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The Protection Project

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**UNODC**

United Nations Office on  
Drugs and Crime

## **Combating Trafficking in Persons in Accordance with the Principles of Islamic Law**

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**Acknowledgements**

This paper is published by the UNODC under the supervision of Riikka Puttonen, Martin Fowke, and Marika McAdam and guided by their most valuable insights and commentary. The publication was drafted by Mohamed Y. Mattar, Research Professor of Law and Executive Director of The Protection Project at The Johns Hopkins University School of Advanced International Studies (SAIS). Special gratitude is extended to Anna Koppel, Director of Research and Development at The Protection Project, for her significant research and editorial contribution to the present work. Thanks must also be extended to other members of The Protection Project team, especially Leanne Cochrane, Jessica Morrison, and Svetlana Milbert.

## Introduction

Trafficking in persons or human trafficking,<sup>1</sup> a recognized human rights violation prohibited by international law, affects all countries and regions of the world. As a national and international, often organized crime, it knows no boundaries—geographic, cultural, political, or religious. Its victims and perpetrators hail from all around the world, and its flows reach from and to some of the most far-flung corners of the planet. It manifests itself as exploitation in different forms and types across countries, but no region is immune. In this global phenomenon, Muslim countries<sup>2</sup> are no exception—all are affected by this crime. Trafficking for the purpose of sexual exploitation, as well as for labor exploitation in the domestic service industry and in agriculture and construction, affect Muslim countries in the Middle East and North Africa. Trafficking of children and women for sexual and labor exploitation likewise occurs in African countries both within and across national borders. In South and Southeast Asia, trafficking in men, women and children for similar purposes, which may also include trafficking for the purpose of begging and child sex tourism, are prevalent.<sup>3</sup>

While international law provides the central guiding framework for States in combating human trafficking, for this effort to be most effective, national legislatures should design legal provisions which, while consistent with international law, are also responsive to national specifics and are tailored to the legal structures and the phenomenon of trafficking as manifested in each State.<sup>4</sup> Given that the legal traditions and legal systems in many Muslim countries rely primarily on Islamic law, a study of Islamic legal provisions and traditions which relate to trafficking in persons becomes important. An understanding of Islam's position on trafficking in persons and its related acts and elements, can provide important avenues for the development of a comprehensive approach to combating trafficking in Muslim countries, one which draws on and is grounded in the Islamic tradition, as well as in compliance with international law.

The purpose of this paper is thus to analyze the Islamic legal tradition from the perspective of those sources, principles and provisions that may best be utilized in understanding, addressing, and combating trafficking in persons. More specifically, this entails the elaboration of a

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<sup>1</sup> The two terms are used interchangeably. The United Nations in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the Convention Against Transnational Organized Crime prefers the term, trafficking in persons, while the Council of Europe Convention on Action Against Trafficking in Human Beings uses the term, human trafficking.

<sup>2</sup> The Organization of the Islamic Conference has 57 members as follows: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei-Darussalam, Burkina-Faso, Cameroon, Chad, Comoros, Cote D'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyz Republic, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Yemen.

<sup>3</sup> For a discussion of the various aspects of trafficking in persons, see Mohamed Mattar, *Trafficking in Persons: An Annotated Bibliography*, 96 Law Library Journal 669 (2004), Mohamed Mattar, *Trafficking in Persons: An Annotated Legal Bibliography Delineating Five Years of Development*, 2 The Protection Project Journal of Human Rights and Civil Society (forthcoming 2009).

<sup>4</sup> For the most appropriate legal responses, see generally, UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009).

comprehensive theory of Islamic legal principles for the prohibition of the crime of trafficking in persons, and associated acts and means on the one hand, and the protection of victims of trafficking on the other. It involves understanding what the nature of the crime of trafficking under the Islamic law of crime and punishment is and what protections and safeguards are provided by Islamic law to the accused in the prosecution of trafficking. It merits analyzing how Islam relates to a victim-centered approach to the problem, and what the obligations of the ordinary citizen in providing victims with assistance may be. It is also necessary that any checklist of issues addressing trafficking in persons under Islamic law also include prevention, education, and public awareness—all core principles of a comprehensive strategy of combating trafficking as enshrined in international law.<sup>5</sup> Some of the important questions tackled as part of this paper will thus include, for example, how does Islamic law provide for the principle of compensation for victims of a crime? In regard to prevention, how does Islam deal with vulnerable victims such as children, orphans, refugees and internally displaced persons, and non-Muslims living in a Muslim country? How does, if at all, a religious approach differ from a non-religious approach when one designs a public awareness campaign or educational curricula? In answering these and similar questions, the paper will address how applicable principles of Islamic legal theory relate to various forms of trafficking in persons, especially those most pertinent to the context of Muslim countries. An exploration of the forms of trafficking which are most significant in the Muslim world will thus be explored accordingly.<sup>6</sup> The international framework governing trafficking in persons, especially the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>7</sup> as the central guiding international instrument for combating trafficking in persons, will serve as a foundational and comparative frame of reference throughout the paper. Since the source of Islamic law is the religious text, as opposed to legislation or court decisions, issues of religion that are relevant to trafficking in persons may arise and it is among the aims of this paper to address these considerations.

It is the position of this paper that Islamic law, though it does not specifically prohibit trafficking in persons, explicitly prohibits many of the acts and elements that constitute trafficking in persons. Islam is particularly explicit on the prohibition of slavery. Similarly, Islam prohibits sexual exploitation for profit. Likewise, the institution of domestic service is common in many Muslim countries and, though not prohibited *per se*, may constitute a form of trafficking for the purpose of labor if it entails exploitation under the sponsorship rule, as Islam is deeply respectful

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<sup>5</sup> This comprehensive approach is articulated under the UN Protocol on Trafficking in Persons, Especially Women and Children, which provides that the purpose of the Protocol is “(a) To prevent and combat trafficking in persons, paying particular attention to women and children; (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among States Parties in order to meet those objectives.”

<sup>6</sup> For a detailed discussion of the scope of the problem of trafficking in persons in countries of the Middle East, see Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 *Fordham International Law Journal* 729 (2003).

<sup>7</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the Convention Against Transnational Organized Crime, U.N. GAOR, 55<sup>th</sup> Sess., U.N. Doc. A/Res/55/25, *opened for signature* Dec. 12, 2000 (*entered into force* Dec. 25, 2003) [hereinafter UN Protocol on Trafficking].

of the rights of the worker, and emphasizes the centrality of honoring contracts, the breach of which is considered a grave offense.<sup>8</sup>

In exploring these and similar provisions, it is important to note that these Islamic principles, which amount to a framework prohibiting trafficking in persons, may not always be followed in practice. For example, although migrant workers are entitled under Islamic tradition to the same rights as nationals, this principle is not always applied. Another practice common in many Muslim countries is trafficking for the purpose of marriage, and we therefore must examine how Islam addresses the different forms of marriage and the rights afforded to individuals such that these forms of marriage do not become forms of trafficking. The question thus arises as to whether these practices are customs and cultural practices or whether they are part of Islamic law?

Ultimately, this paper seeks to incorporate Islamic legal thought and practice into the international discourse and legal efforts to combat trafficking in persons, so as to enhance and supplement the implementation of the international legal framework for combating trafficking in persons, especially in Muslim countries. The implementation of Muslim States' obligations under the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children will benefit greatly if underpinned by an Islamic framework of prohibition of the crime of trafficking in persons and the protection of victims of trafficking. This is particularly important given that Muslim countries have been enacting laws against trafficking in persons, which indicates that such legislation is not in contradiction with Islamic principles.

The paper will thus be divided into seven sections. Section I will be devoted to the concept of trafficking itself as a global problem and the international legal framework that is designed to combat such a problem, especially in light of the United Nations Protocol on Trafficking in Persons, Especially Women and Children. Section II will provide an introductory explanation of Islamic law, its sources, schools of interpretation, characteristics, and the process of *ijtihad*. In Section III, the paper will examine trafficking in persons as a form of slavery and explore how international law shifted the focus from traditional slavery to trafficking in persons and defined the latter as a form of exploitation. This section will also discuss the gradual elimination of the institution of slavery in Islamic law. Section IV will focus on the principle of prohibition of exploitation in Islamic law, making references to labor exploitation, sexual exploitation, trade in human organs, trafficking for the purpose of adoption, in addition to forced, temporary and child marriages, all of which constitute a violation of the principle of consent under Islamic law and may merely constitute harmful customary practices in contravention with the Islamic doctrine. Section V will examine the victim of trafficking, emphasizing how Islamic law addresses the concept of a vulnerable victim, especially women, children, orphans, refugees, internally displaced persons, and migrants. This section will also refer to the various rights of a victim of trafficking under Islamic law, which explicitly provides for the principle of non-punishment of a victim, prevents victimization, and calls for a role of the ordinary citizen in enjoining the good and forbidding the evil. Section VI is devoted to the crime of trafficking in persons, distinguishing among *Hudud*, *Ta'zir*, and *Qisas* crimes and concluding that trafficking in persons

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<sup>8</sup> See Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 Fordham International Law Journal 729 (2003)..

is a *Ta'zir* crime that is subject to a serious punishment that should not be subject to the statute of limitations. Finally, Section VII addresses contemporary legislative enactments prohibiting trafficking in persons in the Muslim world.

## SECTION I: DEFINITION OF TRAFFICKING IN PERSONS UNDER INTERNATIONAL LAW

### 1.1. The Global Problem of Trafficking in Persons and the Need for a Comprehensive Response

Recognized by scholars of human trafficking as a contemporary, or a modern form of slavery,<sup>9</sup> trafficking in persons is a crime that has grown to constitute one of the most lucrative illicit trades in the world, alongside arms and drug trafficking, generating billions of dollars in revenue annually—for international criminal syndicates, lone perpetrators, facilitators, and exploiters.<sup>10</sup> The victims of this most profitable crime, however, see nothing of these enormous profits, enduring instead exploitation, physical pain, and psychological trauma. As such, trafficking in persons is a crime which is different from that of arms or drug trafficking, in that human beings become the “commodity” from which profits are made. As such, trafficking in persons constitutes a crime not just against the state, but more importantly, a crime against the individual—a human rights violation, and an issue of human security, not just state security.<sup>11</sup> Trafficking in persons is also different from migrant smuggling and illegal migration, in that its purpose is the exploitation of an individual who may be seeking to migrate—whether within or across national boundaries.<sup>12</sup> Trafficking in persons is more subtle than outright slavery, though many victims endure conditions similar to slavery, in that it does not necessarily entail “ownership” of a person, but rather allows the perpetrators to exert control by insidious means

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<sup>9</sup> See generally, Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 Boston University International Law Journal, 207 (Fall 2007); Kevin Bales and Becky Cornell, *The Next Step in the Fight Against Human Trafficking: Outlawing the Trade in Slave-Made Goods*, 1 Intercultural Human Rights Law Review (2006); Marilyn R. Walter, *Trafficking in Humans: Now and in Herman Melville's Benito Cereno*, 12 William and Mary Journal of Women and the Law 135 (Fall 2005); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham Law Review 981 (2001); Kevin Bales and Peter T. Robins, *'No One Shall Be Held in Slavery or Servitude': A Critical Analysis of International Slavery Agreements and Concepts of Slavery*, 2 Human Rights Review 18 (Winter 2001); John M. Cook, *Involuntary Servitude, Modern Conditions Addressed in United States v. Mussry*, 34 Catholic University Law Review 153 (1984); Margaret Murphy, *Modern Day Slavery: 9 The Trafficking of Women to the United States*, Buffalo Women's Law Journal 11 (2000–01); Yasmine A. Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law*, 39 Virginia Journal of International Law 303 (1999).

<sup>10</sup> For a discussion of human trafficking as a form of business see generally, Hanh Diep, *We Pay - The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 Loyola University International Law Review 309 (Spring/Summer 2005); Jackie Turner, *Intersections between Diasporas and Crime Groups in the Constitution of the Human Trafficking Chain*, 49 British Journal of Criminology 184 (March 2009); and Louise Shelley, *Trafficking in Women: The Business Model Approach*, 10(1) Brown Journal of World Affairs 119 (Summer/Fall 2003).

<sup>11</sup> See generally, Mohamed Mattar, *Human Security or State Security? The Overriding Threat in Trafficking in Persons*, 1 Intercultural Human Rights Law Review 249 (2006).

<sup>12</sup> See generally, Friedrich Heckmann, et al., *Transatlantic Workshop on Human Smuggling Conference Report*, 15 Georgetown Immigration Law Journal 167 (2000); Akis Kalaitzidis, *Human Smuggling and Trafficking in the Balkans: Is it Fortress Europe?* 5 Journal of the Institute of Justice and International Studies (2005).

such as threats, coercion, and deception. Crucially, it is the exploitation of another's vulnerability, whether economic, social, or political, that forms the cornerstone of the trafficking infrastructure; conditions such as war, displacement, relative income inequality across regions and countries, demand for cheap labor or services, and widespread corruption contribute to this infrastructure, creating fertile ground in which trafficking thrives.<sup>13</sup>

Trafficking in persons affects men, women, and children, though women and children are most frequently victimized. Trafficking involves the movement of these persons from their place of origin to elsewhere in their communities, provinces, regions, or across countries and continents, to destinations where they are ultimately exploited. Exploitation may take a variety of forms, including sexual exploitation of women and children, including in the sex tourism industry; labor exploitation of men, women and children in the domestic service industry, in the agricultural industry, in sweatshops across the world, and in construction. Children may be exploited as beggars in the street, or recruited to sift through garbage or to smuggle drugs. Women and young girls may be exploited through fraudulent marriages, and children may be bought and sold for adoption. Human organs of the most vulnerable are trafficked.<sup>14</sup>

Trafficking in persons is thus a multi-faceted crime, one which constitutes a form of violence against men, women and children; it is an illegal business which may capitalize on international migration flows; it may be considered a form of interference with international family law when legitimate family practices are exploited; and it may likewise constitute a breach of religious and traditional injunctions.<sup>15</sup> It also represents a failure on the part of States to adequately protect and provide for their citizens, and to adequately prevent a grave crime against the individual.<sup>16</sup>

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<sup>13</sup> For a discussion on the root causes of trafficking see generally: Jonathan Todres, *Law, Otherness, and Human Trafficking*, 49 Santa Clara Law Review 605 (2009); Nilanjana Ray, *Looking at Trafficking Through a New Lens*, 12 Cardozo Journal of Law & Gender 919 (Summer 2006); Hanh Diep, *We Pay - The Economic Manipulation of International and Domestic Laws to Sustain Sex Trafficking*, 2 Loyola University International Law Review 309 (Spring/Summer 2005); Jorene Soto, *We're Here to Protect Democracy. We're Not Here to Practice It: The U.S. Military's Involvement in Trafficking in Persons and Suggestions for the Future*, 13 Cardozo Journal of Law & Gender (Summer 2007); Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of International Law 288 (2003); Sarnata Reynolds, *Deterring and Preventing Rape and Sexual Slavery during Periods of Armed Conflict*, 16 Law and Inequality 601 (1998); Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 Wisconsin International Law Journal 131 (Spring 2008).

<sup>14</sup> For a discussion of the various forms of trafficking in different countries, see the UNODC GLOBAL REPORT ON TRAFFICKING IN PERSONS, (UNODC 2009), available at [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf); the U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT (2008), (U.S. Department of State Publication 11407), available at <http://www.state.gov/g/tip/rls/tiprpt/2008/>; THE PROTECTION PROJECT HUMAN RIGHTS REPORT ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN: A COUNTRY-BY-COUNTRY REPORT ON A CONTEMPORARY FORM OF SLAVERY (The Protection Project at The Johns Hopkins University School of Advanced International Studies, Washington DC, 4<sup>th</sup> ed., 2009, available at <http://www.protectionproject.org>).

<sup>15</sup> See Mohamed Mattar, *Access to International Criminal Justice for Victims of Violence against Women Under International Family Law*, speech given at Conference on the Celebration of 60 Years of the Universal Declaration of Human Rights (October 18, 2008).

<sup>16</sup> See Mohamed Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 Loyola International & Comparative Law Review 145 (Spring 2005) at 211-212,

“Essentially, where a state is under an international obligation to prevent and punish injurious acts committed by a private agent within the state's control, failure to do so amounts to a breach of the state's international obligations. Accordingly, states are responsible for the acts committed by state and non-state

Importantly, while this crime has been increasingly recognized, condemned, and prosecuted by the international community, an effective response continues to be impeded by lack of understanding of this complex crime, a slow process of enforcement of the legal responses to it, and hesitant recognition of and provision of assistance and compensation to victims.<sup>17</sup>

Discussion of the topic in a number of Muslim countries is still new, and some countries in the Middle East have yet to pass specific legislation addressing the crime. Others have been more active and have taken significant steps to address the crime comprehensively. Best practices therefore are available and can be built upon.<sup>18</sup> A vibrant dialogue has begun and an exploration of what Islamic law has to offer in this realm can be an important step toward the deepening of such a dialogue and its continued translation into concrete policy steps, especially in the realms of specific and strident legislation; recognition, redress and assistance for victims; prevention and public awareness; and a rethinking of immigration laws, labor laws, health laws, child protection laws, and other relevant legislation to chip away at the trafficking infrastructure.<sup>19</sup> Better understanding of how Islamic law can help is an important step in this journey.

## **1.2 The International Legal Framework to Combat Trafficking in Persons: The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children**

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actors. As such, a state may be held responsible for a privately committed wrongful act. Further, “state responsibility is determined by an objective standard. Thus, whether or not the state intends an act to be harmful or not is largely irrelevant. Responsibility is imposed because the act or omission was committed.” This implies that government complicity is not the only circumstance where a state is held responsible for trafficking in persons as a human rights violation. A state is also responsible for its “inaction” or “failure to act” in preventing trafficking or protecting the victims of trafficking.”

<sup>17</sup> See Mohamed Mattar, *Comparative Models of Human Rights Monitoring and Reporting Mechanisms*, 41 Vanderbilt Journal of Transnational Law 1355 (2008) at 1400 citing Conference of the Parties to the United Nations Convention Against Transnational Organized Crime, Oct. 8–17, 2008, *Report of the Secretariat on the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime: Consolidated Information Received from States for the Second Reporting Cycle*, U.N. Doc. CTOC/COP/2006/Rev.1 (Sept. 9, 2008),

In October 2006, a second reporting cycle focused on states’ compliance with other provisions of the Trafficking Protocol. The report observed that the rate of responses received from states during the second reporting cycle of the Conference was lower than that of the first reporting cycle and acknowledged that, it is, of course, true that the adoption of recovery measures is not mandatory for states parties to the Trafficking in Persons Protocol because of the cost it entails and the fact that it refers to all states in which victims are found, regardless of the level of socio-economic development or availability of resources.

But, the report encouraged compliance in this context:

States should also be aware of the direct benefits that such recovery measures can provide through enhancing the willingness of victims to testify and, thereby, enabling the prosecution of traffickers. Positive outcomes, which would otherwise be unlikely, include the prosecution of traffickers for other forms of organized crime and the seizure of financial assets.

<sup>18</sup> See, for instance, UNODC ONLINE TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, (UNODC, 2008), available at <http://www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html>.

<sup>19</sup> See UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009) at 83-85.

