a set of prevention and cooperation measures. It is relevant to note that these prevention obligations are framed in mandatory, not simply encouraging, language. Accordingly, States are required to take at least some positive action to apply these obligations.<sup>312</sup> All States Parties, whether origin, transit or destination, have the duty to address the underlying causes of trafficking and thus break the cycle of exploitation at its source.<sup>313</sup> However, as the case study of this thesis is considered a destination State for child trafficking, this part will in particular identify and examine prevention obligations applicable to States within this category.

One of the most important provisions is demand reduction. It should be highlighted that the Trafficking Protocol is the first instrument to address the demand which results in children being trafficked, and calls upon States to take or strengthen legislative or other measures to discourage demand that fosters all forms of exploitation of children.<sup>314</sup> It is noted that the reduction in demand required under the Trafficking Protocol is not restricted to demand for exploitative sexual services but encompasses demand for the full range of exploitative practices identified in the international definition of trafficking.<sup>315</sup> Demand must be understood expansively as any act that fosters any form of exploitation that leads to trafficking.

The role of demand in fueling trafficking and the importance of addressing demand as part of a comprehensive response to human trafficking have been repeatedly recognised in other contexts. For instance, in the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 4 states that '[s]trategies aimed at preventing trafficking shall address demand as a root cause of trafficking', while Guideline 7 recommends that States, in partnership with intergovernmental and non-governmental organisations should consider

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<sup>312</sup> UNODC (n 140) 297.

<sup>313</sup> *ibid* 297.

<sup>314</sup> Trafficking Protocol (n 104) art 9(5).

<sup>315</sup> Huda (n 142) paras 52 and 53.

‘analysing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative and other measures to address these issues’. Demand reduction is also addressed by the Preamble of the Human Rights Resolution, ‘noting that some of the demand for prostitution and forced labour is met by trafficking in persons in some parts of the world’; and paragraph 3(g) ‘urges governments ... to adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation of persons and leads to trafficking in persons, including the demand created by sex tourism, especially in children, and forced labour’.<sup>316</sup> Therefore, addressing demand is a key factor in any effective prevention strategy.

It is relevant to note that the Trafficking Protocol does not specifically refer to criminalisation of demand, and the Interpretative Note does not identify any discussion on this issue during the drafting process. The Legislative Guide, on the other hand, notes that demand reduction ‘could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of a victim of exploitation’.<sup>317</sup> Such a provision is provided for at the regional level in Article 11 of the Arab TIP Model Law. It criminalises the use of services of victims of trafficking or any services that constitute a type of exploitation if the perpetrator was aware that the persons had been trafficked. In addition, the penalty is increased if the victim is a child.<sup>318</sup> Following the Arab Model Law, the Syrian anti-trafficking law applies this provision in practice.<sup>319</sup> Such a practice should be applauded because discouraging demand by adopting appropriate legislative measures to prosecute the user is an effective means of combating and preventing child trafficking.<sup>320</sup>

It is evident that the obligation to address demand rests primarily with the States within which the exploitation takes place because it is within these States that both consumer and employer demand is principally generated.<sup>321</sup> Therefore, the duty to reduce the demand for child trafficking lies with the destination States, including SA. It is clear that an international and regional consensus is considered to be in place regarding the strong need to combat demand for trafficking in persons. States must implement this provision in practice as reducing the demand

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<sup>316</sup> UNHRC, ‘Trafficking in Persons, Especially Women and Children’ (17 June 2009) UN Doc A/HRC/RES/11/3.

<sup>317</sup> UNODC (n 140) 297.

<sup>318</sup> Arab TIP Model Law (n 114) art 11.

<sup>319</sup> Art 9(2), Syria Legislative Decree (n 183).

<sup>320</sup> Art 9 of the Trafficking Protocol makes it clear that addressing the demand for the services of trafficking victims is an essential part of effectively preventing and combating trafficking in persons.

<sup>321</sup> Gallagher (n 127) 438.

for child trafficking for any purpose will make the business less profitable and so discourage traffickers from trafficking minor victims into any destination States.

Another important provision in preventing child trafficking is education and awareness-raising. Its significance is highlighted at both levels, international and regional. It helps to improve the understanding of the crime of human trafficking as well as providing advice and warnings, especially to groups or individuals at high risk of victimisation such as children.<sup>322</sup> Children's special vulnerability is recognised by the Trafficking Protocol. It requires States Parties to strengthen the measures, including through bilateral or multilateral cooperation, aimed at alleviating the factors that make persons, especially women and children, vulnerable to trafficking.<sup>323</sup> Article 31 of the UN TOC Convention obliges States Parties to promote public awareness regarding the existence, causes and gravity of and threats posed by transnational organised crime.<sup>324</sup> This is also emphasised in Guideline 7 of the UN Recommended Principles and Guidelines which provides that States, in partnership with intergovernmental and NGOs, and, where appropriate, using development cooperation policies and programmes, 'should consider developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking'. Such measures are also supported by the Special Rapporteur on TIP who noted the need specifically to prevent child trafficking by identifying children in vulnerable conditions, sensitising potential users of services provided by trafficked children and conducting public campaigns.<sup>325</sup> The Special Rapporteur on the Sale of Children explained in a Report that 'children will be less vulnerable to abuse when they are aware of their right not to be exploited, or of services available to protect them, which means the need for permanent and massive preventive campaigns in the mass media and also in schools and on the streets'.<sup>326</sup>

From the Islamic perspective, the importance of education and awareness is emphasised in many parts of the Qur'an and Sunnah, and there is consensus amongst the schools of Islamic jurisprudence that education is absolutely obligatory, as shown in chapter two.<sup>327</sup> In this regard, Baderin notes that, 'under Islamic law, the populace have a right to know and to be informed of

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<sup>322</sup> Trafficking Protocol (n 104) art 9(2); UN TOC Convention (n 119) art 31(5).

<sup>323</sup> Trafficking Protocol (n 104) art 9(4).

<sup>324</sup> UN TOC Convention (n 119) art 31(5).

<sup>325</sup> The Commission on Human Rights appointed a Special Rapporteur on TIP, in 2004. UNCHR (n 106) 20-2.

<sup>326</sup> UNHRC, 'Report Submitted by the Special Rapporteur on the Sale of Children, Juan Miguel Petit' (9 January 2008) UN Doc A/HRC/7/8, para 39.

<sup>327</sup> Qur'an, 96:1-5; 58:11. Also, Hadith, Al-Turmathi, No 4977.

everything of benefit to them, not only for the hereafter but for their welfare in this world as well'.<sup>328</sup> This can be extended to educate child victims of their rights and all services to protect them, as well as to educate the general public and raise their awareness of the causes and gravity of and threats posed by child trafficking crimes. Similarly, at the regional level and in line with international standards, Article 37(7) of the Arab TOC Convention provides for the exact provision.<sup>329</sup> Therefore, destination States are obliged under Islamic, international and regional laws to educate and raise public awareness of the unlawful nature and effects of child trafficking and exploitation.

It is observed that the involvement of NGOs to achieve this aim is also essential as they have greater expertise and are more experienced. The Trafficking Protocol calls upon States to take preventative measures in cooperation with NGOs and other elements of civil society.<sup>330</sup> At the regional level, the Arab Charter's Human Rights Committee made several observations regarding the importance of the work of NGOs in this regard. For example, the Committee in its report urged Jordan to intensify its efforts to promote public awareness regarding the existence, causes and gravity of human trafficking offences, as well as to cooperate with NGOs, other relevant organisations and civil society in providing education and prevention campaigns.<sup>331</sup> This is also supported by Islamic law as there is a general principle of the importance of cooperation.<sup>332</sup> Islamic scholars agreed that, 'the duty of promoting human rights through education is not restricted to States alone, NGOs and religious bodies also have an important role to play in that regard and should be encouraged by the States to do so'.<sup>333</sup>

It is also important to highlight that effort and resources for research, data collection and evaluation are significant in order to identify those actions most effective to prevent crimes including child trafficking at the national level. According to the Trafficking Protocol, States shall endeavour to undertake research, information and mass media campaigns as well as social and economic initiatives to prevent and combat trafficking in persons.<sup>334</sup> Similar provision is

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<sup>328</sup> Baderin (n 26) 336.

<sup>329</sup> Arab TOC Convention (n 115) art 37(7).

<sup>330</sup> Trafficking Protocol (n 104) art 9(3): Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organisations, other relevant organisations and other elements of civil society.

<sup>331</sup> AHRC, 'Concluding Observations: Jordan' (Session 1, 2 April 2012) para 37.

<sup>332</sup> Qur'an, 5:2; 3:104.

<sup>333</sup> Baderin (n 26) 336; Mattar (n 148) 66.

<sup>334</sup> Trafficking Protocol (n 104) art 9(2).

provided, at the regional level, by Article 40 of the Arab TIP Model Law.<sup>335</sup> It must be pointed out that reliable baseline information, data and research that clarifies the causes, prevalence, characteristics, trends and consequences of all forms of child trafficking is crucial for developing anti-trafficking prevention strategies and measuring their impact at the national level and, more generally, supporting the global action against child trafficking.

In short, as shown above, the prevention provisions of both the UN TOC Convention and the Trafficking Protocol create wide-ranging obligations on States Parties. In comparison with relevant provisions at the regional level, it is noted that there is a general consensus on States' obligations to prevent child trafficking.

### **3.7.2 Prevention under international human rights treaties and labour conventions**

Similar to the Trafficking Protocol, the CRC Committee raises an important issue in the prevention of trafficking, which is the issue of the special vulnerabilities of children. In order to reduce this vulnerability, States should raise public awareness of the unlawful nature and effects of child trafficking and exploitation.<sup>336</sup> It is noted that children who may be especially vulnerable to trafficking include girls; abandoned, orphaned, homeless and displaced children; children in conflict zones; and children who belong to a racial or ethnic minority.<sup>337</sup> Moreover, cooperation between States, especially with countries of origin, is essential for dealing effectively with the source of child trafficking. It is evident therefore that the CRC also complements the prevention obligations stipulated under the Trafficking Protocol.

The Preamble of the CRC OP on Sale of Children refers to the efforts that are needed to raise public awareness and reduce consumer demand for the sale of children,<sup>338</sup> similar to the Trafficking Protocol. The instrument also includes a specific obligation on prevention<sup>339</sup> and international cooperation,<sup>340</sup> which is considered a means of combating child trafficking, taking into account its transnational nature. According to the Special Rapporteur on the Sale of Children, the root causes of child trafficking are various and complex; some of the more frequently cited causes are poverty; lack of employment opportunities; low social status of a girl child; a general lack of education and awareness; as well as inadequate legislation and weak law

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<sup>335</sup> Arab TIP Model Law (n 114) art 40.

<sup>336</sup> CommRC, 'Concluding Observations: Nepal' (21 September 2005) UN Doc CRC/C/15/Add.261, para 96(c).

<sup>337</sup> CommRC, 'Concluding Observations: Niger' (18 June 2009) UN Doc CRC/C/NER/CO/2, para 68.

<sup>338</sup> *ibid* Preamble.

<sup>339</sup> CRC OP on Sale of Children (n 187) art 9.

<sup>340</sup> *ibid* art 10.

enforcement.<sup>341</sup> In this respect, States are recommended to take into full consideration such factors in their national anti-trafficking plan in order to combat child trafficking.

Labour exploitation is one of the end purposes of human trafficking. In this respect, research confirms that demand for trafficked persons' labour or service is absent or noticeably less where workers are organised and where labour standards regarding wages, working hours and conditions, and health and safety are monitored and enforced.<sup>342</sup> This was also noted by the ILO:

[A] major incentive for trafficking in labour is the lack of application and enforcement of labour standards in countries of destination as well as origin...Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labour in conditions simply intolerable and unacceptable for legal employment.<sup>343</sup>

Therefore, labour protection must be a central element of any strategy to address demand for trafficking and related exploitation, thus eliminating trafficking in persons. In general, the ILO Convention No 182 imposes an obligation on States Parties to fully implement its provisions in order to prevent and eliminate the worst forms of child labour. Weeramantry observes that under Shariah work 'is looked upon more as a partnership between employer and employee than as a relationship of superiority and subordination' and that the 'right to a fair wage and the employer's obligation to implement the contract justly are deeply ingrained in Islamic doctrine'.<sup>344</sup> According to Qadri, Shariah injunctions on non-exploitation, equity, humane treatment of peers and underlings provide the basis in Shariah for 'social controls and administrative techniques for the general welfare, social security, wages of labour and hours of work together with the rules on the relations of the employees and the employers'.<sup>345</sup> As a result, States are under a religious obligation to prevent economic exploitation, and therefore reduce the demand for trafficked labour.

Given this, it can be concluded that the obligation of States Parties to implement the 3P framework are clearly established under international human rights and labour law. On the

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<sup>341</sup> UNHRC, 'Report of the Special Rapporteur, on the Sale of Children, Ms Ofelia Calcetas-Santos' (27 January 1999) UN Doc E/CN. 4/1999/71/Add, para 49.

<sup>342</sup> Bridget Anderson and Julia O'Connell Davidson, 'Trafficking: A Demand-Led Problem?' (Save the Children 2004) 54.

<sup>343</sup> Patrick Taran and Gloria Moreno-Fontes Chammartin (International Labour Organisation), 'Getting at the Roots: Stopping Exploitation of Migrant Workers by Organised Crime' (Paper presented at the International Symposium on the UN Convention against Transnational Organised Crime: Requirements for Effective Implementation, Turin, 22-23 February 2002) 8.

<sup>344</sup> Weeramantry (n 7) 63 and 64.

<sup>345</sup> Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Taj 1986) 306.

whole, the international human rights conventions clearly complement the provisions of the Trafficking Protocol aimed at preventing child trafficking.

On a final note, it is worth highlighting that victims of trafficking are usually people in search of better standards of living. Populations living in poverty, with minimal employment opportunities, are the most vulnerable to trafficking. In this regard, it is worth noting that Islamic law provide for a protected environment for children, which is an important element in the strategy for prevention of child trafficking. Based on Islamic principles States are obliged to ensure that their national legislation and efforts address and alleviate poverty, lack of education, discrimination and other related factors which may force a child out of the house to seek a better life. One of the main objectives of the OIC Covenant is:

to care for the family, strengthen its capabilities, and extend to it the necessary support to prevent the deterioration of its economic, social, or health conditions, and to habilitate the husband and wife to ensure their fulfillment of their role of raising children physically and psychologically.<sup>346</sup>

Moreover, Article 17 provides that States shall take necessary measures to protect children from all forms of torture or inhumane or humiliating treatment in all circumstances and conditions.<sup>347</sup> States are also responsible for guaranteeing child protection from violence, abuse and exploitation.<sup>348</sup> There are many verses of the Qur'an and the Sunnah that enjoin compassion and prohibit cruelty and oppression. Bassiouni has observed that the Qur'an warns against persecution of human beings in two hundred and ninety-nine places.<sup>349</sup> In line with international standards, the OIC Covenant makes reference to the special vulnerability of children especially children with special needs.<sup>350</sup> Although these are general measures, implementing these provisions at the national level will certainly help to prevent children from falling victim to trafficking and therefore being exploited. In this sense, Islamic States have a duty to implement preventive measures at the national level in order to eradicate this abusive practice and meet their religious and international obligations.

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<sup>346</sup> OIC Covenant (n 146) art 2(1).

<sup>347</sup> *ibid* 17(2).

<sup>348</sup> *ibid* 6(2).

<sup>349</sup> Mohammed Cherif Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System' in MC Bassiouni (ed), *The Islamic Criminal Justice System* (Oceana 1982) 19.

<sup>350</sup> OIC Covenant (n 146) arts 16 and 21.



### 3.8 Conclusion

This chapter examined both international and regional standards relating to action against child trafficking. The key instruments such as the UN TOC Convention and the Trafficking Protocol have established the 3P approach, comprising measures to prosecute traffickers, protect victims and prevent the phenomenon. However, it has been shown that the main thrusts of these instruments are the suppression and prevention of child trafficking rather than protection of victims. This means that they must be supplemented with human rights law. The chapter has further shown that relevant regional and international instruments such as the Arab Charter, the OIC Child Covenant and the CRC and its OP on Sale of Children provide for relevant obligations to protect child victims of trafficking. It should also be highlighted that there are no major discrepancies between regional and international standards on human trafficking. The former amply reflect the latter, and this suggests that Arab States are generally in support of the universal approach to child trafficking.

Regarding the relationship between Shariah and international and regional laws on human trafficking, it is clear that Shariah is in compliance with both standards. Therefore, it can be said that if States representing all four schools of thought support international and regional standards, perhaps they all share the same understanding and sense of duty to prevent and suppress this crime and protect children, regardless of some differences (such as the age of maturity).

Having discussed the international and regional anti-trafficking framework and identified States' obligations under all relevant instruments, the remaining part of this thesis will examine the national legal responses to child trafficking in SA and the UAE. In particular, these case studies will illustrate the extent to which regional and international standards are implemented and how they have or have not assisted both States to develop more effective action against child trafficking.

## Chapter Four: Child Trafficking in Saudi Arabia

### 4.1 Introduction

The purpose of this chapter is to analyse SA's responses to child trafficking, bearing in mind the relevant international and regional standards identified previously. In particular, this chapter will examine the extent to which SA implements the abovementioned 3P obligations (prohibition, protection and prevention). The chapter will start with the SA interpretation of Islamic law and the school of thought which the State follows. The second part will analyse the prohibition and punishment elements of child trafficking in SA. Then the chapter will show and evaluate SA's effort towards protecting child victims of trafficking. Finally the chapter will consider the prevention measures applied in the State. The main conclusion reached in this chapter is that, although there is domestic legislation to combat child trafficking and its related exploitative acts at the national level, full compliance with the provisions set out in Islamic law as well as international and regional laws has not occurred in SA. Trafficked victims are still not afforded the necessary support and assistance. Moreover, prevention measures are limited and lack a child-centred approach.

### 4.2 SA school of thought and its interpretation of Islamic law

Since the founding of SA, the State has generally adhered to the traditional juristic treatises of the four Sunni schools of Islamic jurisprudence, particularly that of the Hanbali school, in almost all aspects of its State law.<sup>1</sup> The Hanbali school is distinctive for its strong emphasis on *ijtihad* (independent legal reasoning).<sup>2</sup> Ibn Hanbal is reported to have instructed: 'do not imitate me ... but take from where we have taken' (i.e. the Qur'an and Sunnah).<sup>3</sup> The Hanbali school considers it a duty to continue *ijtihad*, to have independent *mujtahids* (independent scholars of Islamic law who apply the *ijtihad*) in the community, and not to rely on old fatwas (legal opinions).<sup>4</sup>

It should be noted that, although the Hanbali school is the official school of Islamic law for the courts of SA, judges also have the discretion to make rulings according to jurisprudential

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<sup>1</sup> King Abdul-Aziz issued a Royal Decree in 1926 that established the Hanbali school as the official school of Islamic law for the courts of SA.

<sup>2</sup> Mohammed Kamali, *Shariah Law: An Introduction* (One World Publications 2008) 85.

<sup>3</sup> Islamtoday <<http://islamport.com/w/ftw/Web/3353/2361.htm>> accessed 20 June 2015.

<sup>4</sup> Kamali (n 2) 85.

methods of the other schools of Islam.<sup>5</sup> Ultimately, in making a judicial ruling, Saudi judges are ‘constrained solely by their own conscience in determining the will of God’.<sup>6</sup> This is evidenced by the statement of Sheikh Al-lahaydan in 1985 (President of the permanent board of the Supreme Judicial Council and a member of the board of senior *ulama*):

The *qadi* [judge] of SA is not obliged or compelled to restrict himself to the school of ibn Hanbal, but rather has the right to judge in the case in accordance with that to which his *ijtihad* leads, even if that is not the Hanbali school ... it is not said to him, perform *ijtihad* within the school or without it: rather, he is requested to judge by that which he believes to be the truth.<sup>7</sup>

In order to understand the present law and governance situation of SA, the following section will consider the State’s history and its key alliance between political and religious leadership.

The history of SA reveals that there has been coexistence between two main parties: the Al-Saud ruling family and the Wahhabi scholars. The former needs the latter to persuade the Saudi people that the rule of the Al-Saud family is legitimate, while the latter needs the former to support them in implementing Wahhabi instructions (accepted sources of law limited to the Qur’an, the Sunnah, and the consensus established by the Prophet’s companions only).<sup>8</sup> The objective of this collaboration was to create an ideal society that would be similar to life during the time of the Prophet.<sup>9</sup>

Ibn Abd al-Wahhab based his ideas on the works of the Salafi tradition within Islam,<sup>10</sup> particularly as propounded by two legal scholars, namely ibn Hanbal and ibn Taymiyya (one of the most prominent scholars of that school).<sup>11</sup> Not only did ibn Taymiyya seek to revive ibn Hanbal’s stringent reliance on the revealed texts in his time, his teachings were also influential in the relationship between religious and political authority, manifested in the cooperation of ibn Saud and ibn Abd al-Wahhab and their successors all the way up until today.<sup>12</sup>

Ibn Taymiyya believed that the ruler and the *ulama* (religious scholars) should work closely together. The legitimacy of the ruler depends on his adherence to Shariah; the ruler

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<sup>5</sup> Saudi Ministry of Justice, ‘King Abdul-Aziz and the Saudi Legal System’ <<http://www.moj.gov.sa>> accessed 15 April 2016. See also, Charles Trumbull, ‘Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts’ (2006) 59 Vand L Rev 609, 629 (noting the ability of Saudi judges to use other schools of Islamic law if they prefer).

<sup>6</sup> *ibid* 630.

<sup>7</sup> Salah Al Fozan, *Rad Alshubhat Hual Daua Al Sheikh Imam Muhammad bin Abdul Wahab* (Dar Alasmeh 2004) 35-37; see also Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill NV 2000).

<sup>8</sup> David Dean Commins, *The Wahhabi Mission and Saudi Arabia* (Tauris & Co 2006) 104.

<sup>9</sup> *ibid*.

<sup>10</sup> Jan Michiel Otto, *Sharia Incorporated* (Leiden University Press 2010) 142.

<sup>11</sup> *ibid* 142.

<sup>12</sup> *ibid* 142

himself is also subject to the sacred law. The *ulama*, for their part, have the obligation to advise the ruler and both should collaborate to uphold Shariah.<sup>13</sup>

This explains the unique nature of the Saudi Constitution which states that Islamic law is the main source not only for the laws but also for political powers.<sup>14</sup> Given this fact, there should be no conflict between the laws of the State and the main sources of Islamic law.<sup>15</sup> SA affirmed the Qur'an as its constitution<sup>16</sup> and did not have a separate statutory constitution prior to 1992. It is worth noting that, in general, there are few formal laws in SA. While this can actually make it easy for a flexible interpretation of law and tradition,<sup>17</sup> it can conversely make it difficult to determine the actual position of laws, especially in a system not based on judicial precedents.

Having said this, it is worth noting that ibn Taymiyya's theory on Islamic leadership, which is based on the Hanbali school, provides that rulers are allowed to issue regulations necessary for government policy provided the legislation serves the public good and that it only complements, and certainly does not contradict, Shariah.<sup>18</sup> Based on that, in March 1992 the Saudi government enacted the laws of government consisting of three statutes passed by Royal Decree.<sup>19</sup> Of the three statutes, the Basic Law of Government is the main constitutional document. According to the government, this was not considered as new legislation but rather a codification of what already existed within Islamic Shariah applied in SA.<sup>20</sup>

The Basic Law is divided into nine chapters containing eighty-three articles in total.<sup>21</sup> The first article states that SA is a sovereign Arab Islamic State and its Constitution is the Qur'an

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<sup>13</sup> Vogel (n 7) 202-204.

<sup>14</sup> Saudi Basic Law of Governance (1 March 1992) arts 48 and 67.

<sup>15</sup> *ibid* art 8.

<sup>16</sup> *ibid* art 1, see also part 1, para 1(2)(ii) of SA's Initial Report to the CRC, UN Doc CRC/C/61/Add. 2 (29 March 2000).

<sup>17</sup> Lisa Wynn, 'Marriage Contracts and Women's Rights in Saudi Arabia' in Asifa Quraishi and Frank Vogel (eds), *The Islamic Marriage Contract* (Cambridge University Press 2008) 106.

<sup>18</sup> Based on ibn Taymiyya's theory, rulers were competent to promulgate necessary legislation for government policy, provided it was complementary to and not in contradiction with Shariah and served public interest. In modernising SA, this legislation was often termed 'Royal Decree' or 'ordinance' (*nizam*).

<sup>19</sup> 1.The Basic Law of Governance; 2.The Consultative Council Establishment Decree; and 3.The Regional Authorities Establishment Decree.

<sup>20</sup> In his speech introducing the statutes, King Fahd stated that the constitutional reform was necessitated by the development of modern life and was 'to strengthen something which (was) already in operation'. He asserted that despite the absence of a formal constitutional document before 1992, SA had never known a 'constitutional vacuum' and that 'throughout its march it has been ruled according to guiding principles and bases and clear fundamentals to which judges, *Ulama* and all those employed by the State refer'. King Fahd's Speech introducing the New Statutes reproduced in John Bulloch, *Reforms of the Saudi Arabian Constitution* (1992) 30-37.

<sup>21</sup> Saudi Basic Law (n 14).

and the Sunnah.<sup>22</sup> Article 7 provides that the Saudi government's power is derived from the Holy Qur'an and the Prophet's tradition.<sup>23</sup> According to Article 44, the legislative, executive and judicial powers of government are separate but the king is not subject to this separation of powers. The king is 'their final authority'. As the legislative authority and in accordance with Article 67 of the Constitution, the king can promulgate regulations (*nizams*) where Shariah does not provide a direct answer to certain legal questions but where regulation is nevertheless necessary. In addition, Article 68 provides that the Consultative Council (*Majlis Al-Shura*),<sup>24</sup> which was re-established in 1992, confers with and advises the Council of Ministers. It advises on government policy and may submit regulations and bylaws to meet the public interest or to remove what is bad in the affairs of the State, in accordance with the basic principles of Shariah.<sup>25</sup> It was granted the power to formulate policies related to domestic, foreign, financial, economic and all public affairs. The regulation determined that an ordinance (*nizam*) could only be proclaimed by Royal Decree and would only become effective after it had been published in the official government gazette.<sup>26</sup> Article 48 states that the courts shall 'apply the provisions of Shariah to cases brought before them, according to the Qur'an and Sunnah as well as other regulations issued by the Head of State in strict conformity with the Qur'an and Sunnah'.<sup>27</sup>

To ensure that the government regulations are in conformity with Islamic law, in 1971 the Council of Senior *Ulama* was established. Its primary task is to provide advice to the king and his government. The council has played a crucial role in the development of government policy since that time.<sup>28</sup> The opinions of the Council of Senior *Ulama* constitute legal sources on certain matters of criminal law. Because of this and despite the massive development of SA in all aspects, the State has managed to keep the rules of Shariah in force with the guidance of scholars

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<sup>22</sup> *ibid.*

<sup>23</sup> Saudi Basic Law (n 14) arts 1, 7, 48; see also, Rashid Aba-Namay, 'The Recent Constitutional Reforms in Saudi Arabia' (1993) 42 International and Comparative Law Quarterly 295.

<sup>24</sup> It is entitled to lay down regulations and bylaws to meet the public interest in accordance with the principles of Shariah.

<sup>25</sup> Saudi Basic Law (n 14) art 67.

<sup>26</sup> The term *nizam* (ordinance or regulation) is used deliberately as distinct from the term law, and is a term commonly used to refer to codified man-made law; many Saudi *ulama* consider it to be a Western concept and alien to Shariah, therefore, it should be avoided. In addition, the term 'regulatory authority' is used instead of 'legislative authority' because the latter term can only be used to refer to God, the only legislature. AM Al-Jarbou, 'Judicial Independence: Case study of Saudi Arabia' (2004) 19 Arab Law Quarterly 5, 31.

<sup>27</sup> Saudi Basic Law (n 14) arts 1, 7, 48; see also, Aba-Namay (n 253) 295.

<sup>28</sup> Anders Jerichow, *The Saudi File – People, Power, Politics* (St Martin's Press 1998) 68.

and jurists.<sup>29</sup> Indeed, SA has commonly followed a more traditional and conservative approach in its interpretation and application of Shariah and this might be the reason that many commentators have characterised it as rigid.<sup>30</sup> It should be understood that SA holds the responsibility to protect its Islamic identity, especially as it occupies a very significant position in the Muslim world, being the site of the two most important holy mosques of Islam. It thus claims the status of a complete Islamic State that must protect Islamic traditional norms and principles.<sup>31</sup> Furthermore, SA has been described as being ‘closest to maintaining a pure Islamic legal system’.<sup>32</sup> Therefore, SA not only has a unique legal system compared to Western systems but also compared to other Islamic States.<sup>33</sup>

It is often claimed that Saudi law is nothing but Shariah. However, it is supplemented by government-issued regulations and so the law is more encompassing than at first glance. Whatever way one looks at it, the enactment of the laws represents a new approach to SA’s interpretation of the limitation on legislative powers under Islamic law. This new approach seems to have now recognised the possibility of legislating under Islamic law ‘without in any way trespassing upon the function reserved exclusively for God of making law’.<sup>34</sup> Also, one cannot rule out the importance of tribal values, tradition and customs in Saudi society, as in most Middle Eastern societies. Esmaeili states that, ‘Tribal law, tradition or custom is significant in SA in relation to the country’s political and governmental structure as well as private and personal law areas’.<sup>35</sup> Yet, Shariah is no doubt the main feature of the Saudi legal system. The Qur’an and the Sunnah stand at the head of the legal norms applicable in SA; no regulations can conflict with Shariah.

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<sup>29</sup> Joseph Kechichian, ‘The Role of the *Ulama* in the Politics of an Islamic State: The Case of Saudi Arabia (1986) 18(1) *International Journal of Middle East Studies* 57.

<sup>30</sup> Hossien Esmaeili, ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26(1) *Arizona Journal of International and Comparative Law* 1.

<sup>31</sup> See part 1, para 2 of SA’s Initial Report to the CRC (n 18) which states that: ‘The Kingdom of Saudi Arabia is the cradle of Islam to which Muslims throughout the world turn in prayer. It occupies a special place in Muslims’ hearts as the guardian of Islam’s sacred places’.

<sup>32</sup> cf Enid Hill, ‘Comparative and Historical Study of Modern Middle Eastern Law’ (1978) 26 *The American Journal of Comparative Law* 295.

<sup>33</sup> Otto (n 10) 172.

<sup>34</sup> KA Faruki, *Evolution of Islamic Constitutional Theory and Practice* (1971) 4.

<sup>35</sup> Esmaeili (n 30) 18.

### 4.3 The practice of slavery and the slave trade in SA

Having explained the basis of the SA legal system, it is now useful to examine the State's responses to child trafficking. A starting point is SA's position with respect to slavery. Slavery and the slave trade have existed in the jurisdiction for a long time.<sup>36</sup> Taking into consideration the Islamic position in regard to slavery and the Islamic scholars' understanding of the Islamic tradition and principles (i.e. Shariah does not refer directly to slavery), as shown in chapter two, the government issued a regulation in this regard in 1936 in the form of a Royal Decree entitled 'Instructions Concerning Traffic in Slaves'. Article 1 of this Royal Decree provides that:

Inasmuch as the provisions of the noble Shariah preclude the enslavement or purchase of the subjects of countries in treaty relationships, it is accordingly absolutely forbidden:

1. To import slaves from any country to SA by sea;
2. To import slaves to SA by land, unless the slave dealer has a government document attesting that the person imported was recognised as a slave in the country from which he was imported at the time when this statute was promulgated;
3. To enslave free persons in SA;
4. To purchase or own any person imported or enslaved, in a manner in violation of the foregoing provisions, after the promulgation of this statute.

The Royal Decree further adds:

[A]ny violation of the foregoing provisions shall require the punishment of the perpetrators, as follows:

- (a) The liberation and release of the slave;
- (b) The application of the current customs regulations to the smugglers;
- (c) Severe imprisonment for a term not exceeding one year.<sup>37</sup>

Despite this, evidence suggests that slavery and the slave trade continued.<sup>38</sup> In a memorandum submitted to the United Nations Ad Hoc Committee on Slavery in 1955, CWW Greenidge, Secretary of the British Anti-Slavery Society, drew attention to reports indicating 'an ineffective application of the Saudi law and that slave markets ... in the country were still fed by slaves smuggled across the frontiers'.<sup>39</sup> However, the situation changed on 6 November 1962 when the Saudi government issued a Ministerial Order to declare officially that slavery and the slave trade were to end in the State.<sup>40</sup> Article 10 of the Order provided that: 'the government now finds a favorable opportunity to announce the absolute abolition of slavery and the manumission of all slaves. The government will compensate those who prove to be deserving of compensation'.

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<sup>36</sup> Murray Gordon, *Slavery in the Arab World* (New Amsterdam 1989) 225.

<sup>37</sup> Bernard Lewis, *Race and Slavery in the Middle East: An Historical Enquiry* (Oxford University Press 1990) 167.

<sup>38</sup> Junius P Rodriguez (ed), *Slavery in the Modern World: A History of Political, Social, and Economic Oppression* (ABC-CLIO 2011) 317; see also Gordon (n 38) 233.

<sup>39</sup> Gordon (n 36) 228.

<sup>40</sup> Published in the Official Gazette of Saudi Arabia (Umm Al Qura) 1962, issue No 1944.

Following this declaration, the government paid 8,679,242 riyals (equivalent to £1,785,000) in compensation for the freeing of 1,682 slaves in that year.<sup>41</sup>

From the above, there does not seem to be, as the SA practice might suggest, an Islamic obstacle to accommodate laws that are in conformity with international and regional standards. It is also worth highlighting that SA is party to several Islamic, regional and international instruments, all of which explicitly prohibit slavery and the slave trade, including the Arab Charter on Human Rights in Islam in 2009,<sup>42</sup> the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1973. The adoption of these conventions demonstrates SA's willingness to abide by international and regional standards in order to address traditional slavery and the slave trade. In addition, by examining the SA response to the practice of slavery and slave trade, it becomes clear that Islamic law, as applied in the State, can accommodate international standards in practice. This is also confirmed by the practice of the majority of the Islamic States as shown in chapter two.

#### **4.4 SA Responses to Child Trafficking**

SA previously maintained the position that human trafficking did not represent a problem for the State.<sup>43</sup> Nevertheless, since the late 2000s, significant attention has been paid to combating human trafficking, not only in SA but more generally in the Arab world, especially in the countries that form part of the Cooperation Council for the Arab States of the Gulf (GCC). This is due to the ratification of key instruments such as the UN TOC Convention by these States and the Trafficking Protocol, including by SA in 2007.

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<sup>41</sup> Gordon (n 36) 233.

<sup>42</sup> Arab Charter on Human Rights (approved 23 May 2004, entered into force 15 March 2008) art 10(2).

<sup>43</sup> Giuseppe Calandruccio, 'A Review of Recent Research on Human Trafficking in the Middle East' (2005) 43 IOM 267, 282.



