



**An Analysis of the Crime of Trafficking in Persons under  
International Law with a Special Focus on Jordanian  
Legislation**

**A Thesis Submitted for the Degree of Doctor of Philosophy**

**By**

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## **Abstract**

This thesis analyses the crime of trafficking in persons under international law with a special focus on Jordanian legislation, arguing that efforts to address the crime of trafficking in persons require a holistic approach, but it will focus on questions of jurisdiction and legal definitions.

After analysing the definitions, elements, forms, and typologies of the crime of trafficking in persons under the Trafficking in Persons Protocol (TIPP) as the main legal international instrument, this thesis further examines whether or not Jordanian legislation is in line with international standards. Then, under the holistic approach to addressing the crime of trafficking in persons, this thesis examines trafficking in persons as a transnational organised crime. Subsequently, it examines trafficking in persons as a crime against humanity by examining whether or not the International Criminal Court (ICC) might be regarded as an effective organ for addressing trafficking in persons as a crime against humanity. Later, the thesis examines the efforts made in Jordan to address the crime of trafficking in persons. Accordingly, this thesis concludes that trafficking in persons is a multi-dimensional problem and that long-term success will not be achieved by taking a disjunctive approach to addressing its many facets. Therefore, achieving a unified approach will lead to a permanent solution or will at least make a major contribution to addressing the problem.

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## **List of Abbreviations**

CEDAW - Convention on the Elimination of all forms of Discrimination against Women

CoE - Council of Europe Convention on Action against Trafficking in Human Beings

COP - Conference of the Parties to the United Nations Convention against Transnational Organized Crime

CRC - Convention on the Rights of the Child

ETS – European Treaty Series

EU- European Union

Europol - European Police Office

ICC - International Criminal Court

ICISS - International Commission on Intervention and State Sovereignty

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the former Yugoslavia

ILC - International Law Commission

ILM – International Legal Materials

ILO - International Labour Organization

INTERPOL - International Criminal Police Organization

JAHTNC - Jordanian Anti-Human Trafficking National Committee

JATIPL - Jordanian Anti-Trafficking in Persons Law

LAS - League of Arab States

LNTS- League of Nations Treaty Series

NGOs - Non-Governmental Organisations

PSD - the Jordanian Public Security Directorate

QIZs - the Jordanian Qualified Industrial Zones

RSICC - Rome Statute of the International Criminal Court

SAARC - South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

TIP - Trafficking in Persons

TIPP - Trafficking in Persons Protocol

TIPR - Trafficking in Persons Report

TVPA - Victims of Trafficking and Violence Protection Act

UN – United Nations

UNCATOC - United Nations Convention against Transnational Organized Crime

UNGA - United Nations General Assembly

UNHCR - United Nations High Commissioner for Refugees

UNIAP - United Nations Inter-Agency Project on Trafficking of Human Beings in the Greater Mekong Sub-Region

UNICRI - United Nations Interregional Crime and Justice Research Institute

UNODC- United Nations Office on Drugs and Crime

UNTS – United Nations Treaty Series

USDS - United States Department of State



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## **Dedication**

This thesis is dedicated to all trafficked victims or those affected by the commission of the crime of trafficking in persons, past, present and future.

## **Declaration**

I, Muath Al-Zoubi, declare that this thesis is an original work of my own and has been submitted for the degree of PhD at Brunel University London; it has never been submitted to any other institute before. All information derived from the work of others has been quoted and acknowledged via complete referencing.

# Chapter One

## Introduction

### 1.1 Research Background

Despite the elimination of all forms of legally-sanctioned slavery in most parts of the world, slavery still occurs and the common practice of slavery still persists nowadays under the rubric of trafficking in persons (TIP).<sup>1</sup> It is also becoming increasingly difficult to ignore the fact that slavery has never ceased; it simply uses a new terminology, which is ‘trafficking in persons’.<sup>2</sup> By way of illustration, millions of people worldwide are exploited, sold like chattels, compelled to work for a small sum of money or nothing, and live like slaves.<sup>3</sup> Trafficking in persons is usually called ‘modern-day slavery’.<sup>4</sup> In other words, the expression ‘trafficking in persons’ is arguably a polite way of saying ‘modern-day slavery’.<sup>5</sup> It has also been argued that TIP should be treated as a historical issue rather than just a modern problem, because it is not new and has been known about for a long time.<sup>6</sup>

Furthermore, no country is immune to TIP.<sup>7</sup> More specifically, TIP is considered the third most profitable crime after drugs smuggling and the smuggling of illegal weapons.<sup>8</sup> In this

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<sup>1</sup> John Winterdyk, Philip L. Reichel, and Benjamin Perrin (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 6; Justin Healey (ed), *Human Trafficking and Slavery* (Spinney Press 2012) 1; Chairman I. Ros-Lehtinen, Ileana, ‘Human Trafficking Is One of the Cruellest Realities in Our World’ (2013) 4 University of Miami National Security and Armed Conflict Law Review 7, 7.

<sup>2</sup> Winterdyk, Reichel, and Perrin, op cit, 82.

<sup>3</sup> Healey, op cit, 1.

<sup>4</sup> Joyce Hart, *Human Trafficking* (The Rosen Publishing Group 2009) 4; Kathryn Cullen-DuPont, *Human Trafficking* (Infobase Publishing 2009) 234; Kevin Bales and Ron Soodalter, *The Slave Next Door: Human Trafficking and Slavery in America Today, With a New Preface* (University of California Press 2010) xiii; Bright Mills, *Human Trafficking: Modern-Day Slavery* (Trafford Publishing 2011) 3; Winterdyk, Reichel, and Perrin, op cit, 6; Jennifer L. Enck, ‘The United Nations Convention Against Transnational Organized Crime: Is it all that it is Cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans’ (2003) 30(2) Syracuse Journal of International Law and Commerce 369, 371; Frances P. Bernat and Tatyana Zhilina, ‘Human Trafficking: The Local Becomes Global’ (2010) 20(1-2) Women & Criminal Justice 2, 2.

<sup>5</sup> Catherine Paris, *Modern Day Slavery: Human Trafficking Revealed* (Claddagh Limited Publishing House 2007) 8.

<sup>6</sup> Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 1-2.

<sup>7</sup> Obi N.I. Ebbe and Dilip K. Das (eds), *Global Trafficking in Women and Children* (CRC Press 2007) 44; Alison Brysk and Austin Choi-Fitzpatrick (eds), *From Human Trafficking to Human Rights: Reframing Contemporary Slavery* (University of Pennsylvania Press 2012) 98; Healey, op cit, 7; Aiko Joshi, ‘The Face of Human Trafficking (Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation)’ (2002) 13(1) Hastings Women’s Law Journal 31, 31; Tomoya Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications’ (2005) 54(2) International and comparative law quarterly 445, 445.

regard, it has been stated that '[h]uman trafficking is now a leading source of profits for organized crime syndicates, together with drugs and weapons, generating billions of dollars'.<sup>9</sup> Moreover, TIP is recognised as one of the most serious crimes concerning the entire international community.<sup>10</sup> It has been estimated that every year about 600,000- 800,000 persons are trafficked across borders,<sup>11</sup> and this number rises to about 2,000,000 - 4,000,000 when internally trafficked persons are included.<sup>12</sup> Additionally, citizens of 152 different countries have been identified as trafficked victims in 124 countries all over the world.<sup>13</sup> However, there is a lack of information about TIP<sup>14</sup> and a huge number of trafficking cases are not reported, for many reasons. To begin with, the investigation of cases of TIP is complex and takes a long time.<sup>15</sup> Secondly trafficking cases are connected with other states' jurisdiction. Moreover, the criminal groups who are committing trafficking crimes are well organised.<sup>16</sup> Thirdly, only a limited number of victims are able and willing to testify about their situations.<sup>17</sup>

The integration of TIP with the smuggling of migrants is considered another reason for under-reporting (as migrants can be in an especially vulnerable position).<sup>18</sup> Likewise, authorities and law enforcement agencies are sometimes less interested in the fight against TIP because combating TIP has a low priority relative to other crimes such as terrorism and alien smuggling,<sup>19</sup> and some countries have no legislation against the crime of TIP.