The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention on Organized Crime [“UN Protocol on Trafficking”], which entered into force on December 25, 2003,<sup>20</sup> is the central tool provided by international human rights law to punish the crime of trafficking in persons, to provide a comprehensive framework for victim protection, and to guide an effective prevention strategy. The UN Protocol on Trafficking is the first such comprehensive international legal tool in the realm of trafficking in persons, and it covers all aspects of the crime; it is the treaty which provides the now internationally-accepted definition of trafficking in persons, underpinned by 128 ratifications as of April 2009. This definition states, in Article 3(a) of the UN Protocol on Trafficking, that “trafficking in persons” shall mean:

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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

This definition comprises three main elements that identify the crime of trafficking in persons as such, and which differentiate it from similar crimes, especially smuggling of migrants. These main elements are:

1. An act (what is done): recruitment, transportation, transfer, harbouring or receipt of persons;
2. The means (how it is done): 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; and
3. An exploitative purpose (why it is done): this includes, 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.<sup>21</sup>

The definition of the crime of trafficking in persons requires the presence of a combination of these three elements. Several important points should be noted.

First, this definition of trafficking is broad in its designation of illegal means, embracing abuse of a position of vulnerability, abuse of power, and various forms of coercion as possible illegal

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<sup>20</sup> UN Protocol on Trafficking, Article 17(1) provides that,

This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

<sup>21</sup> UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009), at 13-14.

means.<sup>22</sup> Significantly, the definition is firm in that consent of the trafficked person becomes irrelevant in the event that any of these illegal means are used, with the important consequences that consent cannot be used as a defense of the perpetrator on the one hand,<sup>23</sup> and that consent cannot be utilized to punish the victim for any illegal acts committed as a result of being trafficked, on the other.<sup>24</sup> None of these illegal means need to have been used in cases involving trafficking in children.<sup>25</sup>

Second, while the definition of the UN Protocol on Trafficking outlines a number of exploitative purposes, these are provided “at a minimum,” and imply the possibility of inclusion of additional forms of exploitation as may be relevant. Countries therefore may incorporate additional forms of trafficking as may be relevant to their national circumstances, and may define more specifically those forms of trafficking that the UN Protocol on Trafficking does specify, for example by including the following practices:

Sex trafficking, which may include exploiting prostitution of others or other forms of exploitation such as pornography, sexually-oriented performances and sex tourism;

Trafficking for non-commercial sex purposes, which may include early marriage, forced or servile marriage, arranged marriage, compensation marriage, transactional marriage, temporary marriage or marriage for childbearing;

Labour trafficking, which may include domestic servitude, sweatshop or agricultural or construction labour, or enforced enrolment in an armed force. Other forms of exploitation may include ... the use of the trafficked person in criminal activities or begging.<sup>26</sup>

Third, while the UN Protocol on Trafficking applies to trafficking offenses that are transnational in nature and to those committed by an organized criminal group<sup>27</sup> as defined in the United

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<sup>22</sup> The wide scope of this definition of illegal means can likewise be gleaned from the Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, as elaborated under the Interpretative Notes on Article 3 of the UN Trafficking Protocol: “The reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved” (Travaux Préparatoires of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000), Part Two, Article 3, Section C: Interpretative Notes, Subparagraph (a)(a), at pg. 347).

<sup>23</sup> The UN Protocol on Trafficking, Article 3(b) states that,

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>24</sup> While the UN Protocol on Trafficking does not specifically call for non-criminalization of victims of trafficking, it does call for the treatment of them as such, stating, in Article 2(b), that one of the explicit purposes of the UN Protocol on Trafficking is to “protect and assist the victims of such trafficking, with full respect for their human rights...”

<sup>25</sup> The UN Protocol on Trafficking, Article 3(c) and (d) state,

(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>26</sup> UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009), at 15.

Nations Convention against Transnational Organized Crime,<sup>28</sup> these conditions are not required for the establishment of the crime of trafficking in persons in national legislation.<sup>29</sup>

Fourth, the UN Protocol on Trafficking adopts the three Ps approach to combating trafficking in persons: prosecution, protection, and prevention.<sup>30</sup>

Regarding prosecution, the UN Protocol on Trafficking mandates the recognition of trafficking in persons as a specific crime in national legislation in Article 5:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.<sup>31</sup>

On protection, Articles 6-8 of the UN Protocol on Trafficking outline a comprehensive framework for the protection of victims of trafficking, which guides State Parties to provide for victims' physical, psychological and social recovery, with appropriate housing, counseling and information regarding their legal rights, medical and material assistance,

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<sup>27</sup> The UN Protocol on Trafficking states in Article 4 that the Protocol applies to trafficking in persons offences that "are transnational in nature and involve an organized criminal group."

<sup>28</sup> The United Nations Convention against Transnational Organized Crime states in Article 3, paragraph (2) that "international trafficking is defined broadly to include trafficking that (a) is committed in more than one State; (b) is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) is committed in one State but has substantial effects in another State." The United Nations Convention against Transnational Organized Crime states in Article 2, subparagraph (a) that "'Organized 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 material benefit." See generally, UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009).

<sup>29</sup> The United Nations Convention against Transnational Organized Crime states in Article 34, paragraph (2) that "The offences established in accordance with Articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group." See generally, UNODC AND THE INTER-PARLIAMENTARY UNION, COMBATING TRAFFICKING IN PERSONS, A HANDBOOK FOR PARLIAMENTARIANS NO. 16-2009 (United Nations, 2009).

<sup>30</sup> See generally, Kalen Fredette, Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation, 17 *Cardozo Journal of International and Comparative Law* 101 (Winter 2009); Mohamed Mattar, *Incorporating the Five Basic Elements of a Model Anti-Trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 *Tulane Journal of International and Comparative Law* 357 (2006); Kelly E. Hyland, *The Impact of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children*, 8 *Human Rights Brief* 30 (2001); LeRoy G. Potts Jr., *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 *George Washington International Law Review* 227 (2003).

<sup>31</sup> The UN Protocol on Trafficking, Article 5(2) further provides,

Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b)
- (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
- (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

employment and educational assistance and training, to ensure for the physical safety as well as privacy and confidentiality of victims, and to facilitate the possibility of obtaining compensation for damage suffered. In addition, the UN Protocol on Trafficking encourages States to consider adopting appropriate measures allowing victims of trafficking in persons to remain in their territory, either temporarily or permanently or to facilitate the safe and dignified repatriation of victims of trafficking should they desire to return to their place of origin.

And in relation to prevention, Article 9 of the UN Protocol on Trafficking focuses on the prevention of trafficking in persons and mandates States to undertake research, public awareness campaigns, and pursue economic and social initiatives to prevent trafficking and revictimization and to alleviate those factors that make persons, especially women and children, vulnerable to trafficking, especially poverty, underdevelopment, and lack of equal opportunity.<sup>32</sup>

The UN Protocol on Trafficking calls upon States to take these protective and preventive measures in cooperation with non-governmental organizations and other elements of civil society.<sup>33</sup>

Anchored thus by the UN Protocol on Trafficking and supported by additional international human rights instruments, especially the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)<sup>34</sup> and the Convention on the Rights of the Child (CRC),<sup>35</sup> the international human rights system therefore provides ample guidelines for enacting a comprehensive framework for combating trafficking in persons. Muslim countries as diverse as Algeria, Bahrain, Djibouti, Egypt, Kuwait, Lebanon, Libya, Niger, Oman, and Saudi Arabia have all ratified and are bound by the UN Protocol on Trafficking.<sup>36</sup> Others have signed and

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<sup>32</sup> The UN Protocol on Trafficking states in Article 9(1)(b):

States Parties shall establish comprehensive policies, programmes and other measures: To protect victims of trafficking in persons, especially women and children, from revictimization.

<sup>33</sup> The UN Protocol on Trafficking states in Article 9(3),

Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

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 Organizations*, 13 *Cardozo Journal of Law & Gender* 657 (Summer 2007).

<sup>34</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13, *opened for signature* Dec. 18, 1979 (*entered into force* Sept. 3, 1981).

<sup>35</sup> Convention on the Rights of the Child, 1577 U.N.T.S. 3, 28 ILM 1448, *opened for signature* Nov. 20, 1989 (*entered into force* Sept. 2, 1990).

<sup>36</sup> The following Muslim states are party to the UN Protocol on Trafficking: Albania, Algeria, Azerbaijan, Bahrain, Benin, Burkina-Faso, Cameroon, Djibouti, Egypt, Gambia, Guinea, Guinea-Bissau, Guyana, Iraq, Kazakhstan, Kuwait, Kyrgyz Republic, Lebanon, Libyan Arab Jamahiriya, Malaysia, Mali, Mauritania, Mozambique, Niger, Nigeria, Oman, Saudi Arabia, Senegal, Suriname, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates and Uzbekistan [status as of April 2009].

ratification is pending,<sup>37</sup> and yet others are party to conventions such as CEDAW<sup>38</sup> and the CRC<sup>39</sup> and are thus also bound by their provisions on trafficking in persons.

## **SECTION II: THE ISLAMIC LEGAL SYSTEM: SOURCES OF LAW AND SCHOOLS OF INTERPRETATION**

While international law guides the implementation of a comprehensive strategy for combating trafficking in persons, Islamic law and the Islamic legal tradition can provide crucial guidance for the development and implementation of anti-trafficking policies that are in line with and supported by Islamic principles. These will be examined by focusing on the main precepts of the UN Protocol on Trafficking—protection, prevention, and prosecution, and by underscoring major Islamic legal principles that emphasize, support, and/or expand on these priorities. Before proceeding to a discussion of how Islamic law addresses the various elements of trafficking in persons, it is important to outline the major elements of the Islamic legal system itself, as this system differs from the legal traditions of common and civil law systems.<sup>40</sup>

### **2.1. Characteristics of Islamic Law and its Main Sources**

The definition of law in Islam is different than that of “positive laws” in other legal systems. While in many predominantly Muslim countries positive laws have been enacted on the model of European civil law systems, Islamic jurisprudence still governs the law in such realms as rules of marriage, divorce, child custody and inheritance, laws that are relevant in the context of a discussion of trafficking in persons. It is thus important to delineate the major differences with positive legal traditions.

The major distinction between Islamic law and the civil and common law systems is in the divine origin of Islamic law. As such, Islamic law is not the product of court decisions, as in the Anglo-American legal system, nor in statutes, as in the civil law system. Rather, Islamic law is of a divine nature.

Islam is an Arabic word which means “submission” or “surrender” to the will of God. Several titles have been used to refer to the law of Muslims, one of which is *Sharia* [Islamic law], an Arabic word meaning the “way to be followed.”<sup>41</sup> The law is derived from four main sources.

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<sup>37</sup> Muslim states which have signed the UN Protocol on Trafficking but not yet ratified are as follows: Indonesia, Sierra Leone, Syria, Togo and Uganda [status as of April 2009].

<sup>38</sup> Muslim countries that did not ratify CEDAW include: Iran, Qatar, Sudan and Somalia.

<sup>39</sup> Only one Muslim country did not ratify CRC. That country is Somalia.

<sup>40</sup> See generally, William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law*, 60 *Louisiana Law Review* 677 (2000); Peter G. Stein, *Relationships Among Roman Law, Common Law, and Modern Civil Law*, 66 *Tulane Law Review* 1587 (1992); Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 *Temple International & Comparative Law Journal* 87 (1998); Robert Adraansen, *At the Edges of the Law: Civil Law v. Common Law, A Response to Professor Richard B. Cappalli*, 12 *Temple International & Comparative Law Journal* 107 (1998).

<sup>41</sup> See generally, Cherif Bassiouni and Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 *UCLA Journal of Islamic and Near Eastern Law* 135 (2002); Mohamed H. Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 *Chicago Journal of International Law* 1 (Summer 2007); Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with Liberal Rule of Law*, 21 *American*

The first and primary source is the Qur'an, Islam's holy book. The Holy Qur'an, which is considered to be the literal word of God, was revealed to his Prophet Muhammad as a guide for human behavior and social relations. As such, Qur'anic legislation governs religious obligations as well as legal relations or legal transactions. Islamic law draws a distinction between *Ibadat*, or "devotional obligations," and *Muamalat*, or "legal relations." *Ibadat* includes the five pillars of Islam, or religious obligations<sup>42</sup> while *Muamalat* includes family law (marriage, divorce, child custody, inheritance and wills), contracts, torts and property law; the law of crime and punishment; and the law of war and peace. At least five hundred of the Qur'an's 6,239 verses contain legal rules on family and inheritance, obligations and contracts, criminal law etc. The Qur'an 65:8 states, "We made for you a law, so follow it."

The second source of Islamic law is the *Hadith* (also referred to as the *Sunnah*), which is comprised by the deeds and words of the Prophet Muhammad, which were written down by his followers after his death.<sup>43</sup> The authority of the *Sunnah*, also known as the traditions of the prophet, derives from the Prophethood of Muhammad as declared in Qur'an 4:136: "Oh you who believe, Obey God and this messenger." The *Sunnah* thus interprets and explains the general injunctions and provisions of the Qur'an by basing its conclusions on the traditions of the Prophet, drawn from his verbal teachings or practical demonstrations observed during his lifetime. Two types of *Sunnah* may thus be identified: *Sunnah* by words, and *Sunnah* by deeds.

The *Ijma*, or consensus of Islamic scholars is the third source of Islamic law. The agreement of Muslim jurists or the Muslim community constitutes a rule of law. The Qur'an 4:136 states, "Obey God, his prophet and those in charge of your affairs;" while the tradition of the prophet states "My people shall never be unanimous in error" (reported by Ibn Hanbal, Tirmidhi, Ibn Majah and others).<sup>44</sup>

*Qiyas*, or reasoning that uses analogy to apply precedents established by the divine texts to new problems is the fourth main source of Islamic law. To apply *Qiyas*, four elements must exist: *Asl*,

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University International Law Review 379 (2006); Mohamed Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How will the Clash Between "Human Rights" and "Islamic Law" Be Reconciled in Future Legislative Enactments and Judicial Interpretation?*, 30 Fordham International Law Review 601 (2006).

<sup>42</sup> The five pillars of Islam are faith in God and his Prophet, prayer, fasting, almsgiving, and the pilgrimage to Mecca. On the general principles of the religion of Islam, see e.g. ARSHAD KHAN, *ISLAM 101: PRINCIPLES AND PRACTICE*, (Khan Consulting and Publishing 2006); SAYYID QUTB, *BASIC PRINCIPLES OF ISLAMIC WORLDVIEW*, (Islamic Pubns Intl 2005); and KAREN ARMSTRONG, *ISLAM: A SHORT HISTORY*, (Modern Library, Rev Upd Su ed. 2002).

<sup>43</sup> Muslims relied on the faculty of memory. Scholars of *Hadith* focus their attention on two elements of every reported tradition of the Prophet, namely the content of the tradition and its compliance with the Qur'an, as well as the chain of transmitters. All of the traditions of the Prophet must be traced back to its original reporter through a chain of transmitters and consequently, *Sunnah* is divided into two types: *Mutawatir*, or widely reported by a large number of narrators and thus universally accepted as authoritative; and, *Ahad*, or reported by a limited number of narrators. The *Hadith* is further divided according to its credibility and verification of the chain of transmission to sound (*sahif*), fair (*hasan*), and weak (*dhaif*). The Shia require that the original narrator must be a member of the Prophet's family, while the Sunni do not insist on this condition.

<sup>44</sup> There are two types of *ijma*: *active ijma*, in which all eligible Muslim jurists express the same opinion; and *passive ijma*, in which some jurists express an opinion and the others do not dissent or object.

or an original subject; *Far*, or a new subject; *Illah*, or a common cause in both; and *Hukm*, or a rule derived from *Qiyas*.<sup>45</sup>

Consequently, sources of law in Islam are based on two texts (the Qur'an and the *Hadith*), a declaratory authority (*Ijma*) and a means of interpretation (*Qisas*). In case of a conflict between these sources, there is an order which must be followed. The material sources or the binding texts (the Qur'an and the *Sunnah*) rule first; otherwise, guidance may be sought from reasoning.<sup>46</sup>

## 2.2. The Process of Interpretation and the Concept of *Ijtihad*

Islamic jurisprudence, or *fiqh*, is the process of intellectual activity of discovering the rules of God's law, and *ijtihad* is the process of interpretation of Islamic law which relies on a text of the law to provide legal opinions. Sunni and Shiite legal thought is divided into separate schools. The four main schools<sup>47</sup> of Sunni legal interpretations are as follows: Malikia,<sup>48</sup> Hanafia,<sup>49</sup>

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<sup>45</sup> The following are some examples of *Qiyas*: (1) Performance of Haji on someone's behalf. The prophet was asked by a woman whether she could perform pilgrimage on behalf of her aged father. The prophet replied in the affirmative just as she may discharge on his behalf a pecuniary debt. (2) Transactions during Jumah prayer. The Quran prohibits sale transactions after the last call to Jumah prayer. The rule is extended by analogy to other kinds of transactions which distract Moslems from attending the Jumah prayer. (3) Murder as a bar to inheritance. According to the *Sunnah*, a killer is deprived from sharing in the inheritance of his victim. The rule is extended to the law of will or "wasiyyah". (4) Wine drinking. Wine is prohibited by the Quran as a beverage of an intoxicating nature called "arak" and was unknown at the time of the Prophet. Moslem jurists prohibited it by analogy. And since the cause for this prohibition is intoxication, other intoxicants like all types of drugs are prohibited by analogy.

<sup>46</sup> The basis of this order is derived from the Qur'an and the sayings (traditions) of the prophet, or *Hadith*, from which the *Sunnah* is derived. The prophet said in his last sermon, "I leave two things for you, you will never go stray while holding them firmly, The Book of Allah and the *Sunnah* of his Prophet." When the prophet Muhammad sent Muadh Ibn Jabal as a judge to take charge of legal affairs in Yemen, Muadh said that if there were no Qur'anic verses or traditions to guide him in his judgment, "I will follow my own opinion and not hesitate"—*ijtihad*. The prophet approved and praised this, and this practice gives support to the order and the sources of the law. Abu Bakr, the first Caliph, whenever passing a judgment, looked first into the Qur'an. If he did not find an applicable text therein, he would turn to the *Sunnah*. If he did not find an applicable text therein, he would ask the people whether any of them knew of a judgment passed by the prophet on a particular issue, and if there was not, he would summon the chief representatives of the people and consult them. See generally, Nazeem MI Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 Michigan State Law Review 1443.

<sup>47</sup> The followers of each of the four schools accepted the followers of the other schools, and all four schools of law agreed as to the sources of Islamic law, though their use of these sources differed from one school to another on the relative emphasis they put on the use of these sources. The main distinction is between those who allow a greater measure of personal reasoning through analogy, *qiyas*. The Hanafi and the Shafi are therefore the people of opinion, although they both emphasize that analogy cannot supersede the textual sources of law. Then there are those who emphasize the supremacy of the textual sources of the law, the Malik and the Hanbali, the people of tradition. In other words, the four schools agree on the primacy of the Qur'an and the *Sunnah*, but treat the supplementary or secondary sources of law differently. Regarding interpretation of the textual sources, there is disagreement on whether the text should be interpreted literally or rather on the basis of its intent and purpose. Textual interpretation is employed by the traditionalists, who represent the prevailing religious establishment in the Sunni and Shi'ah. As this is a literal interpretation, they are called "literalists." In order to change the rules without changing the textual rules, resort was made to the supplemental sources of custom, analogy, public interest and custom. However, outcomes deriving from these sources may not contradict a norm or outcome derived from a primary source. Muslim jurists continued to exercise the process of *ijtihad* until the fourth century of the Islamic era, when the door to *ijtihad* was closed, based on a general feeling that all essential questions of law had been thoroughly discussed, and further deliberation was deemed unnecessary, if not disruptive. *majtahid*, or interpreter and discoverer of the rule of law. See Bernard Weiss, *Interpretation in Islamic Law: The Theory of Ijtihad*, 26 The American Journal of Comparative

Shafia<sup>50</sup> and Hanablia.<sup>51</sup> The Shiite Muslims have their own schools of jurisprudence, including Ithna Ashari, Imamis, Ismaili Alawi, Druze and Neydi.