**Table 1: GCC' Ratification of the UN TOC Convention, the UN Trafficking Protocol and Adoption of National TIP Legislations**

<b>Country</b>	<b>Ratification of the UN TOC Convention</b>	<b>Ratification of the UN Trafficking Protocol</b>	<b>National TIP Law</b>
<b>Bahrain</b>	2004	2004	No 1 of 2008
<b>Kuwait</b>	2006	2006	No 91 of 2013
<b>Oman</b>	2005	2005	No 126 of 2008
<b>SA</b>	2005	2007	No M/40 of 2009
<b>Qatar</b>	2008	2009	No 15 of 2011
<b>UAE</b>	2007	2009	No 51 of 2006

According to a Human Rights Council report, the committees of both CEDAW and the CRC recommended that SA should take the following steps to combat trafficking: review its domestic legislation in order to enact a comprehensive anti-trafficking law; strengthen its bilateral and multilateral cooperation with countries of origin and transit; develop and adopt a comprehensive multidisciplinary national plan of action to prevent and combat sexual exploitation of and trafficking in children; and strengthen its efforts to provide adequate assistance and social reintegration services for sexually exploited and/or trafficked children.<sup>44</sup>

On 14 July 2009, the Trafficking in Persons (Offences) Act (Saudi TIP Act) was promulgated pursuant to Royal Decree No M/40.<sup>45</sup> The Saudi government acknowledged that the drafting of this legislation was in response to the demands of international and regional obligations and those of the modern age, and that the enactments of all the State regulations including this Act were not in conflict with Shariah.<sup>46</sup> Following the enactment of this Act, the Committee to Combat Human Trafficking was established at the seat of the Human Rights Commission pursuant to Cabinet Decision No 244 of 13 July 2009. It is a key national mechanism for implementing the TIP Act and has numerous functions which will be discussed later in this chapter.

<sup>44</sup> UNHRC, 'Report of the Working Group on the Universal Periodic Review: SA' (4 March 2009) UN Doc A/HRC/11/23.

<sup>45</sup> Saudi Trafficking in Persons (Offences) Act (14 July 2009) (Saudi TIP Act).

<sup>46</sup> As shown in the second chapter, the child trafficking crime and its related acts and elements are condemned under Islamic law, and it is the State's responsibility to prosecute criminals and protect victims. As mentioned earlier, the government regulations must not contradict Shariah.

At this stage, it can be observed that the SA ratification of the relevant international instruments related to child trafficking and the enactment of the national legislation are essential steps in the right direction to fight this crime at the national level. It also shows that SA as an Islamic State and a member of important international and regional instruments is capable of fulfilling its obligation in practice, and therefore also contributing to the global efforts to combat child trafficking.

The next section will critically analyse the Saudi TIP Act and the State's efforts under the 3P obligations to determine how it handles the prosecution of traffickers and the protection of child victims. This will be done to assess the effectiveness of Saudi laws in relation to child trafficking and their compliance with Islamic, regional and international laws. This chapter will also provide an answer to the question of whether the Saudi TIP Act meets the requirements of international law in relation to child trafficking.

## **4.5 Prohibition, prosecution and punishment**

### **4.5.1 Definition of child trafficking**

Saudi law is based on Shariah and chapter two clarified that human trafficking crime is categorised as *tazir* offences under the Islamic criminal justice system. Article 1(1) of the Saudi TIP Act provides that, 'Trafficking in persons shall mean the use, recruitment, transportation, harbouring or receipt of a person for the purpose of exploitation'. It continues in Article 2 with the following:

It is prohibited to commit any act of trafficking in persons, including coercion, threat, fraud, deceit or abduction of a person, abuse of position or power or any authority thereon, taking advantage of the person's vulnerability, giving or receiving payments or benefits to achieve the consent of a person having control over another for the purpose of sexual exploitation, forced labour or services, begging, slavery or slavery-like practices, servitude or the removal of organs or for the conducting of medical experiments thereon.<sup>47</sup>

In general, it appears that the Saudi Act adopted the same definition contained in Article 3 of the Trafficking Protocol explored earlier. This is important as it represents and reinforces an international consensus regarding the definition of human trafficking at the domestic level, even within the Islamic jurisdictions. In relation to the means element, in line with the Trafficking Protocol and the Arab TIP Model Law as discussed in chapter three, it provides comprehensive

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<sup>47</sup> Saudi TIP Act 2009 (n 45) art 2.

coverage of the criminal means by which the crime of human trafficking takes place.<sup>48</sup> Furthermore, in terms of exploitation, this definition is consistent with, and in fact extends beyond the definition under international law as enshrined in the Trafficking Protocol. This includes additional activities such as begging and medical experiments which are similar to the list of exploitation purposes contained in the Arab TIP Model Law.<sup>49</sup>

In line with the Trafficking Protocol the Act states that the ‘consent of the victim shall be deemed irrelevant in any of the crimes provided for in this law’.<sup>50</sup> Similar to the Trafficking Protocol, the Saudi TIP Act defines ‘child’ as ‘any person not exceeding eighteen years of age’ in Article 1(4). By implementing international and regional standards in this respect,<sup>51</sup> it is clear that the Saudi government has and shares a similar understanding with both standards. This suggests that, despite differences of perception in relation to the maturity of a child, there is a consensus on the definition of ‘child’ for the purpose of human trafficking. This also confirms that, as analysed in chapter two, it is not against Shariah to specify the age of the child in national legislations.

From the Islamic perspective, the enactment of this Act confirms that child trafficking as defined above is clearly prohibited under Islamic law. This is further confirmed by the fact that according to the Saudi Constitution, regulations issued by the head of State must be in strict conformity with the Qur’an and Sunnah’.<sup>52</sup> Therefore, it can be said that by prohibiting the crime of human trafficking, SA is fulfilling its obligation under both Islamic and international laws.

#### **4.5.2 Punishment of child trafficking crime**

It is significant at this stage to introduce Saudi judges’ roles in the application of *tazir* punishments in practice. A judge has a religious duty to settle a dispute brought before him: in each individual case he is allowed to use independent interpretation (*ijtihad*) in order to find the most desirable solution.<sup>53</sup> Judges have resorted primarily to the Qur’an, the Sunnah, and *fiqh*

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<sup>48</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25 (Trafficking Protocol) art 3(c).

<sup>49</sup> Trafficking Protocol (n 48) art 3(a); also, Arab Guiding Law on Human Trafficking (Arab TIP Model Law) (9 November 2005) art 1(2)(f) and (h).

<sup>50</sup> Saudi TIP Act 2009 (n 45) art 5.

<sup>51</sup> Trafficking Protocol (n 48) art 3(d); Arab TIP Model Law (n 49) art 1(6).

<sup>52</sup> Saudi Basic Law of Governance (n 14) art 48.

<sup>53</sup> Maha AZ Yamani, *Polygamy and Law in Contemporary Saudi Arabia* (Ithaca Press 2008) 139.

books (mainly Hanbali school) in their quest for justice.<sup>54</sup> A judge – like all religious scholars – must be competent to interpret the Qur'an and the Sunnah. He enjoys great discretionary power and is not bound by doctrine of precedent.<sup>55</sup> In addition, in SA fatwas are of legal importance and judges take them into consideration. For instance, the '*ulama* issued a fatwa on 18 February 1987 based on their interpretation and understanding of the main sources of Islamic law. They stated that drug trafficking is prohibited and its traffickers are to be sentenced to death:

With regard to the narcotic traffickers, the punishment will be the death sentence as a result of his evil work by bringing a great deal of corruption and deterioration to the country. The traffickers and the person who receives narcotics from abroad will be punished in the same way.<sup>56</sup>

The king (the final authority) approved this sentence and ordered that the courts follow this fatwa in dealing with such crime.<sup>57</sup> This is one example of applying this category in practice.

In Saudi courts, the majority of crimes are categorised under the *tazir* category, with the most commonly stipulated punishment being lashing.<sup>58</sup> However, imprisonment, fines and, in very limited cases, the death penalty can also be inflicted.<sup>59</sup> Nowadays, many *tazir* offences are defined by national regulations (*nizams*).<sup>60</sup>

For its part, the Saudi TIP Act provides in Article 3 that: 'Any person who commits an act of trafficking in persons shall be punished by imprisonment for a period not exceeding fifteen years or fine not exceeding one million riyals, [equivalent to £210,000], or both'.<sup>61</sup> In comparison with other Arab States, more serious penalties are imposed for trafficking, Egypt and Kuwait, for instance, stipulate life imprisonment.<sup>62</sup> Further, Kuwait requires life imprisonment if the victim is a child.<sup>63</sup> Certainly, SA could copy them in specifying more serious penalties.

Unlike the Trafficking Protocol but similar to the Arab TIP Model Law,<sup>64</sup> Article 4 of the Saudi TIP Act introduces a specific provision of aggravating circumstances.<sup>65</sup> The Saudi TIP

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<sup>54</sup> AM Al-Jarbou, 'The Role of Traditionalists and Modernists on the Development of the Saudi Legal System' (2007) 21 Arab Law Quarterly 191, 224.

<sup>55</sup> Yamani (n 53).

<sup>56</sup> Anders Jerichow, *The Saudi File – People, Power and Politics* (St Martin's Press 1998) 74.

<sup>57</sup> *ibid* 75. Another example, the Council of Senior Ulama 'decided that a person should be sentenced to death when he is found guilty of having perpetrated a terrorist act.

<sup>58</sup> Vogel (n 7) 248-249.

<sup>59</sup> *ibid*.

<sup>60</sup> *ibid* 232.

<sup>61</sup> Saudi TIP Act 2009 (n 45) art 3.

<sup>62</sup> Egypt Law No 64 of May 2010 (Law Regarding Combating Human Trafficking) art 6; Kuwait Law No 91 of 2013 (Regarding the Trafficking of Persons and Smuggling of Migrants) art 2.

<sup>63</sup> Kuwait Law No 91 (n 62) art 2(7).

<sup>64</sup> Arab TIP Model Law (n 49) art 3.

<sup>65</sup> Saudi TIP Act 2009 (n 45) art 4; also Arab TIP Model Law (n 49) art 3(2).

Act Article 4(3) establishes child victims as an aggravating circumstance so the penalties given to traffickers and exploiters should be enhanced. However, this article does not specify the sentence, giving judges wide discretion which can lead to inconsistency in sentencing. In this respect, SA should amend this provision and clearly stipulate the punishment in this case in the same way as its neighbour countries mentioned above. As noted earlier, Islamic States have the power under Islamic law to do so.

The Saudi TIP Act considers the nature of the crime (transnational) and the nature of the criminals (an organised criminal group) as aggravating circumstances as well.<sup>66</sup> This means that the law covers both internal and cross-border trafficking crimes, as well as individual traffickers and organised groups. Such an approach can be contrasted with the relatively limited provisions of the Trafficking Protocol.<sup>67</sup>

Furthermore, the Saudi TIP Act in line with the UN TOC Convention extend the reach of the law on child trafficking, Articles 8 and 10 criminalise those who participate or engage as accomplices in child trafficking and also those who attempt child trafficking. These articles provide the same penalty as applied to those who are engaged as principal offenders. This law thus functions to provide an element of deterrence and so contributes toward SA's efforts in preventing trafficking. The law is also a means to deter those likely to engage in child trafficking and those assisting in child trafficking. Due to the nature of such crimes, the principal offenders require a significant network of support, from sourcing, transporting and trafficking children, to engaging in the criminal act of trafficking. The Saudi TIP Act recognises that and positively covers such acts.

Beyond the immediate crime of child trafficking, there are other crimes closely associated with the commission of such a crime that also merit criminalisation within the law so as to ensure that all criminality linked to child trafficking is punishable. Article 6(1) of the Saudi TIP Act criminalises those who:

[use] ... physical force, threats, intimidation, deprivation of an earned benefit or of an unearned promised benefit or the offer or granting thereof as an inducement for the giving of false testimony or as a means to tamper with a witness or procure the presentation of false evidence.

The Saudi TIP Act imposes a penalty of up to five years' imprisonment and/or a fine not exceeding 200,000 riyals for those crimes in order to protect witnesses involved in the

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<sup>66</sup> Saudi TIP Act 2009 (n 45) art 4(1) and (8).

<sup>67</sup> Trafficking Protocol (n 48) art 4.

prosecution of those engaged in child trafficking and to prevent the obstruction of justice. A similar penalty is also stipulated in Article 6(2) which criminalises any attempt to interfere with the judicial process or lawful process in investigating or prosecuting child trafficking. Both provisions are in line with international and regional law, as represented in Article 23 of obstruction of justice of the UN TOC Convention and Article 5 of the Arab Model Law.

In addition, similar to Article 16 of the Arab Model Law, Article 7 of the Saudi TIP Act sanctions the failure of any persons to report a crime of child trafficking and imposes a penalty of up to two years' imprisonment and/or a fine not exceeding 100,000 riyals. In recognition of kinship, the competent court may exempt parents, offspring, spouses and brothers and sisters from the provisions of this article. With respect to this provision, it is suggested that the exemptions of relatives should be in respect only to the imposition of the penalty in order to avoid the use of this provision as an encouragement to cover up the offences. Article 3 of the UAE TIP Law, for example, covers this loophole, as will be shown in the following chapter.

In relation to the above provision, Article 9 punishes those who are involved in covering up child trafficking offences by a penalty of five years' imprisonment and/or a fine not exceeding 200,000 riyals. In this respect, the competent court may exempt the defendant from the penalty for harbouring accomplices if the defendant is the spouse or an ascendant or descendant of the person harboured. This demonstrates a better construction than Article 7 mentioned above as the defendant is only exempt from the penalty under Article 9.

In order to encourage reporting of the crime, the Saudi TIP Act includes an exemption provision in Article 12. Further, it adds, 'if the notification takes place after the crime has been committed, said perpetrator may be exempted from the penalty if such notification leads to arrest of the remaining perpetrators'. In addition, 'if the notification takes place during the investigation, the penalty may be reduced'. This provision is similar to Article 27 of the UN TOC Convention and Article 18 of the Arab TIP Model Law, which encourage offenders to cooperate. Finally, in line with Article 10 of the UN TOC Convention and Article 23 of the Arab Model Law, the Saudi TIP Act recognises corporate liability. Article 13 stipulates that without prejudice to the liability of natural persons, the penalty incurred by a legal person may be a fine of up to 10 million riyals and dissolution or temporary or permanent full or partial closure of the establishment.

Besides the TIP Act, the Saudi Anti-Cyber Crime Act is pertinent to child trafficking. Article 6(2) provides that any person who commits '[t]he construction or publicizing of a website on the information network or computer to promote or facilitate human trafficking' shall be subject to 'imprisonment for a period not exceeding five years and a fine not exceeding three million riyals or to either punishment'.<sup>68</sup> Further, Article 8(3) provides that, '[t]he imprisonment and the fine may not be less than half the maximum if the crime is coupled with the luring and exploiting of minors and the like'.<sup>69</sup> This is significant because it shows that the Saudi law goes further than the Trafficking Protocol, which mainly criminalises the conduct of trafficking itself, but does not criminalise other activities like advertising. This is an example of good practice.

In summary, it seems reasonable to conclude from the above analysis that Saudi law shares a similar understanding of child trafficking with international law by recognising the seriousness of the crime.<sup>70</sup> From the Islamic perspective, it is clear that, SA follows Shariah in prohibiting this practice under *tazir* offences. It is also evident that the legislation generally follows internationally and regionally established standards explored in the previous chapter in terms of the first P (prohibition/prosecution). This is significant because, as Gallagher observed, 'a strong national legal framework around trafficking is widely recognized as the foundation and scaffolding of an adequate and appropriate criminal justice response'.<sup>71</sup>

However, an important question is whether the legislation is enforced effectively in practice in SA. Given this, the next section will examine whether the authorities are actually using the Saudi TIP Act as a basis to prosecute and punish the offenders (traffickers, exploiters, employers or private individuals) who traffic and exploit children in SA. This discussion is geared towards identifying gaps, difficulties and barriers that might hinder the function or the enforcement of the law in practice.

#### **4.5.3 Investigation and prosecution of child trafficking crimes**

Article 16 of the Saudi TIP Act provides that the task of investigating and prosecuting the crimes provided for in the Act is assigned to the Bureau of Investigation and Public Prosecution

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<sup>68</sup> Saudi Anti-Cyber Crime Act (26 March 2007, art 6).

<sup>69</sup> Ibid art 8.

<sup>70</sup> The UN TOC Convention (adopted 15 November 2000, entered into force 29 September 2003) UN Doc A/RES/55/25 (UN TOC Convention) supp 49, 44.

<sup>71</sup> Anne Gallagher and Paul Holmes, 'Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line' (2008) 18(3) International Criminal Justice Review 318, 321.

(BIPP) in accordance with its statutes and the regulations and directives issued pursuant thereto. In practice, when arrests are made the suspects are questioned by the security authorities before being referred to the BIPP for appropriate investigation, after which they may be referred to the judiciary for judgment.<sup>72</sup> In the next step, the Ministry of Justice (represented by the courts) hears the cases referred to it by the BIPP with a view to applying the provisions of the Saudi TIP Act and passing judgments on persons found to be involved in any violation of the said provisions.<sup>73</sup>

At this point, the issue of the public unavailability of court decisions in SA is worth exploring. Child case law is limited in SA and this is due to the lack of a transparent system of recording and publishing court rulings especially in cases involving children.<sup>74</sup> Unlike other Islamic jurisdictions, SA lacks a legal precedent system (a system of recording and reporting judicial opinions and outcomes). However, it is worth noting that there have not been many cases (until November 2016, only one case of child trafficking ruled on in a Saudi court), since the enactment of the TIP Act in 2009. This means that the majority of children are not being properly identified and that the traffickers and exploiters are not being punished. As such, it can be said that the majority of child trafficking cases continue to go undiscovered in SA. Because of this and due to the closed-door trials in SA, which also makes the violations of the principles of fair trial possible, many international human rights watchers have questioned the level of fairness in the Saudi criminal justice system.<sup>75</sup> From the Islamic perspective, Shariah requires that all trials be in public except for reasons of State security or protection of public order and morality.<sup>76</sup> This is evident under Shariah from the fact that traditionally mosques were mostly used as the courtrooms; this was the most obvious public place within the Islamic State.<sup>77</sup> Thus, a complete resort to closed criminal trials and the unavailability of court decisions not only violates international human rights rules but is also a departure from the ordinary fair and public trial of Islamic criminal justice. In this regard, Baderin notes that ‘access to justice is a procedural matter and is thus within the competence of the State under the methods of Islamic law. It is clear that while the Qur’an and Sunnah mainly emphasise substantive justice, the

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<sup>72</sup> Saudi Human Rights Commission, Standing Committee to Combat Crimes of Trafficking in Persons, ‘Annual Report, 2011’ 48.

<sup>73</sup> *ibid.*

<sup>74</sup> Child Rights International Network, *Access to Justice for Children: Saudi Arabia* (DLA Piper 2015).

<sup>75</sup> Amnesty International, ‘Saudi Arabia, Behind Closed Doors: Unfair Trials in Saudi Arabia’ (MDE 23/08/97).

<sup>76</sup> Mashood Baderin, *International Human Rights and Islamic Law* (Oxford University Press 2003).

<sup>77</sup> *ibid.*



procedural detail of its realisation is left for the State authorities to decide in accordance with the best interest of society'.<sup>78</sup> It is worth mentioning that SA is a closed and complex State, which makes it difficult to gain access to extensive and recent data about the legal system and Saudi society at large. Human rights organisations such as Amnesty International have repeatedly been denied access to State data despite promises on behalf of the government in the media.<sup>79</sup> In response to the accusations of human rights violations, unfortunately, the Saudi government has continued to stress the special Islamic character of the State which in their view requires a different social and political order.<sup>80</sup>

Another complicated issue in SA is the lack of official statistics regarding human trafficking at the domestic level. Due to this, the table below shows data collected from three different official sources, namely: the SA Human Rights Commission Report;<sup>81</sup> the SA Second Periodic Report submitted to the Committee of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and finally, the SA Ministry of Justice Report.<sup>82</sup>

**Table 2: Statistics of successful human trafficking prosecutions in SA 2010-2013**

Year	Number of cases	Penalty
2010	3	Imprisonment for terms ranging from 1 year and 8 months to 3 years.
2011	27	Imprisonment for terms ranging from 3 months to 8 years and a fine ranging from 3,000 to 20,000 riyals.
2012	2	Imprisonment for terms ranging from 10 months to 4 years.
2013	4	Imprisonment for terms ranging from 1 to 4 years and a fine ranging from 4,000 to 10,000 riyals.

The only official statistics published by the Human Rights Commission were for the period 2010 to 2011. They show that there were 32 sentences imposed on persons convicted of

<sup>78</sup> Mashood A Baderin, 'Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 Netherlands Quarterly Human Rights 329, 340.

<sup>79</sup> Otto (n 10) 172.

<sup>80</sup> Fred Halliday, *Islam and the Myth of Confrontation: Religion and Politics in the Middle East* (Tauris 2003) 138.

<sup>81</sup> Saudi Human Rights Commission (n 72).

<sup>82</sup> Saudi Ministry of Justice, Research Center, *Majmouat Al-Ahkam Al-Qadaih* (Riyadh, 2015).

having committed crimes related to trafficking of persons in SA.<sup>83</sup> According to the statistics, all the convicted traffickers were involved in sexual exploitation crimes. The sentences ranged from 10 months to 8 years of imprisonment and the maximum fine was 20,000 riyals.<sup>84</sup> Most of the traffickers were sentenced to 2 years (13 cases). In 7 cases out of the 32, traffickers received both imprisonment and fines which ranged from 5,000 riyals to 20,000 riyals.<sup>85</sup> The total number of victims in 2011 was 51,<sup>86</sup> only four of whom were children; their ages ranged from 10 to 13 years old. The number of child victims may in fact be higher because the age of 29 victims was not recorded. The rest were adult victims (21 to 37 years old). All the cases were victims of sexual exploitation except for 2 victims recorded as forced labour and 3 victims of begging.<sup>87</sup> The majority of the victims were foreigners of 10 different nationalities, such as Chad, India and Yemen.<sup>88</sup>

The Saudi government has stated that there were no cases detected in which children were exposed to human trafficking for the purpose of sexual or labour exploitation during that period.<sup>89</sup> In this regard, there is evidence that in 2004 the Saudi Ministry of the Interior cooperated with UNICEF and IOM to repatriate 500 children from Afghanistan and Pakistan who were trafficked into SA during the Hajj season for begging purposes.<sup>90</sup> Further, in 2009, according to the report of the Special Rapporteur on Violence against Women, in SA ‘trafficking of children from countries such as Somalia and Chad for the purpose of sexual exploitation or forced labour and begging have also been reported’.<sup>91</sup> In 2012, the ILO Committee<sup>92</sup> also noted that SA is a destination State for Nigerian, Pakistani and Sudanese children trafficked for the purpose of labour exploitation.<sup>93</sup> All of this clearly suggests that the Saudi government is not taking the issue of child trafficking seriously in practice, despite the existence of TIP legislation.

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<sup>83</sup> UNHRC, ‘Universal Periodic Review: SA’ (5 August 2013) UN Doc A/HRC/WG.6/17/SAU/1.

<sup>84</sup> Saudi Human Rights Commission (n 72) 49.

<sup>85</sup> *ibid.*

<sup>86</sup> UNHRC (n 44).

<sup>87</sup> Saudi Human Rights Commission (n 72) 44.

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> Calandruccio (n 43) 292.

<sup>91</sup> UNHRC, ‘Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk’ (14 April 2009) UN Doc A/HRC/11/6/Add.3.

<sup>92</sup> The ILO body that examines the application of ratified conventions is the Committee of Experts on the Application of Conventions and Recommendations. The ILO supervisory system is set out here <<http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm>> accessed 22 April 2016.

<sup>93</sup> ILO, ‘Observation (CEACR): SA’ (adopted 2011)

The official report published by the Ministry of Justice in 2015 shows that in 2013<sup>94</sup> there were only four convictions for crimes related to human trafficking in SA.<sup>95</sup> According to the report, three of the convicted traffickers were involved in sexual exploitation crimes and one was in relation to child forced labour. Their sentences ranged from one to four years of imprisonment and the maximum fine was 10,000 riyals, it is clear that judges do not really understand the complexity of trafficking crimes. Although the law enforcement authorities have recognised different purposes of trafficking crimes, it appears once again that the Saudi government continues to have difficulties in being able to detect child trafficking cases. Accordingly, the ILO Committee has expressed its deep concern regarding the lack of detection of cases of child trafficking by Saudi law enforcement bodies.<sup>96</sup>

For the purpose of this thesis, the case of the sole child trafficking conviction in 2013 is worth expanding upon.<sup>97</sup> The child was four years old and was trafficked into SA from Yemen. The trafficker forced the child to beg for ten days in front of the mosque in Jeddah city. After that, the child was moved to another city for further begging for one month. However, despite the existence of TIP Act, the trafficker was sentenced to only one year's imprisonment followed by immediate deportation. In the light of the above details, there is a clear failure of law enforcement in practice, particularly judges who do not understand the issue of human trafficking. This is problematic as the Saudi TIP law provides that child trafficking cases should be treated as an aggravating circumstance. Moreover, as shown in chapter two, child exploitation in any form including forced labour and begging are prohibited in Islam and it considers it one of the *tazir* crimes. It is therefore clear that the SA law authorities failed in practice to enforce not only the Saudi TIP Act but also Islamic law. It is obvious that the availability of aggravating circumstances and the harm caused to victims were not taken seriously by judges. It is necessary to ensure that sanctioning of offenders is consistent with the harm they have caused and the benefits they have derived from trafficking or its related exploitation.<sup>98</sup>

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<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:2700662](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700662)>  
accessed 20 April 2016.

<sup>94</sup> SA Ministry of Justice (n 82).

<sup>95</sup> *ibid.*

<sup>96</sup> ILO (n 92).

<sup>97</sup> SA Ministry of Justice (n 82) 231.

<sup>98</sup> UNODC, 'Legislative Guides for the Implementation of the UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children' (UNODC 2004) part 1, para 261, 130.

At this point, it is worth mentioning that in SA only graduates of the Shariah colleges can be appointed judges at the Shariah courts. Several Islamic universities in SA provide training based on Shariah, with a focus on the Hanbali school.<sup>99</sup> However, Shariah colleges have always taken a passive attitude towards teaching the regulations (*nizams*) enacted by the government, one of which is the Saudi TIP Act. Because of that, new law departments were recently established in SA. However, graduates from these latter colleges cannot be appointed at Shariah courts.<sup>100</sup> This is problematic as it casts doubt on the value of the State regulations. As explained earlier, human trafficking crimes are categorised under *tazir* offences. This is where a judge enjoys discretionary power to pronounce a sentence in any given case. However, the State regulation (in this case the Saudi TIP Act) clearly defines this crime and stipulates its penalty. Therefore, Shariah judges need training courses focused particularly on how to apply and enforce State regulations and deal with these types of crimes, including trafficking in persons. Surely this will help Shariah judges to understand the complexity of child trafficking crimes and accordingly pronounce appropriate punishment.

At this stage and from the above analysis, several observations can be made. In general, it seems that the national law is regarded as fit for purpose, however, the inefficacy appears to be down to the lack of proper implementation and enforcement. Furthermore, SA lacks an adequate and comprehensive statistical or data collection system specific to crimes of human trafficking. In particular, accurate information regarding child trafficking is scarce, suggesting that the authorities are not able to identify trafficking cases. This is confirmed by the ILO Committee which noted that while trafficking of children remained a significant issue in SA, there was a severe lack of data on this topic.<sup>101</sup> It also seems that the lack of training, experience and familiarity in dealing with child trafficking and exploitation cases must be considered an integral part of the problem in SA.<sup>102</sup> It is inconceivable to imagine that the statistics are correct when they show only one case of child forced labour in a State where there are estimated to be 83,000

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<sup>99</sup> Al-Jarbou (n 54) 224.

<sup>100</sup> *ibid* 224.

<sup>101</sup> ILO, 'Observation (CEACR): SA' (adopted 2013)

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3143760](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3143760)> accessed 13 January 2016.

<sup>102</sup> It is worth noting that the Ministry of Justice's statistical annual report shows that the number of all criminal cases ruled on in Saudi courts between 2010 and 2011 was 65,669 cases. The record shows that the lowest number were the cases of human trafficking, forming only 0.11% of the total number of all the criminal cases: Ministry of Justice, 'Annual Report, 2011' <<http://www.moj.gov.sa/ar-sa/Pages/Default.aspx>> accessed 13 January 2016.

child beggars<sup>103</sup> and where workers, including children, from very poor States comprise more than 90 percent of the workforce.<sup>104</sup> In addition, it seems that emphasis has been placed upon prosecuting trafficking for the purpose of sexual exploitation. The evidence for this assertion is that all the cases that resulted in convictions except one (according to the report discussed above) were crimes of sexual exploitation. This falls short of the definition of human trafficking in practice as the authorities do not seem to be dealing with other forms of labour exploitation sufficiently. With regard to the punishment for trafficking offences, the majority of the traffickers received short terms of imprisonment, thereby not reflecting the grave nature of this crime, especially in cases considered as aggravated circumstances. This raises a question as to whether judges understand the serious nature of child trafficking. All of this suggests that the Saudi government has not been able to fulfil the obligation to prohibit and/or prosecute sufficiently in practice. This was also echoed by the ILO Committee.<sup>105</sup>

#### **4.5.4 Prohibition of child exploitation**

##### **4.5.4.1 Labour exploitation**

Shariah clearly prohibits forced labour and child labour exploitation as analysed in chapter two. At the national level, the SA Labour Regulation was promulgated by Royal Decree No M/51 in 2005. Article 61(1) states that:

The employer shall not require a worker to perform forced labour, nor shall he withhold all or part of a worker's wage without judicial authorisation. The employer shall treat his workers with due respect and shall refrain from any act or utterance prejudicial to their dignity or their religion. Punishment under the Labour Regulation takes the form of fines of no less than 2,000 riyals and no more than 5,000 riyals.<sup>106</sup>

This provision does not appear to prohibit forced labour that occurs independently of human trafficking. It is designed to discourage employers from using workers for specific work without the payment of wages and, therefore, is primarily concerned with regulating working conditions and pay. Furthermore, a violation of this Regulation is only punishable by a small fine; there is therefore an absence of more serious or harsher penalties such as imprisonment. SA is failing to meet its obligations under the Forced Labour Convention No 29 under which member States are

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<sup>103</sup> UNICEF, 'Where the Streets are Golden: Yemeni Families Traffic their Boys to Saudi Arabia Hoping for a Better Life' <[http://www.unicef.org/protection/index\\_27525.html](http://www.unicef.org/protection/index_27525.html)> accessed 12 April 2016.

<sup>104</sup> Saudi government <<https://www.saudi.gov.sa>> accessed 23 June 2016.

<sup>105</sup> ILO (n 92).

<sup>106</sup> Saudi Labour Regulation (28 October 2005).

obliged to enact legislation that clearly prohibits forced labour with appropriate punishment.<sup>107</sup> Given this, it is suggested that the Saudi government should enact legislation clearly prohibiting this practice with sufficient penalties, as recommended by the ILO Committee.<sup>108</sup>

In 2011, the Ministry of Labour appointed over 1,000 inspectors in order to strengthen monitoring of the labour market.<sup>109</sup> Statistics from 2012-2013 show that they carried out 251,074 field inspections and only 6,081 cases violations of the Labour Regulation were detected. All cases were taken to the Primary Commission for the Settlement of Labour Disputes. Of these cases, 1,513 were resolved by the chambers of the Higher Commission which handed out fines amounting to a total of 11,140,500 riyals.<sup>110</sup> This shows that the inspection is not effective and the majority of cases are not resolved which demonstrates the inability of the Saudi government to adequately address instances of forced labour.

With respect to the employment of children, Article 161 of the SA Labour Regulation provides that:

Juveniles shall not be employed in hazardous operations, harmful industries or occupations or activities which, due to their nature or the circumstances that they entail, are likely to endanger the juvenile's health, safety or morals.

Furthermore, Article 162 specifies the age of the child and states that: 'No person under 15 years of age shall be employed or permitted to enter workplaces'.<sup>111</sup>

As can be observed, the law does not clarify the types of hazardous work that children should not perform. In this regard, it is important to refer to the Worst Forms of Child Labour Recommendation 1999 (No 190)<sup>112</sup> which provides that in determining the types of such hazardous work consideration should be given, inter alia, to:

- (a) Work which exposes children to physical, psychological or sexual abuse;
- (b) Work underground, underwater, at dangerous heights or in confined spaces;

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<sup>107</sup> Article 25, Convention Concerning Forced or Compulsory Labour (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 (ILO Convention No 29).

<sup>108</sup> ILO, 'Observation (CEACR): Saudi Arabia' (adopted 2007)  
<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2286788](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2286788)> accessed 23 June 2016.

<sup>109</sup> UNHRC (n 44).

<sup>110</sup> Saudi Human Rights Commission, 'Ministry of Labour Efforts to Combat Human Trafficking Crimes' (2015) 2 Basharr 14.

<sup>111</sup> Saudi Labour Regulation (n 106).

<sup>112</sup> ILO, 'R190 - Worst Forms of Child Labour Recommendation, 1999 (No 190): Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' (17 June 1999)  
<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312528](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312528)>  
accessed 20 June 2015.

- (c) Work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
- (d) Work in unhealthy environments which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; and
- (e) Work under particularly difficult conditions such as work for long hours or during the night, or work where the child is unreasonably confined to the premises of the employer.

From the above, it is suggested that the Saudi Labour Law should be amended to list clearly the types of work that children are not allowed to perform. Moreover, according to the the Minimum Age Convention No 138,<sup>113</sup> and the Worst Forms of Child Labour Convention No 182,<sup>114</sup> which SA ratified in 2014 and 2001 respectively, a ‘child’ is anyone under the age of eighteen. As such, fifteen years is lower than the age stipulated in both Conventions. This indicates a gap in Saudi law as children above fifteen and under eighteen are not protected. In this respect, the ILO Committee observes that, ‘by virtue of Article 3(a) of the Convention, forced or compulsory labour is considered a worst form of child labour which must be prohibited to all children under 18 years of age’.<sup>115</sup>

Generally, determining the age of adulthood in SA is a very complicated topic. From the perspective of Islamic law, childhood is not strictly specified by age since children reach puberty at different ages, as examined in chapter two. The Hanbali school, for instance considers fifteen years to be the end of childhood for both boys and girls.<sup>116</sup> In this sense, it is not clear at what age a child is granted legal, religious and criminal responsibilities in SA law. Saudi legislation is apparently in direct conflict with the provisions of international law, in particular with Article 1 of the CRC which sets the age as eighteen. This variation can prevent the fulfilment of obligations under many international laws as a certain age group (16-17) may not receive sufficient protection. In this regard, the CRC Committee has noted in the past that ‘narrow interpretations of Islamic texts by State authorities are impeding the enjoyment of many human rights protected under the Convention’.<sup>117</sup> As shown earlier, there is nothing in Shariah that prevent Islamic States from specifying the age of majority. It is evidenced that there are many

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<sup>113</sup> Convention Concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO Convention No 138) art 3(1).

<sup>114</sup> Convention Concerning the Prohibition and Immediate Actions for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 38 ILM 1207 (ILO Convention No 182) art 2.

<sup>115</sup> ILO (n 92).