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<sup>8</sup> Winterdyk, Reichel, and Perrin, op cit, 3,15,69; Joshi, op cit, 40; United States Congressional Research Service, 'Trafficking in Persons: U.S. Policy and Issues for Congress' (2 July 2009) RL34317 <<http://www.refworld.org/docid/4a72d21e2.html>> accessed 1 September 2015.

<sup>9</sup> United States Congressional Research Service, op cit.

<sup>10</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 445.

<sup>11</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 31; Winterdyk, Reichel, and Perrin, op cit, 129; Joshi, op cit, 31; Carol S. Brusca, 'Palermo Protocol: The First Ten Years after Adoption' (2011) 2(3) *Global Security Studies* 8, 10; Steward H. Oppong, 'Human Trafficking Through Organized Crime' (2012) 2(20) *International Journal of Humanities and Social Science* 37, 37; Amy Whitman and David H. Gray, 'Transnational Human Trafficking' (2015) 6(3) *Global Security Studies* 11, 13.

<sup>12</sup> Winterdyk, Reichel, and Perrin, op cit, 129; Joshi, op cit, 31; Poppy A. Lolo, 'Analysis Criminologist Human Trafficking As Extra Ordinary Crime' (2014) 1(7) *International Journal of Multidisciplinary Research and Development* 173, 174.

<sup>13</sup> United Nations Office on Drugs and Crime (UNODC), 'Global Report on Trafficking in Persons' (2014) ISBN: 978-92-1-133830-0; e-ISBN: 978-92-1-057108-1, at 5.

<sup>14</sup> Frank Laczko, 'Data and Research on Human Trafficking' (2005) 43(1-2) *International Migration Review* 5, 12.

<sup>15</sup> Winterdyk, Reichel, and Perrin, op cit, 291.

<sup>16</sup> *ibid*, 131.

<sup>17</sup> *ibid*; Healey, op cit, 7; Laczko, op cit, 12.

<sup>18</sup> Winterdyk, Reichel, and Perrin, op cit, 131.

<sup>19</sup> Anthony DeStefano, *The War on Human Trafficking: U.S. Policy Assessed* (Rutgers University Press 2007) 51; Laczko, op cit, 12.

Therefore, the crime of TIP is prosecuted under other legislation.<sup>20</sup> Moreover, law enforcement officers have difficulty in identifying trafficked victims<sup>21</sup> because of the hidden and clandestine nature of trafficking.<sup>22</sup>

Notably, TIP is regarded as an unlawful activity connected with transnational organised crime.<sup>23</sup> Unlike the first attempts to address TIP, which was considered a human rights issue, there has been a tendency since the 1990s to identify TIP as a transnational organised crime.<sup>24</sup> The new approach to addressing TIP as a transnational organised crime is embodied by the emergence of ‘the United Nations Convention against Transnational Organized Crime’ (UNTOC),<sup>25</sup> and ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP).<sup>26</sup>

TIP as a transnational organised crime is growing rapidly. In particular, the number of criminal organisations involved in TIP has increased recently.<sup>27</sup> Specifically, TIP as a transnational organised crime has been escalating in the last few decades for a number of reasons. The first reason is the small risk of prosecution for committing the crime of TIP. The second reason is the huge profits generated from TIP.<sup>28</sup> The third reason is the low initial costs of entering the field of TIP.<sup>29</sup> The fourth reason is the growing demand for personal

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<sup>20</sup> Laczko, op cit, 12.

<sup>21</sup> Healey, op cit, 7.

<sup>22</sup> Winterdyk, Reichel, and Perrin, op cit, 291; Healey, op cit, 7; Laczko, op cit, 12; Kevin Bales, Olivia Hesketh, and Bernard Silverman, ‘Modern Slavery in the UK: How Many Victims?’ (2015) 12(3) Significance 16, 18.

<sup>23</sup> Enck, op cit, 370.

<sup>24</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 68.

<sup>25</sup> United Nations Convention against Transnational Organized Crime (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

<sup>26</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001); Gallagher, op cit, 70.

<sup>27</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 30; Louise I. Shelley, *Human Trafficking: a Global Perspective* (Cambridge University Press 2010) 110; LeRoy G. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’ (2003) 35(1) *The George Washington International Law Review* 227, 231.

<sup>28</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 30; Maggy Lee, *Human trafficking* (Willan Publishing 2007) 116; Potts, op cit, 231; Sally Stoecker, ‘The Rise in Human Trafficking and the Role of Organized Crime’ (2000) 8(1) *Demokratizatsiya* 129, 129.

<sup>29</sup> Lee, *Human trafficking*, op cit, 116.

services.<sup>30</sup> The fifth reason is the lack of control over human movements<sup>31</sup> as a result of the increase in the number of refugees and asylum-seekers.<sup>32</sup>

The determination to address TIP as a transnational crime is truly important because it acknowledges that TIP is not a small-scale problem; it is linked to international organised crime. Accordingly, it could be said that, by recognising TIP as a crime rather than an issue of human rights, security or migration, the international community might use law enforcement institutions and criminal law to address TIP as a transnational crime.<sup>33</sup>

Interestingly, TIP has been included in ‘the Rome Statute of the International Criminal Court’ (RSICC) as a crime against humanity. Specifically, TIP has been explicitly recognised by the RSICC as a crime against humanity as the RSICC has indicated TIP in its definition of enslavement in the statute.<sup>34</sup> However, it is noticeable that this recognition requires a number of elements to be present in TIP. For example, the traffickers should exercise control over the trafficked persons. Additionally, TIP should be committed by means of an attack, and this attack should be widespread or systematic. Furthermore, a civilian population should be the victims of this attack. Similarly, knowledge of the act by the perpetrators is also required in TIP as a crime against humanity.<sup>35</sup>

It is noteworthy that TIP has become a significant issue in Jordan recently.<sup>36</sup> This is a result, on the one hand, of the influx of refugees entering Jordan, as some of these refugees have been subjected to TIP,<sup>37</sup> and on the other hand, of the increased number of complaints

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<sup>30</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 30; Lee, *Human trafficking*, op cit, 116.

<sup>31</sup> Stoecker, op cit, 129.

<sup>32</sup> United Nations, *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR* (United Nations Publications 2007) 365.

<sup>33</sup> Lee, *Human trafficking*, op cit, 117.

<sup>34</sup> Rome Statute of the International Criminal Court (last amended 2010) adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (entered into force 1 July 2002) ISBN No. 92-9227-227-6, Art 7(2)(c)

<sup>35</sup> The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11, Art 7(1)(c); Mohamed Y. Mattar, ‘The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?’ (2002) *The Protection Project* 1, 1; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 451.

<sup>36</sup> Mohamed Olwan, ‘Trafficking in Persons in Jordan’ (2011) CRIMES AS 2011/42, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute 1, 1.

<sup>37</sup> The Jordanian Anti-Human Trafficking National Committee (JAHTNC), ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 21; Olwan, op cit, 12.

received by the Jordanian National Center for Human Rights.<sup>38</sup> These complaints concerned cases of exploitation of domestic workers in practices related to TIP.<sup>39</sup> However, there are no accurate and comprehensive data, in Jordan, on the problem of TIP with regard to its magnitude and extent, which makes Jordan a special case.<sup>40</sup> Moreover, no comprehensive data on the efforts made by the anti-trafficking-in-persons law enforcement personnel in Jordan have been provided.<sup>41</sup> In this regard, the Jordanian government has admitted that tracking trafficking-in-persons cases is difficult as these cases pass through different bodies such as the police, labour inspectorate, social services, and the court system.<sup>42</sup> Furthermore, there is a lack of coordination in data collection.