Crucially, because of its divine nature, Islamic law is considered a “perfect law” with permanent validity, regardless of place and time. In Islamic legal theory only God has the knowledge of the perfect law. It is also believed that Islamic law therefore, is the just law, it represents the absolute truth, and it is the natural law to be discovered by human reason. Islamic rules of law are valid by their mere existence and not because of their rationality. Likewise due to their divine nature, the revealed rules of Islamic law are certain (*Yakini*) and not presumptive (*Zani*), another distinction between Islamic law and positive law.<sup>52</sup> Positive law has only “presumptive” effect, while Islamic law is based on “assured certainty,” which the Qur’an describes as *elm-al-yaqqin*. In God’s words, “This is the Book (the Qur’an) whereof there is no doubt.”

This “inalterable” nature of Islamic law makes it a unique form of intellectual property<sup>53</sup> which may not be amended, deleted or repealed, though one can distinguish between the immutable principles of Islamic law versus changeable rules which require reinterpretation through the process of *ijtihad*.<sup>54</sup>

Consequently, Islamic interpretation, *ijtihad*, is a process by which rules are derived through the interpretation of the texts. It means that a Muslim jurist must rest his reasoning on a text, the Qur’an and the *Sunnah*; a Muslim jurist does not create the law nor does he invent the law; a jurist is restricted in his exposition of the law; and he may not depend merely on his notions of equity or sound judgment. Interpretation in Islamic law is therefore objective and not subjective, derivative and not authoritative, and presumptive and not certain. This is why every opinion of a Muslim jurist ends with “But God alone really knows” or “God knows better.”<sup>55</sup>

In searching for Islamic legal principles and solutions for societal problems, including the problem of trafficking in persons, one must examine the textual sources of Islamic law, namely

Law 199 (1978), See also Abdel-Wahhab, Salah-Eldin, *Meaning and Structure of Law in Islam*, 16 Vanderbilt Law Review (1962).

<sup>48</sup> Maliki, named after Abu Abd Allah Malik ibn Anas, exists primarily in North Africa.

<sup>49</sup> Hanafi, named after Abu Hanifa al Numan, dominates Afghanistan, Pakistan, Turkey and Egypt.

<sup>50</sup> Shafi, named after Mohamed ibn Idhis al-Shafi, exists in Indonesia and East Africa.

<sup>51</sup> Hanabli, named after Ahmad ibn Hanbal al Shaybani, exists in Saudi Arabia.

<sup>52</sup> See Abdel-Wahhab, Salah-Eldin, “Meaning and Structure of Law in Islam,” 16 Vanderbilt Law Review 115 (1962) 115 at 123.

<sup>53</sup> See generally, Ali Khan, *Islam as Intellectual Property ‘My Lord, Increase Me in Knowledge’*, 31 Cumberland Law Review 361 (2000-2001).

<sup>54</sup> One example of *ijtihad* is the suspension of the theft rule. While Qur’an 5:38 states, “as to the thief, cut off his hands,” the Second Caliph, Omar ibn al Khattab, suspended the application of the penalty for theft during what came to be known as the “Year of the famine.”

<sup>55</sup> See generally Nazeem MI Goolam, *Ijtihad and Its Significance for Islamic Legal Interpretation*, 2006 Michigan State Law Review 1443; David A. Jordan, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence*, 9 Washington and Lee Race and Ethnic Ancestry Law Journal 57 (Spring 2003); Ziba Mir-Hosseini, *How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco*, 64 Washington and Lee Law Review 1499 (Fall 2007); Ali Khan, *The Reopening of the Islamic Code: The Second Era of Ijtihad*, 1 The University of St. Thomas Law Journal 341 (Fall 2003).

the Qur'an and the traditions of the Prophet and seek guidance through *ijtihad*. In the following sections, these principles and solutions will be explored by utilizing this methodology.

### **SECTION III: SUBSTANTIVE LAW: PROHIBITIONS OF ELEMENTS OF TRAFFICKING IN PERSONS AS A FORM OF SLAVERY UNDER INTERNATIONAL AND ISLAMIC LAW**

Having outlined the international legal framework for the prohibition of trafficking in persons and explored the major principles of Islamic law, it is now possible to move on to a more specific discussion of how Islamic law addresses trafficking in persons. In doing so, it is valuable to begin with a discussion of a shift in international legal thinking from traditional slavery to trafficking in persons, which has subsumed the traditional notion of slavery under a wider, more comprehensive and contemporary definition, and in which slavery and practices similar to slavery merely constitute a form of exploitation under trafficking in persons. This is also important since in some countries slavery in its more traditional forms is still practiced, with families held in enslavement or debt bondage for generations. Significantly, Islamic law is very clear on the prohibition of the institution of slavery, and it is important to devote some attention to this fact, as this prohibition in itself creates the foundation in Islam for a prohibition of trafficking in persons. Before discussing the specifics of how Islamic law prohibits slavery, the international legal prohibition of slavery and the shift to trafficking in persons will be discussed.

#### **3.1. The Prohibition of Slavery in International Law**

The prohibition of slavery under international law is clear. Article 1 (1) of the Slavery Convention of 1926 defined slavery as “The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” Article 1(2) defines the slave trade to include “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery, all acts involved in the acquisition of a slave with a view to selling or exchanging him, all acts of disposal of sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.” Consequently, the crime of slavery was traditionally defined in national criminal codes to mean “buying or selling.”<sup>56</sup>

The 1926 Slavery Convention took a narrow approach to defining slavery, distinguishing between slavery and forced labor. Article 5 of the Convention called upon State Parties to “take all necessary measures to prevent compulsory or forced labor from developing into conditions analogous to slavery” and, in Article 2, for States “to prevent and suppress the slave trade” and “to bring about, progressively, and as soon as possible, the complete abolition of slavery in all its forms.”<sup>57</sup>

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<sup>56</sup> See e.g. CRIM. CODE (Azerbaijan), Article 106 stating “(1) Slavery – the partial or full possession of rights of a person treated like property – shall be punished by imprisonment from 5 to 10 years; (2) If the subject of the deed described above is a child or it has been done with a view to trafficking it shall be punished by imprisonment from 7 to 10 years; (3) Slave trade, i.e. forcing into slavery or treatment like a slave, slave-keeping with a view to sale or exchange, disposal of a slave, any deed related to slave-trading or trafficking, as well as sexual slavery or divestment of sexual freedom through slavery, shall be punished by imprisonment from 5 to 10 years.”

<sup>57</sup> Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S. 253, *opened for signature* Sept. 25, 1926 (*entered into force* Mar. 9, 1927) [hereinafter 1926 Slavery Convention].

The 1956 Supplementary Convention on the Abolition of Slavery [“Supplementary Convention”],<sup>58</sup> while adopting the 1926 Convention on Slavery’s definition, broadened its scope by adding “institutions and practices similar to slavery.” Article 1 of the Supplementary Convention thus prohibited debt bondage,<sup>59</sup> servile forms of marriage,<sup>60</sup> serfdom,<sup>61</sup> and the exploitation of child labor.<sup>62</sup>

The prohibition of trafficking in slaves is the subject of Article 3 of the Supplementary Convention, which defined “slave trade” as the act of conveying a slave internationally from one country to another as a crime. Article 6 (1) further states that, “the act of enslaving another person or of *inducing* another person to give himself or person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offense under the laws of the State Parties to this convention and persons convicted thereof shall be liable to punishment.” Article 7 (c) of the Supplementary Convention defines “slave trade” to mean and include

all acts involved in the capture, acquisition or disposal of a person with intent to induce him to slavery, all acts involved in the acquisition of a slave with a view to selling or exchanging him, all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged, and in general, every act of trade or transport in slaves by whatever means of conveyance.

Other international conventions, including the founding documents of the international human rights system, likewise explicitly prohibit slavery. Hence, Article 4 of The Universal Declaration of Human Rights states that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” The legislative history of the Universal Declaration of Human Rights indicates that the term “slavery” was meant to include trafficking in women.<sup>63</sup>

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<sup>58</sup> Supplemental Convention on the Abolition of Slavery, the Slave Trade and Institution and Practices Similar to Slavery, 266 U.N.T.S. 3, *opened for signature* Sept. 7, 1956 (*entered into force* April 30, 1957).

<sup>59</sup> Debt bondage was defined in Article 1 as

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonable assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

<sup>60</sup> See section C of Article 1.

<sup>61</sup> Serfdom was defined under Article 1 (b) as,

the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

<sup>62</sup> Exploitative child labor, under Article 1(d) means,

Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.

<sup>63</sup> The original Article 11 provided that “slavery, in all its forms, being inconsistent with the dignity of man, shall be prohibited by law.” The comment to the article stated that “In adopting Article 11 members of the Working Group meant it to cover traffic in women, involuntary servitude and forced labor, and governments of powers exercising jurisdiction in trust and non-self governing territories to be especially responsible for abolishing slavery in those territories.” For a discussion of the Universal Declaration on Human Rights, see Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration on Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 *European Journal of International Law* 903 (2008); Mary Ann Glendon, *The Rule*

Similarly, Article 8 of the International Covenant on Civil and Political Rights states that “No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited; no one shall be held in servitude. No one shall be required to perform forced compulsory labor.” Again, under these definitions, slavery is defined as an institution whereby a person is taken over as the property of another. Slavery requires ownership, buying, selling and exchange.<sup>64</sup>

As has already been discussed, this international legal journey culminated in the adoption of the UN Protocol on Trafficking, which for the first time addressed trafficking in persons comprehensively. In this comprehensive approach to trafficking, the UN Protocol on Trafficking treated slavery as one of the purposes of trafficking, stating in Article 3(a) that trafficking in persons occurs for the purpose of exploitation, and that

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>65</sup>

The UN Protocol on Trafficking therefore makes trafficking in persons a crime distinct from that of slavery, with slavery or practices similar to slavery becoming one of the purposes for which victims may be trafficked. However, given that slavery and practices similar to slavery do constitute one of the exploitative purposes of trafficking, the prohibition of slavery remains an important element of combating trafficking in persons.

### **3.2. From Slavery to Trafficking in Persons: A Shift from “Ownership” to “Exploitation”**

Trafficking in persons is now recognized as a crime distinct from the traditional definition of slavery. In defining and addressing trafficking in persons, the clearest distinction between slavery and trafficking in persons may be drawn between ownership and control, undue influence, and exploitation. A victim of trafficking in persons (sometimes referred to as a contemporary form of slavery) may not be subject to the “ownership” of his holder, although he/she may be under his control, such as through physical or psychological coercion, deception, or threats, as defined in the UN Protocol on Trafficking, which elaborates, in Article 3(a) that trafficking in persons occurs

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.

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*of Law in the Universal Declaration of Human Rights*, 2 Northwestern University Journal of International Human Rights 5 (2004); Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward a Legal Anthropology of Human Rights and the Family*, 4 Ave Maria Law Review 343 (2006).

<sup>64</sup> Article 3 states that, “The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offense under the laws of the states parties to this Convention and persons convicted thereof shall be liable to very severe penalties”.

<sup>65</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the Convention Against Transnational Organized Crime, U.N. GAOR, 55<sup>th</sup> Sess., U.N. Doc. A/Res/55/25, *opened for signature* Dec. 12, 2000 (*entered into force* Dec. 25, 2003).

Thus the nature of what constitutes “illegal means” has shifted in focus from the exercise of the power of ownership as conveyed in the 1926 definition of slavery to the exploitation of a position of vulnerability and other forms of control. In addition, Article 3(a) also covers as acts of trafficking, the recruitment, transportation, transfer, harboring or receipt of persons, but not the “buying” and “selling.”<sup>66</sup> Article 3 then recognizes slavery or practices similar to slavery as forms of trafficking. Consequently, slavery remains an important element of the definition of trafficking in persons, and the next section will thus discuss the Islamic position on slavery.

### 3.3. The Gradual Elimination of the Institution of Slavery in Islamic Law

Not unlike international law, Islamic law has much to say regarding the institution of slavery, setting out a foundation for the prohibition of trafficking in persons at a minimum for such a purpose. It may then be argued that such a prohibition by extension applies to trafficking in persons as a whole, especially when taken in conjunction with other Islamic prohibitions on certain acts, means and purposes that constitute the definition of trafficking in persons.

Slavery was common in pre-Islamic societies and the prevailing view is that Islam did not abolish slavery at the outset,

“[L]ike the Hebrew Bible and the New Testament, the previously revealed texts of the Abrahamic faiths, the Qur’an accepted the institution of slavery as an established part of the lives of believers. At the outset, it thus sought to humanize and regulate the practice of slavery rather than seek its outright and immediate abolition.”<sup>67</sup>

In fact, some have argued that instead Islam institutionalized and authorized slavery, citing verses of the Qur’an to support the view that Islam allowed sex slavery, such as Qur’an 4:3: “...if you fear that (in your marital obligations) you will not be able to observe justice among them, then content yourself with only one, or the captives that your right hand possesses;” Qur’an 4:24: “And (also forbidden to you are) all married women, save those (captives) whom your right hands possess (and whose ties with their husbands have been practically cut off); Qur’an 16:71: “And Allah has made some of you excel others in the means of subsistence, so those who are made to excel do not give away their sustenance to those whom their right hands possess so that they should be equal therein; is it then the favor of Allah which they deny?”; Qur’an 16:75: “Allah sets forth a parable: (consider) a slave, the property of another, (who) has no power over anything, and one whom We have granted from Ourselves a goodly sustenance so he spends from it secretly and openly; are the two alike? (All) praise is due to Allah! Nay, most of them do not know;” Qur’an 33:50: “Prophet, we have made lawful to you the wives to whom you have granted dowries and the slave girls whom God has given you as booty;” Qur’an 23:5-6: [W]ho abstain from sex, except with those joined to them in the marriage bond, or (the captives) whom their right hands possess...except with their wives and slave girls, for these are lawful to

<sup>66</sup> In fact, some contemporary legislation, do not require proof of any illegal means, see e.g. Malaysia Anti-Trafficking in Persons Act, article 2 which states,

“trafficking in persons” or “traffic in persons” means the recruiting, transporting, transferring, harbouring, providing or receiving of a person for the purpose of exploitation.

<sup>67</sup> Bernard K. Freamon, *Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence*, 11 Harvard Human Rights Journal 1 (1998).

them;” and *Sunnah* 23 (al-Mu’minum), verses 1-5: “Prosperous are the believers who in their prayers are humble, and from idle talk turn away, and at alms giving are active, and guard their private parts, save from their wives and what their right hands own, them not being blameworthy.”

However, the view that slavery is an intrinsic part of Islam has been disputed by other scholars.<sup>68</sup> For example, the Qur’an refers to “what their right hands own” as a “temporary” institution that existed at the time and was allowed in early Islamic society. In fact, Islam called for the freeing of sex slaves, making sex permitted only inside the institution of marriage. More generally, freeing a slave was encouraged as a way of expiating of wrongdoings and shortcomings.

Additionally, nowhere in the Qur’an is a Muslim allowed to make a new slave, and the Qur’an makes freeing a slave a good deed that makes up for a wrongdoing. For example, Qur’an 58:3: “Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this ye are exhorted; and Allah is aware of what ye do;” Surah 5 (al-Maridah), verse 89, “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, when of the expiation is to feed ten poor persons with the average of the food you serve to your families, or to clothe them, or to set free a slave;” “If anyone emancipates a soul, Allah will set free from Hell a part of his body for every limb of the slave.”

It is another tradition that if anyone slaps his slave or beats him then the atonement is that he should set him free. Although Islamic law may seem to praise the slaveowner who releases a slave, rather than condemn the one who keeps him/her, consider the following tradition of the Prophet: “Allah says I will quarrel with these people on the Day of Resurrection, and he with whom I quarrel, I overcome him...the second is he who sells a free man (or woman) and devours the proceeds.” Another tradition states “there are three people whose prayers Allah will not accept. One of them is he who enslaves a free man.” Similarly, Qur’an 24:33 commands, “[if your slaves] seek a writing (of emancipation), give them such writing, if you find that there is good and honesty in them. And give them something (yourselves) out of the wealth of Allah which He has bestowed upon you.” The Prophet said, “Whoever 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>69</sup> And on his deathbed, the Prophet stated that “On the Day of Judgment, I will be the advocate of non-Muslim subjects who were oppressed” (al’Mawardi).

The Qur’an also encourages slaveowners to allow slaves to enter into contracts to earn their freedom, and 24:33 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.” Qur’an 90 tells believers, “And (have We not) shown him the two highways? But he has made no effort on the path that is steep (Aqaba). And what will explain the Aqaba? It

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<sup>68</sup> See generally SAEED AHMAD, *SLAVERY IN ISLAM*, (2000). See also, WILIAM GERVAISE CLARENCE-SMITH, *ISLAM AND THE ABOLITION OF SLAVERY*, (Oxford University Press 2006).

<sup>69</sup> Narrated Abu Huraira. For the treatment of non-Muslims under Islamic law, see Section 5.4.

is freeing the bondsman/slave”<sup>70</sup> Abu Hurayrah stated, “I heard Abu’l-Qaasim (peace and blessings of Allah be upon him) say: “Whoever accuses his slave when he is innocent of what he says will be flogged on the Day of Resurrection, unless he is as he said.”<sup>71</sup> After freeing a slave (this is called a *mukaatabah* or contract of manumission between the slave and his master), Ibn ‘Umar declared, “There is no more reward in it than the equivalent of this, but I heard the Messenger of Allah (peace and blessings of Allah be upon him) say: “Whoever slaps his slave or beats him, his expiation is to manumit him.”<sup>72</sup> One day ‘Umar ibn al-Khattaab passed by and saw some slaves standing and not eating with their master. He got angry and said to their master: “What is wrong with people who are selfish towards their servants?” Then he called the servants and they ate with them.

While the Qur’an thus instructs Muslims to be kind to slaves<sup>73</sup> and to treat them fairly,<sup>74</sup> as can be gleaned from the foregoing discussion, Islamic teachings of the Qur’an and the traditions of the Prophet were intended to gradually eliminate the institution of slavery. This gradual reform of slavery, rather than an outright abolition is consistent with the Islamic philosophy of gradual social change. The prohibition on drinking wine and the prohibition on earning interest on loans were both similarly enacted gradually. At the time when Islam was introduced, the practice of slavery was prevalent and complete, and immediate abolition would have upset the social and economic foundation of society. Later, slavery was only allowed in times of war, a practice that was commonplace, and a sudden change would have caused Muslims loss and military imbalance, since historically, the most common way of acquiring slaves was to capture them during a war. The treatment of prisoners according to the prevalent tradition of pre-Islam was to grant no protection or rights to slaves. They had two options: either to be killed or to be enslaved. However, during the time of Islam, two more options became available, including unconditional release or ransom. Allah says (interpretation of the meaning): “Thereafter (is the time) either for

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<sup>70</sup> Consider the Tradition of the Prophet, “Allah says I will quarrel with these people on the Day of Resurrection, and he with whom I quarrel, I overcome him, One of them is he who gives on My name but cheats. The second is he who sells a free man (or woman) and devours the proceeds, the third is he who hires someone, gets his work done but does not pay him his dues.” Another tradition “there are three people whose prayers Allah will not accept. One of them is he who enslaves a free man”. Encouraging freeing slaves, the tradition states, “If anyone emancipates a soul, Allah will set free from Hell a part of his body for every limb of the slave.” The Qur’an addressed emancipation of slaves by saying: “[B]ut true virtue is of him who believes in Allah and the Last Day, and the angels, and the Book (Divine revelations), and the Prophets, and gives his wealth, for the love of Him to the Kindred, and to orphans, and the needy, and the wayfarer, and to those who ask, and to set slaves free, and (of him who) establishes this prayer and pays the almsgiving...” al-Bagarah, 2:177. Again, as a way of encouraging freeing slaves, the Qu’ran says, “... and he who stays a Believer by mistake, on him is the setting free of a believing slave, and the paying of blood money to his family unless they remit it as alms” ( al-Nisa, 4:92).