<sup>116</sup> W Al-Ahmad, *Himayat Huquq Al-tifl Fe Daw' Ahkam Al-Shariah Al-Islamiyah wa Al-itifaqiyat Al-dawliyah* (AlHalabi Legal Publications 2009) 13.

<sup>117</sup> CommRC, ‘Concluding Observations on Saudi Arabia (2001)’ UN Doc CRC/C/15/Add. 148, para 6.

Islamic States from various Islamic school of thought have managed to comply with international standards while adhering to Islamic law, for example, the Child Act of Malaysia<sup>118</sup> and the Egyptian Child Law, both of which define the term child in line with international standards.<sup>119</sup> This suggests that Islam as both law and religion has not been an obstacle to the application of such practice at the national level, and therefore, SA is recommended to make similar step to protect children and improve its compliance with international standards.

In order to enhance the fulfilment of the SA's obligations under the CRC, the Saudi National Society for Human Rights recommended the age of eighteen as the age for adulthood in accordance with Article 1 of the CRC.<sup>120</sup> Therefore, the Saudi National Commission for Childhood submitted a draft of the Child Protection Act in 2011 under which a child is regarded as anyone under the age of eighteen.<sup>121</sup> In 2014, the Saudi government finally approved this by Royal Order No M/14.<sup>122</sup> Article 21 of this Act states that, the rules and procedures of the law shall not prejudice any more favourable protection for the child stated in any other law or convention that the State is party to. Further, one of the objectives of the law, as stated under Article 2 is: 'Reaffirming Shariah principles, laws and international conventions that the State is party to, which guarantee the rights of the child and protect it from all forms of abuse and negligence'. Despite the existence of such provisions, judges have broad discretion in deciding whether to uphold articles of the international conventions relevant to children, especially the CRC, based on the merits of each case and in accordance with Shariah principles.<sup>123</sup> However, it is important that the Saudi law enforcement authorities proactively enforce this Act, especially as shown earlier that the provisions of the CRC do not contradict the Islamic principles.

#### **4.5.4.2 Begging**

Child begging may also be a form of exploitation related to child trafficking. According to the Special Rapporteur on TIP, 'the prevalence of street children increases their vulnerability

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<sup>118</sup> Child Act 2001 (Malaysia, Act 611) part 1, art 2(a).

<sup>119</sup> Law No 12 of 1996 (Egyptian National Council for Childhood and Motherhood) promulgating the Child Law amended by Law No 126 of 2008, art 2.

<sup>120</sup> SNSHR 'Conformity of the Saudi Rules and Regulations with the Conventions on Basic Human Rights' (Report, 2009).

<sup>121</sup> CommRC, '3-4 Periodic Report of States Parties: Saudi Arabia' UN Doc CRC/C/SAU/3-4/6721-A.

<sup>122</sup> Saudi Child Protection Act (26 November 2014).

<sup>123</sup> CRIN Report (n74) 3.



to child trafficking'.<sup>124</sup> In SA, there were reports that children from poor families and foreign children primarily from Yemen and Ethiopia were trafficked into the State specifically to beg.<sup>125</sup> Indeed, official statistics by the Ministry of Social Affairs confirm this: 18,233 beggars were arrested in 2012, 19% of whom were Saudi citizens and 81% were foreigners.<sup>126</sup> Compared with the statistics from the previous year, the numbers are increasing.<sup>127</sup>

The relevant regulation in relation to begging at the national level is Order No 1/738 issued on 4 July 2004 by the Ministry of Labour. In accordance with Shariah which categorise begging under *tazir*, Article 1 creates an offence of hiring children for the purpose of begging. Article 3 prescribes the punishment which takes the form of banning the offender from engaging in recruitment activities for a period of five years. HRW commented on this and stated that it is quite insufficient as it stipulates a simple five-year ban.<sup>128</sup> Further, the ILO Committee has made the same observation, adding that it is not sufficiently effective or dissuasive in practice.<sup>129</sup> There is evidence suggesting that sometimes an agency's license will be temporarily suspended, after which the suspension is either cancelled or the agent concerned simply starts a new agency under a different name.<sup>130</sup> This situation cannot be expected to change unless serious measures are taken to make action against these agencies possible.<sup>131</sup> Therefore, the ILO Committee has recommended that there is a need to take the necessary measures towards ensuring that competent bodies examine this issue so that sufficiently effective regulations are adopted, and that dissuasive penalties are issued to people who use children under the age of eighteen years to beg.<sup>132</sup> In spite of the power that an Islamic State has under Islamic law in regard to *tazir* offences, SA has failed to enact serious legislation, and therefore contributed to the development

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<sup>124</sup> UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Special Rapporteur on TIP, Ngozi Ezeilo' (15 April 2011) UN Doc A/HRC/17/35/Add.2.

<sup>125</sup> US Dept of State, Bureau of Democracy, Human Rights and Labour, 'Country Report on Human Rights Practices for 2011' 32.

<sup>126</sup> Statistics in the last eight years concerning the nationality of beggars who were arrested in SA show that 13-21% are Saudi and 78-87% are foreigners: Saudi Human Rights Commission (n 79) 19.

<sup>127</sup> Saudi Ministry of Social Affairs (MOSA), 'Annual Report, 2012' 181

<<http://mosa.gov.sa/portal/modules/smartsection/item.php?itemid=40>> accessed 15 April 2015.

<sup>128</sup> HRW, 'As If I Am Not Human: Abuses Against Asian Domestic Workers in Saudi Arabia' (2008).

<sup>129</sup> ILO, 'Observation (CEACR): Saudi Arabia' (adopted 2009)

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2310424](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2310424)> accessed 25 May 2016.

<sup>130</sup> Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and the Emirates: Trafficking Victims? International Migration' (2012) 50(6) International Migration 180, 191.

<sup>131</sup> *ibid* 192.

<sup>132</sup> ILO (n 92).

of this crime in the State. This will increase the demand for child trafficking into SA for begging purposes and traffickers will have a greater incentive to traffic and exploit child victims.

Offices for combating beggary have been established in SA. These offices employ social workers and inspectors who cooperate with law enforcement agencies to undertake daily raids in areas where beggars are found and arrest them.<sup>133</sup> This is in direct contravention of a human rights approach as children are not sufficiently protected. Foreign children are deported instead of being protected and rehabilitated.<sup>134</sup> The most recent statistics show that in 2015 in Makkah city alone 15,235 beggars were arrested: 4,444 of them were foreign children who were deported to their countries of origin.<sup>135</sup> Unfortunately, this does not solve the problem of begging but rather exacerbates it as children are often re-trafficked into SA.<sup>136</sup> From this, it is clear that SA has failed to fulfil its obligations under Islamic law as well as regional and international standards as discussed in previous chapters. SA should take serious measures to deal with begging by amending Order No 1/738, taking into consideration the fact that child begging is considered one of the worst forms of child labour according to the ILO Convention No 182. SA should apply adequate sanctions to combat it and deter its offenders, and consider the enhancement of the punishment in specific circumstances, such as the involvement of children.

#### **4.5.4.3 Camel jockeys**

A widely denounced form of child labour exploitation in SA is the use of minors in camel racing. This is considered a form of child trafficking<sup>137</sup> so the exploitation of child camel jockeys can surely be added to the list of exploitations under the Saudi TIP Act. This competitive sport is considered part of the traditional heritage of the GCC including SA.<sup>138</sup> This sport has typically favoured the use of young and light riders. According to the US TIP report, children from Bangladesh, Sudan and Mauritania are trafficked to the GCC to act as camel jockeys in illegal

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<sup>133</sup> MOSA, Combating Begging Office <<http://mosa.gov.sa/portal/modules/smartsection/item.php?itemid=34>> accessed 25 May 2016.

<sup>134</sup> HRW, 'Inadequate Procedures for Determining Children's Best Interests During Deportation Proceedings in Adults Before their Time' (24 March 2008) 65 <<http://www.hrw.org/en/reports/2008/03/24/adults-their-time>> accessed 21 June 2015.

<sup>135</sup> MOSA, 'Annual Report, 2015' <<http://mosa.gov.sa/portal/modules/smartsection/item.php?itemid=40>> accessed 25 May 2016.

<sup>136</sup> UNICEF, 'Trafficking in Children and Child Involvement in Beggary in Saudi Arabia' (UNICEF Gulf Area Office 2008).

<sup>137</sup> UNICEF, 'Combating Child Trafficking' (Handbook for Parliamentarians No 9, 2005) 13, 14.

<sup>138</sup> ILO, Regional Office for the Arab States, 'Tricked and Trapped: Human Trafficking in the Middle East' (2013).

camel races.<sup>139</sup> SA is one of the key destinations for child victims from various origins.<sup>140</sup> These children are kept in forced labour conditions and frequently are targets of physical abuse. The Special Rapporteur on the Sale of Children expressed her concern during her visit to the region and stated that:

In the Gulf States, the lives of young boys are being put at risk for the entertainment of spectators at camel races. For many years the boys, sometimes as young as four years of age, have been trafficked from countries in South Asia to supply the demand for camel jockeys. The children are attached to the camel's back with cords, and the camels are made to run down a track. Children who fall risk being trampled to death by the other camels on the track, and if they refuse to ride the camels, they are beaten and forced to ride anyway.<sup>141</sup>

On 17 April 2002, Royal Decree No 13000 was published, establishing *tazir* offence. This bans any camel jockey who has not attained eighteen years from participating in races and punishes any person who violates the prohibition. The penalty stipulated in this Royal Decree is that any camel owner who employs a jockey under the age of eighteen years will not, if he wins, receive the prize.<sup>142</sup> This appears to leave a loophole as only if a camel owner wins will he be penalised; if he loses, he faces no penalty. Although the ILO Committee has noted the Saudi government's comment that a camel owner is punished in this situation regardless of whether he wins the race or not, this is not reflected in the Royal Decree.<sup>143</sup> This so-called penalty does not act as a deterrent against employing young camel jockeys, and therefore it is clear that not enough is being done inside SA to prevent children facing this fate. It is significant to note that the employment of children as camel jockeys constitutes dangerous work and violates many of the rights for children under Islamic, regional and international laws, specifically Article 18 of the OIC Child Covenant<sup>144</sup> and Article 34(3) of the Arab Charter on Human Rights.<sup>145</sup> Moreover, Article 32 of the CRC<sup>146</sup> and Article 3(1) of ILO Convention No 138,<sup>147</sup> as well as Islamic law examined in chapter two, all agree on the prohibition of child economic exploitation. It is clear

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<sup>139</sup> US Dept of State, 'Trafficking in Persons Report: June 2006' 250.

<sup>140</sup> Save the Children (Sweden), 'Camel Jockeys of Rahimyar Khan: Findings of a Participatory Research on the Life and Situation of Child Camel Jockeys' (2005).

<sup>141</sup> UNHRC, 'Report of the Special Rapporteur on the Sale of Children, Ms. Ofelia Calcetas Santos' (1999) UN Doc E/CN.4/1999/71, [79].

<sup>142</sup> CommRC, 'Second Periodic Report of States Parties: SA' UN Doc CRC/C/136/Add.121 (12 April 2005).

<sup>143</sup> ILO (n 92).

<sup>144</sup> art 18, OIC Child Covenant (adopted 23 June 2005).

<sup>145</sup> Arab Charter on Human Rights (n 44) art 34(3).

<sup>146</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 32(1).

<sup>147</sup> ILO Convention No 138 (n 113) art 3.

that SA as an Islamic State and State Party to all these instruments at various levels has failed to meet its obligations at the national level.<sup>148</sup>

However, once again the Saudi government in responding to the international pressures stated that measures are being taken to eliminate any violations of children's rights in this regard.<sup>149</sup> For example, each jockey is required to provide official documents confirming his age, after which he will be issued a jockey card with a photograph stamped with the particular festival's seal. Before a race, the competent committees, namely the Saudi National Guard, inspect the jockey card, matching the photo to the name on the identification document.<sup>150</sup> Although the CRC has welcomed the Regulation concerning the Safety of Camel-Racing,<sup>151</sup> unofficially this practice is still flourishing. An article in the *Daily Mail* in 2014 stated that every February more than 2,000 Arabian camels and their young riders compete in ten races during the Al Janadriyah Cultural Festival.<sup>152</sup> It seems that the preservation of traditional camel racing in SA is more important than the protection of children's rights. Unfortunately, using children for camel races will facilitate and increase the demand for child trafficking into SA.

It is interesting at this point to examine how another jurisdiction which subscribes to the same Islamic school of thought (Hanbali) addressed this practice at the national level. Due to the consideration that camel racing is part of the national heritage of all the GCC, including Qatar, the State is currently unable to eradicate it but it has taken certain measures to prevent children from being participants and being exploited in this sport.<sup>153</sup> In May 2005, Qatar enacted a law banning the use of children for camel races, Law No 22.<sup>154</sup> Article 2 provides that '[i]t is prohibited to bring in, employ, train or involve children in camel racing'. The prescribed punishment is a minimum of three years' imprisonment or a fine of between 50,000 and 200,000 riyals.<sup>155</sup> In comparison with the Saudi Order, the Qatari punishment is much more serious. To completely prevent the practice, the Qatari Deputy Minister of the Civil Service stated that, in

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<sup>148</sup> ILO Convention No 182 (n 114).

<sup>149</sup> CommRC (n 142).

<sup>150</sup> *ibid.*

<sup>151</sup> UNHRC (n 44).

<sup>152</sup> Leon Watson, 'Do You Think it Will Catch on? Crowds Flock to See Popular Saudi Sport of Camel Racing in Rural Somerset Village' (*Daily Mail*, 30 March 2014) <<http://www.dailymail.co.uk/news/article-2592835/Do-think-catch-Crowds-flock-popular-Saudi-sport-CAMEL-RACING-rural-Somerset-village.html>> accessed 20 June 2015.

<sup>153</sup> Save the Children (Sweden), 'Camel Jockeys of Rahimyar Khan: Findings of a Participatory Research on the Life and Situation of Child Camel Jockeys' (2005) 13.

<sup>154</sup> Qatari Law No 22 (23 May 2005) on Banning the Employment, Training and Participation of Children in Camel Racing.

<sup>155</sup> *ibid.*, arts 2 to 4.

addition to the penalties provided by the law, camel owners stand to lose their membership of the Camel Racing Federation if they are found to be violating the law.<sup>156</sup> Additionally, in order to completely prevent the use of children in such sport, the Qatari government enforced the replacement of the camel jockeys with robot jockeys and financially supported the local production of robots which respond more adequately to the needs of camel owners in Qatar.<sup>157</sup> The ILO Committee has welcomed this development. It seems that the efforts dedicated to this activity in Qatar were both appropriate and successful. This is evident by the fact that the Qatari Deputy Minister of Justice reported that since the enforcement of the Law he had received no information on any violations of it.<sup>158</sup> This was also confirmed by the UN Special Rapporteur on TIP during her visit to Qatar in which she saw that Qatari legislation was more effective in eradicating child exploitation in this sector.<sup>159</sup> Therefore, the Qatari government approach to this issue represents good practice in the region and is one which SA is recommended to follow. It is obvious that there does not seem to be, as the Qatari practice might suggest, an Islamic obstacle to prevent this act and protect its victims. Therefore, it appears that Islamic law is not the reason behind children's rights violation in camel races in SA. Therefore, and in light of the above, there is scope for SA to follow Qatar's steps and consider similar measures.

It is also worth noting that the OIC Child Covenant clearly obliges States to end actions and practices based on customs, traditions or practices that are in conflict with the rights and duties stipulated in it, which is based on Shariah.<sup>160</sup> Further, parents and States shall protect children from practices and traditions that are socially or culturally detrimental or harmful to their health and from practices that have negative effects on their welfare, dignity or growth.<sup>161</sup> This means that under Islamic law parents and States share the responsibility of ending the practice of children participating in camel races. Saudi government should ensure that legislation and strategies are devised to tackle all forms of child abuses no matter the cultural influences on Saudi society.

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<sup>156</sup> ILO, 'Observation (CEACR): Qatar' (adopted 2006)  
<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:2263487](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2263487)>  
accessed 21 April 2016.

<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> UNHRC, 'Report of the Special Rapporteur on TIP: Sigma Huda, Addendum, Mission to Bahrain, Oman and Qatar' (2007) UN Doc A/HRC/4/23/Add.2 [90].

<sup>160</sup> OIC Covenant (n 144) art 4.

<sup>161</sup> *ibid* art 20.

#### 4.5.4.4 Sexual exploitation

With regard to sexual exploitation and prostitution, it is important to clarify that the act of prostitution per se does not constitute an offence in the SA legal system simply because there is no published Criminal Code in the State.<sup>162</sup> This is because Islamic law is enforced and applied in SA, and therefore Saudi judges apply the rules of Shariah in the cases that are brought to the court based on Islamic law sources which, in respect of sexual exploitation, provide a basis for the prohibition of such acts.

The Saudi government confirmed this position as explained in the government report that was submitted to the CEDAW Committee in 2007:

In view of the fact that SA applies Shariah, which exhorts to virtue and forbids vice, fornication and immorality, as well as the fact that these conflict with tradition and custom, traffic in women and exploitation of prostitution of women are practices unknown to Saudi society. Whoever commits this type of activity is punished in accordance with Shariah, which seeks to root out such inhuman practices.<sup>163</sup>

With respect to child sexual exploitation specifically, the CRC Committee asked the Saudi government to indicate clearly which legal provisions prohibit the use, procurement or offer of children under eighteen years for prostitution and pornography.<sup>164</sup> Responding to the CRC Committee, the Saudi government stated that ‘the State prohibits all forms of sexual exploitation of children and imposes appropriate penalties on persons who engage in sexual exploitation, in accordance with Shariah’.<sup>165</sup> The Saudi government’s response to both Committees shows that it strictly bans prostitution and pornography through the Qur’an and Sunnah and punishes them under *hudud* offences, as noted in chapter two. Having said this, there is no reason why SA cannot enact specific legislation within the framework of Shariah as requested by the CRC Committee, for child sexual exploitation, which would certainly add clarity. There are many instruments discussed in the previous chapter, at international and regional levels, which oblige States to take the necessary measures in this regard.<sup>166</sup> Based on

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<sup>162</sup> There are voices among Saudi scholars advocating codification of the law. However, in 2000, the Saudi Board of Senior *Ulama* issued Fatwa No 8 rejecting codification of Shariah as they considered it un-Islamic; see Frank E Vogel (n 9) 338.

<sup>163</sup> CommEDAW, ‘Reports Submitted by States Parties under Article 18 of CEDAW: Combined Initial and Second Periodic Reports of States Parties: SA’ CEDAW/C/SAU/2 (29 March 2007).

<sup>164</sup> CommRC, ‘Concluding Observations: SA’ CRC/C/Add.148 (22 February 2001) para 41.

<sup>165</sup> SA government’s indication to the CRC Committee. CommRC (n 16) para 264.

<sup>166</sup> For example, CRC (n 146) art 34. Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (adopted 25 May 2000, entered into force 18 January 2002) 39 ILM 1285 (CRC OP on Sale of Children) art 3; ILO Convention No 182 (n 114) art 3(b); Arab Charter on Human Rights (n 42) art 10(b). OIC Child Covenant (144) art 17(3).

that, SA as a member State needs to meet its obligations under such Conventions at the national level.

In practice, the Saudi government has indicated that child sexual exploitation cases are rare and very limited in the country. It has also claimed that no cases in which children were exposed to human trafficking for the purpose of sexual exploitation have been detected.<sup>167</sup> However, there is evidence that contradicts both statements in many international reports. For instance, the CEDAW Committee expressed concern regarding the economic and sexual exploitation of young migrant girls employed as domestic servants in SA.<sup>168</sup> The ILO Committee also noted that there were reported cases of women under the age of eighteen being trafficked into SA from Indonesia for the purpose of commercial sexual exploitation.<sup>169</sup> Similar concerns have been raised in the US TIP report.<sup>170</sup> It is also interesting to note that research has shown that child trafficking for sexual exploitation is a large industry in SA – equivalent to drug trafficking in Western States.<sup>171</sup> Because of that, the CRC recommended SA to conduct research within its borders to discover the extent, nature and changing ‘patterns of sexual exploitation and trafficking in children’.<sup>172</sup> SA needs to acknowledge the problem, address the issue and protect children from such exploitative acts. It is the State’s obligation under both Islamic as well as international laws to prohibit the crime and protect its victims. This can be done by implementing and enforcing an adequate law against child sexual exploitation and its related acts within the Islamic framework.

From the Islamic perspective, Shariah mainly emphasises substantive justice, leaving the procedure of its realisation for the State to decide in accordance with the best interests of society.<sup>173</sup> There is nothing under Shariah which prevents SA from enacting specific laws in accordance with Shariah, in order to clearly define and prohibit the use, procurement or offer of

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<sup>167</sup> Saudi Human Rights Commission (n 72).

<sup>168</sup> CommEDAW, ‘Concluding Observations of the CEDAW Committee: SA’ CEDAW/C/SAU/CO/2 (8 April 2008) para 23.

<sup>169</sup> ILO, ‘Observation (CEACR): Saudi Arabia’ (adopted 2011) <[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2700662](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2700662)> accessed 27 July 2015.

<sup>170</sup> US Dept of State, ‘Trafficking in Persons Report: June 2014’ SA. <<http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226806.htm>> accessed 27 July 2015.

<sup>171</sup> Vlieger (n 130) 122.

<sup>172</sup> UNHRC (n 44).

<sup>173</sup> For classical analysis of the development of the Islamic judicial procedure, See, eg, Ibn Khaldūn, *al-Mugaddimah*, Vol 2, 35-37; Ibn Qayyim al-Jawziyyah, *al-Turuq al-Hukmiyyahfi al-Siydsah al-Shar’iyyah* (1953) 218.

children under eighteen years for prostitution and pornography, as requested by the CRC Committee. It seems that the lack of efforts to address and combat this issue is not because of Islam but rather a matter of political will. Therefore, the issue of political will is worth exploring. Sexual activities and sexual crimes are taboo subject in SA, as it suggests moral corruption which implies a decline in the influence of Islamic principles on Saudi society.<sup>174</sup> As explored earlier from the history of SA, there has been coexistence between two main parties: the Al-Saud ruling family and the Wahhabi scholars. The objective of this collaboration was to create an ideal society that would be similar to life during the time of the Prophet. In this sense, it is the responsibility of the political authority to preserve the traditions and principles of Islam both as a religion and law. Thus, for the Saudi government to acknowledge child trafficking for sexual purposes, at the national level, is to admit the State's diminishing power.<sup>175</sup> This means the government has failed to meet its basic obligation of preserving the religious authority of the State. In this regard, Doe commented that 'successful eradication of something as grave as human trafficking is a matter of political will, not necessarily one of political ability'.<sup>176</sup> Surely, if the political incentives to act exist, the State will afford better compliance with Islamic as well as international standards. According to Baderin:

[W]hile Islamic law will continue to impact, one way or another, on the implementation of international human rights law in many Muslim States, such impact should not necessarily be negative, and that, through the right political will, Islamic law could be constructively utilized for the positive implementation of international human rights law in Muslim States.<sup>177</sup>

At the national level, Order No 738/1 covers prohibition of child labour exploitation but does not include any specific prohibition of child sexual exploitation. This inconsistency has caused major confusion and shows that SA is clearly not fulfilling its obligation under Islamic law. Because of this, Zimmerman noted that the Saudi government is failing to provide evidence of increasing efforts to combat human trafficking and has not made any commitments to take additional steps, part of this was due to insufficient regulations.<sup>178</sup>

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<sup>174</sup> Stephanie Doe, 'Misyar Marriage as Human Trafficking in Saudi Arabia' (2008) 2 *Global Tides* 6, 29 <<http://digitalcommons.pepperdine.edu/globaltides/vol2/iss1/>> accessed 17 March 2015.

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid.*

<sup>177</sup> Mashood A Baderin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after the UDHR and Beyond* (Ashgate 2010) 22.

<sup>178</sup> Sarah Zimmerman, 'Mending the Protection and Prosecution Divide: Looking at Saudi Arabia Human Trafficking Flaws and Possibilities' (2016) 15 *Washington University Global Studies Law Review* 533, 536-537.



It is important to acknowledge that while the construction of the law can be regarded as being a significant indication of the ability and capacity of national laws to combat child trafficking for any purpose, including child sexual exploitation, the application of the law in any State is influenced by its culture. In the case of SA, its laws in terms of construction and application are closely related to Islamic tradition as shown above. Some commentators, such as Dudley, have suggested that Middle Eastern States including SA have failed to realise the prevention, detection and prosecution of those involved in child trafficking largely due to an identifiable conservative cultural value in society.<sup>179</sup> In general, Saudi society has indeed been criticised for being very traditionalist and slow in demanding and embracing change.<sup>180</sup>

It may be argued that a core part of the problem in SA is the apparent unwillingness of victims to report crimes of sexual exploitation. This is especially because sexual activities and sexual crimes remain a taboo subject in SA, sexual activities outside of marriage is prohibited with severe punishment. There often tends to be cultural resistance to the subject of sexual activity or anything related to it.<sup>181</sup> Even though Shariah covers subjects such topics, it also encourages modesty instead of openness when discussing matters of this nature. Saudi society, culture and customs consider this kind of issue highly personal and one that should generally be resolved outside the court system for fear of shame and social stigma.<sup>182</sup> The fear of *fadiha*, ‘a scandal causing damage to the reputation of family members’, may explain why family members hide such cases in total disregard to the effect of the abusive process on the victim.<sup>183</sup> However, confidentiality should not justify any kind of exploitation since there is nothing confidential about a form of exploitation including one that is sexual in nature. In this sense, victims need to be empowered to be able to report the crimes and seek justice, while their right to privacy is protected by the law. A culture which avoids discussing and solving such very serious issues has to be changed and can change. Answering questions from Committee members during the consideration of its initial report on the CRC, SA’s representative, Mr Al-Nasser, stated that ‘in

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<sup>179</sup> Schuyler Dudley, ‘Human Trafficking in the Middle East and North Africa Region’ [2013] Topical Research Digest: Human Rights and Human Trafficking 74.

<sup>180</sup> Esmaili (n 30) 29.

<sup>181</sup> Najat M’jid (Paper presented at the Arab-African Forum against Commercial Sexual Exploitation, Rabat, Morocco, 24-26 October 2001) <<http://www.unicef.org/events/yokohama/background8.html>> accessed 23 February 2015.

<sup>182</sup> Doe (n 174).

<sup>183</sup> MB Brewer and M Yuki, *Culture and Social Identity* in S Kitayama and D Cohen (eds) *Handbook of Cultural Psychology* (Guilford Press 2007) 307.

SA when the majority were in favour of a change in any existing traditions, the rules would be amended to reflect that change'.<sup>184</sup> One way to improve the situation is through education and public sensitisation campaigns on the negative consequences of such traditional practices.

According to Le Renard, part of the problem in SA with controlling sexual activities is related to the fact that its culture places great emphasis on male dominance.<sup>185</sup> The Basic Law of SA states that the family, represented by the elder male, is the core of Saudi society. Further, the State strives to strengthen the bonds of the family and society is sex-segregated, with girls and boys being brought up differently. Thus, society remains deeply embedded in patriarchal and tribal norms and values. Girls' education, for example, is perceived by some families as preparing them for their 'natural roles' as mothers and wives.<sup>186</sup> Given the prevailing norms of sex segregation, women are often hesitant to walk into a police station as all police officers are male.<sup>187</sup> To complicate the situation further, a woman must be accompanied by a *mahram* (husband, father, brother or son) to visit a police station or a court. However, it should be noted that this is based on the opinion of the judges and there is no basis in the main sources of Islamic law. In this sense, it is important to distinguish between what is socially acceptable and what is permitted by Islamic law. The CEDAW Committee examined SA's initial and second periodic report in 2008. A recurring topic in the discussion between the Committee and the national delegation was the concept of male guardianship over women. The Committee noted with concern that 'the concept of male guardianship over women (*mahram*), although it may not be legally prescribed, seems to be widely accepted; it severely limits female's exercise of their rights under the Convention'.<sup>188</sup> The Committee further observed that the concept of male guardianship 'contributes to the prevalence of a patriarchal ideology with stereotypes and the persistence of deep-rooted cultural norms, customs and traditions that discriminate against women and constitute serious obstacles to their enjoyment of their human rights'.<sup>189</sup> Referring back to chapter three, Morocco is an example of good practice to deal with the concept of male

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<sup>184</sup> See Summary Record of the 688<sup>th</sup> Meeting of the CRC: SA, UN Doc CRC/C/SR.688 (24 October 2001) para 2.

<sup>185</sup> Amelie Le Renard, 'Only for Women: Women the State and Reform in Saudi Arabia' (2008) 62(4) The Middle Eastern Journal 610, 612.

<sup>186</sup> UNHRC (n 91).

<sup>187</sup> HRW, 'World Report 2011: SA' <<https://www.hrw.org/world-report/2011/country-chapters/saudi-arabia>> accessed 23 February 2015.

<sup>188</sup> CommEDAW, 'Concluding Comments of the CEDAW Committee: SA' CEDAW/C/SAU/CO/2 (8 April 2008) para 15.

<sup>189</sup> CommEDAW, 'Concluding Comments of the CEDAW Committee: SA' CEDAW/C/SAU/CO/2 (8 April 2008) para 15.

guardianship over adult women, Saudi is recommended to implement similar step. It has been argued that people are less likely to be vulnerable to sexual exploitation and or trafficking if they are strong and secure members of their community.<sup>190</sup> Furthermore, Coomaraswamy has noted that traditional family structures, which are based on the maintenance of traditional sex roles and the division of labour that drives such roles, support the system of trafficking.<sup>191</sup> Therefore, it is important to eradicate all aspects of negative culture, including the one of male dominance, which can oppress females and young girls and render them vulnerable to exploitative situations where their rights are violated. As Mattar notes, '[o]nly when human rights are enhanced and fully protected and guaranteed for the people of the Middle East will human trafficking be successfully confronted and eliminated'.<sup>192</sup>

Before concluding, some recent developments in the law ought to be touched upon here. It is significant that the Child Protection Act of 2014 generally prohibits any activities that might damage a child's health or physical integrity and considers *tazir* offences.<sup>193</sup> In particular, it prohibits child sexual exploitation or the use of children for prostitution, pornography and begging.<sup>194</sup> In addition, it prohibits child participation in any sports that endanger their life or health.<sup>195</sup> Although it does not refer to camel races specifically, it is possible to conclude that it prohibits such a practice. In relation to child labour, it prohibits the employment of children before the age of fifteen.<sup>196</sup> In this sense, the recent law does not improve the already existing provision contained in the Labour Regulation discussed above. It is worth noting that, despite the fact that various Committees recommended that SA improve its national legislations and impose serious penalties, with the enactment of this recent Act SA has failed to implement such recommendations and consider relevant observations. This is one of the main reasons why SA is not meeting its international and regional obligations. Another problem with this Act is that it does not specify penalties for the violation of its provisions. According to Article 23, judges have the power to decide the appropriate penalty against the perpetrator. Therefore, this legislation

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<sup>190</sup> UNODC (UN.GIFT), *Human Trafficking: An Overview* (UNODC 2008) 31.

<sup>191</sup> UNCHR, 'Report by the Special Rapporteur on Violence Against Women, its Causes and Consequences, Radhika Coomaraswamy' (27 January 2000) E.CN.4/2000/68/Add.3, 20, para 57, 20.

<sup>192</sup> Mohamed Y Mattar, 'Human Rights Legislation in the Arab World: The Case of Human Trafficking' (2011) *Michigan Journal of International Law* 101, 131.

<sup>193</sup> Saudi Child Protection Act (26 November 2014).

<sup>194</sup> *ibid* art 9.

<sup>195</sup> *ibid* art 13.

<sup>196</sup> *ibid* art 8.

must be amended, including with adequate penalties, which deter the perpetrators from committing such acts. Furthermore, it should be accompanied by sufficient protection measures that encourage child victims to come forward to report the crime.

To sum up this part of the chapter, the discussion above regarding the prosecution and prohibition elements clearly demonstrates that the Saudi TIP Act and other relevant regulations looks reasonable in law but the problem is the lack of enforcement in practice. Also, the laws against child exploitation (both labour and sexual) are weak and inadequate. The following part will explore the protection measures available to child victims of trafficking.

#### **4.6 Protection measures**

All States have an obligation to protect children from trafficking. Although this is more onerous than the protection of adults, it is equally if not more important due to their particular vulnerabilities and protection needs.<sup>197</sup> Children's vulnerability derives from their age, their dependence on adults and the lack of opportunities to escape situations where they are being exploited. Therefore, child trafficking responses require different measures from those taken in relation to the trafficking of adults. According to the Special Rapporteur on Violence against Women, 'the phenomenon of trafficking in children needs different, child-specific remedies that are likewise gender-specific'.<sup>198</sup> The issue of child vulnerability is clearly addressed under Islamic, international and regional frameworks, as noted in the previous chapters. Each framework has provided general protection measures and more specific ones that should be available for child victims of trafficking. Therefore, SA is in a position to adopt comprehensive protection measures to protect those vulnerable victims who are trafficked into its territory.

SA's efforts in this regard can be examined by reviewing the comments and recommendations received from different international human rights bodies based on the reports that were submitted by the government. For example, during the 2009 UN Human Rights Council's UPR of SA, a number of delegations enumerated pending challenges related to the realisation of child rights. It was recommended that the State develop legislative measures for the protection of children pursuant to the recommendations of the Committee, including providing a

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<sup>197</sup> UNICEF, 'Combating Child Trafficking' (Handbook for Parliamentarians No 9, 2005) 18.

<sup>198</sup> UNHRC (n 91) 6.

reintegration assistance programme for victims of violence and exploitation.<sup>199</sup> Additionally, the CRC Committee recommended SA to ‘strengthen its efforts to provide adequate assistance and social reintegration services for sexually exploited and/or trafficked children’.<sup>200</sup>

The Saudi TIP Act contains specific provisions for protection measures. Article 15 states that the following shall be adopted regarding victims of human trafficking during an investigation or prosecution:

1. Inform the victim of his legal rights, using a language that he understands.
2. Avail the victim 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 the relevant 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 centre if so necessitated by his medical or psychological condition or age.
5. Admit the victim to a specialised centre if he needs shelter.
6. Provide police protection for the victim if necessary.
7. If the victim is non-Saudi and there is a need for him to stay or work in the SA during investigation or prosecution, the Public Prosecution or competent court shall have the discretion to decide upon such need.<sup>201</sup>

Further, the Council of Ministers’ Decision No 244, which approved the establishment of the Human Rights Commission of the Standing Committee to Combat Crimes of Trafficking in Persons, defined some of the functions and tasks of the Committee as follows:

1. To monitor the situation of victims of trafficking in persons in order to ensure that they are not harmed again.
2. To coordinate with the competent authorities with a view to returning the victim to his place of origin in the State of which he is a national or to his domicile in any other State if he so requests.
3. To recommend that the victim remains in the Kingdom, and that his legal status be regularized in order to enable him to work, if the situation so requires.
4. To formulate a policy to promote an active search for, and provide training in ways to identify, victims.<sup>202</sup>

From the above, it seems that the protection provision covers various areas: legal, medical, social and security rights. Although the Trafficking Protocol has more discretionary provisions than binding ones relating to the protection and assistance of victims, the fact that SA has ratified the Protocol means that the aims and purposes of the Protocol contained within its Article 2 were implicitly accepted.<sup>203</sup> Therefore, SA must develop a more multi-faceted and holistic approach to achieve the Trafficking Protocol’s aims in practice at the national level. The

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<sup>199</sup> UNHRC (n 44).