It is worth noting that the Jordanian Penal Code does not criminalise the crime of TIP *per se*. This Law criminalises trafficking-related offences.<sup>43</sup> Examples of these offences are the exploitation of the prostitution of others,<sup>44</sup> abduction,<sup>45</sup> fraud and deception,<sup>46</sup> and the abusing of a position of vulnerability.<sup>47</sup> Therefore, the Jordanian Anti-Trafficking in Persons Law (JATIPL)<sup>48</sup> is regarded as the initial step to addressing the crime of TIP. Notably, the criminal law aspect is the main aspect of this Law in the fight against the crime of TIP.<sup>49</sup>

This research underscores the legislative gaps in the JATIPL regarding the definition of the crime of TIP with regard, first, to the use of the plural form to refer to trafficked victims and, second, to the absence of definitions of the forms of TIP. The research also draws attention to the legislative gaps in the elements of this crime in the matter of limiting the lists of components of these elements. Furthermore, the research deals with the legislative gaps

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<sup>38</sup> 'The National Centre for Human Rights (NCHR) is an independent national institution which has a juridical personality with full financial and administrative independence in practicing its intellectual, political and humanitarian activities related to human rights' <<http://www.nchr.org.jo/english/Aboutus.aspx>> accessed 1 September 2015.

<sup>39</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2006) 57-58; The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2007) 73.

<sup>40</sup> United States Department of State (USDS), 'Trafficking in Persons Report (TIPR)' (2005) 233. It should be stressed that Jordan has few statistics in relation to the crime of trafficking in persons in contrast with other jurisdictions. Therefore, statistics stated in the United States Department of State's trafficking in persons reports will be used to fill this gap as these reports contain information about trafficking in persons in Jordan.

<sup>41</sup> USDS, 'TIPR' (2009) 173.

<sup>42</sup> USDS, 'TIPR' (2013) 214, (2014) 223.

<sup>43</sup> Olwan, *op cit*, 2.

<sup>44</sup> The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Arts. 309-318.

<sup>45</sup> *ibid*, Arts. 291, 302.

<sup>46</sup> *ibid*, Arts. 292(1), 302, 417.

<sup>47</sup> *ibid*, Art. 293.

<sup>48</sup> The Jordanian Anti-Trafficking in Persons Law (JATIPL) (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009.

<sup>49</sup> Olwan, *op cit*, 4.



regarding the overlap between the JATIPL and other Jordanian laws in the matter of determining the applicable law, where these laws overlap. Other gaps in the JATIPL include the failure to address a number of legal issues, such as the attempt to commit the crime of TIP, the criminal participation in the commission of this crime, and the criminal responsibility of medical staff involved in TIP or anyone using trafficking in persons' services, and the failure to address a number of rights under this law such as the right of trafficked victims to counselling, compensation, and temporary or permanent residence in Jordan.

This research examines the practical gaps in the efforts made to address the crime of TIP in Jordan, such as the problems in relation to sheltering trafficked victims and those affected by the commission of this crime, insufficient training and efforts to raise awareness, the lack of formal procedures for identifying trafficked victims, the lack of data on TIP, and the lack of future plans under the Jordanian National Strategy to Prevent Trafficking in Persons.

The research attempts to analyse, in relation to TIP as a transnational organised crime, the failure to specify, under the UNCTOC, whether or not there are differences among organised criminal groups in matters related to transnational organised crimes they have committed. This research investigates the failure of the International Criminal Court to successfully prosecute anyone for TIP as a crime against humanity.

The scope of this research is TIP, first, as a crime under the Jordanian legislation especially the JATIPL, second, as a transnational organised crime under the TIPP and, third, as a crime against humanity under the RSICC. In particular, it focuses on issues of jurisdiction and legal definition.

Concerning Jordan, generally, information and data on TIP in Jordan are available from various bodies, such as the Ministry of Justice, the Ministry of Labour, the Anti-Trafficking in Persons Unit, and the Jordanian National Center for Human Rights. However, there is no national unified system of data collection concerning TIP. Furthermore, such information and data are mainly available in the Arabic language. Additionally, there is little literature in relation to the crime of TIP in Jordan. Consequently, this constitutes part of the research limitations, but also indicates the capacity of the research to contribute to the literature. Moreover, TIP as a crime against humanity has not been yet prosecuted under the International Criminal Court. Accordingly, there has been no international precedent to serve as a standard or model for countries to rely on.

## 1.2 Research Aims and Questions

The main aim of this research is to address certain pertinent questions by examining how the crime of TIP might be addressed nationally, transnationally, and internationally in order to develop a holistic approach that could be used in the fight against this crime and to fill the gaps in this respect. This research will examine these questions:

- To what extent does Jordanian legislation conform to international standards in addressing the crime of trafficking in persons?
- Would the International Criminal Court (ICC) be suitable as an effective international organ for addressing trafficking in persons as a crime against humanity in international law?

Interestingly, to achieve its main aim and to answer the research questions, this research has additional aims. The first aim is to analyse the JATIPL and other related legal documents for the purpose of identifying potential areas for reform. The second aim is to use Jordan as an example of compliance with international standards in attempts to address the crime of TIP. Therefore, the Jordanian experience in the fight against TIP might be developed and used as a reference point to address similar situations in other countries in the same region or other countries with similar legal systems facing the same problem. The third aim is to examine the Islamic approach to addressing the crime of TIP and whether such an approach might be adopted under the holistic approach in the fight against the crime of TIP. The fourth aim is to examine how TIP has been addressed as a transnational organised crime, taking into account the transnational nature of the crime of TIP. The fifth aim is to examine the significance of addressing the crime of TIP as a crime against humanity under the ICC jurisdiction.

## 1.3 Research Methodology

This research uses a combination of approaches in order to address the research questions, including a critical analysis approach by dealing with ‘the process of determining how the law applies to the problem’,<sup>50</sup> a doctrinal approach by asking ‘what the law is in a particular area’,<sup>51</sup> and, to a lesser extent, a comparative approach<sup>52</sup> by comparing ‘between two or

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<sup>50</sup> William Putman and Jennifer Albright, *Legal Research, Analysis, and Writing* (3rd edn, Cengage Learning 2013) 3; Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Bailey Press 2000) 6. In this regard, Charles states that ‘[t]o analyse means: To take to pieces; to separate, distinguish or ascertain the elements of anything complex. To examine minutely, so as to determine the essential constitution, nature or form, apart from extraneous accidental surroundings’.

<sup>51</sup> Mike McConville and Wing H. Chui (eds), *Research Methods for Law* (Oxford University Press 2007) 3-4, 18-19.

<sup>52</sup> Tushar K. Saha, *Textbook on Legal Methods, Legal Systems & Research* (Universal Law Publishing 2010) 4-5. In accordance with Tushar comparative method ‘is a discipline which incorporates the idea of comparison

several more or less distinct and different legal 'systems' or the laws of those systems on the same particular issues'.<sup>53</sup>

However, the main approach used in this research is the critical analytical approach which analyses the existing primary and secondary sources on relevant issues in relation to TIP. The primary sources analysed include charters, conventions, treaties, statutes, protocols, legislation, regulations, and case law. Other primary sources analysed include legal documentations compiled by the United Nations (UN), the European Union (EU), and the League of Arab States (LAS). Additionally, this research analyses statutory provisions in relation to the crime of TIP, in particular, statutory provisions stated in the TIPP, the RSICC, and the JATIPL, as well as relevant statutory provisions stated in other legal instruments. The aim of this analysis is to suggest the best approach to use in the fight against the crime of TIP through a more comprehensive legal definition and treatment.

The secondary sources analysed include published works in areas relevant to the research, such as books, articles, reports, statistics, strategies, working papers, and relevant websites. In order to determine the scale of the crime of TIP, this research analyses trafficking-in-persons reports compiled by the United States Department of State between 2002 and 2015. In this regard, because Jordan has few statistics in relation to the crime of TIP compared to other jurisdictions, the United States Department of State's trafficking- in-persons reports will be used to fill this gap, as these reports contain information about TIP in Jordan. Furthermore, this research also analyses a number of Status Reports of Human Rights in the Hashemite Kingdom of Jordan conducted by the National Center for Human Rights between 2004 and 2013<sup>54</sup> regarding trafficking-in-persons issues in Jordan. Additionally, this research examines the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan conducted by the Jordanian Anti-Human Trafficking National Committee (JAHTNC). This report might be regarded as the most comprehensive and authoritative report on TIP in Jordan to date. Moreover, this research investigates the Global Reports on Trafficking in Persons conducted by the United Nations Office on Drugs and Crime for the years 2012 and 2014.