<sup>71</sup> Narrated by al-Bukhaari (6858).

<sup>72</sup> Narrated by Muslim (1657).

<sup>73</sup> “And worship Allah, and associate no things with Him, and be kind to parents, and the near kinsfolk, and to orphans, and to the needy, and to the neighbour who is a stranger, and to the companion at your side, and to the wayfarer, and to those whom your right hands possess: surely Allah loves not such as are arrogant (and) boastful” (Qur’an 4:36).

<sup>74</sup> “Your slaves are your brothers whom Allah has placed in your hands. Thus, he who has his brother in his hands must feed him what he eats, clothe him with that which he wears. And he should not burden him with that which is beyond him but, if he entrusts him with that when he should lend him a hand” (Bukhari and Muslim). In another passage, the Qur’an states, “let no one of you say, my slave, or my female slave. And, let not a slave say, my lord. The master should say, my son or my daughter, and the slave should say master and lady because all of you are owned and the lord of all is Allah.”

generosity (i.e. free them without ransom), or ransom (according to what benefits Islam).” During the battle of Badr, the Prophet accepted ransoms from the Mushrik prisoners of war and let them go, releasing them with no ransom. During the conquest of Makkah it was said to the people of Makkah: “Go, for you are free.” “[B]ut true virtue is of him who believes in Allah and the Last Day, and the angels, and the Book (Divine revelations), and the Prophets, and gives his wealth, for the love of Him to the Kindred, and to orphans, and the needy, and the wayfarer, and to those who ask, and to set slaves free, and (of him who) establishes this prayer and pays the almsgiving...” (al-Bagarah, 2:177). Again, as a way of encouraging freeing slaves, the Qur’an says “... and he who stays a Believer by mistake, on him is the setting free of a believing slave, and the paying of blood money to his family unless they remit it as alms” (al-Nisa, 4:92). Islamic tradition further commands “Your slaves are your brothers. Allah has placed them under your authority. He who has his brother under him, should feed him from whatever he eats, and dress him with whatever he wears, and do not burden them (assign burdensome task to them) beyond their capacity; and if you burden them then help them” (Al-Bukhari and Muslim).

Finally, "There are three categories of people against whom I shall myself be a plaintiff on the Day of Judgment; Of these three, one is he who enslaves a free man, then sells him and eats this money" (Bukhari and Ibn Maja).

It is therefore possible to draw out, on the basis of these Qur’anic injunctions and the traditions of the Prophet, the Islamic position against the institution of slavery. The repeated and consistent commandments to, first, treat slaves humanely and second, to free them, indicate that the institution of slavery was one that the Islamic tradition sought to abolish. Therefore, insofar as trafficking in persons may occur for the purpose of slavery or practices similar to slavery, these Islamic principles can and should be applied to condemn trafficking in persons for these purposes, and by extension in its other forms, especially when taken in conjunction with Islamic prohibitions relevant to other acts, means and forms of trafficking. Insofar as trafficking in persons is often referred to as a contemporary form of slavery, this Islamic prohibition on slavery becomes especially significant, although it is not sufficient as grounds for the prohibition of all forms of exploitation. Consequently, in the following section, we will address the general principle of prohibition of exploitation in Islamic law and apply it to the various forms of exploitation that may constitute a form of trafficking.

#### **SECTION IV: THE PRINCIPLE OF PROHIBITION OF EXPLOITATION IN ISLAMIC LAW**

Exploitation is the key element of the definition of trafficking in persons, and what differentiates it from similar crimes such as migrant smuggling. Exploitation takes a variety of forms, and in addition to slavery, and practices similar to slavery, which have already been discussed, the UN Protocol on Trafficking includes, under its comprehensive definition, the following additional forms of exploitation: forced labor or services, the exploitation of the prostitution of others or other forms of sexual exploitation, and removal of organs. The Protocol leaves the definition open to incorporation of other forms of exploitation, as these are listed “at a minimum.”<sup>75</sup>

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<sup>75</sup> For other examples of exploitation in national legislation, see e.g. FIGHT AGAINST HUMAN TRAFFICKING LAW (Azerbaijan) of 2005, Article 1.0.2 (illegal bio-medical research).

Islamic law outlines a general prohibition of exploitation, and likewise prohibits certain specific types of exploitation, which include, similarly to the UN Protocol on Trafficking, that of a prohibition of labor exploitation, a prohibition of exploitation of the prostitution of others, and the trafficking of organs. In addition to the practices specifically covered by the UN Protocol on Trafficking, Islamic law likewise condemns additional forms of exploitation, such as those that may arise out of illegitimate adoption practices and forced marriage. Before turning to these specific prohibitions under Islamic law, the general principles of a prohibition of exploitation under Islamic law will be explored.

#### 4.1. A General Prohibition of Exploitation

Islamic tradition prohibits exploitation in a number of ways. Specifically, Islamic law places a ban on certain types of insurance, establishing them as forms of exploitation. For example, Islamic law prohibits an insurance contract, whether life insurance or liability insurance if it entails an element of uncertainty, speculation or exploitation.<sup>76</sup> Similarly, Islamic law forbids the earning of interest on the basis of striving for equity and avoidance of unfairness and exploitation. Since it is often the poor and needy who are forced to borrow, whereas the rich have surplus funds to save, Islamic tradition gradually took the view that interest penalizes the poor and benefits only the rich. In addition, interest is viewed as an unearned income, a reward without productive effort, which is considered to be “unjust enrichment,” or the taking of one’s property without just cause. Islam thus places the prohibition on interest not only in cases in which the money is loaned at a high interest rate; any form of fixed interest is prohibited because interest is an addition to the principal amount of money loaned. This avoids the accumulation of wealth in the hands of a few and avoids the accumulation of wealth through such a selfish means instead of hard work and personal activity. *Riba*, or interest, is thus a sin under Islamic law and even those hired to write the interest contract or who witness the preparation of the interest contract are considered party to the sin.

More generally, one can identify basic distinguishable prohibitions in the Qur’an, all of which are classified as forbidden and *Haram* illegal commercial practices because they entail an element of exploitation, including: Exploiting another’s property – “Oh, you who believe, eat not each other’s property by wrong means;” *Riba*, usury or interest – “God has permitted sale and prohibited usury;” *Ghara* (risk), or uncertainty; *Monopoly*;<sup>77</sup> *Maysir*, Gambling;<sup>78</sup> and Bribery.<sup>79</sup>

The prohibition of bribery is particularly important for the purposes of the present discussion, as corruption of public officials is a contributing factor to trafficking in persons. The giving and taking of bribes by border, customs, law enforcement, and other government officials serves to facilitate the illegal acts and means, as well as exploitative practices that define trafficking in persons. While some government officials who may be on the traffickers’ payroll simply choose

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<sup>76</sup> See generally Ali Adnan Ibrahim, *The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration*, 23 American University International Law Journal 661 (2008).

<sup>77</sup> According to the tradition of the Prophet, “monopolists are sinners” (narrative by Saheeh Muslim).

<sup>78</sup> “Satan’s plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain?” (Al-Maeda 5:91).

<sup>79</sup> And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that ye may eat up wrongfully and knowingly a little of (other) people’s property” (Al-Baqara 2:188).

to look the other way, others actively seek to profit from the trafficking business. Alongside the promotion of equality between the genders, equal opportunity, the prohibition of violence against women, and the general prohibition on exploitation, the Islamic prohibition on bribery can thus complement the evolving theory of a comprehensive Islamic framework to combat trafficking in persons, by focusing on corruption—an important contributing and facilitating factor in the prevalence of trafficking in persons throughout the world today.

#### 4.2. Prohibition of Labor Exploitation

The UN Protocol on Trafficking includes forced labor<sup>80</sup> and services as a form of exploitation outlined in the definition of trafficking persons. Trafficking for the purposes of forced labor and services is one of the most prevalent forms of trafficking in persons throughout the world today, and is particularly important in some wealthy Muslim countries, where large pools of foreign labor work in construction, as well as in the hospitality industry and as domestic servants—many are vulnerable to exploitation. Trafficking in this manifestation often involves broken contracts, with promised compensation replaced by debt that is to be repaid through work, wages which are a mere fraction of those promised, exploitative working hours which do not reflect those promised, restriction of movement, and hard physical labor often in unbearable conditions—in short, trafficking in persons for forced labor often involves broken and/or unfulfilled, deceptive contracts.

Islamic labor law, however, clearly prohibits the exploitation of labor.<sup>81</sup> According to the traditions of the Prophet, an employee should be paid before “his sweat dries,” stating that “Give the hired man his wages before his sweat dries” (Reported by Ibn Maajah, 2/817). Qur’an 7:85 commands, “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.” This applies equally to men and women, stating in Qur’an 4:32: “...to men Is allotted what they earn, And to women what they earn.”

In addition, there are four major principles which are emphasized in Islamic labor law that are particularly relevant when considering the violations of labor practices that constitute forced or exploitative labor under the concept of trafficking in persons. First, if one is employing a worker he must fulfill his contractual obligation: “[b]e faithful to your pledge to God when you enter into a pact.” Further, the Islamic tradition advocates that wages must be paid upon a worker’s

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<sup>80</sup> Earlier conventions defined forced labor, including ILO Conventions on the elimination of forced or compulsory labor of 1930 and 1957. The International Labour Organisation, 87<sup>th</sup> Sess., Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, *opened for signature* June 17, 1999 (*entered into force* Nov. 19, 2000), which prohibits “(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 conflict; (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” (Article 3a-d).

<sup>81</sup> See generally Adnan A. Zulpigar, comment: *Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions*, 9 University of Pennsylvania Journal of Labor and Employment Law 421 (2007).

completion of the agreed upon contract.<sup>82</sup> Thirdly, when there is an agreement to work, compensation must be specified prior to entering into contact. Finally, in another tradition of the Prophet, he stated that “if you are employing a worker, you have to tell him how much he will be compensated for his labor.” Cases of trafficking in persons for forced labor, and exploitative labor usually involve the violation of at least one, but also more frequently, of several of these injunctions. The Islamic legal tradition in the realm of labor law thus provides clear guidelines against these types of practices – another important piece in our compilation of Islamic prohibition of the various acts and means that constitute trafficking in persons.

The Islamic tradition values work and labor, and considers it an act of worship with recognized rights of the employer, as well as the employee.<sup>83</sup> Importantly, the concept of a contract in Islam does not exist merely as a legal institution necessary for the satisfaction of legitimate private needs. The very foundation of a contract is a covenant, a pact between God and man. For example, clear and transparent agreements are emphasized before a worker enters into a work contract so the worker will be protected and motivated to work honestly and securely and contracts are to be duly fulfilled: “O you who believe! Fulfill all contracts” (Qur’an 5:1).<sup>84</sup> Contract in Islamic law is thus not merely secular law between the contracting parties, it is of a sacred nature, a covenant with God.

Another important principle in Islamic labor law is that the work performed has to be lawful. This means that trafficking for the purpose of any illicit practice, such as drug smuggling or stealing, for example, is clearly forbidden in Islam. Likewise, Islam respects work and labor over “idle” practices and begging. This is important in relation to the fact that trafficking for the purpose of forced labor can include trafficking for the purpose of begging, a practice that occurs in some Muslim countries. However, such a practice would clearly be in breach of the Islamic tradition, with the Prophet praising hard working laborers and encouraging work rather than begging. The prominent Muslim scholar Shaikh al-Islam Ibn Taimiyah says: “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 by stepping over them or with one's loudness, for instance, when the people are listening to the Friday khutbah, and one distracts them by one's voice.”<sup>85</sup> Similarly, exploiting a person for the purpose of begging constitutes an act that is forbidden under Islamic law, since there is no real need on the part of the perpetrator who simply seeks a profit, and especially because it frequently involves harm and deception of the victim of trafficking.

Moreover, Islam condemns the infliction of harm. Inflicting hardship and harm, whether intentional or not, is thus prohibited. As such, subjugating any person to hard labor is likewise prohibited, as illustrated in the Qur’an 22:78: “He has chosen you and has not laid upon you in religion any hardship;” this sentiment is restated in 2:185: “Allah desires for you ease. He

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<sup>82</sup> Al-Mutaqqi al-Hindi, “The Treasure of Workers in Normative Words and Deeds,” *Hadith* 9125. Translation from Arabic - Dr. Mohamed Mattar.

<sup>83</sup> Jazakum Allahu Khayran, *Rights of Workers in Islam*, World Fatwa Management and Research Institute Islamic Science, University of Malaysia, January 26, 2007.

<sup>84</sup> *Workers' Rights in Islam*, June 24, 2008, p.1, available at <http://www.readingislam.com>.

<sup>85</sup> *Fiqh Us Sunnah*, [http://www.iiu.edu.my/deed/lawbase/fiqh\\_us\\_Sunnah/vol2/fsn\\_vol2b.html](http://www.iiu.edu.my/deed/lawbase/fiqh_us_Sunnah/vol2/fsn_vol2b.html).

desires not hardship for you.”<sup>86</sup> Insofar as forced labor often requires excruciating and harmful forms of labor, Islam thus prohibits these types of practices. Crucially, the illicit means by which persons are frequently trafficked, such as coercion and deception, would also fall under the category of prohibited types of labor practices under Islamic law.

In summary then, forced labor or services, including such practices as forced begging are not acceptable in the Islamic tradition, placing it in harmony with the prohibition on trafficking in persons for the purpose of forced labor or services in international law under the UN Protocol on Trafficking. Additionally, the Islamic tradition prohibits corrupt, deceptive and coercive practices and thus addresses some of the most important contributing factors to the trafficking infrastructure and illicit means of trafficking.

### **4.3 The Sponsorship Rule: A Violation of the Islamic Principle of Freedom**

Closely related to labor exploitation specifically is the practice of the sponsorship rule: a rule that provides an employer sponsoring a worker with a variety of rights that may infringe on the rights of the employee. This type of practice, however, is in contradiction with the Islamic principles of freedom.

Many countries of the Middle East adopt the sponsorship rule, a rule that is often argued to contain elements of control and exploitation. Under the rule, foreign workers’ travel documents are withheld by employers and an employee may not leave his employer and seek another employment without approval, restricting the workers’ freedom of movement; nor is the employee allowed to leave the country for any reason without first obtaining the approval of the employer. However, Sheikh Youssef El Qaradawi, an eminent Islamic scholar, issued a fatwa in March 2008 that the sponsorship rule which prevails in some countries is inconsistent with the teachings of Islam and should be abolished:

The sponsorship system nowadays produced visas market, leaving tens of workers living in sub-human conditions, as a large number of laborers are accommodated in small areas. It is really a shame and also it is against the Islamic principles which call for respecting human rights.<sup>87</sup>

Earlier, the Saudi Arabian Grand Mufti, the highest Islamic authority in the country, issued a Fatwa on September 3, 2002, against abuse of foreign labor by Saudi employers, stating that "blackmailing and threatening [foreign] laborers with deportation if they refuse the employers' terms, which breach the contract, is not allowed." A recent Saudi Council of Ministers’ Decree explicitly provides that an alien employee is entitled to keep his travel documents and the travel documents of his family. The employee also has a right to travel anywhere in the Kingdom of Saudi Arabia without showing documentation, as previously required.<sup>88</sup> In August 2009, Bahrain

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<sup>86</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), p. 8.

<sup>87</sup> Nour Abuzant, *Call for Review of Sponsorship System*, Gulf Times, 14 March 2008.

<sup>88</sup> Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 Fordham International Law Journal 729 (2003). “Council of Ministers Decision No. 166 of 12/7/1421 AH regulating relations between migrant workers and their employers further stipulates as follows:

will become the first country of the Gulf region to abolish the sponsorship rule, thereby allowing for the right of foreign workers to transfer from one employer to another without obtaining the approval of the current employer, without losing their residency permits, and with entitlements to receive unemployment benefits should these be necessary while securing a new place of employment.<sup>89</sup>

It is clear that the sponsorship rule, which is a means toward potential exploitation and abuse of workers, and thus a potential element of trafficking in persons, is prohibited by Islamic law, adding another component to the comprehensive Islamic framework for combating trafficking in persons.

#### 4.4. Prohibition of Sexual Exploitation

Trafficking in persons for the purpose of sexual exploitation, a recognized purpose of exploitation under the UN Protocol on Trafficking is one of the most prevalent forms of trafficking in persons throughout the world, including in some Muslim countries. We will thus explore the Islamic traditions that are relevant to this particular form of exploitation, so as to enhance our developing theory of the Islamic framework for combating trafficking in persons.

Forced prostitution is one of the most common forms of sexual exploitation victims of trafficking, especially women and girls, are forced to endure. Often, deceived by promises of employment as waitresses, saleswomen and similar occupations, women and girls find themselves instead forced into and exploited in prostitution or other forms of sexual exploitation.

Islamic law provides a basis for the prohibition of the act of prostitution in many of the Muslim countries. While the act of prostitution per se may not constitute an offence in some legal systems, Islamic law considers an act of prostitution as a form of sexual exploitation and thus forbids it.<sup>90</sup> Forced prostitution is likewise forbidden, as is sexual exploitation for profit, according to Quran 24:33, stating “But force not your maids to prostitution when they desire

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Employers shall not retain the passports of migrant workers or the passports of members of their families; Migrant workers shall be entitled to freedom of movement within the Kingdom of Saudi Arabia provided that they hold a valid residence permit; Migrant workers may apply to governmental and other bodies to avail themselves of the services needed to ensure a decent life for themselves and their families, such as the issuance of driving licenses, the purchase of motor vehicles, telephone connections etc., without being obliged to obtain the consent of their employers; The term “sponsor” shall be invalid wherever it appears and shall be replaced by the term “employer”; the Decision also makes provision for the establishment of a special committee to resolve any problems arising from its application (See HUMAN RIGHTS COUNCIL WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, Fourth Session, Geneva, 2-13 February 2009, A/HRC/WG.6/4/SAU/1 (Dec. 4, 2008).

<sup>89</sup> See, for example, *Bahrain to Halt Labour Sponsorship*, Al Jazeera, May 7, 2009, available at <http://english.aljazeera.net/business/2009/05/20095733344100581.html>.

<sup>90</sup> According to the Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, as elaborated under the Interpretative Notes on Article 3 of the UN Trafficking Protocol: “The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws” (Travaux Préparatoires of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, U.N. Doc A/55/383/Add.1 (Nov. 3, 2000), Part Two, Article 3, Section C: Interpretative Notes, Subparagraph (a)(a), at pg. 347).

chastity, in order that ye may make a gain in the goods of this life.” The tradition of the Prophet likewise prohibited taking the earnings of a soothsayer and the money earned by prostitution.<sup>91</sup> It also must be stressed here that the Recommended Principles and Guidelines on Human Rights and Human Trafficking developed by the United Nations High Commissioner for Human Rights, stress the importance of non-criminalization with respect to any illegal activities a trafficked victim may have been involved in as a result of being trafficked.

#### 4.5 The Prohibition of Trade in Human Organs

Another form of exploitation defined under the UN Protocol on Trafficking is that of organ trafficking, which involves the illicit provision of organs to those who need and can afford them by obtaining these organs from poverty-stricken individuals, who may or may not be aware of what the procedure entails, nor of its consequences. The price at which the organs are sold to the recipient is far higher than that paid out to the so-called organ “donor” (if they are paid at all). Organ trafficking characterized by operations carried out by transnational organized networks and/or private doctors. This form of trafficking, one of the most sordid manifestations of the crime of trafficking around the world, may be carried out both by “organ brokers” working for international organized crime groups, or independently by doctors, ambulance drivers, and mortuary workers.<sup>92</sup> Most of the time, victims are impoverished individuals, who are often misinformed about the procedures, and give their consent without being informed as to the true extent of health risks that are associated with the action. Organ trafficking is a murky phenomenon, largely hidden underground and notoriously difficult to regulate and control. Victims rarely seek assistance fearing shame and stigma, while evidence that can be utilized in investigations and prosecutions is scarce.<sup>93</sup> Prevention is thus key, and the Islamic prohibition on such a practice can be utilized toward sensitization of the public and the passage of stringent legislation, which may act as a deterrent for potential perpetrators.