<sup>200</sup> CommRC, ‘Consideration of Reports Submitted by States Parties, Under Article 44 of the Convention, Concluding Observations: SA’ CRC/C/SAU/CO/2 (17 March 2006) para 72(f).

<sup>201</sup> Saudi TIP Act (n 45) art 15.

<sup>202</sup> Saudi Human Rights Commission (n 72) 30.

<sup>203</sup> Trafficking Protocol (n 48) art 2.

following paragraphs will examine this article in detail and will critically analyse how the rights of child victims are protected in practice.

#### **4.6.1 Identification of child victims**

The identification of child victims of trafficking is special feature upon which every other protection provision depends. Although the Trafficking Protocol recognises that there is a need to protect victims of trafficking, there is no obligation regarding the identification of victims. As shown in the previous chapter, the UN Trafficking Principles and Guidelines highlight this issue and call upon States to ensure that procedures are in place for the rapid identification of child victims of trafficking.<sup>204</sup> Furthermore, the UNICEF Guidelines emphasise the importance of such a provision and provide more details in this regard.<sup>205</sup> At the regional level, similar provision is provided by the Arab TIP Model Law.<sup>206</sup>

All of these illustrate the importance of identification of child victims. It is the first step to provide the appropriate protection and assistance necessary for them to escape and recover from their experience. However, due to the clandestine nature of trafficking, the identification of victims is not an easy or straightforward task, and children's experiences are diverse.

Provisions on the identification of child victims are not given in the Saudi TIP Act although one of the tasks assigned by the Human Rights Commission to the Standing Committee to Combat Crimes of Trafficking in Persons is to formulate a policy to promote an active search for and provide training to identify victims.<sup>207</sup> However, the statement of the Saudi government described earlier that there have been no specific cases of child victims of trafficking is clear evidence of the failure of the committee in this regard. It is crucial to point out that the process of identification of the victims of trafficking is a difficult one. In 2009, of the estimated 12.3 million individuals (approximately) who were trafficked all around the world, only 49,105 were actually recognised as being victims of human trafficking crimes.<sup>208</sup>

In order to improve this situation, it is worth noting that the Special Rapporteur on TIP during her visit to Egypt stated that Egypt should:

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<sup>204</sup> UNCHR (n 124) guideline 6.2.

<sup>205</sup> UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* (UNICEF 2006) guideline 3.1.

<sup>206</sup> Arab TIP Model Law (n 49) art 30.

<sup>207</sup> Saudi Human Rights Commission (n 72) 30.

<sup>208</sup> US Dept of State, 'Trafficking in Persons Report: SA' (June 2010). Furthermore, 4,166 people were successfully prosecuted for trafficking and 8.5% of convicted offenders were identified by their victims.

... [e]stablish procedures to identify trafficked persons and a referral mechanism to ensure that they are referred to the appropriate service providers for assistance ... they should create guidelines for identification and referral of trafficked persons for distribution to all officials who may come into contact with trafficked persons, including the police, immigration officials, border guards, labour inspectors, and medical and health professionals.<sup>209</sup>

These recommendations should be applicable to all the destination States including SA. Proper identification of victims would potentially increase the number of witnesses available and willing to cooperate in criminal proceedings, thereby increasing the chances of successful prosecutions of traffickers. Certainly, this would improve the State's efforts to tackle child trafficking at both national and international level. Therefore, it is the responsibility of the Saudi government to formulate and implement practical and systematic identification strategies that can fit the many different circumstances that trafficked victims find themselves in. This takes into consideration that under the Saudi TIP Act trafficking of children is considered an aggravated offence and in this respect failure to correctly identify a trafficked child could lead to an incorrect punishment for traffickers.<sup>210</sup>

#### **4.6.2 Appropriate housing and assistance**

As noted in the previous chapter, the only specific reference to child victims within the Trafficking Protocol in relation to protection measures is contained in Article 6(4) which emphasises that, in granting assistance and protection to trafficking victims, special attention should be paid to children, especially for their housing, education and care.<sup>211</sup> At the regional level, the relevant provisions in the Arab TIP Model Law require appropriate shelters for trafficked victims with particular attention to the special needs of children.<sup>212</sup> Adoption of such a provision can be found in many of the Islamic States. For example, in Malaysia, the Malaysian Ministry of Women, Family, and Community Development operates four facilities for women and one specifically for children victims of trafficking.<sup>213</sup>

Although the Saudi TIP Act provides for this right for victims in Article 15(5), in practice there is no evidence at all of the existence of specialised shelters or appropriate housing in SA

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<sup>209</sup> UNHRC (n 91) para 69.

<sup>210</sup> Saudi TIP Act (n 45) art 4(3).

<sup>211</sup> *ibid* art 6(4).

<sup>212</sup> Arab Model Law (n 49) art 32.

<sup>213</sup> UNHRC, 'Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: 'Report of the Special Rapporteur on TIP, Maria Grazia Giammarinaro, Mission to Malaysia' (1 June 2015) UN Doc A/HRC/29/38/Add.1, 13-14.

specifically established for trafficking victims in general or for child victims in particular.<sup>214</sup> In response to this issue, although the State does not lack wealth, the Saudi government has stated that its Human Rights Commission collaborates with some charitable associations to provide shelter for victims of trafficking.<sup>215</sup> Moreover, there is evidence that victims will normally be sent to one of the shelters, which were established for beggars and/or domestic workers.<sup>216</sup>

The Saudi government states that these centres provide ‘care and protection to non-Saudi child beggars, hosts them in private and friendly spaces, and provides social, health and psychological services’.<sup>217</sup> In addition, the Ministry of Social Affairs claims that children hosted in these centres are treated with care.<sup>218</sup> However, according to UNICEF, this care is limited in practice as they are eventually deported or returned to their relatives in a process that typically takes ten to fifteen days.<sup>219</sup> Furthermore, the US TIP Report noted that, ‘due to a lack of available and adequate protection services for all trafficking victims, some victims in smaller cities were kept in jails until their cases were resolved’.<sup>220</sup> Commenting on the victims’ shelters, Vlieger observed that ‘they are reported to be overcrowded, dirty and prison-like, and victims’ deportation usually follows swiftly’.<sup>221</sup>

This is problematic and it is clear that the Saudi government has not fulfilled international and regional standards on the protection of child victims. A lack of specialised shelters for victims of trafficking and the existence of short-term (maximum 15 days) as opposed to long-term care of children may be taken as evidence of a failure in the practice of domestic law in protecting children from child trafficking. This is especially so as no effort is made to distinguish between trafficked and non-trafficked children involved in beggary, forced labour or sexual exploitation, and all are treated in the same manner with a complete ignorance of what they have experienced. Children’s needs vary depending on the type of exploitation, the conditions experienced and the individual child. Unfortunately, this situation still remains the same even after the enactment of the Saudi TIP Act in 2009 which was supposed to provide victims with the

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<sup>214</sup> US Dept of State, ‘Trafficking in Persons Report: June 2014’.

<sup>215</sup> Saudi Human Rights Commission (n 72) 42-43.

<sup>216</sup> *ibid.*

<sup>217</sup> CommRC, ‘Combined Third and Fourth Periodic Reports of States Parties: SA’ (8 April 2015) CRC/C/SAU/3-4, para 304.

<sup>218</sup> MOSA (n 127).

<sup>219</sup> UNICEF, ‘Trafficking in Children and Child Involvement in Beggary in Saudi Arabia’ (UNICEF Gulf Area Office, 2008).

<sup>220</sup> US Dept of State, ‘Trafficking in Persons Report: June 2015’ SA.

<sup>221</sup> Vlieger (n 130) 208-209.



necessary protection. In this respect, the ILO Committee urged the Saudi government to ‘take effective and time-bound measures to ensure that child victims of trafficking including for the purpose of commercial sexual exploitation or camel racing are effectively identified and admitted to a shelter or a medical, psychological and social rehabilitation centre’.<sup>222</sup> Further, SA should provide them with appropriate assistance during their stay in the shelter, including legal and/or medical help, so they are better protected and do not fall back into the vicious trap of trafficking.

It is useful at this point to examine how the begging centres work in practice in order to clarify the Saudi authorities’ approach in dealing with victims. The Director of the Madinah branch of the Ministry of Social Affairs, Hatem Barri, stated that the Directorate Office against Begging has launched some campaigns for follow-up and arrest in which a number of authorities participated.<sup>223</sup> They arrested many beggars including children through these campaigns. He added that the cases are being studied and those who were Saudi citizens were sent to charitable organisations after pledging not to return to begging. Those who are able to work were referred to the labour office while those who could not were sent to the social care home.<sup>224</sup>

In relation to foreign beggars, if the child is arrested with a female adult family member, they are photographed, registered and then sent to the shelter centre. Thereafter, they are deported.<sup>225</sup> If the child is arrested with a male adult family member, they are separated. The adult male family member is sent to a deportation department and the child is sent to a shelter centre. When arrangements for deportation are completed, the child and the male adult are reunited and deported together. The country of origin consulate focal point coordinates and supervises the process. While the child is in the shelter and before any deportation, there is a short period of time during which the status of the child could be assisted in a number of ways depending on whether he/she has a residence permit or not. If the child turns out to have a valid residence permit, the family pays a fine and signs an undertaking and takes the child. If the child is found to be an illegal resident, procedures for deportation to the country of origin are initiated.<sup>226</sup>

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<sup>222</sup> ILO (n 101).

<sup>223</sup> Saudi Human Rights Commission, ‘Begging: An Organised Crime Hidden Behind Women and Children’ (2015) 1 Basharr 26, 28.

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

The consulate of the child's country is alerted by the immigration focus point linked to the centre and is requested to prepare a temporary travel document (since most children lack travel documents, or most of those they possessed expired or were fraudulent). An immigration official who works directly with the shelter arranges for plane tickets at the Saudi government's expense and alerts an NGO, such as the World Assembly of Muslim Youth and International Islamic Relief, which operates in many of the countries of origin of children who are routinely identified in SA and with which there is a prior agreement to receive such children.<sup>227</sup>

From the above-detailed description of the official process, it is apparent that this is a clear violation of the human rights of the child victims because the main role of the centre is to facilitate deportation instead of providing protection. Typically, foreign children are deported quickly because the Ministry of Social Affairs Administration for Combating Begging<sup>228</sup> does not want to take on the responsibility of tracing children's families. It argues that this responsibility lies with the State of origin.<sup>229</sup> Prince Turki Bin Mohamed Bin Saud, Assistant Undersecretary for Political Affairs at the Foreign Ministry, emphasised this position: '[I]t should be understood that Saudi has no authority over the nations' citizens. The only legal action it can take is to deport the infiltrators whether children or adults'.<sup>230</sup> This statement raises doubt regarding the government willingness to combat child trafficking in SA. However, in replying to this statement, two important points must be made. First, this is clearly against the basic principles of Islam as a religion and law, which is the religion of the State and the only source of its law. Doing justice is considered a duty to God, from which originates the rights to equality and fairness for all human beings without regard to status, race, gender or religion. The Qur'an says: 'O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women. And fear Allah, through whom you ask one another, and the wombs. Indeed Allah is ever, over you, an Observer'.<sup>231</sup> Islamic scholars interpret this verse, stating that the expression 'O Mankind!' with which the verse begins is an

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<sup>227</sup> *ibid.* See also CommRC (n 142) para 304.

<sup>228</sup> HRW, 'Inadequate Procedures for Determining Children's Best Interests During Deportation Proceedings in Adults Before their Time' (24 March 2008) 65 <<http://www.hrw.org/en/reports/2008/03/24/adults-their-time>> accessed 21 June 2015.

<sup>229</sup> HRW, Interview with Yusif Siyali (MOSA officer) (9 March 2008).

<sup>230</sup> Mariam Al-Hakeem, 'Saudis Deny Human Trafficking Allegations' (*Gulf News*, 13 August 2006) <<http://gulfnews.com/news/gulf/saudi-arabia/saudis-deny-human-trafficking-allegations-1.249699>> accessed 9 March 2016.

<sup>231</sup> Quran, 4:1.

important indicator of the non-regard to status, race, gender or religion in the claiming of rights and the doing of justice with which the verse ends.<sup>232</sup> On the other hand, the current position is clearly against the national law of SA as Article 4(2) of the Child Protection Act states that:

[T]he relevant authorities should take appropriate action to protect any child begging or exploited in an illegal act and to ensure that such child is provided with help and assistance. If the child is non-Saudi, relevant authorities need to coordinate with his/her state of origin to deport him; assistance and support should be provided for the child until he/she has left the land of SA.<sup>233</sup>

In addition, Article 7(2) states that '[a] child who is deprived temporarily or permanently of the family environment has the right to protection and assistance and shelter through government social welfare, civil or charitable institutions or alternative families, failure to provide official documents or some of them does not prevent the child from this right'.<sup>234</sup> It is clear that child victims of trafficking are lacking their family protection and can be included in such a group. Consequently, they should enjoy these rights in practice.

From another perspective, guaranteeing the rights of individuals is vital to Islam. The word 'equality' and 'justice' are repeated in 16 places in the Qur'an.<sup>235</sup> The Prophet mentioned in his last sermon that 'there is no superiority of an Arab over a non-Arab' and that 'all Muslims are brothers unto one another'. Thus, it can be said that providing safety and protection is one of the fundamental principles of Islam. Most trafficking victims into SA are Muslims. However, no difference is made in the application of SA laws where the victims are non-Muslim.

The issue of non-Muslim victim treatment in SA is worth elaborating. The Saudi Basic Law of Governance does not contain a specific provision on equality and non-discrimination. However, the Saudi initial report on the CRC stated its policy as follows:

The application of Islamic law to all persons. Rights are guaranteed equally to all individuals irrespective of their race, sex or other considerations. The law is applicable to all without partiality and all the judicial, social and cultural systems are based on this principle. Moreover, the kingdom of SA shows due concern for children deprived of a family environment or afflicted with a disability with a view to ensuring their enjoyment of all their rights on an equal footing with other children.<sup>236</sup>

It then concluded that Saudi society is based on justice and equality and strongly rejects all forms of discrimination. Man, woman or child all enjoy the rights and freedoms guaranteed by the regulations, based on Islamic law, which are applicable in SA without discrimination of any

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<sup>232</sup> Baderin (n 76) 100.

<sup>233</sup> Saudi Child Protection Act, art 4(2).

<sup>234</sup> *ibid* art 7(2).

<sup>235</sup> Mohamed Y Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law' (2010) UNOV/DM/CMS/EPLS 1, 7, 92.

<sup>236</sup> See part 1, para 40 of SA's Initial Report to the CRC (n 16).

kind, irrespective of colour, sex, ethnic origin, age or religion.<sup>237</sup> In respect to treatment of foreign children or non-Muslims, the Saudi Deputy Minister for Foreign Affairs stated at the 56<sup>th</sup> Session of the UN Commission on Human Rights that ‘equal rights were granted to citizens and foreign residents’, and ‘Non-Muslims enjoyed all the basic rights and freedoms guaranteed to Muslim residents’.<sup>238</sup> Article 5 of the OIC Child Covenant is relevant to this as it provides that ‘States shall guarantee equality of all children as required by law to enjoy their rights stipulated in this Covenant regardless of sex, race, religion, language or any other consideration affecting the right of the child’.

In commenting on the immediate deportation of child victims, and taken together with the analysis of the previous chapter, the Saudi approach can be identified as being incompatible with Islamic and internationally accepted standards of human rights. The current approach does not provide children with adequate protection from trafficking at all. Moreover, taking into consideration the Saudi law by way of the Saudi TIP Act of 2009 or even under the Child Protection Act of 2014, this raises a question over the effectiveness of these laws in practice. Not only that, it casts doubt on the commitment of SA to combat child trafficking. It can be argued that on a practical level SA is not enforcing the protection provisions adequately and not doing enough to protect these young victims. The existing shelters are clearly inadequate to accommodate trafficked children, whose circumstances and needs are different, for example, to those of victims of begging. In order to do more for child victims, there needs to be a conscientious effort to consider what is in the best interests of each child, taking into account factors such as their physical and psychological health rather than rushing to deport them. If it is in the child’s best interests that they remain in SA, then efforts should be made to re-home them.

#### **4.6.3 Residency status and/or repatriation**

At the international level, each signatory State to the Trafficking Protocol is encouraged to consider adopting measures to enable a victim to remain in its territory, either temporarily or permanently.<sup>239</sup> This provision is designed to prevent deportation of victims from the receiving State and to give them the right to remain in the State temporarily or permanently, taking into

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<sup>237</sup> *ibid* part 1, para 45.

<sup>238</sup> UNCHR (n 91) paras 6 and 7.

<sup>239</sup> Trafficking Protocol(n 48) art 7.

consideration humanitarian and compassionate factors.<sup>240</sup> Article 30(8) of the Arab TIP Model Law provides for the same provision.<sup>241</sup>

In a broader sense from the Islamic perspective, freedom of movement and choice of place of residence is recognised on the basis of the Qur'anic provision that: 'It is He who made the earth tame for you – so walk among its slopes and eat of His provision – and to Him is the resurrection'.<sup>242</sup> In practice, in Islamic history, people's right to freedom of movement and choice of settlement is reported to have been demonstrated by the fourth Caliph, Ali ibn Abi Talib, even in the face of the difficult political crisis with Mu'awiyah during his reign. Ali was advised then to prevent the movement of some people who were crossing from Medinah to Syria to join Mu'awiyah who was then contending the leadership of the Islamic Empire with the Caliph. Caliph Ali declined to prevent the movement on grounds that the people had a God-given right of movement over the land, which the Caliph could not revoke without justification. He is reported to have even assured the Dissenters (Khawarij) that they may live wherever they wished within the Islamic Empire as long as they did not indulge in bloodshed and acts of oppression.<sup>243</sup> This is also supported by Article 12 of the OIC Covenant: 'Every person shall have the right, within the framework of Shariah, to free movement and to select his place of residence whether inside or outside his country'.

It is worth noting that this approach has been implemented by some Islamic States such as Turkey, foreign victims identified by Turkish authorities can apply for humanitarian visas valid for up to six months and obtain permission to work, with the option to extend their visas for additional six-month periods up to three years.<sup>244</sup> Another example is Malaysia where victims will be able to stay in government facilities under fourteen-day interim protection orders for suspected victims and ninety-day protection orders for certified victims. This is renewable until the victim is no longer needed in judicial proceedings against a suspected trafficker.<sup>245</sup> This suggests that Shariah is not a hindrance for implementing this provision at a national level.

In SA, according to the TIP Act, the option is limited and it will be applied selectively, based on the victim's ability or willingness to cooperate with the authorities. In this respect, SA

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<sup>240</sup> *ibid* art 7(2).

<sup>241</sup> Arab TIP Model Law (n 49) art 30(8).

<sup>242</sup> Quran, 67:15.

<sup>243</sup> Baderin (n 76) 95; also Sultanhussein Tabandeh, 'A Muslim Commentary on the Universal Declaration of Human Rights (1970) 33.

<sup>244</sup> US Dept of State, 'Trafficking in Persons Report: June 2014' Turkey.

<sup>245</sup> UNHRC (n 44) 14.

has no refugee legislation nor has it established administrative procedures for asylum-seekers.<sup>246</sup> This may make matters worse, particularly when trafficked victims are able to escape and seek help.

From another perspective, the right to a residence permit is consistent with Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which requires that, '[N]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.<sup>247</sup> SA has ratified this convention and so is obliged to implement such a provision at the national level. Victims of persecution, such as victims of child trafficking, also have a right to non-refoulement so as to protect children from 'serious abuses at the point in the migration cycle where their home State cannot or will not provide protection'.<sup>248</sup>

In addition, there are obligations under CEDAW as interpreted by its Committee which 'calls upon the State party to refrain from deporting victims of trafficking, especially those with heightened protection needs, and to consider granting them temporary residence permits irrespective of their ability or willingness to cooperate with the prosecutorial authorities'.<sup>249</sup> The CRC Committee<sup>250</sup> and the UN Special Rapporteur on TIP expressed similar opinions.<sup>251</sup> In line with these and in a similar manner to the practice of the other Islamic States, SA should consider adopting appropriate measures that permit child victims of trafficking to remain in the State where the victim is either cooperating with a criminal investigation or proceedings or alternatively where it is found to be necessary due to the individual's circumstances. Gallagher has pointed out that victims of trafficking have a legal entitlement to receive assistance because of their status as victims of crime and as victims of human rights violations. Thus, states are required to provide such support, and linking this support to victim cooperation means denying the legal nature of both the entitlement and the obligation.<sup>252</sup> Segrave believes that providing

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<sup>246</sup> US Dept of State, 'Country Reports on Human Rights Practices' (8 April 2011) SA Country Report.

<sup>247</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987). SA ratified it on 23 September 1997.

<sup>248</sup> Alice Farmer, 'A Comment on the Committee on the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights' (2011) 80 Fordham Law Review Res Gestae 40, 40.

<sup>249</sup> CommEDAW, 'Concluding Observations on the Combined Second and Third Periodic Reports of the UAE' (24 November 2015) CEDAW/C/ARE/CO/2-3, para 32.

<sup>250</sup> CommRC, 'General Comment No 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin' UN Doc CRC/GC/2006/6.

<sup>251</sup> UNHRC (n 91) para 81.

<sup>252</sup> Gallagher (n 71) 298.

protection and support only to those who agree to participate in the criminal justice proceedings denies the experiences of other victims who have been trafficked and do not wish to participate.<sup>253</sup> She further emphasised that linking the help and support provided to victims with their cooperation reflects the widely acknowledged importance of the victim as a source of intelligence and testimony required to secure convictions against traffickers.<sup>254</sup> This approach views victims of trafficking purely as witnesses for the prosecution and clearly prioritises the interests of the criminal justice system above the needs of those victims and their experiences.

Victims' right to residency status should be understood as follows: 'it is constructive in building a sense of trust between victims and the authorities, and may well facilitate co-operation in the long run'.<sup>255</sup> In addition, Kappelhoff argues that victims of trafficking 'whose rights are restored, whose humanitarian needs are met, and who have access to the support necessary to become independent survivors of the ordeals they have endured are also more effective witnesses'.<sup>256</sup> Therefore, it seems that by prioritising the needs of these trafficked victims above those of the criminal justice system, there is the potential for the criminal justice system to benefit through an increase in victims willing to engage with the system.

There is growing acceptance in the relevant international and regional trafficking instruments of the need to separate protection and support from victim cooperation. The UN Principles argue that appropriate protection and support should be extended to all trafficked victims without discrimination.<sup>257</sup> Therefore, the issue of a residence permit is a positive initiative that should also be extended to SA, and the welfare and human rights of the victim must be the main consideration in order to achieve better outcomes in the fight against child trafficking.

Having said this, if victims wish to return to their country of origin, then voluntary repatriation must be facilitated. In this case, trafficked victims should be informed about the possibility of getting assistance in their country of origin to avoid re-victimisation before starting

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<sup>253</sup> Marie Segrave, 'Surely Something is Better than Nothing: The Australian Response to the Trafficking of Women into Sexual Servitude in Australia' (2004) 16(1) *Current Issues in Criminal Justice* 87.

<sup>254</sup> *ibid.*

<sup>255</sup> Tomoya Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff 2006) 156.

<sup>256</sup> Mark J Kappelhoff, 'Federal Prosecution of Human Trafficking Cases: Striking a Blow against Modern Day Slavery' (2008) 6(1) *University of St Thomas Journal Law* 13.

<sup>257</sup> OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2010) UN Doc E/2002/68/Add. 1, 6.

the repatriation process. As noted by the UPR, this could happen through cooperation between the destination and originating States.<sup>258</sup> At the international and regional level, victims have a right to repatriation under the Trafficking Protocol and under the Arab TIP Model Law, as noted in the previous chapter.<sup>259</sup> In relation to children, the UN Special Rapporteur on TIP stated that States must ‘ensure that appropriate procedures are in place to evaluate the best interests of the child during the stage of identification, protection and assistance and before making any decision on the eventual repatriation of the child’.<sup>260</sup> With the above in mind, there is a need for SA to conduct proper risk assessment in the light of children’s interests before repatriation.

#### **4.6.4 Non-criminalisation**

Non-criminalisation of child victims is another important measure which should be implemented. The CRC Committee has repeatedly emphasised its importance.<sup>261</sup> From an Islamic law perspective, it was shown previously that the principle of non-punishment of a victim is expressed in the Qur’an.<sup>262</sup> The Qur’an provides that, ‘Whoever disbelieves in Allah after his belief ... except for one who is forced [to renounce his religion] while his heart is secure in faith. But those who [willingly] open their breasts to disbelief, upon them is wrath from Allah, and for them is a great punishment’.<sup>263</sup> The Prophet also stated that his community is exempted from responsibility for things committed through mistakes, forgetfulness and under duress.<sup>264</sup> Shariah provides that a person will not be punished for things done involuntarily or under compulsion. Even for the sin of apostasy, compulsion exonerates the person from God’s punishment in the hereafter.<sup>265</sup> This provision is missing in the Trafficking Protocol, however, at the regional level, the Arab Model Law includes a specific provision in this regard.<sup>266</sup> It is significant to note that non-criminalisation is applied by many Islamic States such as Egypt.<sup>267</sup>

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<sup>258</sup> UNHRC, ‘Report of the Working Group on the Universal Periodic Review, Saudi Arabia’ UN Doc A/HRC/25/3 (26 December 2013).

<sup>259</sup> Trafficking Protocol (n 48) art 8; Arab TIP Model Law (n 49) art 33 and 34.

<sup>260</sup> UNHRC (n 157) 22.

<sup>261</sup> CommRC (n 142) para 69.

<sup>262</sup> Qur’an, 24:33.

<sup>263</sup> Quran, 16:106.

<sup>264</sup> Hadith 39, reported by ibn Majah.

<sup>265</sup> Baderin (n 76) 108.

<sup>266</sup> Arab TIP Model Law (n 53) art 28.

<sup>267</sup> Egypt Trafficking Law art 21: ‘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’.



Unfortunately, the Saudi TIP Act is silent as to whether victims of trafficking will be prosecuted for their involvement in the trafficking process. This means that enforcement actions can be taken against them. Indeed, according to a HRW report in SA, authorities often treat foreign children who are victims of trafficking primarily as offenders and they can be arrested, detained or deported.<sup>268</sup> This conclusion is corroborated by the US Report of 2015 which points to evidence that government officials continue to arrest, detain, deport and sometimes prosecute victims of trafficking.<sup>269</sup> This is problematic as children should not be held responsible for crimes that are committed because of the elements of coercion or deception. The absence of appropriate legislation in this area is also a real barrier to achieving cooperation with competent authorities; it is likely to discourage victims from coming forward to the authorities due to a fear of potential law enforcement actions against them.

It is important that the Saudi TIP Act be amended to deal explicitly with this situation. The Saudi TIP Act must provide clarity on the approach to be taken in these particular circumstances in order to ensure that victims of trafficking are not subjected to incarceration, detention or other punishment for any criminal activities they have been compelled to commit, including illegal entry or falsification of travel documents.

#### **4.6.5 Compensation**

At the international level, the Trafficking Protocol and the UN TOC Convention requires States to ensure that national legal systems contain measures to provide victims of trafficking with the possibility of pursuing compensation for damage suffered as a result of being trafficked.<sup>270</sup> The CRC OP on Sale of Children provides the same.<sup>271</sup> As noted in the second chapter, Islamic law also recognises the right of a victim of a crime to compensation. At the regional level, the Arab TIP Model Law provides this right, and some Islamic States have adopted this measure, such as Jordan's anti-trafficking law.<sup>272</sup> Article 39 of the Arab TIP Model Law takes further steps in an attempt to enhance a victim's access to justice by exempting 'the victim from the fees of a civil action that he/she files asking for compensation for the harm

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<sup>268</sup> HRW, 'Precarious Justice – Arbitrary Detention and Unfair Trials in a Deficient Criminal Justice System' (2008).

<sup>269</sup> US Dept of State, 'Trafficking in Persons Report: June 2015' SA.

<sup>270</sup> Trafficking Protocol (n 48) art 6(6); UN TOC Convention (n 70) art 25(2).

<sup>271</sup> CRC OP on Sale of Children (n 166) art 9(4).

<sup>272</sup> Jordan Law of 3 March 2009 on Combating Human Trafficking, art 12 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'.

resulting from the exploitation of human trafficking'.<sup>273</sup> This is the approach adopted by the Omani anti-trafficking law.<sup>274</sup> Moreover, as noted in chapter three, among the comments of the Arab Human Rights Committee are recommendations for States Parties to provide victims with compensation.<sup>275</sup> Shelton argues that, compensation is recognised as an important remedy that aims to ensure recognition of the wrongful acts that have been committed by the offender due to the lack of respect for the fundamental human rights of victims.<sup>276</sup>

Unfortunately, there is no similar provision in the Saudi TIP Act. Consequently, SA has failed to fulfil this obligation. Any victim of trafficking should be entitled to compensation due to the failure of the State in preventing and detecting this crime which leads to their continuing victimisation. In addition, children should be able to restore their life back to a degree of normality in the light of the trauma likely to have been experienced as a victim of trafficking, and this requires sufficient assistance from the States in which they were exploited. Therefore, the Saudi TIP Act should be amended to provide victims with compensation.

In analysing victim protection measures in SA, it becomes apparent that they are not sufficient. As can be observed, there is lack of a victim-centred, and especially a child-victim-centred, approach. This leads to the conclusion that SA has not fully adopted a human rights framework. There are several issues that support this conclusion: the fact that deportation of child victims takes precedence over their protection; a formal procedure to identify the trafficked victims is lacking; unidentified child victims face the risk of being dealt with as irregular migrants rather than as exploited children; and children can be charged with crimes committed as a result of being trafficked. Consequently, the Saudi TIP Act does not conform fully to the standards set out in the abovementioned Islamic, regional and international instruments.

The advantage of a human rights approach to child trafficking is worth exploring. By applying this approach, the focus moves from 'seeing trafficked victims as objects towards understanding them as people bearing human rights'.<sup>277</sup> It represents a move towards viewing trafficking 'as a human rights issue with immigration implications, rather than an immigration

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<sup>273</sup> Arab TIP Model Law (n 49) art 39.

<sup>274</sup> Oman Law, art 17.

<sup>275</sup> For example, AHRC, 'Concluding Observations: Qatar' (Session 4, 15-21 June 2013) para 7.

<sup>276</sup> Dinah Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup> edn, Oxford University Press 2006) 215.

<sup>277</sup> AD Jordan, 'Human Rights or Wrongs? The Struggle for a Rights-based Response to Trafficking in Human Beings' (2002) 10(1) Gender and Development 30.

issue with human rights implications'.<sup>278</sup> Additionally, a human rights approach helps to reduce the possibility that victims 'will be seen purely as a witness for the prosecution'.<sup>279</sup> This approach does not impinge on States' ability to prosecute traffickers and may in fact assist and improve the rate of successful prosecutions. If victims feel supported during their recovery, they may be more able to reach a decision to help the authorities. What a human rights approach may do is 'put more pressure on States to address the human rights issues pertinent to the phenomenon'.<sup>280</sup> McSherry and Kneebone state that:

It should be viewed as a human rights issue because such conduct poses a serious threat to the promotion and protection of human rights. The benefit of a human rights approach is that it treats those trafficked as victims of human rights abuse rather than as victims of crime and persons who violate national immigration laws. It provides a framework for exploring the conditions that may give rise to trafficking such as poverty, unemployment, discrimination and persecution.<sup>281</sup>

Therefore, in order to promote a victim-centred approach in SA, all actions undertaken in relation to child victims shall be guided by applicable human rights standards and in particular by the principles of protection and respect for children's rights as set out in the CRC and in the OIC Child Covenant. State obligations under both instruments apply to each child within the State's territory and to all other children subject to its jurisdiction. Therefore, the enjoyment of rights stipulated in them is not limited to children who are citizens of SA but must also be available to all children – including trafficked children – irrespective of their nationality, immigration status.<sup>282</sup>

#### **4.7 Prevention measures**

Preventative action aimed at tackling child trafficking is vital in order to prevent it in the future. Prosecution of traffickers is not sufficient on its own to prevent trafficking in children although any action taken to criminalise trafficking and impose penalties may act as a

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<sup>278</sup> Becki Young, 'Trafficking of Human Beings Across United States Borders: How United States Laws Can be Used to Punish Traffickers and Protect Victims' (1998) 13 *Georgetown Immigration Law Journal* 73, 75.

<sup>279</sup> Bernadette McSherry and Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) *International Journal of Human Rights*, 83.

<sup>280</sup> Tomoya Obokata (n 255) 34.

<sup>281</sup> McSherry and Kneebone (n 279) 82.

<sup>282</sup> CRC (146) art 2; CommRC, 'General Comment No. 6' UN Doc CRC/GC/2005/6, para 12. Also, Article 5 of the OIC Child Covenant (n 144).

deterrent.<sup>283</sup> Effective laws and policies would include measures not only for the prosecution and punishment of offenders and the protection of victims but also for tackling the root causes and reduction of the demand for trafficked people.<sup>284</sup>

As stated in chapter two, prevention is a key concept in the Islamic legal tradition. Islamic law seeks to provide a framework that offers children protection and prevents inhumane practices such as those involved in child trafficking.<sup>285</sup> As set out in chapter three, the Trafficking Protocol, the UN TOC Convention, the CRC and its OP on Sale of Children all detail preventative measures to combat trafficking in persons, especially children. Such measures are also provided by the Arab TIP Model Law, the Arab TOC Convention, the Arab Charter and the OIC Child Covenant. Domestically, the Saudi TIP Act does not contain specific provisions for the prevention of human trafficking. However, there is evidence of some efforts in this regard by the Saudi government, to which this section now turns.

#### **4.7.1 Demand reduction**

Destination States are obliged to address demand ‘because it is within these countries that both consumer and employer demand is principally generated’.<sup>286</sup> According to Gallagher, the relatively wealthier destination (a group that includes the Middle Eastern States) bear the greatest legal and moral responsibility for responding to trafficking because it is in these States that the real profits are made and the real exploitation takes place.<sup>287</sup> As shown in chapter three, an international consensus is considered to be in place regarding the strong need to combat demand for human trafficking, most notably, Article 9(5) of the Trafficking Protocol. The reduction in demand required under the Trafficking Protocol is not restricted to demand for exploitative sexual services but encompasses demand for the full range of exploitative practices identified in the international definition of trafficking.<sup>288</sup> Demand must be understood expansively as any act that fosters any form of exploitation that leads to trafficking.<sup>289</sup>

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<sup>283</sup> Anne Gallagher, ‘Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments’ (2006) 8 *European Journal of Migration and Law* 163, 184.

<sup>284</sup> Obokata (n 255).

<sup>285</sup> OIC Child Covenant arts 17(3) and 18(1). See also, Masoud Rajabi-Ardeshiri, ‘The Rights of the Child in the Islamic Context: The Challenges of the Local and the Global’ (2009) 17(3) *International Journal of Children's Rights* 475.