Furthermore, this research deals with a number of Jordanian laws in relation to TIP, such as the Jordanian Abolition of Slavery Law,<sup>55</sup> the Penal Code,<sup>56</sup> the Code of Criminal

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into its name and this alone suggests that its method is somehow special or distinguishable from what comes naturally'.

<sup>53</sup> Pier G. Monateri (ed), *Methods of Comparative Law: Research Handbooks in Comparative Law* (Edward Elgar Publishing 2012) 145.

<sup>54</sup> The only reports which are available.

<sup>55</sup> The Jordanian Abolition of Slavery Law (1929) the Official Gazette (No 223) dated 1 April 2009.

<sup>56</sup> The Jordanian Penal Code, Arts. 309-318.

Procedures,<sup>57</sup> the Labour Law,<sup>58</sup> the Jordanian Law of Utilizing Organs of the Human Body,<sup>59</sup> the Jordanian Passports Law,<sup>60</sup> the Civil Code,<sup>61</sup> the Law of Information Systems on Crimes,<sup>62</sup> the Juvenile Law,<sup>63</sup> the Jordanian Bar Association Law<sup>64</sup> generally, and in particular the JATIPL.<sup>65</sup> It also analyses a number of regulations such as the Regulation of Shelters for Trafficked Victims or Those Who are Affected by the Commission of the Crime of Trafficking in Persons,<sup>66</sup> the Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status,<sup>67</sup> and the Regulation of Organising the Private Offices Working in Recruiting and Using Non-Jordanian Workers in Houses.<sup>68</sup> Additionally, this research analyses the Jordanian case law in relation to the crime of TIP.<sup>69</sup>

Interestingly, under the critical analytical approach, the research uses the historical aspect by examining international legal instruments that dealt with a number of forms of TIP through

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<sup>57</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) page 311 of the Official Gazette (No 1539) dated 16 March 1961.

<sup>58</sup> The Jordanian Labour Law, as amended (No 8 of 1996) page 1173 of the Official Gazette (No 4113) dated 16 April 1996.

<sup>59</sup> The Jordanian Law of Utilizing Organs of the Human Body, as amended (No 23 of 1977) page 1320 of the Official Gazette (No 2703) dated 1 June 1977.

<sup>60</sup> The Jordanian Passports Law (No 2 of 1969) page 96 of the Official Gazette (No 2150) dated 16 February 1969.

<sup>61</sup> The Jordanian Civil Code (No 43 of 1976) the Official Gazette (No 2645) dated 1 August 1976.

<sup>62</sup> The Jordanian Law of Information Systems on Crimes (No 30 of 2010) page 5334 of the Official Gazette (No 5056) dated 16 September 2010.

<sup>63</sup> The Jordanian Juvenile Law (No 24 of 1968) page 555 of the Official Gazette (No 2089) dated 16 April 1968.

<sup>64</sup> The Jordanian Bar Association Law (No 11 of 1972) page 666 of the Official Gazette (No 2357) dated 1 January 1972.

<sup>65</sup> The (JATIPL).

<sup>66</sup> The Jordanian Regulation of Shelters for Trafficked Victims or Those Who are Affected by the Commission of the Crime of Trafficking in Persons (No 30 of 2012) page 1623 of the Official Gazette (No 5153) dated 16 April 2012.

<sup>67</sup> The Jordanian Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status (No 90 of 2009) page 5348 of the Official Gazette (No 4989) dated 1 October 2009.

<sup>68</sup> The Jordanian Regulation of Organizing the Private Offices Working in Recruiting and Using Non-Jordanians Workers in Houses (No 89 of 2009) page 5342 of the Official Gazette (No 4989) dated 1 October 2009.

<sup>69</sup> Amman Court, in its criminal capacity and as a court of first instance, Decisions (No 113/2011) dated 7 February 2011, (No 43/2011) dated 13 June 2011, (No 5/5/141/2011) dated 20 June 2011, (No 1377/2011) dated 30 June 2011, (No 5/4/1012/2012) dated 16 April 2012, (No 5/4/1041/2012) dated 17 April 2012, and (No 5/5/730/2012) dated 8 November 2012; East Amman Court, in its criminal capacity and as a court of first instance, Decision (No. 227/2011) dated 30 November 2011; *Mafrq* Court, in its criminal capacity and as a court of first instance, Decisions (No 21/4/73/2011) dated 14 December 2011, (No 266/2012) dated 30 September 2012; *Zarqa* Court, in its criminal capacity and as a court of first instance, Decision (No 640/2011) dated 20 February 2012; The Amman Appeal Court, Decisions (No 3744/2012) dated 29 January 2012, (No 23643/2012) dated 3 July 2012, (No 32209/2012) dated 7 October 2012, (No 28333/2012) dated 8 October 2012, (No 37255/2012) dated 21 November 2012 (No 29575/2012) dated 2 December 2012; the Jordanian Cassation Court, Decision (No 3569/2000) dated 20 March 2001, (No 818/2003) dated 9 June 2003, (No 4309/2003) dated 22 April 2004, (No 4211/2004) dated 15 May 2005, (No 2294/2006) dated 31 March 2007, (No 1674/2008) dated 23 December 2008, (No 1477/2005) dated 7 September 2009. It is noteworthy that there is no extensive discussion of the Jordanian case law in relation to the crime of trafficking in persons. This is because case law is available as reported and it does not contain a comprehensive explanation of the element of the crime. However, it is evidence of practice. Additionally, case law in Jordan does not have status as a precedent.

history, such as slavery, prostitution, forced labour, and the removal of organs. This is important because it may provide a better understanding of these practices and how such forms have been dealt with in these instruments; this in turn may help to address the crime of TIP through a knowledge of how the roots of this crime have been tackled. Additionally, the historical aspect shows how there has been an evolution and whether there has been development, as well as the reasons for legal changes: both these things can help illuminate the possible need for legal reform and what reforms might be effective. Hence, this supports the view that the crime of TIP needs to be dealt with as a historical issue rather than just a modern problem.<sup>70</sup>

This research also uses the doctrinal approach by providing a systematic exposition of legal tools, rules, norms, and principles used in addressing the crime of TIP. In doing so, it examines the relationships between them in order to find coherence. Additionally, this research deals with areas of difficulty in relation to addressing this crime. Furthermore, it produces recommendations and suggestions for a better understanding of the crime of TIP.

This research uses the comparative approach mainly by, firstly, comparing between the JATIPL and internationally accepted best standards stated in the TIPP and, secondly, comparing between the JATIPL and other laws in countries within the same regions and similar legal systems dealing with the topic of TIP, such as in Egypt,<sup>71</sup> Saudi Arabia,<sup>72</sup> and Syria.<sup>73</sup> Such comparisons are significant because they help enable the loopholes in the Jordanian law to be closed through the adoption of the good practices and appropriate means used in these legal instruments. Additionally, the adoption of such practices may fill the gaps in the efforts to address the crime of TIP under the Jordanian law. Such comparisons are important because they will enable the research to overview and evaluate the situation of the crime of TIP in order to suggest possible reforms, wherever possible.

It is noteworthy that most of the statutory provisions in the Jordanian legislation in relation to the crime of TIP and the books dealing with this crime in Jordan are written in Arabic. Therefore, English translations of the Arabic texts have been undertaken by the author of this thesis. Additionally, on a very few occasions, references were made to working papers as they were the only sources available on some aspects of the work that had to be addressed.

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<sup>70</sup> Lee, *Human Trafficking*, op cit, 1-2.

<sup>71</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010).

<sup>72</sup> The Saudi Arabian Law for Combating Crimes of Trafficking in Persons (Royal Decree No M/40 of 2009) *Um Al-Quaran*, dated 7 August 2009.

<sup>73</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons.

Notably, the empirical approach has not been used in this research because such an approach may not have been appropriate to accomplish the aims of this research. Furthermore, no aspects of the research questions required any further investigation by empirical means, such as through vulnerable research participants.