Islamic law clearly prohibits the buying or selling of a human being or part of his or her body. According to the tradition of the prophet, it is *haram* (meaning absolutely prohibited) to deal unlawfully in a Muslim’s blood, property, or honor. Islamic law, which holds all human beings to be owned solely by God, thus prohibits the possibility of a sale of another human being, as no human being may be owned by another. By extension, this applies to the sale of a part of a person’s body (with the exception of a mother’s milk).

This traditional Islamic prohibition on the sale of human organs has been recently reiterated and supported in a number of Islamic forums and human rights documents. For example, the

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<sup>91</sup> For a discussion of prostitution and prostitution-related activities in countries of the Middle East, see Mohamed Mattar, Mohamed Mattar, *Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses*, 26 Fordham International Law Journal 729 (2003). Many penal codes of Muslim countries explicitly prohibit living off the proceeds of prostitution. See, e.g. CRIM. CODE (Bahrain), Article 326, CRIM. CODE (Iran), Article 213, CRIM. CODE (Kuwait), Article 202, CRIM. CODE (Lebanon), Article 527, CRIM. CODE (Morocco), Article 498-(2), CRIM. CODE (Oman), Article 221, CRIM. CODE (Qatar), Article 207, CRIM. CODE (Syria), Article 5, CRIM. CODE (Tunisia), Article 232(2).

<sup>92</sup> UNODC ONLINE TOOLKIT TO COMBAT TRAFFICKING IN PERSONS, (UNODC, 2008), available at <http://www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html>.

<sup>93</sup> Marwa Awad, *Organ Trafficking Reaches New Heights in Egypt*, Al Arabiya, November 18, 2008, available at <http://www.alarabiya.net/articles/2008/11/18/60359.html>.

International Conference of Islamic Jurisprudence, in its Decision #1 of 1988, emphasized the Islamic position in prohibiting transactions in human organs.<sup>94</sup> The donation of a human organ is subject to strict limitations, including that such a donation may not subject the donor to death or bodily harm, that the donation is made with full and informed consent, and that the donor has obtained the age of majority. Similarly, the limited permissibility of the sale of human organs is subject to dire necessity, and is only permissible when the patient cannot find a donor, his life is in danger, and he has no other alternative to cure his ailment. And even in such a case, it may be argued that such permission would become immediately null and void if the contract to obtain the necessary organ were to be characterized by deceit, misinformation, coercion, or any other violation of a contract in compliance with Islamic law, as discussed earlier. It is thus implied that the brokering of human organs in the fashion in which it occurs within the context of the crime of trafficking in persons, would clearly be prohibited by Islamic law.

#### 4.6 Trafficking for the Purpose of Adoption

While it is not explicitly defined as part of the UN Protocol on Trafficking, trafficking in persons for the purpose of illicit adoption is a practice prohibited by international law<sup>95</sup> and in many countries' national legislation.<sup>96</sup>

Islamic law does not recognize adoption, and it is thus forbidden. The Qur'an 33:4-5 states: "[Nor] has He made your adopted sons your sons. Such is only your manner of speech by your mouths. But God tells you the Truth, and he shows the right way. Call them by [the names of]

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<sup>94</sup> An earlier *fatwa*, or legal opinion, was issued by The Ministry for Awqaf (Trust) and Islamic Affairs of Kuwait in 1985, stating that the purchase of another's kidney is *haram*, since God created people in a respectable and beautiful image (Sura At-Tin 4). Consequently, parts of the body should not be removed and sold for compensation.

<sup>95</sup> The 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption, which prohibits inter-country adoption in cases where parental consent is obtained as a result of payment or compensation, and which mandates that "No one shall derive improper financial or other gain from an activity related to an inter-country adoption" (Article 32) (Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 1879 U.N.T.S. 181, *opened for signature* May 29, 1993 (*entered into force* May 1, 1995).

<sup>96</sup> For adoption, and trafficking in persons for the purpose of adoption, see generally Patricia J. Meier and Zhang, Xiaole, *Sold into Adoption: The Human Baby Trafficking, Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 *Cumberland Law Review* 1 (2008-2009); David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 *Vermont Law Review* 1 (Fall 2007); David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 *Wayne Law Review* 113 (Spring 2006); Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 *Boston University International Law Journal* 179 (2003); Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children Be Controlled?* 27 *Syracuse Journal of International Law and Commerce* 405 (2000); Bridget M. Hubing, *International Child Adoptions: Who Should Decide What Is in the Best Interest of the Family?* 15 *Notre Dame Journal of Law, Ethics, and Public Policy* 655 (2001); Jonathan G. Stein, *A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should Be Modified to Include the Consent Provisions of the Uniform Adoption Act*, 24 *Thomas Jefferson Law Review* 42 (2001); Sara R. Wallace, *International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?* 20 *Arizona Journal of International and Comparative Law* 689 (2003); Kelly M. Wittner, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?* 12 *Pacific Rim Law and Policy Journal* 595 (2003).

their fathers: that is juster in the sight of God.” Despite this prohibition on adoption, the practice of *Kafala* is accepted and widely practiced in the Islamic world. *Kafala* is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until the child reaches majority. *Kafala* is considered a form of unilateral contract, and is used in various Islamic nations to assure protection for such minors, as these nations generally do not legally recognize the concept of adoption. However, unlike adoption, *Kafala* neither conveys inheritance rights nor any right to use the guardian’s family name.<sup>97</sup> International law recognizes the practice, stating in the Convention on the Rights of the Child that “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”

Some Muslim countries have also enacted legislation or facilitated practices of guardianship which are more similar to adoption in practice, bestowing on adopted children the rights to inheritance and providing for the fact that the children may not be able to establish links with their biological parents.<sup>98</sup>

The lack of the practice of adoption as understood in the West, however, does lower the demand for adopted children throughout the Muslim world. The extent of the problem of trafficking in persons for the purpose of adoption in the Muslim world is thus less significant than in other parts of the world, where adoption is a more commonly practiced and acceptable custom. However, insofar as any children may be trafficked for the purpose of various forms of exploitation into the institutions of guardianship or *Kafala*, as they are practiced in the Muslim world, such a practice would be prohibited under Islamic law, as it would violate the principles of Islamic law that we have already discussed previously, such as practices characterized by deception, coercion, misinformation, and similar illegal practices.

#### **4.7 Forced, Temporary, and Child Marriages: Distinction between Islamic Doctrine of Consent and Harmful Customary Practices**

In elaborating the theory of Islamic provisions as they address the various elements of the crime of trafficking in persons, it is important to draw a distinction between Islamic doctrine and certain customary practices still prevalent in some Muslim countries today, which actually contradict Islamic doctrine. As an example, we will explore the issue of certain types of

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<sup>97</sup> Global Legal Information Network, *at*

[http://www.glin.gov/subjectTermIndex.action?search&reset=true&searchDetails.queryType=BOOLEAN&searchDetails.queryString=mt:%5E%22Kafala%22\\$](http://www.glin.gov/subjectTermIndex.action?search&reset=true&searchDetails.queryType=BOOLEAN&searchDetails.queryString=mt:%5E%22Kafala%22$)

<sup>98</sup> Muslim states have introduced different alternatives for adoption. See e.g. ACT CONCERNING PROTECTION OF CHILDREN WITHOUT PARENTS (Iran), Article 1, which states that “Every wife and husband residing in Iran can take care of a child upon mutual agreement and in accordance with approval of the court and pursuant to the regulations relating to child supervision.” Similarly, under Article 2 of the Child Protection and Welfare Ordinance of Libya, “It is permissible for a family to assume responsibility for the care of welfare beneficiaries residing in social welfare centers for the homeless, within the categories and in accordance with the conditions laid down in the ordinance.” Consequently, the State party’s reservation to articles 20 and 21 of the CRC Convention is unnecessary. Article 20 (3) of the Convention expressly recognizes *kafalah* of Islamic law as a form of alternative care. Article 21 expressly refers to those States that “recognize and/or permit” the system of adoption, which does not apply to the State party because it does not recognize the system of adoption.

exploitative marriage, which demonstrates well how certain harmful customary practices lead to trafficking, but would not be approved by Islamic doctrine. Such an approach will help us in countering trafficking in persons facilitated by such practices by drawing public attention to their incompatibility with Islamic law and traditions.

Harmful customary practices are defined as traditional practices which may be values or beliefs held by communities for generations, but which may inflict harm on certain members of these communities.<sup>99</sup> According to Fact Sheet Number 23 published by the United Nations Office of the High Commissioner of Human Rights, “Harmful Traditional Practices Affecting the Health of Women and Children,” includes the following practices under its definition of harmful customary practices: female genital mutilation (FGM), forced feeding of women, early marriage, taboos that prevent women from controlling their own fertility, son preference, female infanticide, early pregnancy, and dowry price.

Some of the practices outlined above are found throughout the contemporary Muslim world and are relevant to a discussion of trafficking in persons. Indeed, women and children are the targets of the most serious violations of human rights which occur in Muslim countries as a result of these harmful customary practices. However, these practices largely do not comply with Islamic doctrine. Most frequently, these practices either pre-date Islam, are based on tribal law, or are based on a misinterpretation of Qur'anic and Islamic principles. We will now turn to the discussion of various forms of marriage to tease out harmful customary practices from Islamic doctrine.

In some traditional societies, trafficking of women and girls for the purpose of forced marriage may occur. These practices are common in places where the number of women is significantly lower than that of men, as well as in some countries where tradition and custom may allow for such a practice. While some argue that Islam allows or even provides for such practices, in reality they constitute a perversion of Islamic family law,<sup>100</sup> which rests fundamentally on the right of each person to choose a spouse, a right universally conferred by international human rights law.<sup>101</sup>

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<sup>99</sup> See generally, Kathryn Christine Arnold, *Are Perpetrators of Honor Killings Getting Away with Murder? Article 340 of the Jordan Penal Code Analyzed Under the Convention on the Elimination of All Forms of Discrimination Against Women*, 16 *American University International Law Review*, 1343 (2001).

<sup>100</sup> For the application of Islamic family law in various Muslim countries, see generally, Mark Cammack, Lawrence A. Young, Tim Heaton, *Indonesia's Marriage Law: Legislating Social Change in an Islamic Society*, 44 *The American Journal of Comparative Law*, 45 (Winter 1996); Carol Weisbrod, *Gender-Based Analyses of World Religions and the Law: Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 *Southern California Review of Law and Women's Studies* (Fall 1999); Yakare-Oule Jansen, *Muslim Brides and the Ghost of the Shari'a: Have the Recent Law Reforms in Egypt, Tunisia and Morocco Improved Women's Position in Marriage and Divorce, and Can Religious Moderates Bring Reform and Make It Stick?* 5 *Northwestern University Journal of International Human Rights* 181 (Spring 2007). See also Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* 44 *American University Law Review* 1978 (Summer 1995).

<sup>101</sup> Relevant instruments of international human rights law on marriage include: 1948 Universal Declaration of Human Rights: Men and women have the right to marry, to found a family and are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with free and full consent [Art. 16]; 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery: State Parties agree to abolish any institution or practice whereby “A woman, without the right to

The various schools of Islamic law confer the right of a woman to choose her own spouse in a variety of ways. While the Hanafi school of Islamic jurisprudence grants women such a right directly, the other three schools provide that a woman's "proper guardian" must conclude the marriage contract on her behalf. Consent, however, remains the basis of the marriage, and while these schools contend that the marriage contract is to be executed through a guardian, guardianship with the right of compulsion is explicitly prohibited. In all cases, consent of all parties must be secured for the marriage contract to be valid. Similarly, arranged marriages do not constitute an invalid form of marriage under Islamic law as long as consent is obtained from the parties to the contract.<sup>102</sup> A marriage executed without consent, or a forced marriage, would thus be prohibited by all schools of Islamic jurisprudence, in accordance with international law, and as we shall see, often in contradiction with customary practices. It is important to note here, that the institution of guardianship may indeed lend itself to abuse and illegitimate practices leading to forced marriage.

One example of the abuse of the Islamic institution of marriage as one based on consent, is the practice of "compensatory marriage." In this form of marriage, which is practiced in some Muslim countries, girls are forced into arranged marriages as compensation for a crime committed by their family or as a means of settlement of debts or other family disputes. This practice is known as *Swara* or *Vanni*<sup>103</sup> and is a way of keeping the peace between families and tribes, but it forces young girls into slavery at a young age. This practice, however, "pre-dates Islam and violates Islamic matrimonial law—which states that marriages require the consent of

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refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or a woman on the death of her husband is liable to be inherited by another person." [Art. 1] State Parties must prescribe a minimum marriage age, facilitate methods in which both parties can freely express consent to marriage to appropriate authorities, and encourage the registration of marriages. [Art. 2]; 1957 Convention on the Nationality of Married Women: The nationality of a wife does not automatically change by marriage or dissolution of marriage, when the two parties are of differing nationalities. [Art. 1] A wife has the right to acquire the nationality of her husband. [Art. 3]; 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage: Marriage is not considered legal without the free consent of both parties. [Art. 1] States are responsible for specifying a minimum age for legal marriage. [Art. 2] All marriages must be registered in an appropriate official registry designated for this purpose. [Art. 3]; 1966 International Covenant on Social, Economic and Cultural Rights: Marriage must be entered into with the free consent of intending spouses. [Art. 10]; 1979 Convention on the Elimination of All Forms of Discrimination Against Women: Neither marriage to an alien nor change of nationality of the husband can automatically change the nationality of a wife; women and men have equal rights as to the nationality of their children. [Art. 9] Women cannot be discriminated against on ground of marriage. [Art. 11] Men and women have the same right to freely choose a spouse, enter into marriage, and make decisions about family matters, profession, and ownership of property. Child marriage shall have no legal effect. [Art. 16]. See THE PROTECTION PROJECT AT THE JOHNS HOPKINS UNIVERSITY SCHOOL OF ADVANCED INTERNATIONAL STUDIES (SAIS), COMPREHENSIVE LEGAL APPROACHES TO COMBATING TRAFFICKING IN PERSONS: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE, Mohamed Mattar, (The Protection Project at The Johns Hopkins University School of Advanced International Studies (SAIS), 2006)) at 52.

<sup>102</sup> Prashina J. Gagoomal, "A Margin of Appreciation" for "Marriages of Appreciation": *Reconciling South Asian Adult Arrange Marriages with the Matrimonial Consent Requirement in International Human Rights Law*, 97 *The Georgetown University Law Journal* 589 (2009).

<sup>103</sup> UNFPA FACTSHEET, THE PRACTICE OF 'COMPENSATION MARRIAGES, UNITED NATIONS POPULATIONS FUND FACTSHEET (UNFPA), available at <http://www.unfpa.org/gender/docs/fact-sheets/marriage.doc>, p.1.

both parties”.<sup>104</sup> This form of marriage is thus in violation of international human rights law and Islamic law, which both propagate consent as the fundamental basis for a marriage.

Another condition for the validity of a marriage contract is *Mahr* [dowry], which is to be paid to the bride, otherwise it amounts to a practice similar to slavery.<sup>105</sup> Islamic law forbids trafficking for the purpose of forced marriage and forced marriage more generally, as both constitute a violation of the fundamental principle of Islamic marriage tradition – the consent of all parties to the marriage. Another Qur’anic passage specifically refers to a practice common in pre-Islamic times, which is akin to chattel slavery—one allowing men to “inherit” women as chattel. On this, the Qur’an is clear in its prohibition: “O you who believe, you are forbidden to inherit women against their will... [Ayah 4:19].<sup>106</sup>

Temporary marriage is a form of marriage which is practiced in some Muslim countries and which can, under certain circumstances, lend itself to trafficking for the purpose of sexual exploitation. While the Sunni Muslims believe in a strict prohibition of this practice, it is allowed in Shia Islam. It is thus a more complicated matter than forced marriages, which are explicitly prohibited in Islam. However, while it is more difficult to differentiate, in the case of temporary marriage, whether it is a customary practice or whether it is sanctioned by Islamic tradition, in either case, the exploitation of this practice for illegitimate purposes such as sexual exploitation, is unequivocally prohibited in Islam based on the textual interpretations against deception, coercion and other malfeasant practices condemned by Islamic tradition.<sup>107</sup>

Transactional marriages are common in some Muslim countries, in which a foreigner finds a wife through a “marriage broker,” then takes her back to his home country where he may exploit

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<sup>104</sup> AMNESTY INTERNATIONAL, AFGHANISTAN: WOMEN STILL UNDER ATTACK-A SYSTEMATIC FAILURE TO PROTECT,” (Amnesty International Index ASA 11/007/2005, 2005), available at <http://www.amnesty.org/en/library/info/ASA11/007/2005>, p.1.

<sup>105</sup> Section C of Article 1 of the 1956 Supplementary Convention on Slavery referred to,

Any institution or practice whereby:

- (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardians, family or any other person or
- (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or,
- (iii) A woman on the death of her husband is liable to be inherited by another person”.

<sup>106</sup> Azizah al-Hibri, *An Islamic Perspective on Domestic Violence*, Conference on Dignity and Domestic Violence, Bahrain, December 2-4, 2008.

<sup>107</sup> Historically, *Mut’a* marriage was a type of union customary among some pre-Islamic Arab and Persian tribes before the Arab conquest in the seventh century AD. In its more ancient Arabian form, *mut’a* was a temporary alliance between a woman and a man, who was often a stranger seeking refuge among the woman’s tribe. *Mut’a* was allowed during the year of the conquest of Mecca, as there were so many new converts to Islam and the Prophet feared, being so accustomed to *zina’a*, they would commit it during the time prior to Islam. Although this practice was allowed in the beginning of Islam and was practiced among Muslims during the lifetime of the Prophet, the Prophet later banned this practice, though the Shi’a do not believe in the prohibition. Sunni scholars who are critics of temporary marriage, such as Abdullah Ibn ‘Abbas, explain that “temporary marriage was at the beginning of Islam. A man comes by a town where he has no acquaintances, so he marries for a fixed time depending on his stay in the town, the woman looks after his provisions and prepares his food, until the verse was revealed: “Except to your wives or what your right hands possess.” Ibn ‘Abbas explained that any relationship beyond this is forbidden (Narrated by Tirmizy). See generally Manana Hendissi, *Temporary Marriage in Islam, Part I*, 38 Feminist Review (Summer 1991); Abu Ruquayyaa, “Temporary Marriage and Its Illegitimacy in Islam,” available at <http://www.islam.org.au>.

her.<sup>108</sup> Similar to the abuse and exploitation of the legitimate industry of consensual matchmaking in the West, such a practice constitute an illegitimate abuse of an otherwise legitimate institution.

Child marriages are problematic in some Muslim countries because there is no consensus among Islamic schools of jurisprudence regarding the age of adulthood, and the Qur'an does not specifically address or prohibit child marriage. While customary international law and the UN Trafficking in Persons Protocol define a child as any person under the age of 18, minority status in Islamic law ends with puberty. Additionally, one view of marriage generally accepted by all Islamic branches is that "female or male children not matured or mentally disturbed persons [may be married off by] their due guardians if it could be considered in their best interests".<sup>109</sup>

In these cases, child marriage is permitted only when it is in the best interest of the child, and sexual relations with the spouse are not permitted before the child reaches the required physical competencies, which are defined differently among the different schools of religious law. There is, however, an irrefutable presumption that children cannot have reached puberty before a certain age (defined differently by the various schools) and must have reached it after a certain age. This is different among Shia Muslims, who do not fix a minimum age.