<sup>286</sup> Gallagher (n 71) 438.

<sup>287</sup> Gallagher and Holmes (n 175) 321.

<sup>288</sup> Huda (n 142) paras 52 and 53.

<sup>289</sup> *ibid.*

It is also observed that, since the adoption of the Trafficking Protocol, further guidance has been elaborated on interpreting its approach to addressing demand. More recently, the UN Global Plan of Action to Combat Trafficking in Persons included several articles that suggest action to discourage demand, including one referring to the need for ‘measures at national level to combat trafficking for labour exploitation’, as well as the importance of educating consumers.<sup>290</sup> Important guidance on addressing demand is also contained in the UN Recommended Principles and Guidelines. Principle 4 states that ‘Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking’, while Guideline 7 recommends that States, in partnership with intergovernmental organisations and NGOs, should consider ‘[a]nalyzing the factors that generate demand for exploitative commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues’.<sup>291</sup>

It is important to highlight that, for States like SA, the persistent demand for children in the sex and labour sectors is one of the key causes of trafficking. In particular, it was shown that the demand for child jockeys and child begging is quite strong in SA as in other Middle Eastern States. Therefore, any awareness-raising/education campaign to reduce the demand of child victims must effectively target those who are likely to exploit children. Addressing demand requires increased attention on the places where trafficked persons are exploited and rooting out the causes and contributing factors that make the exploitation of trafficked victims possible, including economic, social and cultural factors. In this sense, in SA the tradition of camel racing and using children as camel jockeys is popular target. Because of this culture and also due to the economic significance of the State, as noted earlier some families from poor countries such as Sudan, Pakistan, India, Yemen,<sup>292</sup> have sent their children to perform as camel jockeys in order to improve their living conditions. Therefore, traffickers have taken advantage of this opportunity to bring thousands of trafficked children for this purpose into the State. It should be noted that SA has not done much to reduce the demand for child trafficking and has therefore failed to meet its obligations under international law in this respect.

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<sup>290</sup> UNGA Res 64/293, ‘United Nations Global Plan of Action to Combat Trafficking in Persons’ (12 August 2010) UN Doc A/RES/64/293. Article 22 calls on States to ‘adopt and implement specific measures at the national level to combat trafficking for labour exploitation and strive to educate consumers on those measures’.

<sup>291</sup> OHCHR (n 257).

<sup>292</sup> Save the Children (Sweden), ‘Camel Jockeys of Rahimyar Khan: Findings of a Participatory Research on the Life and Situation of Child Camel Jockeys’ (2005) 13.

Although there is a limited knowledge base on the role of demand-side interventions in addressing child trafficking in this regard, successful examples of this do exist in comparable fields. Most famously, the transatlantic slave trade was reduced in the early 19th century primarily by a war over the demand for slaves. Abolitionists ran a campaign targeting consumers of sugar, which was typically produced by slaves, describing sugar as ‘steeped in the blood, sweat and tears of the slaves who produced it’. In addition to this moral campaign, the legal prohibition of slavery and its enforcement made the transatlantic trade less profitable, which led to its progressive decline.<sup>293</sup> Undoubtedly, lessons can be learned from this, including for child exploitation in camel races. Raising the public awareness of using child jockeys and how they are being exploited and abused before, during and after camel races will certainly help to change public attitudes towards attending and participating in these types of races. This will lead to the reduction in the demand for child jockeys in Saudi camel races.

Another successful example in this respect was the initiative to stop Albanian children from begging on the streets of Greek cities. The government’s preventive strategy was mainly achieved through effective messaging and the raising of public awareness. Moreover, they conducted a communication campaign that reduced donations by the public to children and highlighted the abuse and exploitation which was experienced by each child in performing the act of begging.<sup>294</sup> Their experience proves that when the business of child trafficking becomes less profitable, traffickers will have fewer incentives to exploit more children. This model could potentially be adapted and applied in other contexts as well. It must be pointed out that there is a need to learn from other successful models in order to develop a fully-fledged policy and programme package to address child exploitation for any purposes in SA.

Destination States should understand that the principal responsibility for protecting the rights of citizens and other people within their borders ultimately rests with States, and accordingly, they must take the lead in addressing the factors which lead to trafficking.<sup>295</sup> Prevention efforts can become more sophisticated, scalable and effective if supported by

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<sup>293</sup> Julia O’Connell Davidson, ‘Absolving the State: The Trafficking-Slavery Metaphor’ (2012) 14(2) *Global Dialogue* 1. See also, ICAT, ‘Preventing Trafficking in Persons by Addressing Demand’ (ICAT Paper Series, Issue 2, September 2014) 7.

<sup>294</sup> Krishna Belbase and others, ‘Preventing Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options’ (UNICEF Division of Policy and Planning, Working Paper, February 2007) 18.

<sup>295</sup> ICAT (n 293) 27.

sufficient resources and political will.<sup>296</sup> Saudi governments must work in partnership with NGOs, religious leaders, and the private sector and individual citizens in their roles as both consumers and members of society to develop targeted strategies to prevent and address the factors that drive child trafficking in SA.

#### **4.7.2 Education and awareness-raising**

It is believed that educating and increasing public awareness about the risks and signs of child trafficking is an important piece of any anti-trafficking prevention strategy.<sup>297</sup> Knowledge of the risks of trafficking is important to empower vulnerable populations and foster a vigilant general public.<sup>298</sup> Referring back to the previous chapters, it is noted that the Trafficking Protocol and the UN TOC Convention, as well as the Arab TIP Model Law, emphasise the importance of education and raising awareness to improve the understanding of the crime as well as providing advice and warnings especially to groups or individuals at high risk of victimisation, such as children.<sup>299</sup> The Preamble of the OP on Sale of Children to the CRC refers to the efforts that are needed to raise public awareness and reduce consumer demand for the sale of children.<sup>300</sup> This has also been done by bodies such as the CRC Committee<sup>301</sup> and the Arab Human Rights Committee,<sup>302</sup> as well as the UN Special Rapporteur on TIP,<sup>303</sup> and on the Sale of Children.<sup>304</sup> It is clear, therefore, that there is a general consensus on its importance at both international and regional levels.

In looking at State practice in SA, it is important to recognise that the Saudi government has taken some steps in promoting awareness-raising. For instance, Saudi television channels have addressed the issue of crimes of human trafficking in programmes that have hosted a number of well-known personalities who have spoken of SA's role in combating trafficking in

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<sup>296</sup> US Dept of State, 'Trafficking in Persons Report 2016: Meeting the Global Challenge: Effective Strategies to Prevent Human Trafficking' <<https://www.state.gov/j/tip/rls/tiprpt/2016/258686.htm>> accessed 10 September 2017.

<sup>297</sup> *ibid.*

<sup>298</sup> *ibid.*

<sup>299</sup> Trafficking Protocol (n 48) art 9(2); UN TOC Convention (n 70) art 31(5). Arab TIP Model Law (n 49) art 37(7).

<sup>300</sup> CRC OP on Sale of Children (n 166) Preamble.

<sup>301</sup> CommRC (n 175) para 66(g); CommRC, 'Concluding Observations: Nepal' (21 September 2005) CRC/C/15/Add.261, para 96(c).

<sup>302</sup> AHRC, 'Concluding Observations: Qatar' (Session 4, 15-21 June 2013) para 9.

<sup>303</sup> UNCHR (n 44) 20-2.

<sup>304</sup> UNHRC 'Report Submitted by the Special Rapporteur on the Sale of Children, Juan Miguel Petit' (9 January 2008) UN Doc A/HRC/7/8, para 39.

persons in general and exploitation of labour in particular.<sup>305</sup> In addition, local newspapers have focused on this crime through articles written by specialists with a view to promoting greater public awareness of the seriousness of this issue and the extent of its social consequences.<sup>306</sup> Radio broadcasters have also drawn attention to this issue by producing programmes highlighting the need to respect human rights.<sup>307</sup> Naif Arab University for Security Sciences, in collaboration with other regional and international bodies, has organised a number of symposia and workshops on human trafficking-related issues with a view to endowing participants with the skills needed to tackle this problem and coordinate Arab and international endeavours to combat human trafficking.<sup>308</sup>

Despite these commendable efforts, it seems that in SA there is a distinct lack of specific measures targeting child trafficking into the State for any purposes. Saudi government should collaborate with traditional and religious leaders to find the way forward for the State in terms abandoning bad cultural that often put children's life at risk, this is very important as Islam plays such a big role in SA. Public awareness must be seen as an important element or mean of overcoming child trafficking. Making the communities aware of the negative impacts and consequences of child trafficking on their development and the future of the entire community is vital. This is particularly the case with education and awareness-raising even though the CRC Committee made explicit reference to SA that it should 'raise public awareness about the risks of child trafficking and train professionals working with and for children, as well as the general public, to counter trafficking in children'.<sup>309</sup> Furthermore, the Committee recommended that SA should 'develop and adopt a comprehensive multidisciplinary national plan of action to prevent and combat sexual exploitation of and trafficking in children'.<sup>310</sup>

Therefore, it is recommended that SA should substantially increase awareness of child trafficking, mostly for begging and camel races participation, within law enforcement agencies, social service agencies, schools and potential victim populations not only in SA but also abroad, especially in States that are known as countries of origin for child trafficking. These steps must be taken in order to reduce or eliminate the number of children becoming trafficking victims in

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<sup>305</sup> Saudi Human Rights Commission (n 72) 35.

<sup>306</sup> *ibid.*

<sup>307</sup> *ibid.*

<sup>308</sup> Naif Arab University for Security Science <<http://www.nauss.edu.sa/en/Pages/Home.aspx>> accessed 17 September 2015.

<sup>309</sup> CommRC (n 142) para 72(e).

<sup>310</sup> *ibid* para 72(c).



the first place. In addition, SA should enhance the methods of raising awareness with victims, such as providing multilingual helplines and posters in places where potential victims are most likely to see them, that is, in streets, city centres, hospitals and airports. Similar efforts were made by the UAE government as will be shown in the next chapter.

Chapter three indicated that the role of NGOs in implementing preventive measures is also essential as they have greater expertise and are more experienced than government departments. Research confirmed that NGOs have played an important and recognised role in preventing child trafficking and assisting its victims.<sup>311</sup> They can play a central role in the effort to combat this crime; such a role will be an active and indispensable element to avoid the dangers of this crime as well as contributing to the success of all the efforts made in this direction.<sup>312</sup> The Trafficking Protocol calls upon States to take preventative measures in cooperation with NGOs and other elements of civil society.<sup>313</sup> In addition, the Arab Human Rights Committee made several observations regarding the importance of the work of NGOs. For example, the Committee in its report urged Jordan to cooperate with NGOs and other relevant organisations and civil society in providing education and prevention campaigns.<sup>314</sup> Unfortunately, NGOs hardly exist in SA. Vlieger argues that this is because Saudi government ‘does not allow NGOs to be set up’.<sup>315</sup> This was confirmed by the CRC Committee as well, which has expressed its concern in this respect and recommended that ‘the Government should at least enhance its dialogue and communication with NGOs’.<sup>316</sup> The Saudi TIP Act is silent as to any role for NGOs.

The main problem in this respect is that Saudi law restricts the establishment and operation of NGOs. It requires significant governmental oversight. The receipt of foreign funding is prevented at the domestic level.<sup>317</sup> Foreign organisations are also prohibited from

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<sup>311</sup> Vlieger (n 130) 193.

<sup>312</sup> See generally, Shashi Irani Kara, ‘Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organisations’ (Summer 2007) 13 *Cardozo Journal of Law & Gender* 657.

<sup>313</sup> Trafficking Protocol(n 48) art 9(3): Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organisations, other relevant organisations and other elements of civil society.

<sup>314</sup> AHRC, ‘Concluding Observations: Jordan’ (session 1, 2 April 2012) para 37.

<sup>315</sup> Vlieger (n 130) 193.

<sup>316</sup> CommRC, ‘Concluding Observations of the CRC Committee: SA’ CRC/C/SAU/CO2 (17 March 2006).

<sup>317</sup> Saudi government issued a Royal Decree No M/8, to regulate associations and NGOs, on 2 December 2015, art 21(12).

opening branches in SA.<sup>318</sup> According to Article 8(2) of the Saudi Regulation in this respect, it is prohibited to approve an NGO whose work is in conflict with Shariah, public order, public morals or national unity. There is no additional information or further clarification on what constitutes a violation of national unity or public order. Surely such regulation limits the activities of NGOs and hinders the achievement of their aims in practice. Having said this, it should be noted that from the Islamic perspective there is a general principle of the importance of cooperation. This is noted in the Qur'an: 'And cooperate in righteousness and piety, but do not cooperate in sin and aggression. And fear Allah; indeed, Allah is severe in penalty'.<sup>319</sup> In addition, the Qur'an states that: 'There should be among you (O believers), a group (of the learned and sincere persons) who should call (the people) towards goodness, bid (them) to the good and forbid (them) from the evil – they are the successful people'.<sup>320</sup> Based on these Qur'anic verses there is nothing in Islam prevents SA from working with NGOs. Therefore, SA should adhere to this religious principle more rigorously.

At the regional level, according to Article 23 of the Omani TIP Law, the National Committee for Combating Trafficking in Persons<sup>321</sup> shall coordinate among all competent national authorities 'and relevant international organisations and NGOs to set up measures and procedures capable of combating transnational trafficking crimes'.<sup>322</sup> In addition, the achievement of international and local NGOs in Egypt to prevent human trafficking was highlighted and praised by various bodies.<sup>323</sup> Therefore, the Saudi government should endeavour to amend its law and change its attitude towards NGOs in order to facilitate their work and contribute to achieving the government's aim of eliminating child trafficking effectively.

#### **4.7.3 Information-gathering/research**

In destination States, reliable information, data and research that illuminates the causes, prevalence, characteristics and consequences of all forms of child trafficking is crucial for developing anti-trafficking prevention strategies and measuring their impact.<sup>324</sup> Research is the backbone of any evidence-based policy and anti-trafficking stakeholders have a responsibility to

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<sup>318</sup> *ibid* art 39(2).

<sup>319</sup> Qur'an, 5:2.

<sup>320</sup> Qur'an, 3:104

<sup>321</sup> Established in accordance with art 22 of the Law Combating Trafficking in Persons (23 November 2008) art 22.

<sup>322</sup> *ibid* art 23(2).

<sup>323</sup> US Dept of State, 'Trafficking in Person Report: June 2014' Egypt.

<sup>324</sup> US Dept of State (n 296).

ensure that sufficient attention and funding are dedicated to it.<sup>325</sup> Therefore, efforts and resources for research, data collection and evaluation are needed to identify those actions most effective to prevent crimes.<sup>326</sup> A State's obligation in this respect is clearly provided by the Trafficking Protocol.<sup>327</sup> At the regional level, Article 40 of the Arab Model Law also provides for the same provision.<sup>328</sup>

In practice, in SA, the Human Rights Commission of the Standing Committee to Combat Crimes of Trafficking in Persons was established in 2009. Some of its defined functions are to undertake research, gather information to combat and prevent human trafficking.<sup>329</sup> Further, it is intended to coordinate with government agencies in relation to information and statistics on the crimes of trafficking in persons.<sup>330</sup> In this sense, the Standing Committee has formulated a set of objectives so that it can play an effective role in ensuring coordination with the authorities concerned to put an end to this crime.<sup>331</sup> These objectives include constant monitoring of cases involving human trafficking in order to form a comprehensive and precise idea of the current situation and developments and trends in regard to this traffic in SA.<sup>332</sup>

When reflecting upon the Committee's work to date, as discussed throughout the chapter, it is obvious that more effort is needed, especially with regards to child trafficking, and in terms of victim protection as well as the prevention of the crime. SA is not fulfilling various international and regional obligations. One of the major weaknesses of the Committee's work in practice is that, since its establishment in 2009, only one annual report has been published and regrettably it lacks any child-specific details and statistics. Not enough information has been produced on the actual scale and nature of trafficking of children in SA. This has complicated the task of improving SA's current anti-trafficking policies and measures specifically related to children. Therefore, there is a need to conduct research into the causes of child trafficking and the best practices for preventing and combating it. Information-gathering is important and it is connected to other prevention measures, such as, assessing the scope of the problem; studying methods to reduce the demand of all those activities which encourage the trafficking of children;

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<sup>325</sup> *ibid.*

<sup>326</sup> *ibid.*

<sup>327</sup> *ibid* art 9(2).

<sup>328</sup> *ibid* art 40.

<sup>329</sup> Saudi Human Rights Commission (n 72) 30.

<sup>330</sup> *ibid.*

<sup>331</sup> *ibid.*

<sup>332</sup> *ibid* 31.

suggesting further tools to combat trafficking; and highlighting the link between trafficking of children and other social and economic issues in SA. Certainly, this will enable the Saudi government to develop a more precise plan of action and direct their anti-trafficking policies to target core issues of child trafficking at the national level.

#### **4.8 Conclusion**

This chapter has presented the response of SA to child trafficking at the national level with particular reference to the implementation of the 3P obligations. A detailed examination of the international and regional provisions in relation to child trafficking in the light of Islamic law indicates that Shariah and the prohibition of child trafficking and its exploitative acts are in full accord with one another. This harmony between international trafficking provisions and Islamic law is demonstrated by the national legislation of Islamic States which prohibits human trafficking in accordance with the Trafficking Protocol. Therefore, the international influence on SA legislation represents Islamic law's agreement with international anti-trafficking measures and provisions on the subject of trafficking in persons, including children. As such, if SA realises that child trafficking violations are not only condemned by the international and regional laws but also by the Qur'an and Islamic principles, they may be ideologically compelled to become more proactive in anti-trafficking activities and actions. The main conclusion reached is that, although SA has enacted domestic legislation to combat child trafficking and implemented measures which can augment the 3P obligations, SA is not in full compliance with the relevant international and regional standards, or with Islamic law.

Prosecution and suppression alone have been shown to be insufficient to reduce child trafficking, and the existing anti-trafficking framework arguably fails to respond to the long-term prevention of child trafficking and protection of human rights of trafficked victims. In response to these shortcomings, this chapter calls for the amendment of the Saudi TIP Act in order to move towards the development of a comprehensive framework to fulfil all 3P obligations. To improve prosecution/prohibition of child trafficking, there is a need to stipulate specified and heavier penalties, especially in cases where the victim is a child. It should also impose clear legal obligations in relation to identification and protection (including-non-criminalisation). A related point is the need for more proactive participation of NGOs and other members of civil society, which should be facilitated by the Saudi government. Finally, in relation to the prevention aspect

there is a need to develop a child-specific prevention strategy which focuses on the factor of demand reduction and raising public awareness to denounce bad cultural and customary practices.

In order to understand how these can be achieved within an Islamic jurisdiction, the following chapter presents a case study of anti-trafficking efforts in the UAE. Its aim is to highlight examples of good practices which might be considered by SA.

## **Chapter Five: Child Trafficking in the UAE**

### **5.1 Introduction**

The previous chapter provided a detailed discussion of the efforts made by SA to combat child trafficking. In order to effectively determine whether these efforts are adequate or whether they can be improved upon, it is necessary to examine practices in other States. Therefore, the attention in this chapter is directed towards another Islamic jurisdiction, the UAE. In order to explore whether different school of thoughts have resulted in different responses or whether Islam has much influence over UAE's action. This is done with the aim of identifying good practices in the UAE, which can be recommended to SA, possibly resulting in an improvement of SA's anti-trafficking framework.

This chapter begins by outlining the UAE interpretation of Islamic law and the school of thought that it follows. The second part will analyse the prosecution, prohibition and punishment element of child trafficking in the UAE. The third part will then show the efforts made by the UAE towards protecting child victims of trafficking. The fourth part will explore the prevention measures applied in the State. In doing this, best practices which may be transferred to SA will be identified throughout the chapter. The main conclusion reached is that the UAE's response to child trafficking is more progressive, particularly when compared with SA. It is also further observed that the UAE's national legislations and efforts with respect to child trafficking are better in terms of compliance with Islamic law, international and regional standards. Given all these, there are many lessons identified which need to be learned and transferred to SA to improve its efforts to combat the abusive practice of child trafficking.

### **5.2 UAE school of thought and its interpretation of Islamic law**

According to the Constitution: 'Islam is the official religion of the UAE, Shariah is a main source of legislation, and the official language is Arabic'.<sup>1</sup> In addition, Federal Law No. 28 of 2005 provides that:

In understanding, interpreting or construing the legislative provisions of this Law, the principles and rules of the Muslim doctrine shall be consulted ... The provisions of this Law shall apply on all matters dealt with herein, in words and context. For the purposes of interpretation and completion of their provisions, the doctrinal school of thought from which these matters derived shall be consulted ... In the absence of a text

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<sup>1</sup> UAE Constitution (2 December 1971) art 7.

in this Law, judgment shall be given in accordance with what is widely known of Malik's doctrine, then Hanbali, then Al Shaffei's, then Hanifa's doctrine.<sup>2</sup>

Judges are bound to apply 'provisions of the Shariah, the federal laws and the other laws in force in the Emirates'.<sup>3</sup> This originates from the dual system of government of the UAE: federal laws are made by the central federal government and are based on a western approach whereas the local laws are passed by the rulers of the Emirates and are applicable to each particular Emirate only.<sup>4</sup> Most of the local laws have their origins in Shariah, tribal customs and traditions. The federal laws are mostly borrowed from the Egyptian legal system, which in turn is based on the French legal system.<sup>5</sup> In general, although the criminal and civil laws are drafted by the legislative authority, following this western legal tradition, they are influenced by the principles of Shariah, while 'social laws, such as family law, divorce or succession' are completely and directly taken from Shariah law.<sup>6</sup>

Having said this, it worth mentioning that, in practice, the UAE legislature has clearly revealed its intention in the Federal law No 80 of 1973, which is concerned with the specification of the authority and the jurisdiction of the highest court in the land, the Federal Supreme Court, which obliges the court to apply Islam as the principal supreme source of legislation.<sup>7</sup> The main principle established by the Federal Supreme Court in this case was that although it may appear from Article 7 of the Constitution that Shariah is to be on equal terms with other sources of law because it is referred to as 'a main source' instead of 'the main source' of law, the doubt has been removed by Article 75 in which the legislation has explained the intention from Article 7 of the Constitution that Shariah is the principal source having supremacy over other sources of law.<sup>8</sup> The court explained its judgment by saying that Article 75 of Federal law No 10 of 1973 obliges

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<sup>2</sup> UAE Law of Personal Affairs Federal Law No 28 (19 November 2005) art 2. Also, UAE Civil Transactions Law issued by Federal Law No 5 of 1985, art 1.

<sup>3</sup> Federal Law No 3 (1983) art 1.

<sup>4</sup> BSBA Al-Muhairi, 'The Development of the UAE Legal System and Unification with the Judicial System' (1996) 11(2) Arab Law Quarterly 116.

<sup>5</sup> *ibid.*

<sup>6</sup> Ahmed Aly Khedr and Bassam Al Nuaimi, 'A Guide to UAE Legal System' (*GlobaLex*, June 2010) <[http://www.nyulawglobal.org/Globalex/United\\_Arab\\_Emirates.htm#legal system](http://www.nyulawglobal.org/Globalex/United_Arab_Emirates.htm#legal%20system)> accessed 27 June 2015.

<sup>7</sup> UAE Federal Supreme Court's Opinion in case No 4 of the year No 9, 25 December 1983, in Aham Al-Ahkam, *wa Almadadia' Aljaza'iyyah allaty Qarraratha Almahkamah Al-Ittihadhiyyah Al'aulya* (Jam'aiyyat Alhuqoqiyyeen 1980) 12.

<sup>8</sup> *ibid* 16.

the UAE courts to apply the Shariah as the dominant law and to abstain from applying any law that is inconsistent with the rules of Islam.<sup>9</sup>

In respect to the school of thought that the UAE follows, although the Maliki school is the official school for the national courts, judges also have discretion to make rulings according to the jurisprudential methods of the other schools of Islam described in chapter two. The Maliki school opinion in regard to child trafficking is that it considers human flesh *haram* and what is *haram* cannot be sold or disposed of.<sup>10</sup> In this respect, it can be said that this is similar to SA's understanding based on its school of thought. Therefore, it is clear that both schools of thought, despite their different methods of interpreting Islamic legal texts, agree that the prohibition of such a crime is compatible with Islamic law. In this sense, different schools of thought have resulted in the same responses in both jurisdictions.

As shown in chapter two, the institution of slavery is a condemned practice within the Islamic framework. However, slavery was practised in the UAE as recently as the late 1960s.<sup>11</sup> Slaves worked everywhere in the UAE, even in desert areas where they helped Bedouins with the rearing of animals.<sup>12</sup> Nevertheless, in 1963, the practice of slavery was finally abolished in the UAE.<sup>13</sup> At the domestic level, there are laws which explicitly prohibit slavery and the slave trade which is considered as *tazir* offences, for instance, Article 34(3) of the Constitution.<sup>14</sup> Another key provision is the UAE Penal Code No 3 which states that 'it is an offence to possess, purchase, or sell a person as a slave, whoever violates this provision shall be punished with provisional imprisonment'.<sup>15</sup>

In modern times, the expansion of the oil industry in the UAE during the last four decades brought with it rapid economic growth which, at the same time, resulted in a heavy reliance on foreign expertise and labour.<sup>16</sup> According to a recent ILO report, the most attractive destinations in the Middle East are the Gulf Cooperation Council (GCC) States which have been

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<sup>9</sup> Federal Law No 10 of 1973, art 75.

<sup>10</sup> Mohammed Ibn Rushd, *Bedat Al-Mujthed* (Dar Alfekar 1995) part 1, 96.

<sup>11</sup> Rima Sabban, 'UAE: Migrant Women in the UAE' (GENPROM Working Paper No 10, 1 October 2002).

<sup>12</sup> *ibid.*

<sup>13</sup> Aadil Majed, '*Combating Human Trafficking Crimes in International Conventions and National Law*' (Institute of Training and Judicial Studies 2007) 13.

<sup>14</sup> UAE Constitution (n 5) art 34(3).

<sup>15</sup> Federal Penal Code No 3 (1987) art 346.

<sup>16</sup> UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on TIP Joy Ngozi Ezeilo, Addendum, Mission to the UAE' (22 February 2013) UN Doc A/HRC/23/48/Add, para 4.



going through a societal transformation in the wake of their emergence as economically prosperous nations.<sup>17</sup> With cities like Abu Dhabi and Dubai having huge commercial potential, the UAE developed into a destination and transit State for human trafficking.<sup>18</sup> Therefore, it is important to examine how the UAE government has responded to child trafficking and to critically analyse its legislation in this regard.

### 5.3 UAE responses to child trafficking

It is common knowledge that the UAE was the first Arab State<sup>19</sup> to adopt laws to combat human trafficking, such as Federal Law No 51 of 2006.<sup>20</sup> This law was issued before the UAE's ratification of the UN TOC Convention in 2007.<sup>21</sup> Furthermore, the UAE in its first annual report on human trafficking released in 2007 publicly and explicitly acknowledged the occurrence of trafficking in persons within its jurisdiction and dedicated substantial funds to combat trafficking and related crimes.<sup>22</sup> The UAE government announced a strategy which focuses on four main areas in order to combat trafficking in its territory: legislation, law enforcement, victim support and bilateral agreements and international partnerships.<sup>23</sup>

In 2015, the 2006 TIP Law was amended in order to improve its compliance with both regional and international standards as the original one was focused only on prohibition and prosecution and missed out any protection provisions.<sup>24</sup> In this regard, Dr Gargash, the Minister of State for Foreign Affairs, said that 'the amended law is an important step in the UAE's strategic plan to combat human trafficking'.<sup>25</sup> Further, it shows that 'the country is serious about cases of human trafficking, whereas it is not simply a frozen [law], but it is being continuously

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<sup>17</sup> ILO, Regional Office for the Arab States, 'Tricked and Trapped: Human Trafficking in the Middle East' (2013). 25.

<sup>18</sup> *ibid* para 4.

<sup>19</sup> UAE Judicial Department, 'Encyclopaedia of Combating Human Trafficking' (2014) 5.

<sup>20</sup> UAE Federal Law No 51 of 2006 on Combating Human Trafficking Crimes as amended under Federal Law No 1 of 2015.

<sup>21</sup> UN TOC Convention, 'Status of Ratification'

< [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en) > accessed 22 February 2016.

<sup>22</sup> National Committee to Combat Human Trafficking (NCCHT), 'Combating Human Trafficking in the UAE, 2007' (Annual Report) 6.

<sup>23</sup> NCCHT, 'NCCHT Strategic Plan'

<<http://www.nccht.gov.ae/en/menu/index.aspx?mnu=cat&PriMenuID=12&CatID=6>> accessed 22 February 2016.

<sup>24</sup> NCCHT (n 22) 9.

<sup>25</sup> Dana Moukhallati, 'UAE Human Trafficking Law Tightened' *The National, Dubai* (25 March 2015)

<<http://www.thenational.ae/uae/uae-human-trafficking-law-tightened>> accessed 22 February 2016.

developed'.<sup>26</sup> The 2015 amendment was welcomed and considered a positive step at the international level, for instance, by the CEDAW Committee.<sup>27</sup> Unlike the Saudi practice, it is observed that in the UAE the drafting of the amended law took into consideration many of the comments and suggestions which were received from regional and international committees. This will be shown throughout this chapter. The inclusion of these suggestions in the amended law is regarded as evidence of the serious commitment by the UAE government to improve its national efforts in order to fight crimes of trafficking in persons and to ensure compliance of its domestic law with international and regional standards.

## **5.4 Prohibition, prosecution and punishment**

### **5.4.1 Definition of child trafficking**

In accordance with Islamic law which treats human trafficking crimes under *tazir* category, Article 1(1) of the UAE TIP Law provides that whoever commits any of the following shall be deemed a perpetrator of a human trafficking crime:

- (a) Selling persons, offering persons for selling or buying, or promising the same.
- (b) Soliciting persons, employing, recruiting, transferring, deporting, harbouring, receiving, receiving or sending the same whether within the country or across the national borders thereof, by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person for the purpose of exploitation.
- (c) Giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation of the latter.

Based on the recommendations of a number of international and regional committees,<sup>28</sup> and in compliance with international standards, the amended law supplemented the above general definition with three provisions relating to children in particular.

Article 1(2) states that the following shall be deemed human trafficking even if the activity does not incorporate the use of any of the means provided in the previous paragraph:

- (a) Recruiting a child, transferring, deporting, harbouring or receiving the same for the purpose of exploitation.

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<sup>26</sup> *ibid.*

<sup>27</sup> The UAE ratified the CEDAW in 2004, OHCHR, 'Status of Ratification' <<http://indicators.ohchr.org/>> accessed 22 February 2016. CommEDAW, 'Concluding Observations on the Combined Second and Third Periodic Reports of the UAE' (24 November 2015) CEDAW/C/ARE/CO/2-3, para 31.

<sup>28</sup> For instance, the Special Rapporteur on the Sale of Children noted the absence of a specific article on trafficking in children and made recommendation regarding the inclusion of such provision: See the UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, including the Right to Development: Report of the Special Rapporteur on the Sale of Children Najat Maalla M'jid, Addendum, Mission to the UAE' (18 November 2010) UN Doc A/HRC/16/57/Add.2, para 32.

- (b) Selling a child, offering the same for selling or buying.
- (c) Child is any person under the age of 18 years old.

Exploitation purposes are introduced under Article 1(3). This includes ‘all forms of sexual exploitation, engaging others in prostitution, servitude, forced labour, organ-trafficking, coerced service, enslavement, begging, and quasi-slavery practices’.

As can be observed, the UAE TIP Law offers a definition of trafficking which is closely aligned with that outlined in Article 3 of the Trafficking Protocol. The definition identifies the same three elements (action, means, and purpose) that have been recognised by the Trafficking Protocol definition and other international and regional instruments, as discussed in the third chapter.<sup>29</sup> It is worth noting that the definition of the term ‘child’ in the UAE TIP law is in line with both international and regional standards.<sup>30</sup> This is an example which signifies that it is not against Shariah to specify the age of maturity. Making reference to chapter two, the Maliki school agree that the end of childhood is marked by the onset of puberty and specify it to be a maximum of eighteen years and a minimum of fifteen years for both genders.

On the other hand, unlike the definition of the Trafficking Protocol, but in line with the CRC OP on Sale of Children, the UAE TIP Law considers the act of selling or offering for sale and buying the child to be ‘child trafficking’. Most importantly, this is in compliance with Shariah. As shown in chapter two, these practices are condemned by Islamic law and all four schools agree on its prohibition. This demonstrates that the UAE TIP law compliance with Shariah is better when compared with the Saudi TIP Act.<sup>31</sup> Brig. Al Murr, Head of the Human Rights Department at Dubai Police, commented on the addition to the law as follows:

[T]he roles played in a human trafficking crime have been specified in the amended law, which also finds those with intent to sell a human guilty of a human-trafficking crime ... to sell a person, put them up for sale, make a promise of sale and buying, are all punishable in the same degree under the UAE TIP law.<sup>32</sup>

Similar to the Trafficking Protocol definition, in the UAE TIP Law there is a specific provision for child trafficking (Article 1(2)) which considers the offence of trafficking of children complete in the absence of any means provided in the law. Compared to the Saudi

<sup>29</sup> The UAE ratified the Trafficking Protocol in 2009; see also the Arab Guiding Law on Human Trafficking, (9 November 2005) (Arab TIP Model Law) art 1(2)(f) and (h).

<sup>30</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 September 2003) UN Doc A/RES/55/25 (Trafficking Protocol) art 3(d); Arab TIP Model Law (n 29) art 1(6).

<sup>31</sup> The Maliki school considers that human flesh is *haram* and what is *haram* cannot be sold or disposed of. Ibn Rushd (n 10) part 1, 96.

<sup>32</sup> Moukhallati (n 25).

definition noted in chapter four, it appears that the UAE TIP Law is more progressive as it specifically mentions children, although the Saudi TIP Act does not contain a similar provision for child trafficking, the definition of trafficking in persons provided by SA is applicable to all persons including children.<sup>33</sup> By taking into consideration the fact that these acts are prohibited by all four schools of thought, SA can follow the UAE's steps and amend its TIP Act to provide similar provisions. A comparison of the UAE TIP Law and the Saudi TIP Act with respect to the human trafficking definition shows that the Trafficking Protocol has been taken as the starting point for national anti-trafficking legislations in both Islamic States. Furthermore, the two States' legislations, in line with international and regional standards, have provided the same definition of the term 'child'. This suggests that the different schools of thought have no significant implications when formulating the offence of trafficking.

#### **5.4.2 Punishment of child trafficking crime**

The UAE TIP Law provides in Article 2 that, 'whoever commits any of the human trafficking crimes provided for in Article 1 of this Law shall be punished by temporary imprisonment for a term of no less than five years, and a fine of no less than one hundred thousand dirhams'. It is important to note that Article 68 of the Penal Code No 3 of 1987 states that the term of any temporary imprisonment may not be less than three years and not more than fifteen years, unless the law provides otherwise. Noting the above mentioned provision in the TIP Law, it can be observed that the UAE legislators have increased the minimum term of temporary imprisonment to five years in trafficking cases. This is a clear indication of the legislators' intention to depart from general principles and of their view that trafficking is a serious crime which needs harsher penalties.