#### **1.4 Research Significance and Contribution to Knowledge**

This research contributes to knowledge by filling the gaps in the literature on attempts to address the crime of TIP nationally, transnationally, and internationally. Furthermore, this research provides a comprehensive and systematic evaluation of the crime of TIP under the Jordanian laws, especially the JATIPL in relation to the crime of TIP, as a new crime under Jordanian legislation. Additionally, this research investigates the application of international standards in Jordan. Moreover, this research examines the adequacy of international substantivity in the matter of the definition of TIP. This research also analyses TIP as a transnational organised crime and as a crime against humanity.

This research is important not only because it is one of the first of its kind in Jordan but also because it is the first comprehensive piece of research written in English about the crime of TIP in Jordan. As such, this research takes an in-depth look at the following aspects of this crime. The first aspect concerns the situation of TIP in Jordan. The second aspect involves the significance of the definition of the crime of TIP and its elements under the JATIPL. The third aspect concerns criminal investigation and prosecution of this crime in Jordan. The fourth aspect involves the efforts made in Jordan to address this crime. The fifth aspect concerns the legal and practical challenges facing the fight against this crime. The final aspect concerns whether or not the JATIPL, in the matter of trafficked persons' rights, is in line with the TIPP. This research attempts to collect as much information and data as possible on the crime of TIP in Jordan derived from literature, reports, statistics, and case law in order to conduct a comprehensive study covering the main aspects of this crime. This is significant because it may pave the way for a better understanding of this crime. Consequently, the fight against this crime may become easier.

Additionally, considering the fact that the crime of TIP is often transnational in nature, this research focuses on how this crime might be addressed as a transnational organised crime and considers the legal challenges facing such efforts and how these challenges might be overcome. Furthermore, as TIP might be categorised as a crime against humanity, this research examines whether or not the International Criminal Court (ICC) might be regarded

as an effective organ for addressing TIP as a crime against humanity. Accordingly, efforts to address the crime of TIP as a transnational organised crime and as a crime against humanity are significant because a legally holistic approach to the fight against the crime of trafficking in persons captures or addresses different aspects of the problem.

## **1.5 Research Structure**

This research is divided into seven chapters. Chapter one presents the introduction to this research by dealing with the following aspects: the research background, the research questions and aims, the research methodology, the research significance and its contribution to knowledge, and the research structure.

Chapter two examines trafficking in persons as a crime under international law. In doing so, this chapter has been divided into two sections. The first section identifies TIP by analysing definitions of TIP. It then examines the elements of TIP. After that, it distinguishes between TIP and the smuggling of migrants. Later, it looks at various forms of TIP. Subsequently, it discusses the typologies of TIP. The second section of this chapter analyses the historical background of TIP.

Chapter three examines trafficking in persons as a crime under Jordanian legislation in three sections. Section one looks at the current situation in Jordan with regard to TIP. Section two identifies the crime of TIP in Jordan. Section three highlights criminal investigation and prosecution of the crime of TIP in Jordan.

Chapter four examines trafficking in persons as a transnational organised crime by dealing with the following issues. The first issue is the concept of transnational organised crime. The second issue is the transnational nature of TIP. The third issue is jurisdiction over TIP as a transnational organised crime. The fourth issue is the efforts to address TIP as a transnational organised crime. The fifth issue is the key legal challenges to efforts to address TIP as a transnational organised crime.

Chapter five examines trafficking in persons as a crime against humanity by investigating whether or not the ICC might be regarded as an effective organ for addressing TIP as a crime against humanity. In doing so, this chapter answers the following questions: First, in what situations might TIP be regarded as a crime against humanity falling under the ICC jurisdiction? Second, what elements are required in the crime of TIP in order for it to be

classified as a crime against humanity? Third, for what reasons might the ICC be considered a more capable organ for addressing TIP as a crime against humanity? Fourth, in what ways might the ICC exercise its jurisdiction over TIP as a crime against humanity? Fifth, are there any gaps or problems with transnational treatment of the issues?

Chapter six addresses the crime of trafficking in persons in Jordan by taking an in-depth look at the efforts made in Jordan to address this crime, highlighting the role of Islamic Criminal Law in addressing the crime of TIP in Jordan, analysing the legal and practical challenges facing such an approach, and investigating the consistency between the JATIPL and the TIPP in the matter of trafficked persons' rights.

Chapter seven concludes this research by providing chapter summaries and recommendations from this research.



## Chapter Two

# Trafficking in Persons as a Crime under International Law

### 2.1 Introduction

The aim of this chapter is to analyse trafficking in persons (TIP) as a crime under international law by dealing with aspects of TIP and its historical roots. It will do so by answering the following two questions: what is TIP, and how has TIP been addressed through international legal instruments?

This chapter has been divided into two sections. The first section is entitled ‘[i]dentifying trafficking in persons’. This section will address the question of what constitutes TIP by shedding light on definitions of TIP, as there are a number of definitions of this practice. To be more specific, some of these definitions are considered narrow, limited, or vague, whereas other definitions could be considered broad, inclusive, or clear. After that, the action element, the means element, and the purpose element will be examined as the main elements of TIP. Next, this section will distinguish between TIP and the smuggling of migrants by focusing on the similarities and differences between them.

Subsequently, this section will investigate various forms of TIP. Finally, this section will highlight typologies of TIP by dealing with a number of issues. The first issue is national, transnational, and international TIP. The second issue is the legal basis of TIP and whether it is based on treaty or custom or soft law. The third issue is gender differences in addressing TIP.

The second section is entitled ‘[t]he historical background of trafficking in persons’. This section will look at how TIP has been addressed through international legal instruments by highlighting the initial stages of attempts to tackle the crime of TIP in the nineteenth century in the United States and Britain, followed by some international legal instruments intended to eliminate slavery.

Then, this section will address TIP after the appearance of the League of Nations by taking an in-depth look at how TIP has been tackled in this era. Afterwards, this section argues that comprehensive efforts to address TIP began in 2000.

## 2.2 Identifying Trafficking in Persons

This section will examine TIP by analysing a number of definitions of TIP. Then, the elements of trafficking will be discussed. After that, this section will distinguish between TIP and the smuggling of migrants. Subsequently, this section will deal with the various forms of TIP. Finally, the typologies of TIP will be highlighted.

### 2.2.1 Definitions of Trafficking in Persons<sup>74</sup>

First of all, it should be stressed that it is not easy to create a consistent definition of TIP.<sup>75</sup> This is because there are different ways of defining TIP.<sup>76</sup> In this regard, in 1994, the United Nations General Assembly (UNGA) defined TIP as follows:

[T]he illicit and clandestine movement of persons across national and international borders, largely from developing countries and some countries with economies in transition, with the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations, for the profit of recruiters, traffickers and crime syndicates, as well as other illegal activities related to trafficking, such as forced domestic labour, false marriages, clandestine employment and false adoption.<sup>77</sup>

This definition might be challenged on the basis that it is considered to be narrow in its scope because it focuses on the movement of people ‘from developing countries and some countries with economies in transition’.<sup>78</sup> More to the point, the UNGA definition limits TIP to women and girl children. In doing so, other categories such as men and boy children are ignored. However, it should be noted that in this definition a number of the end purposes of TIP have been included, such as ‘forced domestic labour, false marriages, clandestine employment and false adoption’<sup>79</sup> as well as sexual exploitation.

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<sup>74</sup> The definitions of trafficking in persons will be further discussed in chapter two (2.3).

<sup>75</sup> Justin Healey (ed), *Human Trafficking and Slavery* (Spinney Press 2012) 7.

<sup>76</sup> Frank Laczko, ‘Data and Research on Human Trafficking’ (2005) 43(1-2) *International Migration Review* 5, 11.

<sup>77</sup> United Nations General Assembly (UNGA), ‘Traffic in Women and Girls’ (23 December 1994) UN Doc. A/RES/49/166; Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 17-18.