## **SECTION V: PROTECTION OF VICTIMS OF TRAFFICKING IN PERSONS UNDER INTERNATIONAL LAW AND ISLAMIC LAW**

As with the various acts, means and purposes of trafficking in persons, Islamic tradition and Islamic law can provide us with important procedural guidelines that support international law's approach to preventing the crime of trafficking, punishing traffickers and protecting victims of trafficking as mandated by the UN Protocol. For example, Islamic law places a strong emphasis on prevention, and thus addresses what in international anti-trafficking law is referred to as "the concept of the vulnerable victim." Similarly, Islamic law takes into account the special needs of children and members of vulnerable communities, such as of refugee populations. In terms of punishment of offenders, Islamic law provides guidelines that allow us to classify trafficking in persons as a serious crime, as mandated by the UN Protocol, and in terms of the protection of victims of trafficking, Islamic law provides for a variety of victims' rights, such as the right of privacy and the right to compensation for any harm inflicted.

We will explore these issues in-depth, in a comparative perspective with the relevant provisions of the UN Protocol, as well as United Nations Office of the High Commissioner on Human Rights Principles and Guidelines on Human Rights and Trafficking, which provide additional procedural guidelines for addressing trafficking in persons, as stipulated by international law.

### **5.1 Identification and Definition of the Vulnerable Victim**

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<sup>108</sup> USAID, ASSESSMENT OF THE STATUS OF TRAFFICKING IN PERSONS IN EGYPT: CHANGING PERCEPTIONS AND PROPOSING APPROPRIATE INTERVENTIONS (USAID, 2007), available at [http://pdf.usaid.gov/pdf\\_docs/PNADK922.pdf](http://pdf.usaid.gov/pdf_docs/PNADK922.pdf).

<sup>109</sup> Saeid Rahaei, *The Principle of Free and Full Consent to Enter into Marriage (Women and Forced Marriage in Islam)* (on file with author).

Victims of trafficking are “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member states, including those laws proscribing criminal abuse of power.”<sup>110</sup>

Trafficking is generally imposed by the use of threat, force, coercion, abduction, fraud, deception, abuse of power or a position of vulnerability or the giving or receiving of payments or benefits to obtain consent of a person for the purpose of exploitation.<sup>111</sup>

There are certain groups of individuals who are more vulnerable than others to human trafficking. These groups include women, children, refugees, migrants, and internally displaced persons (IDPs), orphans or runaways. Their susceptibility to victimization by traffickers is due to their vulnerable status. Sources of vulnerability stem from a multitude of factors including, but not limited to, poverty, underdevelopment, social-immobility, and lack of equal opportunity.

The holy Qur’an lays out certain regulations and mechanisms to lend additional support to women and children, especially orphans who are considered more vulnerable<sup>112</sup> than other groups and states that believers are to do good to parents, kinsfolk, orphans, the needy, neighbors, strangers, wayfarers, and slaves.<sup>113</sup> Women and children are granted special protection by Islam, and believers are required to provide assistance to the needy and those in distress; some contend that the failure to do so is a sin because of a generally-accepted principle of Islamic law, “whoever neglects an obligation is legally liable for the consequences of that neglect.”<sup>114</sup> This protection is granted to all, as the Qur’an 5:32 states, “If anyone kills a person, it would be as if one has killed all of humanity; if anyone saves a person, it would be as if one has saved all of humanity.”

## 5.2 Violence Against Women and Islamic Law

Trafficking in persons may be classified as a form of violence, especially violence against women,<sup>115</sup> who are often physically and psychologically abused, especially when exploited in the

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<sup>110</sup> Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, G.A. Res 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).

<sup>111</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children to the Convention Against Transnational Organized Crime, U.N. GAOR, 55<sup>th</sup> Sess., U.N. Doc. A/Res/55/25, *opened for signature* Dec. 12, 2000 (*entered into force* Dec. 25, 2003), Art. 3(a).

<sup>112</sup> See e.g. The Qur’an 4:2, “Hence, render unto the orphans their possessions, and do not substitute bad things [of your own] for the good things [that belong to them], and do not consume their possessions together with your own: this, verily, is a great crime” and 17:34, “And do not touch the substance of an orphan, save to improve it, before he comes of age. And be true to every promise – for, verily, [on Judgment Day] you will be called to account for every promise which you have made.”

<sup>113</sup> Qur’an 4:36.

<sup>114</sup> Shikh Zayd b. Abd al-Karim al-Zayed, *The Islamic Duty of Providing First Aid*, Islamtoday, available at [http://www.islamtoday.com/showme2.cfm?cat\\_id=29&sub\\_cat\\_id=1961](http://www.islamtoday.com/showme2.cfm?cat_id=29&sub_cat_id=1961).

<sup>115</sup> The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which calls upon State Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” (Article 6). The 1993 UN Declaration on Elimination of Violence Against Women explicitly defines violence against women to include trafficking. A somewhat similar

sex industry and as domestic servants. More generally, women are among the most frequent victims of trafficking in persons, often as a result of patriarchal social structures and consequent lack of opportunity. These are important considerations when looking at the prohibition of trafficking from an Islamic perspective—we can look at how Islamic tradition approaches violence against women in drawing out the comprehensive Islamic framework of combating trafficking in persons. In doing so, we will first turn to the issue of equality between women and men in the Islamic tradition. A clear understanding of where Islam stands on these issues<sup>116</sup> is crucial to combating trafficking, especially in seeking to ameliorate those conditions that may be contributing to the trafficking infrastructure, as called upon by the UN Protocol on Trafficking.

As was mentioned previously, Islam considers all human beings as equal before God, and this applies likewise to relations between the two genders. On equality between men and women, Qur'an 4:1 states, "O mankind! Be mindful of your duty to your Lord, Who created you from a single being, and from it created its mate, and from the two of them has scattered countless men and women (throughout the earth). Fear God, in Whose (Name) you demand your rights of one another, and (be mindful of your duty) towards the wombs that bore you. God is ever Watching over you." Finally, Qur'an 4:31-32 commands "Do not long for the favours by which God has made some of you excel others. Men shall have a share of what they have earned, and women shall have a share of what they have earned. (Do not envy each other) but ask God to give you of His bounty. God has knowledge of all things." These verses convey the principle of equality and what we today may refer to as equal opportunity, to both genders; such equality of opportunity is likewise conveyed in verse 36 of Ahzab (The Confederates), stating that "Men and women who have surrendered, believing men and believing women, obedient men and obedient women, truthful men and truthful women, enduring men and enduring women, humble men and humble women, men and women who give charity, men who fast and women who fast, men and women who guard their private parts, men and women who remember God often – for them God has prepared forgiveness and a mighty reward." Finally, verse 194 of Al-i-Imran (House of Imran) states that: "I waste not the labour or any that labours among you, be you male or female – the one of you is as the other."

Importantly, Islam, and by extension, Islamic law and society in their true form are to be based on non-hierarchical principles and a prohibition of oppression of others. These tenets stem directly from the central precept of the monotheistic belief in one God whose Will supersedes that of all others and who is thus the only Supreme Being. A human being who considers himself "better" than any other, is considered to be engaging in what Islam calls "Satanic logic," and condemns as hubris or arrogance.<sup>117</sup> Islam thus advocates full equality among human beings. Qur'an 49:13 states, "O mankind, we have created you from a male and female, and we set you up as nations and tribes so that you may be able to recognize each other." And in Qur'an 103:3,

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approach was followed by the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), which prohibited the "exploitation of prostitution of women." It also prohibited "all forms of traffic in women." Whether the 1979 Convention intended to recognize a more comprehensive definition of trafficking, which includes all types of slavery practices, is not entirely clear, although a strict interpretation of the language used may support this conclusion.

<sup>116</sup> Andra Nahal Behrouz, *Women's Rebellions: Towards A New Understanding of Domestic Violence in Islamic Law*, 5 UCLA Journal of Islamic and Near Eastern Law 153 (2005-2006).

<sup>117</sup> See generally Azizah al-Hibri, *An Islamic Perspective on Domestic Violence*, Conference on Dignity and Domestic Violence, Bahrain, December 2-4, 2008.

“I swear by the declining day, that perdition shall be the lot of man. Except for those who have faith and do good works and exhort each other to justice and fortitude.”

The Islamic rules on domestic violence have also been perceived to contribute toward violence against women, especially as concerns the so-called “right to discipline” exercised by a husband over his wife. The right to discipline is based on a Qur’anic verse, which states: Qur’an 4:34 “Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband’s) absence what Allah would have them guard. As to those women on whom part [you] fear disloyalty and ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly); but if they return to obedience, seek not against them means (of annoyance): for Allah is Most High, great (above you all).” However, the interpretation of this verse to read that the husband has a right to hit or otherwise physically discipline his wife has been contested by scholars who argue that such a interpretation contradicts the spirit of the Qur’an, which is to be read as consistent and harmonious with itself; such scholars argue that this type of interpretation stems from patriarchal views on gender relations and is not consistent with the Qur’an.<sup>118</sup> Moreover, any physical harm inflicted upon the wife as a result of a violent action by the husband is considered by the Qur’an as grounds for divorce, and possibly retribution (an important right especially when it comes to the right to compensation afforded to victims of trafficking by the UN Protocol on Trafficking, to be discussed later). Verbal abuse is likewise considered by many Muslim jurists as grounds for divorce. Moreover, as the Qur’an was revealed gradually, it provided further prohibitions on violence against women more generally. For example, in one verse, the Prophet stated “Do not hit *ima’ al-lah* (female servants of God).” Similarly, the Prophet stated that those men who hit their wives are not the best among the Muslims, and that the best among the married men are those who are best toward their wives. When taken together with these *Sunnah*, we must read the “right to discipline” verse accordingly, as one meant symbolically, not literally.

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<sup>118</sup> For example, Dr. Azizah Al-Hibri argues that a non-patriarchal view of this controversial verse bases itself on a reading of the Qur’an as a text which is consistent with itself, and insofar as the text, in many of its verses, emphasizes harmony and affection between the two genders, particularly between husband and wife, the interpretation of the verse in question as encouraging of or bestowing unto the husband a right to beat his wife is inconsistent with these other verses. That the Qur’an encourages marital tranquility and mercy is supported by such Qur’anic verses, and the Prophet’s traditions, in which he never raised a hand against a woman or anyone in his household in contrast to many of his contemporaries. Similarly to the gradual prohibition on wine, interest, and, as we have seen, slavery, because men raising their hand against their wives was a common trend during the pre-Islamic and early Islamic period, Islam sought to place limitations on such behavior, which would ultimately serve to rule it out completely. In this interpretation, the Qur’anic verse in question actually implores the husband to essentially explore all peaceful alternatives, leaving what some interpret as “hitting” to a last resort; further, the injunction “...to beat them lightly” is subject to very strict limitations and actually refers to a non-violent symbolic action. This interpretation is more consistent with the Qur’anic ethos of harmony and tranquility among the sexes and in the family sphere and of its disapproval for the harsh treatment of women in society during the Prophet’s time, and is supported by such verses as: “Be good to women; for they are powerless captives (*awan*) in your households. You took them in God’s trust, and legitimated your sexual relations with the Word of God, so come to your senses people, and hear my words...” and “O people, your wives have certain rights over you and you have certain rights over them. Threat them well and be kind to them, for they are your partners and committed helpers” (See generally, Azizah al-Hibri, *An Islamic Perspective on Domestic Violence*, Conference on Dignity and Domestic Violence, Bahrain, December 2-4, 2008).

The foregoing discussion provides us with ample arguments on the basis of which we can confidently infer an Islamic prohibition on violence against women, whether within or outside the family sphere, which helps us further flesh out our theory of an Islamic framework for combating trafficking in persons.

### 5.3. The Child Victim: Addressing the Special Needs of Children and Orphans

In addition to children being particularly vulnerable to trafficking, children's special vulnerabilities and needs must be taken into account once they are no longer in trafficking situations. Special protection and assistance are required to ensure the best interest of the child. In both cases, the Islamic tradition provides for a secure and protected environment for children. This is particularly important, as child victims of trafficking often come from abusive family environments, where children may be physically or psychologically mistreated. The Islamic approach to caring for children is thus important in its focus on the prevention of circumstances which may force a child out of the house and to seek another life, making the child vulnerable to trafficking.

Islam provides children with a protective environment. Scholars find that the Islamic tradition views childhood with hope and aspiration, seeing it as something to look forward to and long for. According to the Qur'anic text, progeny is a gift from the Almighty Allah to His faithful servants and Islamic law thus seeks to securely provide for the child a framework and a psychological and social climate wherein children may safely learn about the world and understand its customs and norms.<sup>119</sup> According to UNICEF and Al-Azhar University in Cairo, Egypt, "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 - with basic rights to attain sufficient parental care, education, healthcare, enjoyment of recreation and sports and freedom of expression and thought."<sup>120</sup>

When Islam was introduced to pre-Islamic tribes and peoples, the Prophet took an oath from the men and women that they would not kill their children and that this would be considered an absolutely prohibited crime, stating: "...That they will not steal nor commit *zina* nor kill their children" (Qur'an 60:12). For all children, Islam affirms (in the Qu'ran, Sharia, and *Sunnah* of the Prophet the following rights: the right to health and life,<sup>121</sup> the right to a family, kindred, name, property and inheritance; the right to healthcare and proper nutrition; the right to education and the acquisition of talents; and the right to live in security and peace, and enjoy human dignity and protection under the responsibility of the parents.<sup>122</sup> Moreover, "After

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<sup>119</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), p.1.

<sup>120</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), p.7.

<sup>121</sup> This is evident in the Prophet's saying, "There should be neither harming nor reciprocating harm." See *The Right of Parents and Children in Islam, Islam the Modern Religion*, available at [http://www.themodernreligion.com/family/children\\_rights.htm#Equal%20Treatment%20of%20Children](http://www.themodernreligion.com/family/children_rights.htm#Equal%20Treatment%20of%20Children).

<sup>121</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), p.1.

<sup>122</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).

safeguarding the lineage in this manner, Islam imposed certain mutual rights, which proceed naturally from the parent-child relationship, upon children and parents, making certain things *haram* for them in order to protect these rights.<sup>123</sup> This is applied directly to women bearing children, yet it ensures the protection of the “vulnerable child.” For example, a child has the right to sustenance, education, and proper care. The parents are not permitted to neglect the child's needs nor to abuse them. The Prophet said: “Each one of you is a caretaker (*ra'iy*) and is responsible for those under his care” (Reported by al-Bukhari and Muslim). “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” (Reported by Ahmad, al-Nisai, and Abu Daoud).

A father is likewise obligated to treat all his children equally. He is prohibited from bestowing more favors on some of his children than on others without any necessity or valid reason, so as not to provoke dissatisfaction and animosity. These injunctions also apply to the mother, with the Prophet stating, “Do justice among your sons,” and repeating it thrice. The Prophet also stated: “Do not ask me to be a witness to injustice. Your children have the right of receiving equal treatment, as you have the right that they should honor you (Reported by Abu Daoud).” “Fear Allah and treat your children with equal justice” (Reported by al-Bukhari and Muslim). In Al-Mughni, it is stated that special treatment of a child is permissible only due to a special need, a handicap, blindness, or similar. The Prophet's relationship toward children of both genders is noted as “unique for his time and the emphasis placed by him upon the right to life for every child along with the care of orphans was based upon the desire “that his Community should be renowned for the care of children.” This concern is reiterated by the Prophet in disassociating anyone from his community who did not show kindness towards children and respect towards the elderly.<sup>124</sup>

Children who are orphans or runaways are particularly vulnerable to trafficking. These children may be sought out on the streets by unsavory individuals who may force them into exploitative forms of labor, which often include stealing or begging on the streets. Orphans are eligible for special protection in Islam with distinctive mechanisms to protect their property and preserve their dignity.<sup>125</sup>

Special attention is given to orphans since, according to the Prophet “the most loved homes to God, mighty & sublime, are homes in which the orphan is honored.”<sup>126</sup> According to Islamic law, Muslims have a responsibility to show benevolence and care for orphans. Islamic law defines orphans as those children who are left with no protection from their fathers due to death. Traditionally in the history of humanity, men have been the maintainers of their families not only monetarily but also in providing physical protection. In this context, “orphans are vulnerable and

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<sup>123</sup> *The Right of Parents and Children in Islam*, Islam the Modern Religion

[http://www.themodernreligion.com/family/children\\_rights.htm#Equal%20Treatment%20of%20Children](http://www.themodernreligion.com/family/children_rights.htm#Equal%20Treatment%20of%20Children).

<sup>124</sup> Shabnam Ishaque, *Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in the Context of a Child's Right to an Identity*, 22 (3) International Journal of Law, Policy and the Family 393 (2008).

<sup>125</sup> Abdul Hamid Al-Ansari, *Rights of Orphans in Sharia (Islamic Laws)*, International Covenants and National Legislation, National Human Rights Committee (NHRC), Doha Qatar, May 26, 2008.

<sup>126</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>, p.3.

need aid and protection from the community even if their mothers are still living.”<sup>127</sup> Besides the clear mandate within the Qur’an to assist and care for orphans, Muslims have a natural compassion toward orphans because of the life of the Prophet who himself was an orphan. This is evident in the Qur’an 2:83: “[and be good] to the orphans and the very poor, speak kindly to men, make prayer, and give in charity.” God decreed that his final prophet, Muhammad, would become an orphan at a very young age. Finally, the Qur’an concludes that “those who unjustly eat up the property of orphans, eat up a Fire into their own bodies: they will soon be enduring a blazing Fire!”<sup>128</sup> This is reinforcement for the fair and just treatment of orphans who are vulnerable based on the practice and words of the Prophet. The Qur’an obliges guardians of orphans to protect them; “breaching this duty under Qur’anic provisions is punishable with hell.”<sup>129</sup>

The Islamic tradition therefore provides a robust framework for taking into account the special vulnerabilities of children, especially orphans, which may also be extended to the contemporary populations of “street children,”<sup>130</sup> who, while not technically orphaned, often find themselves in situations in which they have lost the protection of their families, and who thus often face the same vulnerabilities as do orphans.

#### 5.4. Refugees, the Internally Displaced, and Migrants

Regarding migrant workers, Qur’anic verses (4:97-99) show that migration can become a necessity for anyone in times of trouble or when one’s life and beliefs are in danger. Some verses go as far as requiring the faithful to choose migration in such circumstances (if they are able to do so).<sup>131</sup>

Although Islam does not offer a comprehensive legal system for the protection of refugees and internally displaced persons, there are Qur’anic citations referring to their status. While the right to seek asylum is discussed in the Qur’an, there is no explicit obligation in Sharia for an Islamic state to grant asylum.<sup>132</sup> The notion of asylum was most exemplified by the Prophet, who himself suffered torture and prosecution and migrated to Mecca with his followers in 622 AD to escape persecution, then was cared for by host communities as a refugee.<sup>133</sup> Islamic scholars have

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<sup>127</sup> Dawud Walid, 2007.

<sup>128</sup> Qur’an 4:10.

<sup>129</sup> Shabnam Ishaque, *Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in the Context of a Child’s Right to an Identity*, 22 (3) International Journal of Law, Policy and the Family 393 (2008).

<sup>130</sup> For a discussion of the phenomenon of street children, Uché U. Ewelukwa, *Litigating the Rights of Street Children in Regional or International Fora: Trends, Options, Barriers, and Breakthroughs*, 9 Yale Human Rights and Development Law Journal 85 (2006).

<sup>131</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>, p.3.