According to Article 2(1) of the UAE TIP Law, child trafficking crimes are considered aggravated circumstances where the penalty should be enhanced, and the enhancement of the penalty is clearly specified to life imprisonment. In this sense, the UAE TIP Law goes further than the Saudi TIP Act, most notably, it limits judge's discretion. It provides the minimum number of years' imprisonment and the minimum amount for fines, in order to avoid cases where judges impose lesser punishments. As shown in chapter two, *tazir* crimes are within the discretion of the ruler who is in charge of maintaining public order and public safety, Islamic law

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<sup>33</sup> Saudi Trafficking in Persons (Offences) Act (14 July 2009) (Saudi TIP Act) art 1(1).

sources broadly describe *tazir* offences but leave the specific details of those offences to be decided by the human legislation represented by the government. In applying this it is clear that the UAE approach is quite different to the Saudi TIP Act which is quite vague as it only provides that the punishment should be enhanced and it is up to the judge to decide what the additional punishment ought to be. The UAE practice suggests therefore that heavier and specified penalties are not in conflict with the Islamic criminal justice system. From the Islamic perspective, the penalty for alcohol drinking crimes which were 40 lashes was introduced during the Prophet's lifetime. However, as noted in chapter two, under the rule of ibn Al-Khattab (the Prophet's Companion) the punishment was increased to 80 lashes.<sup>34</sup> It is interesting to note that the Maliki school of thought (which is followed in the UAE) endorsed the example of Omar while the Hanbali school (SA) did not change the penalty of 40 lashes. This is why some scholars consider ibn Hanbal as a traditionalist more than a jurist, particularly when his school is compared with the other three schools.<sup>35</sup> In this sense, it might be argued that the school of thought in the UAE is better equipped to deal with child trafficking crimes than that of SA. However, it is significant to note that, in making a judicial ruling Saudi judges are 'constrained solely by their own conscience in determining the will of God'.<sup>36</sup> This was clarified by the statement of Sheikh Al-lahaydan in 1985 (President of the permanent board of the Supreme Judicial Council and a member of the board of senior *ulama*):

The *qadi* [judge] of SA is not obliged or compelled to restrict himself to the school of Ahmad Ibn Hanbal, but rather has the right to judge in the case in accordance with that to which his *ijtihad* leads, even if that is not the Hanbali school ... it is not said to him, perform *ijtihad* within the school or without it: rather, he is requested to judge by that which he believes to be the truth.<sup>37</sup>

In this sense, it is desirable that Saudi judges consider other Islamic jurisdictions' practices, such as the UAE, and specify clearly the minimum penalty for this crime and the specific penalty for aggravated circumstances especially when a victim is a child.

The UAE TIP Law, in line with international and regional standards,<sup>38</sup> extended the reach of the law on child trafficking crimes through provisions such as Article 8(1) which provides that

<sup>34</sup> The Shafi'i and Hanbali schools followed the Prophet's tradition and punished the drinking of alcohol with 40 lashes, Al-Shafi'i, *Al-Umm*, vol 6, 281; Hanafi and Maliki schools endorsed the example of Omar, 80 lashes, Muhammad Al-Sarakhsi, *Al-Mabsut*, vol 9, 295. Hadith, Sahih Muslim, No 3281.

<sup>35</sup> A Zedan, *Almadkhal Le Derasat AlShariah Al Islamiyah* (Dar Al-Ressalah 1969) 143.

<sup>36</sup> *ibid* 630.

<sup>37</sup> Salah Al Fozan, *Rad Alshubhat Hual Daa Al Sheikh Imam Muhammad bin Abdul Wahab* (Dar Alasmeh 2004) 35-37; see also Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill NV 2000).

<sup>38</sup> Trafficking Protocol (n 30) art 5(2)(b)-(a). Arab TIP Model Law (n 29) art 15.

‘any person who attempts to commit one of the crimes enumerated in Articles 2, 4 or 6 of this Law shall be punished by the penalty of a complete crime’. It is worth noting that the legislators equated complete crime and attempt in terms of punishment. Once again, this is contrary to the general principles of the UAE Penal Code regarding attempt.<sup>39</sup> Therefore, it is another indicator of the government’s serious commitment to combating human trafficking at the domestic level.

Further, Article 8(2) states that ‘any person who collaborates in committing one of the crimes provided for in Articles 1, 2, 4, 5 and 6 of this Law, as a direct participant or accomplice shall be deemed a perpetrator of the crime’. Article 3(1) of the UAE TIP Law penalises the failure of any persons to report a crime of child trafficking with a punishment of imprisonment for a period of no less than one and no more than five years and a fine of no less than 5,000 dirhams or by both penalties. Further, it adds in Article 3(2) that ‘[t]he person who failed to inform the authorities may be pardoned from the said penalty, if he/she was the perpetrator’s spouse, antecedent, descendant, sibling or the like of in-laws’. In order to encourage the reporting of these crimes, similar to Article 12 of the Saudi TIP Act, the UAE TIP Law copies the exemption provision provided by Article 18 of the Arab TIP Model Law as discussed in chapter three. Finally, in line with Article 10 of the UN TOC Convention and Article 23 of the Arab Model Law, the UAE TIP Law recognises corporate liability as stated in Article 7 and the punishment is a fine of no less than 100,000 dirhams, no more than one million dirhams, and dissolution or temporary/permanent full/partial closure of the establishment.

There are other laws in the UAE which are relevant to child trafficking. One example is the Penal Code No 3 which includes offences whereby a person kidnaps, arrests, detains or deprives a person of his freedom, whether by himself or through another by any means, without lawful justification.<sup>40</sup> These offences are relevant to the present discussion because victims are exposed to the full deprivation of their freedom of movement, in addition to torture, beatings and starvation, during the process of trafficking. There is a mandatory punishment of life imprisonment where the victim is, among others, under eighteen years.<sup>41</sup> If the victim dies, then

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<sup>39</sup> Article 35 of the Federal Penal Code No 3 of 1987 states that: ‘Unless otherwise provided in the Law, attempt to perpetrate a felony shall be sanctioned by the following penalties :( I) Life imprisonment, should the penalty prescribed for the crime be the capital sentence.(2) Temporary imprisonment, should the penalty prescribed for the crime be life imprisonment.(3) Imprisonment for a period not exceeding half the maximal level of the penalty prescribed for the crime or incarceration if the penalty is temporary imprisonment’.

<sup>40</sup> Penal Code No 3 of 1987, art 344.

<sup>41</sup> *ibid* art 344(5).

the punishment of life imprisonment may be imposed on convicted traffickers.<sup>42</sup> Moreover, the punishment prescribed for the principal offender shall apply to anyone ‘who becomes an intermediary to any of the crimes indicated in this Article, as well as anyone who knowingly conceals a kidnapped person’.<sup>43</sup> There are currently no similar provisions in Saudi law so this aspect should be considered further by the law-makers.

In summary, the UAE laws are largely in line with the international and regional standards, and certainly more progressive than the SA legislation, particularly the punishment regime. Therefore, SA is recommended to follow the UAE approach. The discussion will now proceed to question how the UAE authorities are actually applying the TIP law as a basis to prosecute and punish criminals who traffic and exploit children in the UAE. This analysis is aimed at drawing lessons for the Saudi authorities to learn from and implement.

#### **5.4.3 UAE TIP Law enforcement**

In the UAE, the key agencies dealing with the suppression of trafficking in persons are the Ministry of the Interior (police), the General Directorate of Residency and Foreigners Affairs (immigration officers) and government institutions supporting trafficking victims. Furthermore, unlike SA, in the UAE there are special control centres dedicated to human trafficking which have been established across the UAE police forces, this demonstrates a strong and serious commitment to combat trafficking. In February 2009, Dubai Police established the ‘Human Trafficking Crimes Control Centre’. The centre specialises in studying and analysing human trafficking cases; raising awareness among law enforcement authorities and the public about the crime and ways of preventing it; training and qualifying police forces to be able to effectively address trafficking cases and deal with victims of human trafficking; enhancing cooperation with other national and international agencies concerned with trafficking crimes; and finally guaranteeing support and care for trafficking victims. This centre works side by side with the Organised Crime Department of Dubai Police which has a specialised unit to investigate trafficking cases and is equipped with qualified officers.<sup>44</sup> There is no such centre in SA and it is suggested that Saudi Police should adopt the UAE practice in this regard for better detection and prevention of child trafficking.

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<sup>42</sup> *ibid* art 344.

<sup>43</sup> *ibid*.

<sup>44</sup> Dubai Police Official website, Human Trafficking Crimes Control Centre.

The police usually carry out preliminary investigations into all crimes, including trafficking cases, and have the obligation to inform the public prosecutor of any such case within twenty hours.<sup>45</sup> Thereafter, prosecutors take on the investigation, evaluate the case and decide whether to refer it to court.<sup>46</sup> Another important body dedicated to human trafficking is the National Committee to Combat Human Trafficking (NCCHT) which was established in 2007.<sup>47</sup> Its main tasks are to coordinate activities across relevant public authorities and implement plans aimed at combating trafficking. In comparison with the SA TIP Committee, the UAE NCCHT is a very active institution. Since its establishment in 2007, it has published annual reports which contain valuable details on the law enforcement and government's efforts at the national and international level. Therefore, the Saudi Committee is a toothless committee in practice, and this casts doubt on the commitment of the Saudi government to address child trafficking.

The following paragraphs will examine the official statistical figures on law enforcement since the enforcement of the TIP Law in 2007. All the data utilised are provided by the NCCHT and the Ministry of the Interior reports. According to the statistics released in 2014, 34 human trafficking-related cases were registered by the police under the UAE TIP Law. However, the public prosecutor treated only 15 of these as human trafficking cases.<sup>48</sup> All these cases were related to sexual exploitation, involving twenty victims, and this led to the arrest of forty-six traffickers.<sup>49</sup> Notably, there were convictions in six cases, and stiff penalties were imposed in two cases as the traffickers received life imprisonment sentences.<sup>50</sup> In general, a measure of the UAE's performance in tackling this crime is evident in the number of cases registered since the enforcement of the TIP Law. There has been a notable increase from only 10 cases in 2007 to 43 in 2009,<sup>51</sup> and then 58 in 2010. However, there was a noticeable decline in 2011 to only 37.<sup>52</sup> In

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<sup>45</sup> UNHRC (n 16) para 61.

<sup>46</sup> *ibid.*

<sup>47</sup> Art 12: 'Under this law, a committee shall be established and known as the "National Committee to Combat Human Trafficking", the formation and chairmanship of which shall be determined under a resolution issued by the Cabinet, based on the Minister's proposal'.

<sup>48</sup> NCCHT, 'Annual Report: Combating Human Trafficking in the UAE, 2014' 17.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> NCCHT, 'Human Trafficking Statistics' <<http://www.nccht.gov.ae/default.aspx?PageId=70>> accessed 3 February 2016.

<sup>52</sup> *ibid.*



2012, the number of cases increased again to 47. The 2013-2014 statistics show a further decline in the number of registered cases.<sup>53</sup>

In relation to child trafficking cases in particular, the Special Rapporteur on the Sale of Children remarked on the low number of reported cases during her visit to the UAE. The Abu Dhabi Police informed her that only one case of child trafficking for sexual exploitation which involved two girls was recorded in 2008.<sup>54</sup> Statistical figures for 2012 show that there were four child cases out of the 31 total cases resulting in convictions, and they involved six child victims between 14 and 17 years old. All were trafficked for sexual exploitation purposes.<sup>55</sup> Nine traffickers were arrested and received sentences ranging from three to ten years of imprisonment followed by deportation to their home countries after completing their sentences.<sup>56</sup> This number of child trafficking cases is lower than what was registered in 2010-2011, when there were eight cases involving fifteen child victims (between 13 and 17 years old), and they resulted in the arrest of thirteen traffickers.<sup>57</sup> Sentences ranged from two to fifteen years of imprisonment followed by deportation.<sup>58</sup>

However, it is clear that the rates of child trafficking cases are lower in comparison with adult trafficking cases in the UAE. The statistics also show that the focus is placed upon sexual exploitation, like SA, and not enough is done to police cases of labour exploitation. Despite the fact that both States' definitions of TIP encompass human trafficking for labour exploitation, as well as human trafficking for sexual exploitation, the recorded cases above might give an indication that the overwhelming focus of criminal justice agencies' efforts and operational work appear to remain on sexual exploitation. The US TIP Report observed in this regard that, the UAE's efforts in the area of forced labour are still weak.<sup>59</sup> Referring back to chapter two, it was clear that all types of child exploitation are prohibited as provided by the Qur'an and the Sunnah. This means that Shariah is not the reason behind such a failure at the domestic level in the UAE also. This issue therefore requires further clarification.

In a broad sense, the global report of the UNODC found that the scale of human trafficking for labour exploitation tends to be underestimated. According to the report, there are

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<sup>53</sup> *ibid.*

<sup>54</sup> UNHRC (n 28) para 18.

<sup>55</sup> NCCHT, 'Combating Human Trafficking in the UAE, 2012-2013' 17.

<sup>56</sup> *ibid.*

<sup>57</sup> NCCHT, 'Combating Human Trafficking in the UAE, 2010-2011' 12.

<sup>58</sup> *ibid.*

<sup>59</sup> US Dept of State, 'Trafficking in Persons Report: June 2010' 334.

many reasons, including a perception widespread among both law enforcement agencies and the general public that trafficking occurs only in the context of sexual exploitation.<sup>60</sup> In a narrow sense, this is also evidenced at the national level as, according to the ILO report, awareness of labour exploitation and forced labour among the public and some government officials in GCC including SA and the UAE is very low. There is even ‘some reluctance to accept that there are abuses which may indeed constitute forced labour and trafficking’.<sup>61</sup> This has also been concluded from the statement of some senior law enforcement officials in the UAE. Hamid Bin Demas, the Acting Director General at the Ministry of Labour, argued that the distinction between labour exploitation outcomes of trafficking and other forms of labour violations at the domestic level is still a problem.<sup>62</sup> In this respect, raising the awareness of the general public and the enforcement officers will help to improve the understanding of human trafficking and its various end purposes, as given in its definition.

Another important aspect in this issue is that it seems there are no clear definitions of these terms in SA or UAE domestic laws. The Attorney General’s Office in Abu Dhabi conceded that in the absence of clear precedents to guide them on the interpretation of ‘forced labour’ under the UAE TIP Law, prosecutors and even judges are facing challenges in applying this concept.<sup>63</sup> The same factors also impede effective investigation of trafficking cases by the police as it seems that there is a general tendency for the police only to arrest offenders in cases involving prostitution and not labour exploitation.<sup>64</sup> To solve this issue, Majed has argued that even though the UAE TIP Law does not elaborate on these exploitative purposes, it is the duty of public prosecutors and judges to exercise caution in dealing with these exploitative acts and defining their elements – guided by the general and specific provisions contained in the Penal Code and other national laws that include acts of exploitation.<sup>65</sup> In addition, Ayser Fouad, a Judge at the Dubai Court of Appeal, has recommended that reference should be made in the law not only to domestic laws but also to other relevant international instruments which define and

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<sup>60</sup> UNODC, *Global Report on Trafficking in Persons* (UNODC 2009) 51.

<sup>61</sup> ILO, ‘The Cost of Coercion’ (Global Report under the follow-up to ILO Declaration on Fundamental Principles and Rights at work, International Labour Conference, 98th Session, Geneva, 2009) 5, 6.

<sup>62</sup> Zoi Constantine and Wafa Issa, ‘Traffickers’ Cash may be Used to Aid Victims’ *The National*, UAE.

<sup>63</sup> UNHRC (n 16) para 63.

<sup>64</sup> *ibid.*

<sup>65</sup> Majed (n 13) 104-107.

elaborate these forms of exploitation, such as human rights, labour and slavery conventions.<sup>66</sup> His argument is supported by Article 14 of the Trafficking Protocol which acknowledges the existence of other international instruments in interpreting the Trafficking Protocol.

It is interesting to note that Vlieger argues the lack of forced labour prosecution is not caused by a lack of clarity of legal concepts but by certain societal issues.<sup>67</sup> This might be because the law enforcement responses to trafficking cases in SA and the UAE are affected by moral considerations, where sexual exploitation victims deserve more attention and assistance. As such, it may be that the only trafficked victims who will be provided assistance are those who fit the stereotype of the young migrant female who was lured to work and then subjected to extreme violence and sexual abuse, for financial gain. Both States' national TIP reports and local media usually tend to view trafficking victims in this way. However, raising the general public's awareness is a key factor in changing this view.

The overwhelming focus on detecting and prosecuting trafficking cases for sexual exploitation not only risks overlooking a significant number of the trafficked victims for other forms of exploitation but also diverting government agencies' attention away from addressing the conditions or factors that increase the vulnerability of victims to labour exploitation forms of trafficking. The UAE government must therefore address these challenges; this point was also expressed by the UN Special Rapporteur.<sup>68</sup> Dr Gargash, the Chairman of the NCCHT, emphasised that the police and prosecutors should keep an eye on the problem and identify labour violations that amount to trafficking crimes.<sup>69</sup>

Table 3 below shows the conviction rate since the introduction of the UAE TIP Law. It improved in 2012 with 31 convictions out of 47 cases. The conviction rate for 2012 stood at nearly 66%, much better than 51% for 2011, but this was still much lower than that achieved in 2009 (nearly 81%).

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<sup>66</sup> A Fouad, *The Legal Framework around Human Trafficking Crimes: A Comparative Study* (1st edn, Dubai Court 2010) 50-52.

<sup>67</sup> Antoinette Vlieger, 'Domestic Workers in Saudi Arabia and the Emirates: Trafficking Victims?' 2012 50(6) *International Migration* 180, 190.

<sup>68</sup> UNHRC (n 16) para 77.

<sup>69</sup> Loveday Moeis, 'Minister: Dishonest Recruiting is Human Trafficking' *The National, UAE* (23 April 2009).

**Table 3: UAE Conviction Rates for Human Trafficking 2007-2014**

<b>Year</b>	<b>Number of Cases</b>	<b>Number of Convicted Cases</b>
2007	10	5
2008	20	6
2009	43	35
2010	58	5
2011	37	19
2012	47	31
2013	19	12
2014	15	6

The statistics also show the number of victims identified and the number of traffickers arrested since the introduction of the TIP Law in 2006 (Table 4).<sup>70</sup> It appears that the highest number was in 2010 when 58 cases of trafficking in persons that involved 152 victims were identified, and thus resulted in the arrest of 169 individuals as traffickers. The protection measures available for trafficked victims are discussed in detail below under their respective headings.

**Table 4: UAE Number of Victims and Traffickers Identified 2008-2014**

<b>Year</b>	<b>Number of Victims</b>	<b>Number of Traffickers</b>
2008	32	43
2009	86	125
2010	152	169
2011	51	111
2012	75	149
2013	24	50
2014	20	46

One of the important features of trafficking in persons is that the crime has changed its form. All the cases between 2007 and 2010 involved sexual exploitation only.<sup>71</sup> However, according to the NCCHT Annual Report, a change is being observed in the nature of human trafficking crimes that are being recorded in the State as there are now cases of labour exploitation, forced labour and in even fewer instances the sale of children – this is linked to

<sup>70</sup> NCCHT, 'Human Trafficking Statistics' <<http://www.nccht.gov.ae/default.aspx?PageId=70>> accessed 3 February 2016.

<sup>71</sup> NCCHT (n 47) 27.

adoption, which is illegal in Islamic States including the UAE.<sup>72</sup> According to the Minister of State for Foreign Affairs, in order to ensure better enforcement, the profiling of companies likely to be involved in trafficking is regularly undertaken and strict surveillance is used on them.<sup>73</sup> This has resulted in positive outcomes, such as the permanent closure of two nightclubs in 2007 which were found to be involved in the exploitation of trafficked women.<sup>74</sup> Moreover, in May 2014, the Abu Dhabi Criminal Court convicted three police officers for their involvement in sex trafficking.<sup>75</sup> One received a sentence of eight years' imprisonment while the other two received sentences of three years' imprisonment.<sup>76</sup> From the above examples, it is clear that the UAE practice is much better than that of SA. It is obvious that much effort has been made to train law enforcement authorities and officials and enable them to lead serious criminal investigations into a crime as complex as human trafficking. These efforts have been recognised by several international trafficking instruments as important indicators of an effective criminal justice response to the crime of trafficking.<sup>77</sup> These efforts have also led to many of trafficking cases being investigated, prosecuted and convicted at a national level – surely SA can learn from the UAE practice in this respect.

Furthermore, the UN Special Rapporteur on TIP has commended UAE's efforts.<sup>78</sup> However, she highlighted that the number of cases registered and prosecuted, though positive, is clearly low compared with the scale of trafficking.<sup>79</sup> She suggested that this is due to the absence of effective witness protection programmes resulting in a situation where 'the majority of trafficked persons are scared to come forward and report their cases to authorities'.<sup>80</sup> It is noted from the previous chapter that there are no similar programmes in SA either so both States should give full consideration to this recommendation. In this regard, as shown in chapter three, Article 24 of the UN DOC Convention and Article 31 of the Arab TIP Model Law provide for

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<sup>72</sup> NCCHT (n 48) 13.

<sup>73</sup> Dr Anwar Gargash (Speech at United Nations General Assembly, New York, 3 June 2008).

<sup>74</sup> *ibid.*

<sup>75</sup> The UAE was ranked second in the Middle East and North Africa region in 2011 for combating corruption: see the Corruption Perceptions Index developed by Transparency International. It was ranked twenty-eighth in the world out of 183 countries listed, which was one place higher than its ranking in 2010. See the CommRC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Second Periodic Report of UAE' (3 November 2014) CRC/C/ARE/2, para 21.

<sup>76</sup> US Dept of State, 'Trafficking in Persons Report: July 2015' 348.

<sup>77</sup> For example, Article 10(2) of the Trafficking Protocol (n 30), and OHCHR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2010) UN Doc E/2002/68/Add. 1, 5.2, 5.3, 5.4.

<sup>78</sup> UNHRC (n 16) para 76.

<sup>79</sup> *ibid* para 62.

<sup>80</sup> *ibid.*

the protection of witnesses. Additionally, the UN Principles and Guidelines state that ‘an adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses’.<sup>81</sup> Furthermore, there are cases where trafficked victims are unable or reluctant to complain or to serve as witnesses because they lack trust in the police and the judicial system or because of the absence of any effective protection mechanisms.<sup>82</sup> Thus, there is a need to provide these trafficked victims with real incentives to come forward and cooperate, whilst protecting their rights. It is argued that victims of trafficking ‘whose rights are restored, whose humanitarian needs are met, and who have access to the support necessary to become independent survivors of the ordeals they have endured are also more effective witness’.<sup>83</sup>

In summary, an analysis of the enforcement of the TIP Law reveals that the UAE’s efforts are much better than those of the SA even though the legal structure is almost the same and both schools of thought followed in the two States are equally equipped to deal with child trafficking. However, the approach adopted by the UAE government taken together with the strong efforts of the law enforcement authorities, the amendment of the TIP Law and the data collection system, all show that the UAE government has the will to fight this type of crime at the domestic level. By taking into consideration that strong legislative frameworks do not always result in the desired outcome, in the UAE, it is noted that prosecutions in cases of human trafficking carried out for purposes other than sexual exploitation are rare. This indicates that the law enforcement agencies in the UAE consider trafficking mostly in terms of prostitution and sexual exploitation, similar to SA. The UAE and the Saudi government must therefore address these challenges.

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<sup>81</sup> OHCHR (n 77) 7.

<sup>82</sup> *ibid* 7.

<sup>83</sup> Mark J Kappelhoff, ‘Federal Prosecution of Human Trafficking Cases: Striking a Blow against Modern Day Slavery’ (2008) 6(1) University of St Thomas Journal Law 13.

## 5.5 Prohibition of child exploitation in the UAE

### 5.5.1 Labour exploitation in the UAE

In conformity with Islamic law and international standards,<sup>84</sup> forced labour is explicitly prohibited under the UAE Constitution.<sup>85</sup> Further, Penal Code No 3 defines forced labour in the following terms:

... to compel a person to work either for free or in return of payment, and the punishment stipulated for the violation of this provision is the imprisonment for a period not exceeding one year, by a fine not exceeding ten thousand Dirhams, or by one of these two penalties.<sup>86</sup>

In comparison with the punishment of human trafficking crimes, prescribed in the UAE TIP Law analysed above, where victims might be trafficked for forced labour purposes, it seems that the specified punishment for forced labour as a separate crime from trafficking is not sufficient, especially if the victim is a child. Making reference to chapter four, there is no similar provision in Saudi legislation. From the Islamic perspective, the penalty for such a crime falls under the *tazir* category. This means it is up to the State to decide the appropriate punishment. In this sense, legislators should ensure that the punishments prescribed fit this type of crime. As noted in chapter two, its purpose is to prevent any further crime and reform the offender. Therefore, punishments stipulated for forced labour crimes in the UAE should be reviewed to improve their compliance with Islamic as well as international standards.

In relation to child labour, the Labour Relations Act No 8 of 1980 prohibits the employment of juveniles below the age of fifteen.<sup>87</sup> Furthermore, it requires employers, before employing any juvenile, to obtain a birth certificate, a certificate of medical fitness to perform the required work and written consent from the juvenile's guardian.<sup>88</sup> In addition, '[j]uveniles may not be employed in jobs which are considered hazardous, exhausting or detrimental to health'.<sup>89</sup> Ministerial Decree No 6/1 of 1981, passed pursuant to the abovementioned federal law, provides a detailed list of types of work that are likely to harm the health, safety or morals of females regardless of their age. With regard to punishment, Article 181 of the Penal Code No 8

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<sup>84</sup> ILO, 'Ratification of the UAE'

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:103495](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103495)>  
accessed 15 December 2015.

<sup>85</sup> UAE Constitution (n 1) art 34(2): 'forced labour is prohibited except in certain circumstances provided for by the law and in return for compensation'.

<sup>86</sup> UAE Penal Code No 3 of 1987, art 347.

<sup>87</sup> Law 8 of 1980 on the Regulation of Labour Relations of the UAE 1980, art 20. The UAE ratified the Minimum Age Convention, 1973 (No 138) in 1998.

<sup>88</sup> Law 8 of 1980 (n 87) art 21.

<sup>89</sup> *ibid* art 24.

imposes ‘imprisonment for a period not to exceed six months, and a fine of not less than 3,000 and not more than 10,000 dirhams or either of the two penalties on any person who violates any of the obligatory provisions of this Law or any of the executive regulations or orders issued thereunder’.<sup>90</sup> The penalties stipulated above are more serious when compared with the Saudi labour law.<sup>91</sup> However, it still does not reflect the seriousness of the crime. Therefore, it is recommended that legislators in both States consider the fact that child trafficking attracts a heavier penalty (life imprisonment in the UAE law), and therefore this should be the basis for stipulating similar penalties for child forced labour – taking into consideration the strong Islamic position against child forced labour and States’ obligations under international conventions, in particular the ILO Convention Nos 138 and 182, as well as the CRC, explored earlier.

To its credit, the UAE government has taken several measures to enforce its labour law. For example, the government adopted a Ministerial Order No 44/1 of 1980 which empowers labour inspectors who are responsible for supervising the proper implementation of labour laws and, in particular, the provisions regulating the employment of young persons and women. They are also supposed to inform the competent authorities of any loopholes in the law.<sup>92</sup> Furthermore, labour inspectors shall periodically inspect the establishments covered by law, receive complaints on violations of the law and carry out relevant investigations.<sup>93</sup> They are explicitly in charge of carrying out night inspections to check the working hours and employment of young persons and women.<sup>94</sup> According to the Penal Code No 8, the same punishment mentioned earlier for the violation of the labour law is imposed on ‘any person who hinders or prevents any of the officials assigned to enforce the provisions of this Law or any of its executive regulations or resolutions, or whoever attempts or starts to prevent him from performing his job either by force or violence or by threatening to use force or violence’.<sup>95</sup> It is worth noting that Article 34 of the Penal Code No 8 provides for criminal liability with respect to the enforcement of the provisions on the employment of young persons. There are no similar provisions in Saudi labour law, and therefore the Saudi government should consider their implementation both in law and in practice.

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<sup>90</sup> Law 8 of 1980 (n 87) art 181(1).

<sup>91</sup> Saudi Labour Regulation (28 October 2005) art 16(1).

<sup>92</sup> UAE Ministerial Order No 44/1 of 1980, art 1.

<sup>93</sup> *ibid* art 2.

<sup>94</sup> *ibid*.

<sup>95</sup> Law 8 of 1980 (n 87) art 181(2).



Several observations can be made from an analysis of the UAE's Labour Law. Firstly, unlike SA but similar to other Islamic States, the UAE legislation does prohibit forced labour explicitly and stipulates punishments in the form of imprisonment and fines for the violation of the law. On the other hand, similar to SA, the UAE Labour Law applies to children under the age of fifteen, which is lower than the age specified in the CRC and the ILO Convention.<sup>96</sup> The CRC Committee as well as the ILO Committee accordingly requests the government 'to take, without delay, the necessary measures to ensure that Labour Relations Act No (8) of 1980 is amended so as to prohibit the employment of young persons under 18 years of age in hazardous work' and to 'bring its legislation into line with the International Labour Organization Minimum Age Convention, 1973 (No. 138)'.<sup>97</sup> From the Islamic perspective, it is worth noting that the Maliki school followed by the UAE agrees that the end of childhood is marked by the onset of puberty and specifies it to be a maximum of eighteen years and a minimum of fifteen years for both genders.<sup>98</sup> In this sense, it seems that the law applies the minimum age possible for specifying the age of the child. However, there is no reason to prevent both governments from amending their child labour laws to bring them into line with the international standards and there is nothing in Shariah that would prevent such a change in the law.

It is also important to note that the Ministerial Decree No 6/1 of 1981 mentioned above addresses the types of hazardous work from which the female child is protected but limits its consideration to work performed in factories and does not cover the male child who is under the age of eighteen. Therefore, the UAE government should take into consideration the requirement to determine the types of work that children must not be allowed to perform in accordance with Paragraph 3 of the Worst Forms of Child Labour Recommendation 1999 (No 190), which was discussed in the context of SA labour regulation in chapter four.<sup>99</sup> The ILO Committee has requested the UAE government:

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<sup>96</sup> CRC (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC). ILO Convention Concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO Convention No 138) art 3(1). ILO Convention Concerning the Prohibition and Immediate Actions for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) 38 ILM 1207 (ILO Convention No 182) art 2.

<sup>97</sup> CommRC, 'Concluding Observations on the Second Periodic Report of the UAE' CRC/C/ARE/CO/2 (30 October 2015) para 67.

<sup>98</sup> W Al-Ahmad, *Himayat Huquq Al-Tifl Fe Daw Ahkam Al-Shariah Al-Islmiah Wa Al-Itifaqiyat Al-Dawliyah* (Al-Halabi Legal Publications 2009) 13.

<sup>99</sup> ILO, 'R190 - Worst Forms of Child Labour Recommendation, 1999 (No 190): Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' (17 June 1999)

... to take the necessary measures to ensure that a list determining the types of hazardous work that shall not be performed by boys and girls under 18 years of age, shall be adopted in consultation with the organizations of employers and workers concerned.<sup>100</sup>

The same recommendation applies to SA, especially when one considers that there is currently no official list of hazardous work that children are not allowed to perform.

The UAE Ministry of Labour established a separate department in 2009 to combat human trafficking and economic exploitation which monitors the possibility of workers falling prey to such crimes.<sup>101</sup> The Ministry of Labour has forty specialist officials dealing with various aspects of the law, namely the crime itself, investigation, prevention and awareness.<sup>102</sup> These officials receive complaints from workers and attempt to settle disputes quickly. If the worker or the employer rejects the settlement, the dispute is referred to a court of law. The court issues a summary verdict without charging the worker any fees, irrespective of the nature of legal process or the damage involved.<sup>103</sup> In 2014, officials carried out 263,944 visits; only 147 facilities were caught violating the law and they were fined 15,000 dirhams each.<sup>104</sup> However, it is not clear if any of the cases involved violation of child labour law or forced labour cases. In addition, the Ministry of Labour launched a programme called 'We Are All Ears' in order to encourage telephone complaints from workers regarding violations of labour laws through a toll-free line (800 5005) that is operational 24 hours a day.<sup>105</sup> In 2013, the Ministry received 1005 complaints and in 2014 1407 complaints. Most complaints were related to wage disputes.<sup>106</sup> Although the Saudi government established a similar department for the same purposes, the efforts in reality have been quite weak as the numbers of visits conducted by the Saudi inspectors are less and, therefore, the number of facilities caught violating the labour law was fewer. Considering this, there is a need for an increased number of well-trained inspectors, especially in the light of the large number of labourers in a State like SA.

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<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312528](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312528)> accessed 20 June 2015.

<sup>100</sup> ILO, 'Direct Request (CEACR) UAE' (adopted 2004)

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:2237052](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2237052)> accessed 27 June 2015.

<sup>101</sup> UAE Ministry of Labour <<https://eservices.mol.gov.ae/enetwasal/login.aspx?lang=eng>> accessed 27 June 2015.

<sup>102</sup> NCCHT (n 47) 14.

<sup>103</sup> *ibid* 15.

<sup>104</sup> *ibid* 15.

<sup>105</sup> *ibid* 12.

<sup>106</sup> *ibid*.

### 5.5.2 Begging

Begging by children is not a major problem in the UAE, especially when compared to SA. However, there is a statute that regulates this. Chapter two analysed the Islamic perspective in relation to begging, and States' obligation to prohibit the act was clearly identified under Shariah. Based on that, the UAE Anti-Begging Act No 15 was issued in 1975.<sup>107</sup> It prohibits begging,<sup>108</sup> and offenders are punished by a penalty of not less than 500 dirhams in fines and a two-month prison sentence as well as forfeiting all amounts illegally collected.<sup>109</sup> The law provides that 'Emirati offenders will be admitted into an occupational rehabilitation centre, non-Emiratis will be deported immediately'. Furthermore, 'in the event where an offence is committed again before the lapse of one year from the act of a judgment being rendered against the perpetrator in respect of a similar offence, the Court may inflict the penalty of imprisonment of not less than three months and not more than six months'.<sup>110</sup>

Another important piece of legislation regarding child begging is Act No 9 on Juvenile Vagrants and Delinquents. According to Article 9 of this Act, the penalties of imprisonment, capital punishment and financial sanctions are prohibited for juveniles.<sup>111</sup> A 'juvenile' is defined as a person who, at the time of the commission of the act, was less than eighteen years of age.<sup>112</sup> Another important provision in this Act is Article 42 which stipulates that a penalty of up to one year in prison or a fine of between 2,000 and 5,000 dirhams will be imposed upon:

... anyone who exposes a minor to delinquency, by preparing him for it, inciting him to engage in such behaviour or in any way facilitating his involvement therein, even if the delinquency does not actually materialise as far as the law is concerned.<sup>113</sup>

According to Article 13(1) of this Act, delinquency is identified in four situations, the first one is a situation in which a person commits begging.<sup>114</sup> Thus, this provision would presumably cover situations of use of children in begging. In this regard, it is significant to note that begging is considered a *tazir* offence under Shariah, and the application of it in both jurisdictions (SA and the UAE) is different. It is observed that the UAE law clearly prohibits begging and imposes a penalty in the form of imprisonment and fines for exploiters. It is

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<sup>107</sup> UAE Anti-Begging Act No 15 (30 October 1975).