<sup>78</sup> *ibid.*

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

In the same year, trafficking was defined according to the Inter-American Convention on International Traffic in Minors as follows: ‘the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means’.<sup>80</sup>

It is noteworthy that this definition has a strong effect on the definition of TIP that was adopted by the United Nations (UN) in 2000.<sup>81</sup> By way of illustration, this definition used expressions such as ‘unlawful purpose’ and ‘unlawful means’ which comprise the purpose and means elements of TIP, and which were incorporated in the 2000 definition.<sup>82</sup>

Then, in 1996, a definition of trafficking was proposed by ‘a Plan of Action commissioned by the Council’s Steering Committee for Equality between Women and Men’ as follows:<sup>83</sup>

There is trafficking when a woman is exploited in a country other than her own by another person (natural or legal) for financial gain, the traffic consisting of organising (the stay or) the legal or illegal emigration of a woman, even with her consent, from her country of origin to the country of destination and luring her by whatever means into prostitution or any form of sexual exploitation.<sup>84</sup>

This definition was criticised because it was not clear in terms of whether the concept of TIP will be applied to the process and the end result of TIP. Along with this, the definition of trafficking has also been criticised for being narrow<sup>85</sup> by limiting its scope to one category (women). Furthermore, the end purpose of TIP, according to this definition, is limited to prostitution and sexual exploitation.

Additionally, a Joint Action was issued by the Council of the European Union in 1997; it has defined trafficking as follows:<sup>86</sup>

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<sup>80</sup> Inter-American Convention on International Traffic in Minors (entered into force 15 August 1997) OEA/Ser.K/XXI.5, CIDIP-V/doc.36/94 rev. 5, 79 O.A.S.T.S., 33 I.L.M. 721 (1994) Art. 2(b); Gallagher, op cit, 12.

<sup>81</sup> Inter-American Convention on International Traffic in Minors (entered into force 15 August 1997) OEA/Ser.K/XXI.5, CIDIP-V/doc.36/94 rev. 5, 79 O.A.S.T.S., 33 I.L.M. 721 (1994) Art. 2(b); Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), Art. 3(a); Gallagher, op cit, 22.

<sup>82</sup> Gallagher, op cit, 20.

<sup>83</sup> *ibid*, 20. It should be stressed that ‘the Council’ here refers to the Council of Europe.

<sup>84</sup> Michele Hirsch, ‘Plan of Action against Traffic in Women and Forced Prostitution’ EG (1996) 2, 11, cited in Marjan Wijers and Lin Lap-Chew, ‘Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution’ (2009) 26; Gallagher, op cit, 20.

<sup>85</sup> Gallagher, op cit, 20.

<sup>86</sup> *ibid*, 21.

[A]ny behaviour which facilitates the entry into, transit through, residence in or exit from any territory of a member State for the purposes [of] ... (a) sexually exploiting a person other than a child for gainful purposes where use is made of coercion, in particular violence or threats, or deceit is used, or there is abuse of authority or other pressure which is such that the person has no real and acceptable choice but to submit to the pressure or abuse involved; (b) trafficking in persons other than children for gainful purposes with a view to their sexual exploitation.<sup>87</sup>

This definition was criticised for being narrow. To be more specific, the migratory aspects were strongly emphasised. Likewise, according to this definition sexual exploitation was visualised as the solitary potential end result of trafficking.<sup>88</sup>

Furthermore, a recommendation on trafficking was adopted by the Committee of Ministers of the European Union; this recommendation has defined trafficking as follows:<sup>89</sup>

[T]he procurement by one or more natural or legal persons and/or the organisation of the exploitation and/or transport or migration – legal or illegal – of persons, even with their consent, for the purpose of their sexual exploitation, inter alia, by means of coercion, in particular violence or threats, deceit, abuse of authority or a position of vulnerability.<sup>90</sup>

This definition includes the main elements of TIP: the action element, the means element, and the purpose element. Along with this, this definition does not contain any gender limitations. Furthermore, the consent of trafficked victims is not taken into account in TIP. However, this definition could be criticised on the basis that it focuses on sexual exploitation and ignores the other end purposes of TIP.

Moreover, shortly before the adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations

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<sup>87</sup> Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA), OJ L 063, Mar. 4, 1997 (Council of Europe 1997 Joint Action on Trafficking) at Title I A(i), Title I B(a)(b), cited in Gallagher, op cit, 21.

<sup>88</sup> Gallagher, op cit, 21.

<sup>89</sup> *ibid*, 22.

<sup>90</sup> Council of Europe, Committee of Ministers, Recommendation No. R (2000) 11 of the Committee of Ministers to member states on action against trafficking in human beings for the purpose of sexual exploitation, adopted on May 19, 2000, at the 710<sup>th</sup> meeting of the Ministers' Deputies (2000 Committee of Ministers Recommendation), Appendix to Recommendation No. R 11, at I (1), cited in Gallagher, op cit, 22.

Convention against Transnational Organized Crime, hereinafter referred to as the Trafficking in Persons Protocol (TIPP),<sup>91</sup> in 2000 the UN Special Rapporteur on Violence against Women proposed the following definition of trafficking:<sup>92</sup>

Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons: (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage for the purpose of (ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such persons lived at the time of the original act described in (i).<sup>93</sup>

This definition is considered broad and inclusive in contrast to the other definitions that preceded its appearance. The effect of trafficking that includes both men and women was acknowledged explicitly by this definition. Similarly, this definition indicates that trafficking might occur for a number of exploitative purposes. More to the point, this definition tries to fill the conceptual vacuum between process and result through asserting that the trafficking-in-persons chain includes both the process of trafficking in persons (the action element) and the result of trafficking in persons (the purpose element).<sup>94</sup>

Importantly, the TIPP defines TIP as follows:<sup>95</sup>

[T]he 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

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<sup>91</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

<sup>92</sup> Gallagher, *op cit*, 24.

<sup>93</sup> UN Commission on Human Rights, "Report of the Special Rapporteur, Ms. Radhika Coomaraswamy, on violence against women, its causes and consequences, on trafficking in women, women's migration and violence against women," UN Doc. E/CN.4/2000/68, Feb. 29, 2000 (Coomaraswamy, "Report," UN Doc. E/CN.4/2000/68) Para. 13; Gallagher, *op cit*, 24.

<sup>94</sup> Gallagher, *op cit*, 24.

<sup>95</sup> The TIPP.

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>96</sup>

It could be argued that Article 3 of the TIPPP has defined the term ‘Trafficking in Persons’ for the first time in international law.<sup>97</sup> Furthermore, the definition of TIP aims to give consistency to and consensus on the trafficking phenomenon all over the world.<sup>98</sup> In particular, this definition is considered to be a guideline for states parties to this Protocol to adopt the most effective legislation to criminalise TIP.<sup>99</sup> Additionally, this definition classifies TIP as a crime against all persons, not just women and children. Along with this, the definition of trafficking visualises a number of purposes of trafficking, apart from sexual exploitation.<sup>100</sup> A point to note, however, is that the definition of TIP in the TIPPP is considered to be the most accepted and agreed definition of TIP worldwide.<sup>101</sup>

The definition of TIP in the TIPPP was preceded by the Roundtable on 29th January 1998 on ‘[t]he Meaning of "Trafficking in Persons": A Human Rights Perspective’, which seeks to define TIP, because it realises that there is a pressing need to understand what TIP means in order to address and prevent this crime.<sup>102</sup>

The Roundtable on the Meaning of Trafficking in Persons raises the issue of who might be protected according to this definition, because trafficked victims include males, females, adults, and children. Therefore, the best expression is ‘Trafficking in Persons’ since this expression includes all categories without any distinction between victims according to their sex, colour, and age, or any other types.<sup>103</sup>

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<sup>96</sup> The TIPPP, Art. 3(a).

<sup>97</sup> Gallagher, op cit, 12; John Winterdyk, Philip L. Reichel, and Benjamin Perrin (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 133.

<sup>98</sup> United Nations Office on Drugs and Crime (UNODC), ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, At 3; UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2004) UN Sales No. E.05.V.2, at 269.

<sup>99</sup> United Nations Office on Drugs and Crime (UNODC), ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, At 3.

<sup>100</sup> Gallagher, op cit, 45.

<sup>101</sup> United Nations Office on Drugs and Crime (UNODC), ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2004) UN Sales No. E.05.V.2, At 267; Winterdyk, Reichel, and Perrin, op cit, 236; Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 217; Mohamed Y. Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’ (2010) UNOV/DM/CMS/EPLS/Electronic Publishing Unit 1, 7.