<sup>132</sup> Musab Hayatli: “Islam, International law and the protection of refugees and IDPs”, Forced Migration Review-Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK, p.2, <http://www.fmreview.org/FMRpdfs/Human-Rights/1.pdf>.

<sup>133</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>, p.3.

maintained that “the Holy Qur’an requires the faithful to comply with agreements and treaties on the rights of refugees (5:1) [and] provides a set of instructions in dealing with refugees and migrants, praising those who go to the assistance of people in distress and requiring the faithful to protect refugees (9:100 and 117).”<sup>134</sup> The Qur’an likewise “recognizes the rights of refugees and internally displaced persons, entitling them to certain rights and to humane treatment (8:72-75, 16:41).”<sup>135</sup> Furthermore, under the principle of justice, which is the basis for all Islamic regulations (42:15, 16:90), “those who are most at risk as a result of migration and asylum should be offered extra support.”<sup>136</sup>

Some have argued that non-Muslims might be vulnerable to trafficking in persons in Muslim countries since they often do not enjoy the same rights and protections ascribed to Muslims. However, Islamic law employs the legislative mechanism of *Aman* (safeguard) as “refuge that Muslims offer to non-Muslims.” Such refuge remains inviolate even if the person who is being offered protection is in a conflict against Muslims.<sup>137</sup> Islamic scholars believe that *Aman* creates an “irrevocable bond”<sup>138</sup> between the Muslims and the non-Muslims. Likewise, Islam emphasizes justice and equality, providing for the right to life as a fundamental right for Muslims and non-Muslims alike. Similarly, a person, irrespective of their religion, has a right to be protected from physical harm.<sup>139</sup> Finally, on his deathbed, and as part of his last sermon, the Prophet implored his followers to protect non-Muslims, directing his followers to “Observe scrupulously the protection accorded by me to non-Muslim subjects” (Abu Dawud).

It is thus clear that the Islamic tradition provides for the protection of and assistance to migrant and refugee populations, protection of the rights of non-Muslims as well as those of Muslims, and thus supports international law in striving to alleviate whatever causes of vulnerability may place these populations at a particularly strong risk of being trafficked. As we shall see later, the recognition of the rights of refugees and the Islamic tradition’s acceptance and respect for the institution of asylum and provision of refuge to victims of persecution provides an important traditional and legal foundation for the possibility of the provision of temporary (or permanent) residence status to victims of trafficking who may be persecuted should they return to their countries of origin—something encouraged by the UN Protocol. We shall turn to this issue among others now, as we commence our discussion on the rights of victims of trafficking.

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<sup>134</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>.

<sup>135</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>, p.3.

<sup>136</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>.

<sup>137</sup> Qur’an 9:6.

<sup>138</sup> Saeid Rahaei, *The Rights of Refugee Women and Children in Islam*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/2.pdf>.

<sup>139</sup> Musab Hayatli, *Islam, International Law and the Protection of Refugees and IDPs*, Forced Migration Review (Refugee Studies Center, Oxford Department of International Development, University of Oxford, UK), available at <http://www.fmreview.org/FMRpdfs/Human-Rights/1.pdf>, p.2.

## 5.5. Rights of Victims of Trafficking

According to international law, victims of trafficking should be provided access to a variety of protective services. Article 6 of the UN Protocol addresses comprehensively the elements of assistance to and protection of victims of trafficking. The most critical of these, grounded in international standards of human rights protection, may be identified as follows: *the right to safety*<sup>140</sup>; *the right to privacy*; *the right to information*; *the right to legal representation*; *the right to be heard in court*; *the right to compensation for damages*; *the right to assistance*; *the right to seek residence*; and *the right to return*.<sup>141</sup> These are fundamental rights that entitle victims of trafficking to benefits that should be granted irrespective of their immigration status or their willingness to testify in court.<sup>142</sup>

Victims of trafficking should be entitled to the right to safety. If the country requires the victim of trafficking to testify against the traffickers, then the victim should be provided with witness protection as a prerequisite to coming forward and testifying.

Victims of trafficking should be entitled to the right to assistance, in the form of medical, psychological, legal, and social aid. In this regard, the UN Protocol states:

“[E]ach State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons.” The U.N. Protocol further explains that victims have the right to be granted: “(a) Appropriate housing; (b) Counseling and information, in particular as regards their 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” (Article 6(3)).

Respect for individual human rights under Islamic law is crucial to addressing trafficking in persons, a crime which constitutes a violation of human rights. This becomes particularly important since international law calls on States to recognize victims of trafficking as persons entitled to basic human rights.<sup>143</sup>

<sup>140</sup> In this regard, the UN Protocol provides that:

Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory (Article 6).

<sup>141</sup> Mohamed Mattar, *The Victims of Trafficking Bill of Rights*, International Conference on 21st Century Slavery, The Human Rights Dimension to Trafficking in Human Beings, Rome, Italy, May 15-16, 2002 (on file with author).

<sup>142</sup> The Council of Europe Convention on Action Against Trafficking in Human Beings states in Article 12(6),

Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

<sup>143</sup> In contrast to the “Western” notion of individual rights and human rights, however, individual rights and “human rights” in Islam exist in relation to “human obligations” owed toward God and fellow humans. If the aim of Islamic law is to promote and secure individual freedoms, it also aims at ensuring the welfare of the *umma*, or the community as a whole. Though all rights belong to God and the individual is bound by a duty to act in accordance with God’s divine provisions, the ways in which the legal system of Islam has laid down the principles of individual rights and personal freedom is very clear amid extensive injunctions. This link between human rights and human obligations in two articles of the Cairo Declaration on Human Rights in Islam (1990):

Article 1 (a), “All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social

Respect for the individual is the central precept of Islam—the warning against persecution of individuals is repeated 299 times in the Qur’an and the phrase “justice and equality” appears at least sixteen times. It may also be argued that equal protection is likewise a basic premise in Islamic legal theory. For example, the Prophet Muhammad declared in the Great Pilgrimage that “All Moslems are brothers unto one another,” and that “There is no superiority of an Arab over a non-Arab except as his devotion is concerned.”

Islamic law and legal tradition both provide for many of the rights enumerated above to which victims of trafficking are entitled. As we have already discussed, Islam recognizes the right to refuge, asylum and migration, which is applicable to both the victim’s right to safety (since Islam emphasizes the injunction to provide protection to those in distress) and the victim’s right to residence, by providing that one whose life is threatened by persecution has the right to seek refuge in another place. As victims of trafficking often face reprisals and possible persecution by their traffickers in their countries of origin, the countries of destination should thus consider providing refuge to victims who are identified and rescued on their territory. The provision of a safe and secure environment to victims of trafficking would thus follow in the tradition of the Prophet who was himself provided refuge after fleeing persecution.

Likewise, the right to privacy is provided for in Islamic law. It is explicitly provided for in the Qur’an, and applies both to residential privacy: “Enter not houses other than yours until ye have asked permission and saluted those in them. If ye find no one is in the house, enter it not until permission is given to you. If ye are asked to go back, go back”<sup>144</sup> and communication privacy: “and spy not on each other behind their backs”.<sup>145</sup> These mandates to respect privacy may be applied to victims of trafficking, for whom the breach of confidentiality can be dangerous. Islamic law also recognizes the right of a victim of a crime to compensation in accordance with the Islamic tradition of the Prophet, *la darar wa la dirar*, or “no injury and no inflicting of injury.” According to this tradition, he who causes harm should repair such harm—the basis for providing compensation for damages. As stated in the *Majallah-el Ahkam-i-Adliya*<sup>146</sup> “a person who does an act shall be held responsible if such act causes harm to another. The purpose of the principle of no injury or repaired harm is to achieve justice, a basic principle under Islamic law.” The right to assistance is likewise covered by the Islamic principles of assistance to those in distress and those in need—victims of trafficking certainly find themselves often psychologically and physically traumatized and do require medical and psychological aid.

In Islam, free men are equal before the law and are entitled to equal protection from the law. “No Arab is superior to a non-Arab except in devotion” runs the *Hadith*. The right of the accused to be presented by counsel is recognized based on the Islamic theory of “protected interests” which

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status or other considerations. True faith is the guarantee for enhancing such dignity along the path to human perfection.”

Article 9 (b), “Every human being has the right to receive both religious and worldly education from the various institutions of education and guidance, including the family, the school, the university, the media, etc., and in such an integrated and balanced manner as to develop his personality, strengthen his faith in God and promote his respect for and defence of both rights and obligations.”

<sup>144</sup> The Quran, Chapter 24:27.

<sup>145</sup> The Quran, Chapter 49:12.

<sup>146</sup> Translates in English as “The Mejelle.”

guarantees an individual: freedom of religion, right to self-representation, freedom of thought and experience and knowledge, right to procreation, and the right to property. These rights would likewise be applicable to victims of trafficking, providing them with the right to legal representation and to be heard in court.

We can thus glean from the foregoing discussion that we can find in Islamic law the necessary provisions required to provide the comprehensive set of rights for victims of trafficking afforded them by virtue of international law.

## 5.6. The Principle of the Non-Punishment of Victims in Islamic Law

The concept of the non-punishment of a victim of trafficking in persons is closely linked to ensuring that the rights of victims of trafficking are respected. Recognition of the trafficked person as a victim thus requires the application of the principle of non-punishment. According to this principle, the law must excuse victims of trafficking in persons from criminal liability for the acts committed as a result of being trafficked, including illegal entry, falsification of travel documents, or prostitution which is criminalized in the country, if such acts are a result of the act of trafficking itself or if they are compelled to commit these acts.<sup>147</sup>

The Qur'anic legislation is the first law to recognize the principle of non-punishment of the victim of a crime, especially as linked to trafficking for the purpose of sexual exploitation. In accordance with the Quran 24:33, "But force not your maids to prostitution when they desire chastity.... But if anyone compels them, yet, after such compulsion, is Allah, Oft-Forgiving, Most Merciful (*to them*)."

## 5.7. Prevention of Victimization

As has already been mentioned, prevention is a key concept of the Islamic legal tradition, and Islamic thought more generally. "Prevention is better than cure," goes a well-known Islamic saying. This is particularly clear in Islam's approach to illness, for example, with the tradition of the Prophet urging the protection from disease by adhering to the following principles: "Do not

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<sup>147</sup> Similarly, while the UN Protocol treats the trafficked person as a victim, it does not specifically provide for the principle of non-criminalization. However, recommended principle 7 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking stresses that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

The Handbook for Parliamentarians on Combating Child Trafficking recommends that:

*"Under no condition should laws criminalize children. Those who have been trafficked or sexually exploited must be treated as victims, not as offenders. The law needs to include specific provisions guaranteeing that children will not face criminal penalty as a result of their being trafficked into illegal industries such as prostitution. Victims are not to be subject to incarceration, detention or other punishment."*

Guideline 8 of the OHCHR Recommended Principles and Guidelines on Human Trafficking reiterates that children who are victims of trafficking should not be subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons (UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, E/2002/68/Add.1).

harm yourselves or others. Do not let those infected transmit their disease to those who are healthy. If you know that plague is raging in a specific land do not enter it and if it happens in a land where you are, do not seek to leave it.” Similarly to these practical precautions, Islam emphasizes personal and spiritual cleanliness as a form of prevention.<sup>148</sup>

### **5.8. The Role of the Ordinary Citizen in Enjoining Good and Forbidding Evil: The Principle of Participation<sup>149</sup>**

According to Islamic legal theory, the ordinary person is under a duty to enjoin the good and forbid the evil.<sup>150</sup> In accordance with the Qur’anic verse: "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" (3:104) and "...The believing men and the believing women are helpers of each other: they bid the good, forbid the evil, establish the prayer, pay the alms, and they obey Allah and His Messenger--these are the people on whom Allah will be merciful. Indeed Allah is Powerful and Wise." (9:71). Similarly, under the tradition of the Prophet, “Whosoever removes the pain and trouble of another believer, Allah will remove his trouble on the Day of Judgment.” He also said “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” [Abu Daud, Adab Bab al-Muwakhat; Abu Daud, Adab Fial-Ma'unah lil Muslim.]

Consequently, it is the duty of every Muslim not only to report suspicious trafficking activities, but also to treat victims of trafficking with dignity and respect and provide them with the proper assistance and protection.

## **SECTION VI: THE NATURE OF THE CRIME OF TRAFFICKING IN PERSONS IN THE ISLAMIC LAW OF CRIME AND PUNISHMENT**

One of the most important elements of a comprehensive approach to combating trafficking in persons is that of the designation of trafficking in persons as a specific and serious crime, one

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<sup>148</sup> See generally, Sarah S. Gilbert, *The Influence of Islam on AIDS Prevention Among Senegalese University Students*, 20(5) AIDS Education and Prevention 399 (2008), available at <http://www.atypon-link.com/GPI/doi/pdfplus/10.1521/aeap.2008.20.5.399?cookieSet=1>.

<sup>149</sup> For a discussion of the principle of participation in a “5 P” approach to combating trafficking that includes prosecution, prevention, protection, provision and participation. See Mohamed Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention*, 14 Tulane Journal of International and Comparative Law, 357 (2006) at 406-408.

<sup>150</sup> In the Islamic Republic of Iran, "al-'amr bilma'ruf wa al-nahy 'an al-munkar" is a universal and reciprocal duty that must be fulfilled by the people with respect to one another, by the government with respect to the people, and by the people with respect to the government. The conditions, limits, and nature of this duty will be specified by law. (This is in accordance with the Koranic verse "*The believers, men and women, are guardians of one another; they enjoin the good and forbid the evil.*" [9:71]) [Iran Constitution Article 8 [Community Principle]. See generally, "*The state protects Islam; it implements its Shari'ah; it orders people to do right and shun evil; it fulfills the duty regarding God's call.*" [Saudi Arabian Basic Law of Governance, Article 23 [Islam]. For a discussion of the Basic Law, see Abdulaziz H. Al-Fahad, *Ornamental Constitutionalism: The Saudi Basic Law of Governance*, 30 Yale Journal of International Law 375 (2005).

that carries a strict and deterrent punishment. We thus need to explore whether Islamic law provides for us the basis and support for tackling trafficking in persons in this way.

### **6.1. The Classification of Crimes in Islamic Law and the Place of Trafficking in Persons in the Islamic Criminal System**

Islamic law is wider than positive legal systems. While in positive legal systems, civil acts are classified as either lawful or unlawful, civil acts in Islamic law are five, and are delineated according to the degree of the binding character of the act. *Fard* or *wajub* is a mandatory act, such as the daily prayers or fasting during the month of Ramadan. Other acts are *haram*, or forbidden by Islam, such as the consumption of pork or alcohol, while others are *makruh*, or hated, but not considered to be a sin and as such require no civil or criminal sanctions. An example of a *makruh* act is divorce, which “in the sight of God the most reprehensible of all permitted acts.” Other acts are *halal*, or permissible, and this is the basic principle of law, or the norm.<sup>151</sup> Inaction, or failure to protect victims of trafficking or compensate them for the harm they suffer is *haram*.

### **6.2. Hudud, Ta'zir, and Qisas Crimes in Islamic Law**

Under Islamic law crimes are of three categories, *hudud*, *ta'zir* and *qisas*. This classification is based on two textual sources of Islamic law, the Qur'an and the traditions of the Prophet, and the important distinction between three types of rights: God's (divine) rights, individual rights, and mixed rights.

*Hudud* crimes are determined by the text. These include theft, highway robbery, adultery, fornication, an unfounded accusation of sexual intercourse, alcohol use, rebellion, corruption in land and apostasy and are considered crimes against God. *Ta'zir* crimes are those acts that endanger public order or state security, and the crime is left to the discretion of the ruler and its punishment is discretionary in nature. *Qisas*<sup>152</sup> crimes are offenses against persons, such as murder, which either require retaliation (*qisas*) or financial compensation (*diya*). Every legal system considers certain acts unacceptable, criminal in nature and they decide on certain punishments for these criminal acts.

An important function of *Ta'zir* is to provide grounds for the punishment of those who have committed *hadd* crimes or crimes against persons but cannot be sentenced to the appropriate punishment for procedural reasons.

While punishments in the Islamic criminal justice system are severe, they are designed to serve the purpose of “deterrence” and they are also designed to protect the public from the possibility of repeat or worse offenses committed by the same offender. The punishment for apostasy, highway robbery, rebellion and adultery is death. This severe punishment is justified in Islamic law by deterrence, retribution and rehabilitation. The Qur'an 2:179 states “The law of fair

<sup>151</sup> See, Abdel-Wahhab Salah-Eldin, *Meaning and Structure of Law in Islam*, 16 Vanderbilt Law Review 115 (1962) at 119.

<sup>152</sup> See generally, Hossein Esmaeili and Jeremy Gansast, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 Denver Journal of International Law and Policy 145 (2000).

retribution is a source of life [by adhering to it, you may be restrained from desiring the death of those who murder and instead be content with compensation]. This point we clarify so that you may fear God (and exercise caution when seeking revenge).”<sup>153</sup>

Islamic law not only protects the rights of the victims, but also the rights of the accused, and provides for following procedural safeguards: the presumption of innocence until proven guilty, a high standard of proof in criminal matters, the right to cross-examination, the right to appeal, the right to legal counsel, and the prohibition of compelled confessions. The Prophet warned: “God shall torture on the Day of Judgment those who inflict torture on people in life.” The right of the accused to be presented by counsel is recognized based on the Islamic theory of “protected interests” which guarantees an individual the right to freedom of religion, the right to self-presentation, freedom of thought, the right to procreation, and the right to property. Moreover, the right of an individual or his representative to present evidence is supported by the tradition of the prophet who advised Ali when he granted him the governorship of Yemen: “If two adversaries come for arbitration do not rule for the one before you have similarly heard from the other.” *Shubba*, or doubt, will result in nullification of *Hudud* punishments. One *Hadith* states, “Nullify the *Hudud* if there is doubt and lift the death penalty as much as you can,” and in another, “if the judge makes a mistake in amnesty it is better than a mistake in punishment.” Strict rules of evidence ensure that criminal convictions and punishment are imposed only in cases in which there is certainty of guilt, and thus Islamic law requires direct evidence, as opposed to circumstantial evidence (i.e., evidence which is considered to possess a high degree of direct reliability). A defendant’s guilt must be established by direct rather than circumstantial evidence. The classic method for proof is the testimony of an eyewitness. In the crime of *zina* (adultery), for example, the Qur’an requires four male eyewitnesses or four confessions to sustain a *zina* conviction and the four witnesses must see the actual act of penetration.

*Ta’zir* are offenses whose punishments are not fixed by the Qur’an or the *Sunnah*. They are within the discretion of the ruler who is in charge of maintaining public order, public safety and public tranquility. A *Ta’zir* crime may constitute a threat to one of the following five essentials of Islam: (1) The practice of religion; (2) The development of the mind; (3) The right to procreation; (4) The right to personal security; and (5) The right to possess property and wealth. *Ta’zir* are also inflicted for acts condemned in the Qur’an and *Sunnah* or contrary to the public welfare but not subject to *Hudud Qisas* – but *Ta’zir* punishments are also inflicted for acts which do not meet the strict technical requirements of *Hudud* or *Qisas* – such as theft of an item which is not of sufficient value to qualify as a *hudd* offense and for acts which are normally punishable by *Hudud* but due to insufficient or doubtful evidence, they are punishable by *Ta’zir*.