<sup>108</sup> *ibid* art 1.

<sup>109</sup> *ibid* art 2.

<sup>110</sup> *ibid* art 5.

<sup>111</sup> UAE Act of the Juvenile Vagrants and Delinquents (No 9 of 1976) art 9.

<sup>112</sup> *ibid* art 1.

<sup>113</sup> *ibid* art 42.

<sup>114</sup> *ibid* art 13(1).

significant to note that the punishment is prohibited for juveniles and in this sense the UAE law protects children under the age of eighteen. This can be compared with the relevant SA regulation in relation to begging, namely, Article 3 of Order No 1/738, which prescribes a punishment in the form of banning the offender from engaging in recruitment activities for a period of five years.<sup>115</sup> The UAE practice suggests, therefore, that heavier penalties are not in conflict with the Islamic criminal justice system. As such, it is suggested that SA amend its law and criminalise child begging per se, taking into consideration practices in other Islamic jurisdictions, such as the UAE. Furthermore, it should ensure that dissuasive penalties are issued to people who use children under the age of eighteen years to beg. According to the UAE government, begging does not represent a major concern for them, yet despite this, in compliance with Islamic and international standards, there are various efforts in place to prevent the practice at the domestic level. This issue is more complicated in the Saudi context. However, the UAE model could potentially still be adapted and applied in SA.

### **5.5.3 Camel jockeys**

Despite the prohibition of forced labour in the Penal Code No 3 of 1987, and the employment of children under the age of fifteen under the Labour Relations Act No 8 of 1980, there was a widely denounced form of child labour exploitation which was in existence until 2005 – the use of minors in illegal camel races. The CRC Committee expressed its concerns in this regard.<sup>116</sup> Their sentiments were also shared by the ILO Committee in arguing that the employment of children as camel jockeys ‘constitutes dangerous work under article 3, paragraph 1, of the ILO Convention No. 138’.<sup>117</sup> Consequently, both Committees recommended that the UAE bring its legislation into line with the international standards and clearly prohibit labour by children under the age of eighteen in all sectors of the economy, including their use as camel jockeys.<sup>118</sup>

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<sup>115</sup> Saudi Order No 1/738 on 4 July 2004 issued by the Ministry of Labour, art 3.

<sup>116</sup> CommRC, ‘Concluding Observations of the Committee on the Rights of the Child: UAE’ (13 June 2002) CRC/C/15/Add.183, para 40.

<sup>117</sup> ILO, ‘Observation (CEACR): UAE’ (adopted 2004)

<[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2243507](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2243507)> accessed 27 June 2015.

<sup>118</sup> ILO Regional Office for the Arab States, ‘Tricked and Trapped: Human Trafficking in the Middle East’ (ILO-Beirut, 2013) 67.

Act No 15 of 2005 prohibits the employment of persons under the age of eighteen years in camel racing and establishes strict penalties for offenders.<sup>119</sup> The punishment stipulated is ‘three years in prison and/or a fine of at least 50,000 dirhams, double the penalty in the case of recommitting the crime’.<sup>120</sup> Moreover, ‘any person who participates, as direct participant or accomplice, or fails to report the crime shall be punished for a complete crime’.<sup>121</sup> The enactment of this law was seen as a significant step forward at both the international and regional level, particularly because calls had been made for its enactment by human rights organisations, including Anti-Slavery International.<sup>122</sup> This is certainly a more serious penalty in comparison to the relevant SA law. The penalty stipulated supersedes the Saudi Royal Decree No 13,000 of 2002, which states that any camel owner who employs a jockey under the age of eighteen years to participate in camel racing will not, if he wins, receive the prize. This is another area where the Saudi government must take a serious step and stipulate a serious penalty, especially as States (judges) have the power, within Shariah framework, to decide the punishment of *tazir* crimes.

In order to ensure the enforcement of the law, the UAE Ministry of the Interior also adopted Ministerial Decree No 41 of 2005 which established a Special Commission composed of police officers dedicated to the eradication of this crime.<sup>123</sup> The Commission’s tasks are to control camel racing and to respond effectively to any new problem faced in this regard.<sup>124</sup> Furthermore, they are to collect information on the measures taken by neighbouring States concerning camel racing and request the opinion of national as well as international experts on how to develop camel racing in line with international requirements.<sup>125</sup> It is worth noting that in collaboration with UNICEF all the police officers who participated in the task received training in inspecting and responding to this issue.<sup>126</sup> As shown in chapter four, there are no similar measures in place in SA to eradicate this crime. Certainly, the Saudi government should adopt the successful approach of the UAE in this regard.

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<sup>119</sup> Camel Races Regulations, Act No 15 of 2005.

<sup>120</sup> *ibid* art 2(1).

<sup>121</sup> *ibid* art 2(2).

<sup>122</sup> Anti-Slavery International, ‘Report on UAE Compliance with ILO Convention No 182 on the Worst Forms of Child Labour (ratified in 2001)’ (May 2006).

<sup>123</sup> Camel Races Regulations, Ministerial Decree No 41 of 2005.

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid*.

<sup>126</sup> Krishna Belbase and others, ‘Preventing Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options’ (UNICEF Division of Policy and Planning, Working Paper, February 2007).

Although camel races are considered part of the UAE culture similar to the other GCC, all the abovementioned measures confirm the UAE government's serious commitment to eradicate this abusive practice. This was also highlighted at the international level, according to a report by Anti-Slavery International, 'the new law and related measures are all landmark events and extremely welcome'.<sup>127</sup> Further, the result of the government's efforts was acknowledged by the UN Special Rapporteurs on TIP,<sup>128</sup> and on the Sale of Children.<sup>129</sup> In short, it can be said that this law, although adopted to regulate traditional and national camel races, has included other purposes in order to prevent the use of children (those less than 18 years old) and stop them from being exploited in this type of forced labour. This is in line with the Trafficking Protocol's aims and with the ILO Conventions. It is also in line with Islamic principles as provided by Article 4 of the OIC Child Covenant.<sup>130</sup> In contrast to SA, the UAE successfully managed to fulfil its obligations and protect minor victims.

The efforts dedicated to this activity in the UAE were both appropriate and successful and, the measures that were implemented completely ended the exploitation of children in this sport and went beyond this to provide measures to protect children who might be used in this way. Apart from this, the government adopted a policy of reform and rehabilitation of victims in order to reintegrate them into their communities. According to UNICEF, the successful experience of the camel racing project in the UAE is a particularly valuable contribution to how States can initiate, plan and implement collaborative agreements to address child trafficking in a systematic manner.<sup>131</sup> The above practice by the UAE is an example of why the UAE is in a better position compared with SA in terms of compliance with Islamic, international and regional laws. Certainly, the fulfilment of State obligations under these standards helped the UAE to advance a more effective response to such a problem. Considering this, it is suggested that SA draws on these practices and approaches because SA is affected by the same problem, in fact to a larger extent, than the UAE.

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<sup>127</sup> Anti-Slavery International (n 122) 2.

<sup>128</sup> UNHRC (n 16) para 23.

<sup>129</sup> UNHRC (n 28).

<sup>130</sup> OIC Child Covenant (adopted 23 June 2005) art 4-20.

<sup>131</sup> Belbase (n 126).

#### 5.5.4 Sexual exploitation

Similar to SA, it is reported that the UAE government has not publicly addressed the issue of children being trafficked for sexual exploitation because of societal sensitivities and cultural perspectives.<sup>132</sup> This means that there is a lack of understanding of this important issue which in turn affects the identification and prosecution of such cases. According to a report of the IOM, girls from Azerbaijan, Russia and Georgia, are trafficked into the UAE for sexual exploitation.<sup>133</sup> It is therefore evident that child sexual exploitation is occurring in the UAE, just as in any part of the world. Having discussed the UAE TIP law which covers different forms of exploitation, including sexual, in the first part of this chapter, the focus is now directed at examining the relevant national laws which are applicable to child sexual exploitation as a separate crime from trafficking.

Child sexual exploitation, under *tazir* category, is regulated in the UAE by the Penal Code No 3 under which states that, '[w]hoever entices a male or female under eighteen years of age, by any means into committing debauchery or prostitution, or who assists them in such an act, shall be punished by detention for at least two years and a fine'.<sup>134</sup> The law further provides that '[t]he culprit shall be presumed to be aware of the victim's age in the Articles provided for in this section'.<sup>135</sup> In addition, if the victim is forced or coerced, the law provides that:

Whoever resorts to coercion in sexual intercourse with a female or homosexuality with a male, shall be punished by the death penalty. A case of coercion shall arise if the victim at the time of the crime was under fourteen years of age.<sup>136</sup>

In addition to the Penal Code No 3, several laws in the UAE are relevant to child sexual exploitation as well. One example is the law against cyber-crimes which criminalises the actions of anyone who 'produces, draws up, prepares, sends or saves for exploitation, distribution or display to others through the computer network, pornographic materials and whatever that may afflict the public morals'.<sup>137</sup> The penalty stipulated in the case where the 'subject of the pornographic content involves a child under eighteen years of age, or if such content is designed to seduce juveniles', shall be imprisonment for a period of at least one year and a fine of not less

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<sup>132</sup> Giuseppe Calandrucchio, 'A Review of Recent Research on Human Trafficking in the Middle East' (2005) 43(1) IOM 267, 284.

<sup>133</sup> IOM, 'Shattered dreams – Report on trafficking in persons in Azerbaijan' (2002).

<sup>134</sup> Federal Penal Code No 3 of 1987, art 363.

<sup>135</sup> *ibid* art 370.

<sup>136</sup> *ibid* art 354.

<sup>137</sup> Federal Decree Law No 5 (13 August 2012) on Combating Cybercrimes Abrogating: Federal Law No 2 of 2006, art 17.

than 50,000 dirhams and not in excess of 150,000 dirhams.<sup>138</sup> The same law also covers the acts of anyone who ‘entices, aids or abets another person, by using a computer network or any information technology means, to engage in prostitution or lewdness’. If the victim is a child under the age of eighteen, ‘the punishment shall be imprisonment for a period of at least five years and a fine not in excess of one million dirhams’.<sup>139</sup>

Another piece of legislation discussed above in the context of child begging is Act No 9 on Juvenile Vagrants and Delinquents, which is also pertinent to child sexual exploitation. It stipulates that a penalty of up to one year in prison or a fine of between 2,000 and 5,000 dirhams will be imposed upon ‘anyone who exposes a minor to delinquency’.<sup>140</sup> According to Article 13(2) of the Act, delinquency is a situation in which a person ‘commits acts involving prostitution, depravity, moral turpitude, gambling or drugs’.<sup>141</sup> Thus, this provision would presumably cover situations of use of children in pornography.<sup>142</sup>

Having examined domestic laws that are pertinent to child sexual exploitation, it is important to discuss how the law is implemented and enforced in practice. Judges of the Dubai courts<sup>143</sup> informed the Special Rapporteur on the Sale of Children during her visit that they had dealt with only one case of sexual exploitation of a child in their courts in the past five to ten years, and that all cases of prostitution involve women over eighteen years of age.<sup>144</sup> The Abu Dhabi Police also stated that there were no reported cases of the sale or sexual exploitation of children in 2008.<sup>145</sup> Commenting on this, the Special Rapporteur on the Independence of Judges noted that the majority of cases of sexual assault do not reach the courts.<sup>146</sup> She observed that significant social pressure is placed on females not to report such abuses to the police or the courts; the treatment and stigma faced by some females who dare to file a complaint for sexual

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<sup>138</sup> *ibid.*

<sup>139</sup> *ibid* art 19.

<sup>140</sup> UAE Act of the Juvenile Vagrants and Delinquents (n 111) art 42.

<sup>141</sup> *ibid* art 13.

<sup>142</sup> UNHRC (n 28) para 30.

<sup>143</sup> The UAE was ranked first in the Arab and Middle East region and thirteenth in the world in the index on the rule of law and judicial transparency, in 2011. This ranking was developed by the World Justice Project: see CommRC (n 75) para 21.

<sup>144</sup> UNHRC (n 28) para 19.

<sup>145</sup> *ibid.*

<sup>146</sup> UNHRC, ‘Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Addendum, Mission to the UAE’ (5 May 2015) UN Doc A/HRC/29/26/Add.2, para 69.



assault is disturbing.<sup>147</sup> The CRC Committee is also concerned that a child victim will rarely report any instance of sexual abuse or exploitation as she or he runs the risk of being charged with having committed a sexual crime.<sup>148</sup> It is reported that the fear of being arrested for illegally staying in the State or for engaging in prostitution deters victims from going to the police.<sup>149</sup> This was highlighted in a widely publicised case whereby a female of foreign nationality who went to the police to file a complaint for rape ended up being prosecuted and convicted on the grounds that she had engaged in illicit sex.<sup>150</sup>

The issue of victims' unwillingness to report due to fear of criminalisation based on Shariah, which strictly prohibits sexual activities outside of marriage, is worth exploring. Zimmerman comments that the religious nature of the Islamic State presents challenges for trafficked victims and Shariah contributes to a fear of the judicial system due to its strict application.<sup>151</sup> She adds that prostitution is considered a form of adultery in Islam for which the Qur'an provides the sentence of lashing.<sup>152</sup> Mattar notes that some Middle Eastern States, specifically SA, strictly apply this rule in practice.<sup>153</sup> This is indeed true, however, it is significant to emphasise that Islamic law has a strict requirement of evidence in this type of crime, as shown in chapter two. This is in order to ensure that criminal convictions and punishments are imposed only in cases in which there is certainty of guilt. Adultery, for example, must be proven by four male Muslim eyewitnesses (they must see the actual act and their testimonies have to be identical) or four confessions. According to Hanafi and Hanbali schools, the confession should be made four times, and if the accused has admitted the offence once or twice only, his confession becomes invalid.<sup>154</sup> Due to this, *hudud* punishments are rarely

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<sup>147</sup> *ibid.*

<sup>148</sup> CommRC, 'Concluding Observations on the Second Periodic Report of the UAE' CRC/C/ARE/CO/2' (30 October 2015) para 43.

<sup>149</sup> UNHRC (n 16) para 62.

<sup>150</sup> UNHRC (n 146) para 69.

<sup>151</sup> Sarah Zimmerman, 'Mending the Protection and Prosecution Divide: Looking at Saudi Arabia Human Trafficking Flaws and Possibilities' (2016) 15 Wash U Global Stud L Rev 533, 536.

<sup>152</sup> Qur'an, 24:2. 'The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment'.

<sup>153</sup> Mohamed Y Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2002) 26 Fordham Int'l L J 721, 736.

<sup>154</sup> Ibn Qudama, *Al-Mughni* (Dar Al-Kitab Al-Arabi 1987) 8/191.

applied.<sup>155</sup> Another important point to clarify in regard to this issue is that one of the basic principles of Shariah, is the non-punishment of victims'.<sup>156</sup> This means that the victim of such an act who was forced to perform this crime (in this case, *zina*) will not be held criminally responsible under Islamic law. Thus, there is an urgent need to change this misconception and educate the general public about the principles of Shariah in order to encourage victims, especially those who are sexually exploited, to report the crime and seek justice without the fear of being criminalised. After all, '[i]n a society where people are aware of their rights, violations of those rights would be relatively limited'.<sup>157</sup>

At this stage and from the above analysis, several observations can be made. First of all, Although SA and the UAE follow two different schools of thought, all four schools share a general consensus on the prohibition of child sexual exploitation, and the Qur'an clearly protect its victims from punishment. It is noted that, unlike SA, there is specific legislation in the UAE which prohibits child sexual exploitation. It clearly covers all children below the age of eighteen which is in line with the international standards. The legislation covers a wide range of forms of exploitation and includes different features of potential child sexual exploitation. However, it is observed that the laws are not properly enforced in the UAE. Therefore, both SA and the UAE should establish mechanisms, procedures and guidelines to ensure the mandatory reporting of cases of child sexual exploitation and to conduct awareness-raising activities to combat the stigmatisation of victims of sexual exploitation and abuse. They are also to ensure the existence of accessible, confidential, child-friendly and effective reporting channels for such violations.<sup>158</sup>

## 5.6 Protection measures

As noted earlier in this chapter, the UAE 2006 TIP Law adopted a strong criminalisation stance in relation to trafficking. However, it is also important to note that it did not contain any specific provisions for the protection and assistance of victims of trafficking, as provided for in various international, regional and national anti-trafficking legislations. This lack of protection for victims in the law has resulted in concerns being expressed by the relevant international

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<sup>155</sup> Because of such requirements, all four schools, the Hanafi school in particular, suggest that it is nearly impossible for a thief or fornicator to be sentenced unless he wishes to be and confesses: Mohamed S El-Awa, *Punishment in Islamic Law* (American Trust 1981) 126.

<sup>156</sup> Qur'an, 24:33.

<sup>157</sup> Mashood A Baderin, 'Identifying Possible Mechanisms within Islamic Law for the Promotion and Protection of Human Rights in Muslim States' (2004) 22 *Netherlands Quarterly of Human Rights* 329, 336.

<sup>158</sup> *ibid.*

bodies, this is because, the cycle of trafficking cannot be broken without attention to the rights and needs of those who have been trafficked.<sup>159</sup> The Arab Human Rights Committee, for instance, stated the need to amend the 2006 TIP Law to include provision on protection for victims.<sup>160</sup> The Special Rapporteur on TIP also expressed concern that the law does not provide for important protection measures.<sup>161</sup> In response, a sub-committee of the NCCHT in 2010 completed a study on the possibilities of amending the 2006 TIP Law, with a particular focus on the protection and repatriation of victims.<sup>162</sup> In early 2015, the subsequent recommendations were promulgated through a Presidential Decree. As a result, the UAE TIP Law now includes protection provisions, all of which are discussed below. This development further suggests that the NCCHT plays an important role in the protection of victims at the domestic level.<sup>163</sup> The UAE's positive attitude towards international and regional concerns and criticism in the way that it responds quickly, implements all required amendments and improves its level of compliance with international and regional standards, as noted throughout the chapter, is certainly worth acknowledging.

### **5.6.1 Identification of child victims**

In contrast to the Saudi approach, the UAE Ministry of Interior has approved many mechanisms and procedures to ensure a 'victim-centred approach'. For instance, it has published guidance on human trafficking comprising, inter alia, of key procedures for interaction between trafficking victims and competent authorities, guidance for investigators and, most importantly, details of various anti-human trafficking methods and regulations that need to be applied when identifying child victims of trafficking and dealing with such cases.<sup>164</sup> To ensure its effective application, the Ministry of the Interior provides regular training for law enforcement officers. As a result, the Special Rapporteur on Sale of Children was pleased to learn that the number of training sessions for police in the identification of victims of trafficking was on the increase.<sup>165</sup>

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<sup>159</sup> OHCHR (n 77) 8.

<sup>160</sup> AHRC, 'Concluding Observations: UAE' (Session 5, 21-26 December 2013) para 14.

<sup>161</sup> UNHRC (n 16) para 29. A similar concern was raised by the Special Rapporteur on the Sale of Children. See UNHRC (n 28) para 33.

<sup>162</sup> UNHRC (n 16) para 30.

<sup>163</sup> Arab TIP Law (n 29) art 13, 'The Committee provided for in Article (12) of this Law shall assume the following: Examine and update legislations and regulations concerning human trafficking, in a manner that achieves the required protection for victims and witnesses, in accordance with international requirements'.

<sup>164</sup> UNHRC (n 16) para 45.

<sup>165</sup> UNHRC (n 28) para 70.

However, it has been reported that the authorities in the UAE are disproportionately focused on sexual exploitation cases. This is similar to what is done in SA so the two States share the same problem.<sup>166</sup> The UAE government has not established an organisation or department for this particular task. However, where a referral is made for a victim by the authorities, these authorities are considered competent in the exercise of victim identification and in all cases the status of a trafficked victim has to be approved by the public prosecutor.<sup>167</sup> It is worth noting that the DFWAC has social workers who specialise in the principles and skills needed to interview a victim in a self-referral case, with translators if necessary. Their role is to define the psychological and behavioural indicators, including any health problems, which the victim suffers. This is done in accordance with previous experience of correctly identifying trafficked victims.<sup>168</sup> This is an example of good practice because it helps to ensure that care is provided for the trafficked victims in compliance with the UAE's obligations under the Trafficking Protocol. It is recommended that SA should adopt such a practice and learn from the UAE model.

More recently, when the UAE amended its TIP Law, it followed the guidance of the Arab TIP Model Law. The amended law provides that,<sup>169</sup> '[a]ll phases of collecting evidence, investigation, and trials of relevance to human trafficking crimes shall identify the victim and the witness with their legal rights, in a language understood thereby, and allow them to express their legal and social needs'.<sup>170</sup> Further, the amended law tasked the NCCHT with developing adequate mechanisms to identify victims in human trafficking cases.<sup>171</sup> In practice, the UAE government has intensified its efforts to facilitate proper identification of potential victims. For instance, the NCCHT launched a pioneering media campaign on human trafficking at the end of 2010 and early 2011 in the Abu Dhabi and Al Ain international airports.<sup>172</sup> Apart from informative posters, the campaign included the distribution of leaflets in six languages (Arabic, English, Urdu, Hindi, Russian and Tagalog), with contact details of victims' shelters and their

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<sup>166</sup> US Dept of State, 'US Trafficking in Persons Report: June 2014'.

<sup>167</sup> NCCHT (n 47) 35.

<sup>168</sup> *ibid.*

<sup>169</sup> Arab TIP Model Law (n 29) art 30.

<sup>170</sup> *ibid* art 1(2).

<sup>171</sup> *ibid* art 13: 'The Committee provided for in Article (12) of this Law shall assume the following: (10). Develop adequate mechanisms to identify victims in human trafficking cases.'

<sup>172</sup> NCCHT (n 48) 9.

services.<sup>173</sup> The idea behind launching a media campaign at airports crystallised after the NCCHT learned that most of the cases of trafficking, particularly those involving sexual exploitation, originate outside the State. As such, prospective victims could become aware of the assistance available to them as soon as they arrived in the UAE.<sup>174</sup> Following positive feedback about the impact of the public awareness campaigns at the Abu Dhabi and Al Ain airports, this drive was expanded to include the Dubai International Airport in 2013.<sup>175</sup> Led by the NCCHT and in cooperation with Dubai Police, the campaign message was propagated in fourteen prominent languages representing the nationalities of those most vulnerable to human trafficking. In 2015, this campaign was expanded to other airports.<sup>176</sup> This is clearly different to the law and practice in SA. As noted earlier, the Saudi TIP Act is silent in respect of identification of child victims and there are no procedures in practice to achieve this purpose. The UAE government has implemented various measures in this regard and these measures could be adopted and applied in SA. Similar effort is needed in SA in order to improve its compliance with Islamic, international and regional standards.

### **5.6.2 Appropriate housing and assistance**

Unlike SA, in the UAE, there are four shelters for trafficked victims who are usually referred by various sources, including law enforcement officials, embassies and places of worship.<sup>177</sup> The UAE government states that one of the purposes of the establishment of these centres is to provide free services for a period of one to six months to victims who are trafficked into the UAE. In addition, the centres provide safe accommodation and a helpline; case management and medical care; psychological support; legal counselling; and consular and immigration assistance.<sup>178</sup> Apart from these basic facilities, the centres also provide secondary support services including children's education; recreational activities; vocational services; physical fitness; and empowerment and skills training.<sup>179</sup> Shelters provide protection and assistance to women and children who have suffered from sexual exploitation, labour exploitation and trafficking. All trafficked victims, regardless of age, gender or nationality, have

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<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> *ibid.*

<sup>176</sup> NCCHT <<http://www.nccht.gov.ae/>> accessed 20 April 2016.

<sup>177</sup> UNHRC (n 16) para 53.

<sup>178</sup> DFWAC, 'Annual Report on Victims of Human Trafficking, 2011' 10.

<sup>179</sup> *ibid.*

the right to access these services without conditions as long as they are victims of human trafficking.<sup>180</sup> In this respect, the ILO Committee noted that child victims of trafficking not only benefit from such services but also from the eventual transfer to similar institutions in their State of origin.<sup>181</sup>

A brief description of the shelters is useful in understanding the housing and assistance available to victims in the UAE. The first is the Ewa'a shelter in Abu Dhabi city which operates under the umbrella of the UAE Red Crescent Authority. It began its activities in 2008 and has the capacity to accommodate sixty victims. In 2011, Ewa'a opened two more shelters in Sharjah and Ras Al Khaimah, both of which can accommodate seventy victims.<sup>182</sup> At the time of the visit by the Special Rapporteur on the Sale of Children to the UAE, the Abu Dhabi shelter had received 126 victims in total since 2008, while the two shelters in Ras Al-Khaimah and Sharjah had accommodated twenty-two and eighteen victims, respectively.<sup>183</sup> The Special Rapporteur on TIP observed that shelters provide temporary and long-term services for victims of internal and transnational trafficking in persons.<sup>184</sup> In 2011, all the victims in the shelters, except for seven girls, were adult females between 18 and 29 years of age.<sup>185</sup> In the following year, Ewa'a provided assistance to twenty-four victims of human trafficking including three children.<sup>186</sup> In order to encourage more victims to escape from the controls of exploitation and obtain assistance and protection at the shelter, Ewa'a began operating a 24-hour hotline in six languages (800-7283).

The fourth shelter is run by the Dubai Foundation for Women and Children (DFWAC). This is the first licensed non-profit shelter in the UAE for women and child victims abuse and human trafficking.<sup>187</sup> It was established in July 2007 to offer victims immediate protection and support services in accordance with international human rights obligations. The shelter can accommodate up to 250 people.<sup>188</sup> The Special Rapporteur on the Sale of Children visited the

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<sup>180</sup> NCCHT (n 47) 19.

<sup>181</sup> ILO, 'Observation (CEACR): UAE' (adopted 2013)

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3147425](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3147425)> accessed 23 June 2015.

<sup>182</sup> DFWAC, 'Annual Report on Victims of Human Trafficking, 2014'.

<sup>183</sup> UNHRC (n 16) para 54.

<sup>184</sup> *ibid* 56.

<sup>185</sup> *ibid* para 57.

<sup>186</sup> NCCHT (n 47) 38.

<sup>187</sup> *ibid* 21.

<sup>188</sup> NCCHT (n 48) 35.

shelter in 2010 and discovered that there were 150 lodgings, half of which were fully occupied.<sup>189</sup> Statistics regarding trafficked victims show that in 2011 the shelter accommodated twenty-three persons trafficked for sexual exploitation aged between 10 and 37 years, of whom four were boys, and it provided assistance to two victims outside the shelter.<sup>190</sup> In 2012, the shelter supported forty-four victims. The ages of the victims ranged between 13 and 33 years, four of them being female children.<sup>191</sup> In 2013, the shelter received fifteen victims, the ages of those victims ranged from 6 months to 33 years, and among them were four children under 18 years old.<sup>192</sup> The youngest one was a six-month old child sold by her mother and the other child was a seven year old who had been trafficked for exploitation in begging.<sup>193</sup> In 2014, a total of three cases of human trafficking were received and sheltered at DFWAC. This category of victims made up 4% of all new cases, and they were all adults.<sup>194</sup> All human trafficking victims were referred to the DFWAC by Dubai Police.<sup>195</sup> All victims were discharged during the reporting period and their stays at the DFWAC did not exceed three months.<sup>196</sup> In addition, the DFWAC operates a hotline (800-111) to receive calls around the clock in various languages, which facilitates the process of helping and protecting victims.<sup>197</sup> In 2013, DFWAC received 2,203 calls at the hotline centre but only four victims were calling about human trafficking related issues.<sup>198</sup>

In examining the UAE's practice, it is evident that provision of housing to trafficked victims, including children, is far more advanced than in SA. The UAE government's efforts are acknowledged by the ILO Committee<sup>199</sup> as well as the Special Rapporteur on TIP.<sup>200</sup> This shows that the UAE is more in line with international standards, particularly international human rights law. It also becomes apparent that there is much scope for improvement in SA. Although the

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<sup>189</sup> UNHRC (n 28) para 59.

<sup>190</sup> UNHRC (n 16) para 55.

<sup>191</sup> DFWAC, 'Annual Report on Victims of Human Trafficking, 2013'.

<sup>192</sup> DFWAC (n 178) 23.

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid* 37.

<sup>195</sup> *ibid* 23.

<sup>196</sup> *ibid* 24.

<sup>197</sup> UNHRC (n 16) para 55.

<sup>198</sup> DFWAC (n 178) 25.

<sup>199</sup> ILO, 'Observation (CEACR)' (adopted 2013)

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3147425](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3147425)>  
accessed 23 December 2016.

<sup>200</sup> UNHRC (n 16) para 57.

Saudi government has shelter centres established for beggars,<sup>201</sup> their sole focus is on deportation. Therefore, much criticism has been levelled against them because they do little in the way of providing other services over a prolonged period. It also falls short when compared with the efforts made by the UAE. This is because the UAE aims to enable trafficked victims to recover from what they have suffered during their exploitation period and to successfully reintegrate them back into their societies. Certainly, this is in line with the accepted Islamic human rights, and when compared to the Saudi practice, it appears that SA is not fulfilling its religious obligation in this regard. The availability of these services for trafficked victims in the UAE affirms the serious commitment of the State to eradicate this crime in its jurisdiction.

#### **5.6.4 Residency status**

The UAE 2006 TIP Law does not contain any provision that gives trafficked persons the right to stay and work temporarily in the UAE. However, there is one case of a trafficked person who has been allowed to remain and work in the UAE.<sup>202</sup> While it is only one case, it may be considered an indication that the government is not against the idea of granting temporary residence permits. As explained above, victims are permitted to recover at shelters and also have the option of obtaining work visas and remaining in the UAE by using the shelters' employment placement programmes or completing voluntary vocational education programmes.<sup>203</sup> Recently, after the amendment of the TIP Law, a new provision was added which now allows victims to stay in the UAE whilst criminal investigations and proceedings are under way.<sup>204</sup> While this may be beneficial from a criminal justice point of view, the residence permits can be applied selectively – only those who are willing to cooperate with the authorities are entitled to this right. This means that such right will be conditional on a victim's willingness to act as witness. The 2012 UNDOC Report affirms that any criminal justice response to trafficking needs to have 'a victim-centred approach to ensure that victims of trafficking in persons are properly identified at all stages of the trafficking process, that their needs are met and that they are equipped to participate in the criminal proceedings should they wish to do so'.<sup>205</sup> More specifically, the

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<sup>201</sup> Saudi Ministry of Social Affairs, 'Annual Report, 2012'

<<http://mosa.gov.sa/portal/modules/smartsection/item.php?itemid=40>> accessed 15 April 2015.

<sup>202</sup> UNHRC (n 16) para 66.

<sup>203</sup> NCCHT (n 47).

<sup>204</sup> Arab TIP Model Law (n 29) art 1(2)(5).

<sup>205</sup> UNODC, 'Global Report on Trafficking in Persons' (2012) 82.



CEDAW Committee recommended that the UAE consider granting victims temporary residence permits irrespective of their ability or willingness to cooperate with the prosecutorial authorities.<sup>206</sup> This would be more in line with Islamic and international human rights law. The practice of the UAE as shown above is not commendable. This is the same situation in SA. Both States suffer from a lack of this human rights approach, and therefore it is suggested that both States should modify their current practices, especially as this right conforms to Islam as noted in the Qur'an.<sup>207</sup> Thus, both States are not meeting their obligations under international and Islamic law in this regard.

### **5.6.5 Repatriation and integration**

In the UAE, when victims wish and consent to return to their origin States, the shelters arrange their repatriation with the UAE police and NGOs in their home countries at the government's expense under the 'Crime Victim Assistance Programme'.<sup>208</sup> Victims who cannot be repatriated to their countries of origin are resettled in other States, in cooperation with the Office of the United Nations High Commissioner for Refugees and host States.<sup>209</sup> In this regard, in the past, some children were resettled in other States.<sup>210</sup>

Official statistics show that between 2010 and 2011 the DFWAC made 185 referrals, of which 171 individuals were deported back to their State of origin to receive further assistance in conjunction with other organisations such as UNESCO, which helped them to reintegrate back into their own communities.<sup>211</sup> In 2014, all victims were returned to their country of origin after their cases were resolved, with a follow up on their circumstances.<sup>212</sup> It is worth noting that the DFWAC works in collaboration with national and international partners to ensure that victims receive a variety of good quality care and to follow up on the victims after they return home and ensure that they are not trafficked again.<sup>213</sup> Moreover, a follow-up is conducted 30, 90 and 180-days after victims leave the shelter in the UAE.<sup>214</sup> This comprehensive aftercare service includes

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<sup>206</sup> CommEDAW, 'Concluding Observations: UAE' CEDAW/C/ARE/CO/2-3 (24 November 2015) para 32.

<sup>207</sup> Qur'an, 67:15.

<sup>208</sup> UNHRC (n 16) para 67. See also NCCHT (n 47)

<sup>209</sup> NCCHT, 'Annual Report: Combating Human Trafficking in the UAE, 2015' 24.

<sup>210</sup> UNHRC (n 16) para 67.

<sup>211</sup> DFWAC (n 178) 18.

<sup>212</sup> DFWAC (n 191) 10.

<sup>213</sup> NCCHT (n 209) 28.

<sup>214</sup> *ibid.*

details about their safety, housing, basic necessities, medical care, children and education, among others.<sup>215</sup> One of the most useful indicators to show that the UAE's measures of protection are working is the fact that none of the shelters has yet received a re-trafficked victim.<sup>216</sup> Moreover, the Dubai Police adopt a proactive approach, assisting in returning victims to their States of origin, and all repatriated victims are given a list of names and details of those organisations or bodies that can assist them in their home country.<sup>217</sup> This clearly shows that the UAE is fulfilling international and regional obligations and its practice is in conformity with the Islamic standards.

In contrast, SA does not offer this kind of assistance. Deportations usually occur within ten to fifteen days of a trafficked victim being sent to a shelter. SA does not take responsibility for following up on victims nor does it consider how a child is coping, either at the shelter or after return to the State of origin. It could be argued that many children are re-trafficked back into the State because of this.<sup>218</sup> SA therefore needs to implement these types of measures to provide more effective protection to trafficked victims in line with international standards if it is to address problems at the initial point of entry as well as avoid instances of re-trafficking.

#### **5.6.6 Non-criminalisation**

In the past, neither the 2006 TIP Law nor the Penal Code contained any provision that exempted trafficked persons from being prosecuted for their involvement in the trafficking process.<sup>219</sup> However, in contrast to the Saudi TIP Act, the amended UAE TIP Law explicitly deals with this situation.<sup>220</sup> This shows the government's commitment to updating its legislation and improving its compliance with international and regional standards. It also shows that the UAE is committed to fulfilling its Islamic obligation.<sup>221</sup> Given the progressive steps taken by the UAE, it is recommended that the Saudi government provide clarity on the approach to be taken in these particular circumstances and ensure that the law exempts victims of human trafficking

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<sup>215</sup> *ibid.*

<sup>216</sup> NCCHT (n 47) 35.