<sup>102</sup> Ali Miller and Alison N. Stewart, ‘Report from the Roundtable on “The Meaning of Trafficking in Persons”: A Human Rights Perspective’ (1998) 20(1) Women’s Rights Law Reporter 11, 11.

<sup>103</sup> *ibid*, 13.

It might be argued that distinctions are still made between categories included in the definition of TIP. The definition of TIP does not solve the distinction between male and female, adults and children. An example of this is that children should be given greater protection than other categories, and their status should be considered separately from trafficking in adults. In this regard, it should be stressed that reaching the age of 18 is what distinguishes childhood from adulthood.<sup>104</sup>

It is worth noting that the connection between women and children in the TIPP creates some problems for women's rights for the following reasons. The first reason is that it deals with women and children as the same category, assuming they have the same rights, and often treating women as legal minors with less legal capacity. The second reason is that it illustrates that women's only role is that of caretakers of children, despite the fact that their role has other concerns and rights. The third reason is that, if the intent is to combine women and children on the basis of gender discrimination, the expression should be 'women and girls'.<sup>105</sup> However, this might be challenged on the basis that according to both 'the Convention on the Elimination of all forms of Discrimination against Women'<sup>106</sup> and 'the Convention on the Rights of the Child',<sup>107</sup> the connection between women's and children's rights might enhance the protection of those categories of rights by combining them on the basis of gender and age.<sup>108</sup>

However, the Roundtable on the Meaning of Trafficking in Persons rejects the classic definition of TIP in international law and its elements, which has been understood historically as a movement of people across borders for the purpose of prostitution. The main elements of the classic definition were the crossing of borders, prostitution as the end purpose of TIP, and the consent of victims. To begin with, requiring the element of crossing borders was rejected because it is not an element of TIP since trafficked victims are harmed regardless of whether they cross borders. In particular, what is required under this element is the moving of

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<sup>104</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182 (entered into force 19 November 2000) ILO No. 182, 2133 UNTS 161, Art. 2; Miller and Stewart, *op cit*, 13.

<sup>105</sup> Miller and Stewart, *op cit*, 13.

<sup>106</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (entered into force 3 September 1981) 1249 UNTS 13.

<sup>107</sup> Convention on the Rights of the Child (entered into force 2 September 1990) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

<sup>108</sup> Savitri Goonesekere and Rangita De Silva-de Alwis, 'Women's and Children's Rights in a Human Rights Based Approach to Development' (2005) New York: UNICEF, at i.

trafficked victims to an unfamiliar place where access to justice is not easy, thus increasing the opportunity to exploit them.<sup>109</sup>

Additionally, limiting TIP for the purpose of prostitution as the only form of trafficking was rejected by the Roundtable on the Meaning of Trafficking in Persons because victims can be trafficked for many purposes.<sup>110</sup> Arguably, TIP is not limited to the purpose of prostitution; it includes other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>111</sup>

Finally, the Roundtable on the Meaning of Trafficking in Persons rejected the notion of consent as an element of TIP, because if the victim consents to being trafficked that does not formalise TIP *per se*. This consent should include the movement and the end conditions together.<sup>112</sup> What is more, the consent of trafficked persons should be obtained for all the stages of TIP and all its processes. Obviously, it is difficult to obtain this consent since TIP is oppressive.<sup>113</sup>

However, the Roundtable on the Meaning of Trafficking in Persons requires a *mens rea*<sup>114</sup> on the part of the offender as an element of the crime if this offender is to be considered a trafficker. Nevertheless, the level of knowledge and/or intent that has been required has not been agreed because it is not easy to measure these criteria.<sup>115</sup> Moreover, the *mens rea* could be considered to be the purpose element of TIP.<sup>116</sup> Additionally, the definition of TIP should not include any reference to the movement or its purpose, be it legal or illegal, although this movement is irrelevant to this definition, it should nevertheless be noted that some movement is necessary. However, coercive or deceitful movement for an exploitative purpose is considered to be TIP.<sup>117</sup> The Roundtable on the Meaning of Trafficking in Persons suggests

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<sup>109</sup> Miller and Stewart, op cit, 14-15.

<sup>110</sup> *ibid*, 15.

<sup>111</sup> The TIP, Art. 3(a).

<sup>112</sup> Miller and Stewart, op cit, 16.

<sup>113</sup> United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts' (The Vienna Forum to fight Human Trafficking 13-15 February 2008, Austria Center Vienna) UN.GIFT B.P.: 011, Background Paper 1, 5.

<sup>114</sup> The *mens rea* will be further discussed in chapter five (5.3.3) as this section will examine the *mens rea* in the crime of trafficking in persons.

<sup>115</sup> Miller and Stewart, op cit, 16.

<sup>116</sup> Gallagher, op cit, 34.

<sup>117</sup> Miller and Stewart, op cit, 17.



that the definition of trafficking should increase the protection of trafficked victims and decrease the ability of traffickers to exploit their victims.<sup>118</sup>

Furthermore, the 2002 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC) has defined trafficking as follows: ‘the moving, selling or buying of women or children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subject to trafficking’.<sup>119</sup>

Accordingly, this definition has been criticised for being narrow. In this regard, the definition of trafficking in the SAARC includes three elements: the action, the means, and the purpose. However, these elements in the SAARC do not include all the main components that constitute trafficking in the TIPP. To be more specific, the definition of TIP in the SAARC limits trafficking to just one form, which is prostitution.<sup>120</sup> Furthermore, the action element is limited to ‘moving, selling or buying’. In addition, no means have been stated in this definition. Moreover, this definition limits its scope to women and children, ignoring the fact that men might also be subjected to TIP.

A point to note, however, is that the SAARC has adopted this definition of trafficking in order to combat international prostitution networks that use women and children.<sup>121</sup>

Consequently, it should be stressed that although the SAARC definition of TIP comes after the TIPP’s definition, it is not as comprehensive as the definition of TIP stated in the Protocol. To be more specific, a number of components have not been included and addressed in the SAARC’s definition.

Moreover, the Council of Europe Convention on Action against Trafficking in Human Beings (CoE) has defined TIP as follows:<sup>122</sup>

[T]he 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

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<sup>118</sup> *ibid*, 18.

<sup>119</sup> South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, (entered into force 1 December 2005) Art. 1(3); Gallagher, *op cit*, 43.

<sup>120</sup> Gallagher, *op cit*, 43- 44.

<sup>121</sup> *ibid*, 43.

<sup>122</sup> Council of Europe Convention on Action against Trafficking in Human Beings (CoE) (entered into force 1 February 2008) ETS 197, 16.V.2005.

the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>123</sup>

In light of the above definition, it is noticeable that the CoE not only adopts the same definition of trafficking as the TIPP but also defines trafficked victims.<sup>124</sup> This development is considered an important step to applying the provisions of the CoE related to protection correctly.<sup>125</sup> Furthermore, unlike the TIPP, which uses the expression ‘trafficking in persons’, the CoE uses the expression ‘trafficking in human beings’. This could be understood to mean that TIP, in accordance with the CoE, is limited to ‘any natural person who is subject to trafficking in human beings’.<sup>126</sup> In other words, the word ‘persons’ in the expression ‘trafficking in persons’ could be understood as an expression that could include natural and legal persons, whilst the term ‘human beings’ in the expression ‘trafficking in human beings’ is limited to natural persons.

Accordingly, it could be said that there are various definitions of TIP. On the one hand, some of these definitions have narrow aspects because they focus only on gender issues by limiting TIP to women only, or they limit TIP to one form, or they simply concentrate on the movement of victims. On the other hand, some definitions are considered to be inclusive because they contain the main elements of TIP, they have no gender limitation, and they do not limit TIP to just one or a few forms. In other words, from the previous definition of TIP, it is to be noted that the concept of TIP has been developed from mainly concentrating on just one category (women) to include all categories (adults, children, men, and women). Moreover, the concept of TIP has also been developed to include a list of exploitative acts rather than limiting TIP to one or a few categories. In addition, as a result of the development of the concept of TIP, TIP includes the commission of TIP inside and across borders.