Only intentional murder attracts the possibility of the *qisas* retaliatory measure of capital punishment. The other categories may only result in the lesser *qisas* remedy of *diyya*, or monetary compensation. But the right of *qisas* is held exclusively by the heirs of the victim. The

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<sup>153</sup> The concept of *tawba*, or repentance, is the act of forgiveness for one’s wrongdoing after acknowledgment of the harm or injury caused to others or to oneself. The Quran 39:53 states - “Say [O Muhammad]: “O my people who have been excessive against yourselves, do not despair of God’s mercy] surely God will forgive sins altogether] surely God will forgive sins altogether, surely He is the All-forgiving, the All-compassionate. Turn unto your lord and submit to Him, before the chastisement comes upon you [for then it will be too late and] you will not be helped.”

judge's role in the *qisas* capital punishment is limited to reaching the death penalty verdict. An heir to a victim has the following options: he or she may ask for the death penalty, seek monetary compensation, or demand an apology. While the Islamic legal system seeks "retributive justice," it also calls for "restorative justice." Restorative justice encourages the perpetrator of the crime to recognize the harm inflicted on the victim and repair such harm. Consequently, the Qur'anic legislation allows for an alternative to the death penalty and that is "blood money."

### **6.3. Trafficking in Persons: A *Ta'zir* Crime in Islamic Law**

Since it is not defined specifically in the Qur'an or *Sunnah*, trafficking in persons may be classified as a *Ta'zir* crime, and the governments in Muslim countries have the discretion to enact such penalties as to be commensurate with its gravity. Trafficking in persons no doubt constitutes a clear violation of one's right to personal security, one of the five essentials of Islam.<sup>154</sup> This specification emphasizes trafficking in persons as a threat against human security and not only as a crime against the State. In that sense, human trafficking is different from drug trafficking and human smuggling; both are also *Ta'zir* crimes under Islamic criminal law.

Given our foregoing discussion, Islamic law provides a broad and comprehensive foundation outlining a robust prohibition on the acts and means of trafficking, and condemns its exploitative purposes. Given the Islamic injunctions against exploitation and oppression, governments of Muslim countries should thus seriously consider enacting anti-trafficking legislation, which would both fulfill the corresponding obligations of the Islamic legal tradition, as well as international law.

### **6.4. Non-applicability of Statute of Limitations or Prescription Period**

In many States, a statute of limitations or prescription period sets forth the maximum period of time within which legal proceedings may be initiated in respect of certain events. The Organized Crime Convention requires that:

"Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice" (Art. 11, para. 5).

States may also consider providing that no statute of limitations or prescription period applies to such crimes. Together with severe penalties commensurate with the gravity of the crime of trafficking, such a provision may serve to send a strong message of deterrence. This notion is embedded in the Rome Statute of the International Criminal Court<sup>155</sup>, which states that the crimes under the jurisdiction of the Court, which include trafficking in persons, "shall not be subject to any statute of limitations" (Article 29). The Rome Statute of the International Criminal Court defines crimes against humanity to include enslavement and defines enslavement to mean:

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<sup>154</sup> It may be argued that organized trafficking may entail elements of the crimes of corruption in land or highway robbery.

<sup>155</sup> Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, *opened for signature* July 17, 1998, (*entered into force* July 1, 2002).

“the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children” (Article 7).<sup>156</sup>

The crime of trafficking in persons under Islam has no statute of limitations. According to the tradition of the prophet, the second source of Islamic legislation, there is no statute of limitations: “a right of a Muslim does not extinguish by lapse of time.” Therefore, there is always an obligation to fulfill one’s duty and perform regardless of the time a claim is made.

## **SECTION VII: CONTEMPORARY LEGISLATIVE ENACTMENTS PROHIBITING TRAFFICKING IN THE MUSLIM WORLD**

That Islamic law is in harmony with the international law on trafficking in persons is supported by the fact that a number of international and regional human rights documents adopted in the Muslim world, as well as some Muslim constitutions and national legislation have all condemned and prohibited trafficking in persons and/or related crimes. This section of the paper will explore these documents and laws in detail, serving as a collection of best practices to be followed by those Muslim countries which have yet to enact legislation prohibiting trafficking in persons and protecting victims of trafficking.

Some Muslim countries already envision their response to the problem of trafficking as based on the traditions of Islam. Consider the following quote from the Report of Saudi Arabia to the CEDAW Committee in reference to its obligations under Article 6 of CEDAW.<sup>157</sup> The Saudi Arabia report states as follows:

“In view of the fact that the Kingdom applies the Islamic 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 the Islamic Shariah, which seeks to root out such inhuman practices. The Kingdom has been able to take practical measures to close all the loopholes through which unlawful sexual practices might establish a presence in the country by organizing campaigns to apprehend those who engage in immoral practices and taking the necessary measures against them. Such measures are designed to combat these dangerous social diseases and preserve morality and behavioural values in society. These efforts have achieved notable success, reflecting the State’s sincere desire to combat such unlawful practices. It should be stated that these practices are limited and almost negligible, and

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<sup>156</sup> See, Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 *Fordham International Law Journal* 457 (1998); Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 *San Diego International Law Journal* 73 (2004).

<sup>157</sup> Art. 6 of CEDAW states,

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

are contained by the authorities, as explained above and clearly shown in the statistics issued by the security authorities.”<sup>158</sup>

Likewise, in reporting to the CRC committee under Articles 34-36,<sup>159</sup> Saudi Arabia states that

“The law prohibits the sale and trafficking of children and takes appropriate measures to protect children from all other forms of exploitation, abduction and abuse. Anyone who abducts, traffics or exploits a child will be prosecuted under the Criminal Code, which is consistent with Islamic law. Islam prohibits injustice, murder, prostitution, coercion to engage in debauchery, and all forms of depravity, and indicates how the perpetrators of such offences should be dealt with. It shows how minors should be guided and protected, guarantees their welfare and rights, punishes anyone who harms a child, encourages people to love, care for, respect and bring children up well, accords them their rights without humiliating or harming them.”<sup>160</sup>

Clearly, Islamic law provides for basic principles of prohibition of the crime of trafficking in persons and these principles should be fully, adequately, and effectively implemented.

### **7.1 International and Regional Human Rights Documents Propagated in the Muslim World Prohibiting Trafficking in Persons and Related Crimes**

Recent international human rights documents promulgated in the Muslim world have attempted to address the issue of trafficking more explicitly and based on Islamic doctrine. For example, Article 13 of the Cairo Declaration on Human Rights in Islam of 1990 states that an employee “may neither be assigned work beyond his capacity nor be subjected to compulsion or harmed in any way.”<sup>161</sup>

Likewise, since prostitution is prohibited under Islamic law, not only trafficking for the purpose of exploitation of the prostitution of others, but trafficking for the purpose of prostitution is

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<sup>158</sup> CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 18 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, CEDAW/C/SAU/2, COMBINED INITIAL AND SECOND PERIODIC REPORTS OF STATES PARTIES, SAUDI ARABIA, 29 March 2007.

<sup>159</sup> The Convention on the Rights of the Child states,

Article 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35: States Parties shall 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.

Article 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

<sup>160</sup> CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 44 OF THE CONVENTION ON THE RIGHTS OF THE CHILD, CRC/C/136/ADD.1, SECOND PERIODIC REPORTS OF STATES PARTIES DUE IN 2003, SAUDI ARABIA, April 21, 2005.

<sup>161</sup> Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

prohibited under the Arab Charter of Human Rights.<sup>162</sup> Article 10 of the Charter makes this distinction, prohibiting “trafficking in human beings for the purposes of prostitution” and “the exploitation of the prostitution of others or any other form of exploitation.”

More specifically, Article 10 of the Arab Charter on Human Rights provides that:

- (1) All forms of slavery and trafficking in human beings are prohibited and punishable by law, No one shall be held in slavery and servitude under any circumstances.
- (2) Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.

Additionally, the Arab Charter also prohibited organ trafficking, stating in Article 9 that “no one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances”.

Arab countries that ratified the Charter are required to report on the status of trafficking in their countries.<sup>163</sup>

## **7.2. Constitutional Provisions in the Muslim World Prohibiting Trafficking in Persons and Related Crimes**

A number of constitutions of Muslim countries have explicitly prohibited trafficking in persons. Article 11 of the Pakistani Constitution prohibits slavery, all forms of forced labor, and

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<sup>162</sup> Arab Charter on Human Rights, League of Arab States, May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005), *entered into force* March 15, 2008. See generally, Mervat Rishmawi, *The Revised Arab Charter on Human Rights: A Step Forward?* 5 Human Rights Law Review 361 (2005).

<sup>163</sup> The Arab Charter on Human Rights states in Article 48,

1. The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration.
2. Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the States parties to supply it with additional information relating to the implementation of the Charter.
3. The Committee shall consider the reports submitted by the States parties under paragraph 2 of this article in the presence of the representative of the State party whose report is being considered.
4. The Committee shall discuss the report, comment thereon and make the necessary recommendations in accordance with the aims of the Charter.
5. The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General.
6. The Committee's reports, concluding observations and recommendations shall be public documents which the Committee shall disseminate widely.

See generally Mohamed Mattar, *Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings*, 41 Vanderbilt Journal of Transnational Law 1355 (2008).

trafficking in human beings. In Article 20, the Constitution of Sudan states that “everyone shall be free and no one shall be held in slavery or servitude or degraded, or tortured.” Similarly, Article 34 of the Constitution of the United Arab Emirates states that “no person may be enslaved.” More recently, the Iraqi Constitution, under Article 37, explicitly prohibits “trade in women or children” and the “sex trade.”<sup>164</sup>

### **7.3. National Legislations in the Muslim World Prohibiting Trafficking in Persons and Related Crimes**

Finally, that Islamic law is in harmony with international provisions against trafficking in persons has become progressively more emphasized by virtue of the enactment of national legislation prohibiting trafficking in an increasing number of Muslim countries around the world. As most of these countries require that national legislation be in compliance with Islamic law, the fact that anti-trafficking legislation has been developed and enacted signifies that the two are in compliance with one another. These laws cover all the various elements of combating trafficking in persons.

In 2007, the Kingdom of Bahrain prohibited the crime of trafficking in persons and stipulated provisions for the protection of victims and the prevention of the crime.<sup>165</sup> Likewise, Indonesia promulgated a new anti-trafficking law in 2007, endowing victims with benefits and providing

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<sup>164</sup> Mohamed Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and “Islamic Law” be Reconciled in Future Legislative Enactments and Judicial Interpretations?* 30 *Fordham International Law Journal* 126 (2006) states at 131-132,

For the first time, with Article 37 of the new Iraqi Constitution, an Arab constitution explicitly prohibits “trade in women or children” and the “sex trade.”...With the enactment of the new Iraqi Constitution, Article 37 seems to require the Iraqi legislature to enact a law explicitly prohibiting “trade in women or children.” Iraqi Law no. 8 of 1988 only prohibits prostitution, the exploitation and facilitation of prostitution, and maintaining a brothel. A specific anti-trafficking law is needed because criminalization of the offense of trafficking in persons should include all forms of trafficking, whether for the purpose of prostitution, forced labor, or other forms of slavery. In addition, such a law must also provide for the necessary measures to protect victims of trafficking.

<sup>165</sup> LAW ON THE PREVENTION OF HUMAN TRAFFICKING (Bahrain), 2007, Article 6 states,

During the investigations or prosecution of a case of trafficking in persons, the victim (plaintiff) shall be entitled to the following measures:

- 1- Legal counseling in a language that the victim of trafficking in person can understand.
- 2- Information about his/her status and rights;
- 3- Examination by a specialized physician shall be offered to the plaintiff, if he or she needs psychological or medical care, or upon his or her request.
- 4- Housing at a care center, or assignment to a psychological or medical rehabilitation establishment center shall be awarded in case the plaintiff's age, psychological or medical conditions require such a decision.
- 5- Housing shall be provided if the plaintiff is in need. Any accredited institution capable of providing housing, or any shelter centers shall be used to grant the plaintiff a place to stay.
- 6- Security- and according to the circumstances- security arrangements shall be offered, to the trafficking in persons' victim in any proper sheltering place.
- 7-If the victim is a foreigner, or if she/he is in need of work during the investigation or the deliberations of the case, the president of the Committee stipulated in article eight shall be addressed to remove all legal barriers in this regard, and until the final arbitration of the case.

for entitlement to restitution.<sup>166</sup> The Indonesian law went further to penalize the abuse of power which results in trafficking in persons.<sup>167</sup> Also in 2007, Malaysia enacted anti-trafficking legislation which mandated the establishment of an inter-ministerial Council for Anti-Trafficking in Persons tasked with the provision of protection and support to victims of trafficking.<sup>168</sup> Other Muslim countries that have prohibited trafficking and related offences include Nigeria, which also prohibits crimes related to trafficking, such as child sex tourism,<sup>169</sup> and the United Arab Emirates.<sup>170</sup> That Islamic law and the prohibition of trafficking in persons are in full harmony with one another may be exemplified by the law of the United Arab Emirates, which utilizes the exact definition of trafficking in persons provided by the UN Protocol in its law.<sup>171</sup>

## Conclusion

Trafficking in persons is a problem that affects the Muslim world and an Islamic approach, one complementary to and supportive of the international legal framework confronting the problem

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<sup>166</sup> “Every victim or his/her beneficiary, as a result of the crime of trafficking in persons, is entitled to receive restitution. Restitution [...] is payment for losses to be provided by the perpetrator to the victim or his/her beneficiary.” LAW ON THE COMBAT AGAINST THE CRIME OF TRAFFICKING IN PERSONS (Indonesia), 2007, Article 38.

<sup>167</sup> “Any state administrator who abuses his/her power to force a person to commit, not commit or allow something that results in the crime of trafficking in persons, is liable to [a minimum penalty of 4 years imprisonment and a maximum penalty of 15 years and a minimum fine of sixty million rupiahs and a maximum of three hundred million rupiahs.]” Indonesia, Law on the Combat against the Crime of Trafficking in Persons of 2007, Article 12.

<sup>168</sup> “A body to be known as the Council for Anti-trafficking in Persons shall be established. The Council shall consist of various ministries and not more than three persons from non-governmental organizations or other relevant organizations having appropriate experience in problems and on issues relating to trafficking in persons including the protection and support of trafficked persons” (ANTI-TRAFFICKING IN PERSONS ACT (Malaysia), 2007, Article 6).

<sup>169</sup> TRAFFICKING IN PERSONS (PROHIBITION) LAW ENFORCEMENT AND ADMINISTRATION ACT (Nigeria) imposes an obligation upon every tour operator and travel agent to (Art. 30):

- “(a) notify its clients of its obligation not to aid and abet, facilitate, or promote in any way the traffic in any person;
- (b) notify its clients of their obligation not to aid and abet, facilitate, or promote in any way any person’s pornography and other person’s exploitation in tourism;
- (c) insert in contracts with corresponding suppliers in destination countries, clauses requiring them to comply with the obligations stated in the preceding paragraphs of this subsection;
- (d) refrain from utilising messages on printed material, video or the Internet that could suggest or allude to behaviour incompatible with the objectives of this Act;
- (e) inform their staff of their obligations under this Act; and
- (f) include clauses regarding their obligations under this Act to their staff in new employment contracts.”

In addition, the Nigerian law imposes an obligation upon “every airline company [to] promote through very possible means public awareness of the guiding principles of this Act in in-flight magazines, ticket jackets, Internet units and video on long plane flights,” TRAFFICKING IN PERSONS (PROHIBITION) LAW ENFORCEMENT AND ADMINISTRATION ACT (Nigeria), 2003.

<sup>170</sup> “Punishment for the crime of trafficking is life in prison if the perpetrator of the crime is a public official or a person assigned to carry out public service,” TRAFFICKING IN HUMAN BEINGS LAW (United Arab Emirates), 2006, Article 2.

<sup>171</sup> TRAFFICKING IN HUMAN BEINGS LAW (United Arab Emirates), 2006, Article 1 states,

The following words and phrases shall have the meanings indicated alongside, unless otherwise provided for in the context:

Human Trafficking: The Recruitment, transportation, transfer or receipt of persons by means of threat or force or other forms of coercion, abduction, fraud, deception, abuse of power or abuse of a position of vulnerability, or of the giving or receiving of payments or benefits in order to gain the consent of a person having control over another person for the purpose of exploitation.

can become a valuable asset. Addressing the position of Islam on the various issues of trafficking in persons is imperative if we want to educate Muslims about the magnitude of the problem and in developing ways to confront it. Muslim scholars should issue *fatwas* against harmful and illegal acts that constitute trafficking in persons, whether they are manifested as arranged marriages that may take place in the absence of any consent on the part of the woman, mistreatment of domestic workers, or any other forms of labor or sexual exploitation, whether or men, women, or children, in violation of basic principles of Islam. Moreover, Islamic legislation, based upon the two textual sources, the Qur'an and the traditions of the Prophet, provides for general principles, including no injury and no inflicting of injury, enjoining the good and forbidding the evil, and a prohibition of exploitation that should be interpreted through the process of *ijtihad* to establish a general theory of the protection of victims of a crime, including victims of trafficking.

In doing so, this paper has attempted, on the basis of Islamic texts and supported by a process of interpretation, to develop a comprehensive Islamic framework that addresses the problem of trafficking in persons in its entirety. In doing so, the paper has presented the international human rights legal framework for punishing the crime of trafficking and protecting victims of trafficking, and provided an overview of the Islamic legal doctrine. Further, the paper traced the evolution of the international legal approach to combating trafficking in persons from the original prohibition of traditional slavery to a more modern concept of trafficking in persons as a crime of exploitation. Having set out these foundational pillars, the paper discussed both the Islamic gradual elimination of the institution of slavery, as well as its prohibition of exploitation, whether labor or sexual exploitation, as applicable to trafficking in persons. Further, the paper attempted to draw a distinction between harmful and illegal acts that constitute customary practices, such as forced and temporary marriage, which contravene principles of Islamic law, which, in turn, prohibits such practices. Finally, the paper analyzed how Islamic law classifies the crime of trafficking in persons, and the strict punishment that it invokes for such a crime. Trafficking in persons may be classified as a *ta'zir* crime that every Muslim state should declare as a serious offense which warrants a serious penalty. In the meantime, such a penalty should only be imposed in compliance with Islamic substantive and procedural safeguards that protect the accused. Islamic law also affords various protective measures to victims of trafficking, especially women, children, refugees, internally displaced persons, and migrants. Qur'anic legislation is explicit in exempting a victim of prostitution from liability if she is forced to perform this act. The tradition of the Prophet further abolishes the statute of limitations, a rule that should apply to violent crimes, including trafficking in persons.

The Islamic prohibition of trafficking in persons is therefore based on a comprehensive set of principles solidly grounded in the Islamic legal tradition that, taken together, not only criminalize the act of human trafficking, but also prevent such an act, and protect victims of this crime. In summary, these principles include: a prohibition of the institution of slavery, a prohibition of all forms of exploitation including prostitution or prostitution-related activities, domestic servitude and other forms of forced labor or services, begging, or trade in human organs, a prohibition against bribery, a denunciation of hardship, rejection of all forms of oppression, recognition of a person's right to privacy, residency and legal representation, a prohibition of injury or harm, provision for compensation of victims, a general duty to enjoin the good and prohibit the evil, and the exultation to non-discrimination, equality and justice.

This approach supports the view that it is not sufficient to simply conceptualize trafficking in persons in the Muslim world as a form of slavery, especially because slavery, at least in the traditional sense, has been outlawed throughout the Muslim world. The essence of trafficking in persons is exploitation, many forms of which still exist in the Muslim world in clear violation of Islamic principles. Trade in human beings, buying and selling them should be condemned, as well as any case of control, undue influence, or exploitation of human beings.

It is encouraging that the Arab Charter of Human Rights of 2004, the latest regional human rights document promulgated in the Muslim world has created a reporting mechanism whereby Arab countries will report on the status of human rights in their countries, including the status of human trafficking in accordance with Article 10 and human organs, in accordance with Article 9. This mechanism should be fully and effectively implemented.

In conclusion, it thus becomes clear that rules of international law and the principles of Islamic law are complementary to each other in effectively and comprehensively combating trafficking in persons.

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