<sup>217</sup> *ibid.*

<sup>218</sup> HRW, 'Inadequate Procedures for Determining Children's Best Interests During Deportation Proceedings in Adults Before their Time' (24 March 2008) 65 <<http://www.hrw.org/en/reports/2008/03/24/adults-their-time>> accessed 21 June 2015.

<sup>219</sup> UNHRC (n 16) para 52.

<sup>220</sup> Saudi TIP Act art 11(1).

<sup>221</sup> Qur'an, 24:33.

from punishments for any criminal activities they have been forced to commit. This is in order to meet its obligations not only under international and regional laws but also under Islamic law.

### 5.6.7 Compensation

According to the Special Rapporteur on TIP, trafficked persons' rights to compensation in the UAE are not specifically recognised and they are not routinely given adequate information on this right, nor the necessary support to exercise this right such as legal aid.<sup>222</sup> In practice, it may be observed that in human trafficking cases the UAE courts do not compensate trafficked victims without a prior request from the victim.<sup>223</sup> Having said this, it is noted that shelters provide victims with amounts of money ranging from 370 dirhams to 1000 dirhams at the time of repatriation to their origin countries.<sup>224</sup> In line with the Arab TIP Model Law, in October 2013 the NCCHT established a fund to support victims of human trafficking.<sup>225</sup> This fund became operational in 2014 with the help of contributions from private companies, citizens and residents,<sup>226</sup> and a total of approximately 300,000 dirhams was distributed in that year.<sup>227</sup> This is a good example of the authorities working closely with private entities to support victims –many Islamic States provide for similar provision.<sup>228</sup> In contrast, there is no funding in place within SA currently. The introduction of a system similar to that in the UAE would offer significant assistance to trafficked victims and afford them protection. Taking this step would also send a positive message that SA takes the human rights of victims seriously.

In another positive development, the UAE Ministry of the Interior is reportedly considering imposing fines against offenders with a view to providing compensation to victims of trafficking.<sup>229</sup> In addition, unlike the Saudi TIP Act, the UAE amended TIP Law now provides for the confiscation of 'the crime's tools, monies and proceeds resulting therefrom'.<sup>230</sup> It follows

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<sup>222</sup> UNHRC (n 16) para 65.

<sup>223</sup> *ibid* 66.

<sup>224</sup> *ibid*.

<sup>225</sup> NCCHT (n 48) 19.

<sup>226</sup> *ibid*.

<sup>227</sup> *ibid*.

<sup>228</sup> The Egyptian Anti-Trafficking Law 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'. It is significant to note that the Law also allows the fund to 'accept contributions, grants, and donations from national and foreign entities'. Article 27 of the Egyptian Law No 64 of 2010 Regarding Combating Human. Trafficking.

<sup>229</sup> NCCHT, Annual Report 'Combating Human Trafficking in the UAE, 2008-2009' 16.

<sup>230</sup> UAE TIP Law (n 20) art 9(1).

the Arab TIP Model Law<sup>231</sup> in providing that, '[t]he victim of human trafficking crimes shall be exempted from civil-case fees upon filing the same to claim compensation for the damage resulting from the exploitation thereof in a human trafficking crime'.<sup>232</sup> In comparison, there is no similar provision in the Saudi legislation. However, this practice could enhance victims' access to justice and encourage them to seek compensation. All of these are considered positive steps which could eventually lead to the provision of better standards of protection for victims. Although many Islamic States provide for similar provision, no similar practices or provisions currently exist in SA. Considering the example of the UAE in this respect, it is clear that there is nothing to prevent SA from adopting a similar approach and providing better protection to victims of trafficking.

To summarise the protection section, it seems that in contrast to SA the UAE has adopted many mechanisms and procedures to ensure a 'victim-centred approach'. Analysis confirms that the welfare and human rights of the victim, which is a basic principle of Shariah, are the main considerations of the UAE government strategy in dealing with victims. This is also confirmed from the examination of the reports of the UN Special Rapporteur on Violence against Women, on the Sale of Children and on TIP, based on their official missions to the UAE. Lessons for SA were identified and the Saudi government should fully consider them.

## **5.7 Prevention measures**

As noted throughout this thesis, prevention is a key element in the fight against child trafficking. It is linked to the primary obligation of prosecution and punishment, and was also discussed in chapter four in the context of SA. Additionally, the obligations to prevent this crime under international and regional laws have been explored in chapter three. Therefore, it is now appropriate to examine the extent to which the UAE has been or will be successful in meeting its obligation at the national level. The following paragraphs highlight the effort of the government, taking into consideration that, similar to SA, the UAE is a destination State for child trafficking.

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<sup>231</sup> Arab TIP Model Law (n 29) art 39.

<sup>232</sup> UAE TIP Law 2015 (n 20) art 13(1).

### 5.7.1 Demand reduction

According to the NCCHT, the UAE government believes that in tackling the demand for trafficking there is a need for collaboration with sending States, foreign embassies, international organisations and NGOs in order to prevent trafficking at its source. This is evidenced in practice as noted above in the UAE strategy to eradicate the abusive practice of child participation in camel races. It was observed that the UAE government, in order to prevent such practice, signed agreements with many States of origin. This step reflects the international standard.<sup>233</sup> The Special Rapporteur on Sale of Children praised the UAE's efforts in working with States of origin to prevent child trafficking.<sup>234</sup> This was useful and contributed successfully to reducing the demand for child jockeys. Unfortunately, despite the fact that SA is facing the same problem, the government has not made any similar effort, which would also prevent other forms of child exploitation in its territory such as child begging. The UAE practice shows that there is nothing in Shariah that would prevent such effort in practice.

With respect to the demand for children trafficked into the UAE for the purpose of begging, it is worth noting that several measures have been adopted to prevent this practice. For example, since 2006 the police annually undertake a campaign to spread awareness about the impact of begging.<sup>235</sup> Many official bodies and NGOs participate in this campaign.<sup>236</sup> The Dubai Police Deputy Commander Maj. Gen. Al Mazeina stated that it is evident that the majority of beggars enter the State during public festivities and religious occasions so the State has tightened the issuing of visas during these periods and companies found sponsoring people who are caught begging can be fined up to 7,000 dirhams.<sup>237</sup> Furthermore, anyone who houses, aids or encourages a person to beg will also face penalties.<sup>238</sup> During the campaign, leaflets were distributed advising that anyone who has limited resources or faces a difficult situation in the UAE can contact any of the authorised charities and humanitarian organisations, and these will study their individual cases and offer them help in a legal and safe manner.<sup>239</sup> In addition, the

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<sup>233</sup> CRC OP on Sale of Children art 10(3).

<sup>234</sup> UNHRC (n 28) para 95.

<sup>235</sup> Dubai Police <<https://www.dubaipolice.gov.ae/dp/jsps/home.do>> accessed 27 June 2015.

<sup>236</sup> Dubai Police, 'Police Honour Informers in Anti-begging Campaign' (2012)

<[https://www.dubaipolice.gov.ae/dp/jsps/media/news\\_details.do?contentCode=73915](https://www.dubaipolice.gov.ae/dp/jsps/media/news_details.do?contentCode=73915)> accessed 27 June 2015.

<sup>237</sup> Dubai Police, 'Anti-begging Campaign Launched' (2012)

<[https://www.dubaipolice.gov.ae/dp/jsps/media/news\\_details.do?contentCode=73766](https://www.dubaipolice.gov.ae/dp/jsps/media/news_details.do?contentCode=73766)> accessed 27 June 2015.

<sup>238</sup> *ibid.*

<sup>239</sup> *ibid.*

government conducted effective communication and an awareness campaign encouraging public donations in a legal manner to the official charities that help people in need, with an emphasis on the abuse and exploitation experienced by those children who are forced to beg. These are admirable efforts that should be highlighted. Although this issue is more complicated in the Saudi context, however, the UAE model could potentially still be adapted and applied in SA.

An example that demonstrates it is possible to reduce the demand for cheap and exploitative labour in the UAE is the 2009 pilot project on management of contractual work cycles and workers' rights carried out in partnership with India and the Philippines, both considered important labour-sending States.<sup>240</sup> This project established an electronic contract validation system that allowed labour ministries in the UAE and in the sending States to monitor workers' contracts. A web-based system was introduced through this project. This system was accessible to labour authorities in both States in order to prevent workers' employment contracts signed in the source State from being substituted in the UAE, thus preventing employers from exploiting workers and in turn reducing the demand for cheap labour.<sup>241</sup> Such progress was noted and highlighted by the Special Rapporteur on TIP.<sup>242</sup> These measures enable the UAE government to control labour and restrict the chances of labour exploitation. Research confirms that demand for trafficked persons' labour or service is absent or noticeably less where workers are organised and where labour standards regarding wages, working hours and conditions, and health and safety are monitored and enforced.<sup>243</sup> Regrettably, there are no such efforts being made in SA and it is recommended that this changes to something similar to the UAE practice.

Sexual exploitation is also one of the end purposes of child trafficking. Different measures have been taken in order to reduce the demand for child sexual exploitation and prevent such a crime in the UAE. For instance, the UAE requires a separate passport and separate entry visa to be issued for each child.<sup>244</sup> This is to ensure compliance with the regulations and to enable immigration and passport officials to identify children as they enter the UAE and subsequently ascertain that they return to their States of origin with their families and

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<sup>240</sup> UNHRC (n 16) para 74.

<sup>241</sup> *ibid.*

<sup>242</sup> UNHRC (n 16) para 17.

<sup>243</sup> Bridget Anderson and Julia O'Connell Davidson, 'Trafficking: A Demand-Led Problem?' (Save the Children 2004) 54.

<sup>244</sup> *ibid* para 208.

relatives.<sup>245</sup> Moreover, the police in the UAE continue to monitor tourism companies that import women into the State and they impose many restrictions on the entry of unmarried females under the age of thirty years as this group is identified as the most vulnerable to human trafficking risks.<sup>246</sup> Furthermore, the UAE has been attempting to combat this problem. From the evidence gathered it appears that in 2007 a Committee of Senior Officials closed forty hotels and clubs that were known for prostitution and about 4,300 sex workers were deported back to their home countries.<sup>247</sup>

The above examples show that the UAE has demonstrated its serious commitment to reduce the demand of child trafficking through regional and international cooperation. It is observed that the Islamic principle of the importance of cooperation is recognised by the UAE government.<sup>248</sup> Most notably, in the UAE there are continuous efforts to enhance and improve the national action plan and its anti-trafficking framework. The example of the UAE provides documented experience on how destination States can collaborate at the domestic, regional and international level to address the various forms of child trafficking, and therefore improve national law compliance with international standards. In contrast, SA has failed to implement Islamic, international and regional standards at the national level, and this has raised questions regarding the seriousness of the Saudi government's will to reduce the demand for children, and therefore combat and prevent child trafficking in practice.

### **5.7.2 Education and awareness-raising**

In 2009, the UAE Ministry of the Interior established a specific unit concerned with combating human trafficking and its related issues (the Department to Combat Human Trafficking Crimes). One of its main objectives is to ensure that education and awareness-raising measures go a long way towards empowering the general public and professionals working in the field of child protection to detect and prevent all types of violations of the rights of the child.<sup>249</sup> The Interior Ministry has confirmed that human trafficking is a serious crime that violates human rights and dignity. Thus, the Ministry launched the 'Behaviour Rules Document' for law

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<sup>245</sup> *ibid.*

<sup>246</sup> *ibid* para 209.

<sup>247</sup> Sevil Sonmez and others, 'Human Rights and Health Disparities for Migrant Workers in the UAE' (2013) 13(2) *Health and Human Rights* <<http://www.hhrjournal.org/2013/08/20/human-rights-and-health-disparities-for-migrant-workers-in-the-uae/>> accessed 27 March 2016.

<sup>248</sup> Qur'an, 5:2 and 3:104.

<sup>249</sup> UNHRC (n 28) para 72.

enforcement agencies and officers who deal with the crime of trafficking. This document involves ethical standards that law enforcement needs to adhere to while dealing with the prevention of human trafficking crimes.<sup>250</sup> As shown earlier in this chapter, the UAE government has taken serious measures to improve its investigatory and prosecutorial efforts as well as to raise awareness among law enforcement agencies and officers. In other words, the improving results in registration, prosecution and conviction are likely to be the result of the UAE's massive efforts to raise awareness and qualify law enforcement agencies and officials to efficiently combat human trafficking.

It is worth noting that, unlike the Saudi Committee, the NCCHT has been publishing a comprehensive annual report on human trafficking since 2008, which contributes to increasing awareness amongst the public and the international community.<sup>251</sup> It provides thorough details with regard to trafficking in persons including children in the UAE. Furthermore, the NCCHT is engaged in planning a nationwide public awareness strategy on the issue of demand in order to target the root causes of child trafficking. For instance, in conjunction with the IOM, the NCCHT held a training workshop in 2009 to raise awareness further among law enforcement personnel and those who deal with human trafficking cases.<sup>252</sup>

Similar to the NCCHT, the DFWAC centre has published an annual report since its establishment in 2007.<sup>253</sup> It also contributes to and organises various awareness-raising campaigns which are delivered by qualified staff and attended by different groups, including students, employers, parents and the general public.<sup>254</sup> DFWAC centre participated in several training courses and workshops that were organised by the competent authorities at national and international levels (55 in total in 2013) in order to train, equip and develop its employees, to improve knowledge and gain experience and skills to develop services, programmes and mechanisms of work.<sup>255</sup>

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<sup>250</sup> Ministry of Interior, 'Reference Guide for Enforcing the Law 51 on Combating Human Trafficking, Committee on Combating Trafficking' 21-23.

<sup>251</sup> NCCHT <<http://www.nccht.gov.ae/default.aspx?PageId=12>> accessed 23 June 2016.

<sup>252</sup> UNHRC Working Group on the Universal Periodic Review, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, UAE' (2 November 2012) UN Doc A/HRC/WG.6/15/ARE/1.

<sup>253</sup> DFWAC <<http://www.dfwac.ae/en/>> accessed 20 January 2016.

<sup>254</sup> DFWAC (n 191) 86.

<sup>255</sup> *ibid* 91.



At the international level, the government of the UAE provided a grant (55 million dirhams) to the UNODC for the establishment of the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) in 2007.<sup>256</sup> UN.GIFT enhances the efforts of various international organisations by increasing cooperation among them. It is mainly funded by the Crown Prince of Abu Dhabi and includes representatives from six of its founding organisations: the ILO, UNODC, IOM, OHCHR, UNICEF and the Organisation for Security and Cooperation in Europe.<sup>257</sup> UN.GIFT aims to increase awareness about human trafficking, widen the scope of existing knowledge and statistics related to global human trafficking and provide technical assistance.<sup>258</sup>

As can be observed, unlike SA, various efforts are being made by many of the relevant bodies and ministries in the UAE at both national and international levels. In addition, in order to enhance the national activities some efforts were conducted in collaboration with international organisations that are experts in the field. In comparison to the limited efforts of the Saudi government in this respect, it is noted from the above that in the UAE a variety of methods are used to deliver the message of combating child trafficking and raising the general public awareness. Additionally, to guarantee its proper enforcement, the UAE government is keen to ensure that its employees are qualified, trained and capable to practise their tasks effectively and proficiently. This is a good example and it is suggested that the Saudi government should learn from the UAE in this regard.

### **5.7.3 Information-gathering/research**

The UAE government affirmed that data collection and analysis are important because the more information it has, the more proactive it can be in its attempt to tackle such crimes.<sup>259</sup> Therefore, it has established the Centre for Statistics and Security Analysis within the Federal Security Information Department of the Ministry of the Interior for this purpose. The Centre is entrusted with the collection of all the information related to human trafficking crimes in the State, the follow-up on the development of crime detection, and the publication of security and

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<sup>256</sup> World Bank, 'Human Trafficking: A Brief Overview' (Social Development Notes – Conflict, Crime and Violence, No 122, December 2009).

<sup>257</sup> UN Global Initiative to Fight Human Trafficking <<http://www.ungift.org/knowledgehub/en/about/>> accessed 8 February 2016.

<sup>258</sup> *ibid.*

<sup>259</sup> NCCHT (n 47) 7.

statistical reports.<sup>260</sup> In SA there is no national unified system of data collection relating to trafficking in persons in general or in children in particular.

In addition, the Human Trafficking Committee of the Ministry of the Interior also studies the conditions of human trafficking victims on a case-by-case basis to gather information and evaluate the nature of exploitation so that necessary preventive measures can be taken to avoid its recurrence.<sup>261</sup> In order to facilitate this task, memorandums of understanding are shared between the shelters and police departments with the aim of developing effective mechanisms and improving the government's plan of action to combat human trafficking.<sup>262</sup>

The Special Rapporteur on the Sale of Children highlighted that the DFWAC shares practices and exchanges information and research on a regular basis with other national and international NGOs, academic institutions and United Nations agencies.<sup>263</sup> Such measures, which SA failed to implement, are also in line with the Trafficking Protocol and follow the Arab TIP Guiding Law as well as the CRC OP on Sale of Children as shown in chapter three.<sup>264</sup> This is another example of why the UAE is better in its compliance with international and regional standards. It also shows that nothing in Islam prevents the UAE from working with NGOs. Because of this, SA should allow NGOs to operate at the national level within the framework of Shariah, similar to the practice in the UAE. It is noted that the NCCHT maintains continuous contact with the ILO, IOM and UNDOC in order to share and learn from their experiences in combating human trafficking.<sup>265</sup> The Ministry of the Interior has also cooperated with Interpol by exchanging information on trafficking crimes, especially those related to women and children, as well as monitoring individuals involved in, or suspected of being involved in, such crimes and circulating their information internationally.<sup>266</sup>

These measures certainly enable the UAE government to tackle this crime more effectively. It will also facilitate the government in developing a more precise plan of action that

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<sup>260</sup> ILO, 'Observation (CEACR): UAE' (adopted 2012)  
<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID:3085628](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3085628)>  
accessed 23 September 2015.

<sup>261</sup> NCCHT, Annual Report 'Combating Human Trafficking in the UAE, 2011-2012', 18-19.

<sup>262</sup> *ibid* 18-19.

<sup>263</sup> UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural, including the Right to Development: Report of the Special Rapporteur on the Sale of Children, Najat Maalla M'jid, Addendum, Mission to the United Arab Emirates' (18 November 2010) UN Doc A/HRC/16/57/Add.2, para 73.

<sup>264</sup> Trafficking Protocol (n 30) art 9(2), (3); Arab TIP Model Law (n 29) art 40; CRC OP on Sale of Children art 10(1).

<sup>265</sup> NCCHT (n 48) 26.

<sup>266</sup> UAE, 'Annual Trafficking Report 2011-2012' 17.

targets the State's problems and therefore improves its anti-trafficking framework. This is acknowledged at the international level, particularly during the State's last UPR in which the delegation noted that, 'the UAE was committed to the global effort to combat this phenomenon and was taking a lead on this issue regionally. Remarkable progress has been made since 2007 on the UAE's anti-trafficking strategy'.<sup>267</sup> In addition, according to the US TIP Report, the UAE government continued to make prevention of trafficking in persons a priority.<sup>268</sup> It is obvious that SA has a lot to learn from the UAE, and this thesis has identified many of the successful experiences that the Saudi government should follow at the national level to demonstrate its serious commitment to combating and eradicating child trafficking in compliance with Islamic, international and regional standards.

## **5.8 Conclusion**

This chapter has discussed the response of the UAE to child trafficking. The main purpose was to compare its practice with that of SA in order to identify good practices, which can be recommended to SA, possibly resulting in an improvement of its anti-trafficking framework. The main conclusion reached is that, in general, the UAE has taken a more developed and progressive approach in the fight against child trafficking and its related exploitative acts, whilst complying with Islamic, regional and international standards. Given this, it is surmised that SA has a lot to learn from the UAE's practices. In general, analysis of the UAE TIP Law revealed that the Trafficking Protocol has been taken as a starting point and frame of reference. An examination of the UAE's efforts under each element of the 3P approach showed how the UAE is seriously committed to meeting its obligations. It is evident that the implementation of Islamic, international and regional laws at the national level has resulted in a more advanced and effective action against child trafficking in the UAE.

By comparing the legislative efforts of the UAE and SA, it is apparent that although each State subscribes to different school of thought, however, both share a general consensus in terms of framing the offence of human trafficking. This indicates that Islamic law, principles and traditions generally support the international law action against trafficking in persons especially children. In terms of punishment stipulated, it is noted that although within the Islamic

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<sup>267</sup> UNHRC, 'Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, UAE' (21 March 2013) UN Doc A/HRC/23/13, para 17.

<sup>268</sup> US Dept of State, 'Trafficking in Persons Report: June 2014' UAE.

framework *tazir* penalty are under the discretion of judges, however, this chapter has emphasised that specified and heavier penalties are not inconsistent with Shariah. The UAE government's amendment of the TIP Law, by taking into consideration international and regional committees' suggestions and observations, the data collection system, the strong law enforcement, all affirm that the UAE government has the right will to fight this type of crime. In terms of protection, unlike SA, the UAE protections measures are generally ensure a victim-centred-approach. Finally, in respect to the prevention, the UAE approach to reduce the demand for children who used to be trafficked for the purpose of camel racing is commendable. It also demonstrates the State's ability to denounce bad cultural and customary practices in order to address the issue of child trafficking in a comprehensive manner.

That brings to a close the analysis of the UAE as a case study. The following chapter provides the overall conclusion of this thesis. The chapter also summarises all the important findings of this study. In addition, it makes a number of recommendations to be taken into consideration by the stakeholders in SA in order to improve the anti-trafficking framework of the State.

## **Chapter Six: Conclusion**

### **6.1 Introduction**

The aim of the thesis was to contribute to the body of knowledge about Islamic States' responses to human trafficking, particularly of children. This study has shown that for the last two decades the question of trafficking in persons including children has become a major topic. Islamic States, specifically within the Middle East, have been affected by this issue. However, despite the significance of this topic and the growing literature, information regarding this problem in SA is limited. Given the lack of results in the fight against child trafficking, this thesis sought to examine the contributing factors to the existing state of affairs. This endeavour intended to fill the existing gap in the literature and propose a way forward in regard to the total eradication of child trafficking in SA.

As stated in the introduction of this thesis, the main research question was whether SA has created a legal response that takes account of all trafficked children regardless of the type of exploitation they experience and whether the enforcement of the law accurately reflects the law. Some might think that answering this question would only benefit the audience in SA; this is not true. The comprehensive approach and methodology adopted by this research to explore and investigate the research questions confirmed that this thesis would also benefit other audiences from different Islamic jurisdictions. This is especially the case as this thesis has examined the question of whether or not Shariah is capable of implementing international standards in Islamic States, and whether Islamic States can comply with international law while they still adhere to Shariah. This research has exhaustively analysed the subject of child trafficking, from both an international and Islamic legal perspective.

The analysis and discussion within the five chapters enabled this research to answer the research questions and to reach major findings. The first part of this chapter looks at the seven research questions raised and how they have been addressed. It also summarises the intent and scope of each chapter, whilst the second section draws together the main recommendations.

### **6.2 Summary**

Chapter one introduced the thesis and presented its main questions and objectives. Chapter two addressed the Islamic legal framework in relation to child trafficking. Based upon the Quran, Sunnah, the consensus among Islamic scholars, and – potentially the most relevant to

the human trafficking issue – the actions of contemporary Islamic governments from across the four schools of thought, one may draw the conclusion that Islam no longer accepts slavery. The concept of slavery is essential when exploring the issue of trafficking in persons in Islamic States because perpetrators often subject victims to slave-like conditions where they threaten or coerce them. This chapter not only focused on tracing traditional slavery to its contemporary form but also discussed the Islamic position concerning other common purposes of child trafficking such as selling and buying children, and sexual and labour exploitation. The chapter showed that there are a plethora of provisions in the Qur'an and the Sunnah that proscribe such acts, and these religious prohibitions are significant as they are prime factors that pave the way for fighting child trafficking and its purposes in the Muslim world today. Based on the analysis of the Islamic criminal justice system, child trafficking crimes are categorised as *tazir* offences. Finally, chapter two concluded that Islam not only encourages the protection of victims but also punishes perpetrators and seeks to prevent further victimisation. Therefore, it supports and complements the international action against child trafficking.

In chapter three, one of the main findings regarding the relationship between Islam, international and regional laws on child trafficking is that Islamic law is in compliance with both standards. Therefore, it can be said that if States representing all four schools of thought, (Hanafi, Maliki, Shafi'i and Hanbali), support international and regional standards, perhaps they all share the same understanding and sense of duty to prevent and suppress child trafficking and protect victims, regardless of some differences (such as the age of maturity). The fact that anti-trafficking legislation has been enacted in Islamic States using the international standards as guidance signifies that both Islamic as well as international laws in relation to the prohibition of child trafficking are compatible. The chapter showed that, despite the existence of different schools of thought, if they agreed to abide by relevant international and regional standards, this would suggest that Islam is not a hindrance to implement effective action against trafficking and protect its victims. More importantly, interpretation of Shariah revealed that Islamic law shares a similar understanding with relevant international human rights law, especially in respect of protection of children's rights. This is evidenced by the fact that all Islamic States have ratified the main instrument in this respect at the international level, (CRC). Furthermore, all Islamic States have ratified the OIC Child Covenant, which contains the same provisions as the CRC, within the Islamic framework. This confirms the compatibility of international and Islamic laws

in relation to child victims' protection. Finally, it should also be highlighted that comparative analysis revealed that there are no major discrepancies between regional and international standards on human trafficking. The former amply reflect the latter, and this suggests that Arab States are generally in support of the universal approach to child trafficking.

In chapter four, the research examined the Saudi legal instruments aimed at tackling child trafficking and exploitation. The research revealed that although the Saudi government enacted trafficking legislation, it was evident that they are not properly enforced. Saudi judges do not understand the complexity of child trafficking. There is a lack of proper understanding of the various kinds of child trafficking, like child forced labour. Due to this, the majority of children are not properly identified and traffickers are not punished. Legislations for both child labour and sexual exploitation are very weak and inadequate. Another major finding is that there are several external factors contributing to the increase in child trafficking at the domestic level. It is apparent that such factors, not Islam as religion or law, are a more plausible and precise explanation for the SA's violations of Islamic and international laws relevant to child trafficking. It is evident that, although the primary determinant of child trafficking appears to be economic gain, it is also driven by traditional perceptions. One major factor is the preservation of some Saudi negative customs and traditions. For instance, child jockeys endure horrors and life-threatening conditions simply for the amusement of wealthy people. The preservation of this tradition is one of the main reasons why the demand for children who are trafficked into SA is on the rise. Another example is that sexual exploitation, although it is prohibited by Shariah, it is still a taboo subject in SA. The fear of shame and social stigma, results in the exploitation of female victims. This culture is one of the main reasons why victims of sexual exploitation are not able to report the crimes and seek justice. Such factors explain some of the reasons for the severity of child trafficking in SA and call for serious thinking while planning a particular national prevention strategy for this State.

Discussions in chapter four found that enforcement authorities lack a formal and effective identification mechanism to identify victims of trafficking. This is major problem as assistance is conditional upon proper identification. Furthermore, Saudi TIP legislation is silent on many of the victims' rights, such as residency status, compensation, and non-criminalisation, although all of which are provided by Islam (the religion of SA and the only source of its law). There is also no guarantee of a reflection period, witness protection programme, and safe return policy or

comprehensive integration programmes. Saudi does not allow for the establishment of NGOs, while nothing in Islam prevent that. Certainly, SA should adhere to these religious principles more rigorously. One clear message from the analysis of this chapter is that Islam as law and religion is not the main reason for Saudi failure to meet its Islamic, international and regional obligations. Examples of other Islamic jurisdictions provided in the chapter confirm this conclusion.

In order for SA to improve its current practices and measures in regard to child trafficking, chapter five examined the practice of another Islamic jurisdiction, the UAE. The analysis revealed that, when compared with SA, the UAE has taken a more progressive approach in the fight against child trafficking and its related exploitative acts, whilst complying with Islamic, regional and international standards. It was, however, also observed that there is still some scope for improvement.

The comparison of the two Islamic States showed that the TIP laws of the UAE and SA are based on the definition of trafficking provided by Article 3 of the Trafficking Protocol. This means that, although each State follows a different Islamic school of thought, they share a general consensus in terms of framing the offence of human trafficking. By comparing the two States, it is apparent that the UAE's national legislative efforts have seen greater progress compared with the efforts made by SA. Unlike SA, in the UAE it was evident that there is significant political will directed at establishing detailed procedures for child trafficking and, more importantly, at allocating resources for their implementation. Moreover, several measures have been adopted in the UAE to enhance prosecution and conviction operations, including training courses, the establishment of specialised police and judicial units, and raising awareness among law enforcement agencies and the public. This confirmed that Islam as religion and law was not a hindrance to the UAE's successful approach against child trafficking. On the contrary, it has been positively utilised for the enforcement of international law, especially in relation to child victims' protection. This has placed the UAE in a better position when compared with SA, particularly with regard to compliance with international and regional standards. This suggests that, ultimately, religion has nothing to do with the Saudi failure to fulfil its obligations. Quite the opposite, Shariah is a positive tool in establishing widespread compliance with international legal norms, as represented by the example of the UAE. Finally, a main finding of the research revolves around the fact that Islamic States today are under not only international and regional



obligations but also religious obligations to prohibit child trafficking, prosecute traffickers and protect child victims.

### 6.3 Recommendations

A number of shortcomings were identified in the overall anti-trafficking policies of the Saudi government. Adopting certain recommendations in the areas of the 3P measures, discussed in this thesis, can rectify these shortcomings. The recommendations in this area are important for the government and anti-trafficking organisations of both SA and the UAE. Based on the conclusions above, the following recommendations are proposed according to its priority (short, medium and long terms).

For the short term recommendations, The Saudi government is recommended to amend the TIP Act to clearly provide for the following:

1. In the discussion of *tazir* crimes, under which fall the offence of child trafficking and some of its related exploitation acts, it was observed that this category has discretionary punishments which leaves room for leniency. The UAE TIP Law presents good example in this regard. It provides for specific and strong penalty in case where the victim is child. It limits judge's discretion by providing the minimum number of years' imprisonment and the minimum amount for fines in order to avoid cases where judges impose lesser punishments. In this sense, judges in SA are recommended to copy this provision and to develop jurisprudence within the Islamic framework and the Saudi government should publish them.
2. To consider granting victims temporary residence permits irrespective of their willingness to cooperate with the prosecutorial authorities. Analysis revealed that both States (SA and the UAE) suffer from a lack of this human rights approach, and therefore it is suggested that both States should modify their current practices. In this regard, SA and the UAE may consider the examples set by the government of Turkey and Malaysia. SA and the UAE should consider adopting appropriate measures that permit child victims of trafficking to remain in the State where the victim is either cooperating with a criminal investigation or proceedings or alternatively where it is found to be necessary due to the individual's circumstances.

3. To ensure that the law exempts victims of human trafficking from punishments for any criminal activities they have been forced to commit. Many Islamic jurisdictions provide similar provision, such as UAE, Egypt, Qatar and Jordan. The Saudi TIP Act must provide clarity on the approach to be taken in these particular circumstances.
4. To clearly provide victims with compensation. The UAE has adopted various measures which SA can learn from. With a view to providing compensation, UAE TIP Law provides for the confiscation of the crime's tools, monies and proceeds resulting therefrom. Furthermore, the UAE Ministry of the Interior is reportedly considering imposing fines against offenders. Moreover, the UAE authorities work closely with private entities to support victims. SA is recommended to implement these good practices.
5. To allow the establishment of NGOs and facilitate their work in SA, similar to the practice of other Islamic States. SA is recommended to learn from the UAE practice. The UAE committees share practices and exchange information and research on a regular basis with other national and international NGOs, in order to share and learn from their experiences in combating child trafficking. The Saudi National TIP Committee should play a similarly active role in this task.

In terms of medium term recommendations, the establishment of a number of specialised centres is needed. To start with Saudi government should establish a national unified system of data collection relating to trafficking in persons in general and in children in particular. The Saudi government can learn from the UAE practice, which has established the Centre for Statistics and Security Analysis within the Federal Security Information Department of the Ministry of the Interior. It includes data collected from all bodies concerned with issues relating to child trafficking in order to reveal the magnitude and extent of the crime. Such a system in SA would be significant because national reports and strategies could be conducted according to the data collected. Thus, solutions could be found and recommendations made in order to tackle the child trafficking crime in SA. It is believed that any initiatives and programmes aimed at preventing child trafficking should be designed on the basis of accurate data and evidence and then their impact and effectiveness should be closely monitored and evaluated. The Saudi National TIP Committee should play an active role in this task.

To improve its protection measures, an organisation or department for the task of victim identification should be established. To achieve this, the UAE has implemented recommended measures which could be applied in SA. It created guidelines for identification of trafficked victims for distribution to all officials who may come into contact with trafficked persons. It provides regular training for law enforcement officers in the identification of victims of trafficking. It launched a media campaign on human trafficking at airports, malls, hospitals through the distribution of leaflets in different languages with contact details of victims' shelters and their services in order that prospective victims can become aware of the assistance available to them. SA can learn from the UAE in this regard, and it is the responsibility of the Saudi government to formulate and implement practical and systematic identification strategies that can fit the many different circumstances that trafficked victims find themselves in.

There is a need for the establishment of appropriate housing specifically for trafficking victims in general and for child victims in particular. The UAE practice in this regard is highly recommended. In the UAE, shelters are specifically established across the country to provide protection and assistance to all trafficked victims. Shelters provide temporary and long-term services for victims in the form of safe accommodation and a helpline; case management and medical care; psychological support; legal counselling; and consular and immigration assistance. All this facilitates the process of helping and protecting victims. Certainly, SA should adopt the UAE practice.

To improve its prevention measures, tackling demand is a starting point. The UAE adopted various recommended measures. For example, the government conducted an effective communication and awareness campaign for the general public with an emphasis on the abuse and exploitation experienced by children who are exploited for many purposes in the UAE. Moreover, signing agreements with many States of origin to reduce the demand for trafficked victims. Similar measures can be applied in SA. Saudi governments must develop targeted strategies to prevent and address the factors that drive child trafficking in SA.

For long term recommendations, cultural perspectives are not easy to be changed. In order to eradicate the crime of child trafficking, it is important to eradicate all aspects of negative culture and tradition, including the one of male dominance and male guardianship over adult women which can oppress females and young girls and render them vulnerable to exploitative situations where their rights are violated. It is crucial to educate people to differentiate between

what is socially acceptable and what is permitted by Islamic law. The tradition of using children in camel races should also be banned. This could be achieved by collaborating with traditional and religious leaders to find the way forward for the State in terms of abandoning all bad customs that often put children's lives at risk. This kind of collaboration with religious leaders is very important especially as Islam plays such a big role in SA. One way to improve the situation is through general public education and sensitisation campaigns on the negative consequences of such traditional practices.

In conclusion, it is submitted that SA has a moral, legal and religious obligation to take meaningful steps to eradicate the problem of child trafficking and exploitation. This thesis will hopefully provide the basis and impetus for change in SA. It is the hope of the researcher that the relevant governmental authorities in SA will consider the abovementioned findings and recommendations. This should ultimately result in the adoption of the recommendations, leading to real and practical change in the law and practice of child trafficking in SA.

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