Therefore, by examining the previous definitions, it might be said that the definition of TIP in the TIPP could be considered to be the best existing definition but not necessarily the best possible definition for the following reasons. Firstly, this definition gives a unified meaning

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<sup>123</sup> The CoE, Art. 4(a).

<sup>124</sup> Article 4(e) of the CoE defines trafficked victim as follows ‘any natural person who is subject to trafficking in human beings as defined in this article’.

<sup>125</sup> The CoE, Art. 4(a), Art. 4(e); Gallagher, op cit, 46.

<sup>126</sup> The CoE, Art. 4(e).

to what TIP represents.<sup>127</sup> Secondly, this definition is not limited to TIP for one purpose; it gives a list of exploitative purposes.<sup>128</sup> Thirdly, this definition deals with TIP as a crime against all persons rather than just women and children. However, it is noticeable that there is a special focus on women and children.<sup>129</sup> Fourthly, this definition does not require the crossing of borders for trafficked persons.<sup>130</sup> Finally, this definition contains the main elements of TIP. These elements will be addressed in the following section.<sup>131</sup>

## 2.2.2 Elements of Trafficking in Persons

There are three elements to the crime of TIP that can be derived from the definition of trafficking in the TIPP, and these elements are as follows:<sup>132</sup>

### 2.2.2.1 The ‘Action’ Element<sup>133</sup>

The action element is the first element which comprises part of the *actus reus* of the TIP process.<sup>134</sup> This element has been referred to as the process or the act, which represents that which is done in the course of TIP. Along with this, the action element includes ‘the recruitment, transportation, transfer, harbouring or receipt of persons’.<sup>135</sup>

The action element might be achieved through a diversity of activities.<sup>136</sup> However, the inclusion of the terms ‘harbouring’ and ‘receipt’ under the action element could be criticised because these terms include both the process and the end condition of TIP.<sup>137</sup> A point to note,

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<sup>127</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 267; Winterdyk, Reichel, and Perrin, op cit, 236; Allum and Gilmour, op cit, 217; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 7.

<sup>128</sup> The TIPP, Art. 3(a).

<sup>129</sup> Gallagher, op cit, 45.

<sup>130</sup> Miller and Stewart, op cit, 14-15.

<sup>131</sup> The TIPP, Art. 3(a); Winterdyk, Reichel, and Perrin, op cit, 8, 130, 216; Healey, op cit, 7, 11, 13; Gallagher, op cit, 29.

<sup>132</sup> The TIPP, Art. 3(a); Winterdyk, Reichel, and Perrin, op cit, 8,130,216; Healey, op cit, 7, 11, 13; Gallagher, op cit, 29; Jessica Elliott, *The Role of Consent in Human Trafficking* (Routledge 2015) 3; Amy Whitman and David H. Gray, ‘Transnational Human Trafficking’ (2015) 6(3) *Global Security Studies* 11, 11.

<sup>133</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices* (United Nations Publications 2003) 101; Gallagher, op cit, 29- 31; Elliott, op cit, 54-55. This element will be discussed in detail in chapter three (3.3.2.1).

<sup>134</sup> Gallagher, op cit, 29.

<sup>135</sup> The TIPP, Art. 3(a); UNODC, ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 2-3; Winterdyk, Reichel, and Perrin, op cit, 8, 130, 216; Whitman and Gray, op cit, 11.

<sup>136</sup> Gallagher, op cit, 29. These activities, in accordance with Article 3(a) of the TIPP, are: ‘the recruitment, transportation, transfer, harbouring or receipt of persons’.

<sup>137</sup> Gallagher, op cit, 30.

however, is that in the case of trafficking in children the action element and the purpose element are the only elements required.<sup>138</sup>

### 2.2.2.2 The ‘Means’ Element<sup>139</sup>

The means element is the second element that comprises part of the *actus reus* of the TIP process.<sup>140</sup> This element has been referred to as the method by which the TIP is carried out. This element includes ‘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’.<sup>141</sup> It might be argued, however, that this element is irrelevant to trafficking in children and merely refers to trafficking in adults.<sup>142</sup> In particular, in accordance with the TIPP the means element is not relevant in regard to trafficked persons aged less than eighteen years; in such cases, the prosecution of the crime of TIP requires the presence of the action and purpose elements.<sup>143</sup>

It should be noted that coercion is essential to the idea of TIP. Likewise, coercion is what differentiates trafficking from other similar phenomena, such as the smuggling of migrants, legally and conceptually.<sup>144</sup> In addition to this, coercion requires the use of threats or force.<sup>145</sup> More to the point, some means of trafficking have been classified as additional means, such as abuse of power or of a position of vulnerability.<sup>146</sup>

It should also be noted that, in accordance with the TIPP, the consent of trafficked victims to be exploited is considered irrelevant when any means of TIP have been exercised, as the

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<sup>138</sup> The TIPP, Art. 3(c)(d); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 270; Gallagher, op cit, 29.

<sup>139</sup> United Nations Economic and Social Commission for Asia and the Pacific, op cit, (United Nations Publications 2003) 101; Catherine Paris, *Modern Day Slavery: Human Trafficking Revealed* (Claddagh Limited Publishing House 2007) 11-15; Gallagher, op cit, 31- 33; Elliott, op cit, 60-68. This element will be discussed in detail in chapter three (3.3.2.2).

<sup>140</sup> Gallagher, op cit, 31.

<sup>141</sup> The TIPP, Art. 3(a); UNODC, ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 2-3; Winterdyk, Reichel, and Perrin, op cit, 8, 130, 216; Whitman and Gray, op cit, 11.

<sup>142</sup> The TIPP, Art. 3(c); Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 17; Gallagher, op cit, 31; Healey, op cit, 13, 29; Virginia M. Kendall and T. Markus Funk, *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* (Rowman & Littlefield 2012) 140.

<sup>143</sup> The TIPP, Art. 3(c)(d); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 270.

<sup>144</sup> Gallagher, op cit, 31.

<sup>145</sup> Paris, op cit, 14.

<sup>146</sup> Gallagher, op cit, 32.

consent of trafficked victims is unimaginable in those situations.<sup>147</sup> In this regard, the ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ states that ‘[o]nce it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence’.<sup>148</sup>

In other words, if a person has agreed to be trafficked, this consent will not be taken into consideration unless this person shows an understanding of his or her situation, which includes consent with free will to the movement and the end conditions.<sup>149</sup> Nonetheless, this could be challenged on the basis that TIP contains processes and stages and the consent should be applied to all of them. Consequently, it is inconceivable that trafficked persons would agree to all those stages because they include risky and oppressive means.<sup>150</sup>

Moreover, the term ‘abuse of authority’ might include males exercising power over females in the same family or parents exercising this power over their children.<sup>151</sup> In addition, the expression ‘abuse of a position of vulnerability’ applies when the trafficked persons have no choice but to submit to the *status quo* of abuse.<sup>152</sup> Furthermore, this expression might be interpreted according to the *travaux préparatoires* as follows: ‘any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved’.<sup>153</sup> In this regard, the Explanatory Report to the European Convention on Action against Trafficking states that:<sup>154</sup>

[T]he vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s immigration status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such

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<sup>147</sup> Gallagher, op cit, 78-79; Kristina Touzenis, Trafficking in Human Beings – N° 3 – Human Rights and Transnational Criminal Law, Developments in Law and Practices (UNESCO 2010) 32; Healey, op cit, 11.

<sup>148</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 276.

<sup>149</sup> Miller and Stewart, op cit, 17.

<sup>150</sup> United Nations Global Initiative to Fight Human Trafficking, ‘Human Trafficking for the Removal of Organs and Body Parts’, op cit, 5.

<sup>151</sup> Gallagher, op cit, 32.

<sup>152</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 269.

<sup>153</sup> UNODC, ‘Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2006) 347; Gallagher, op cit, 32.

<sup>154</sup> Gallagher, op cit, 32.

a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.<sup>155</sup>

The expression ‘the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’ has a vague meaning, because it is not clear in terms of the means element whether this expression is restricted to circumstances in which an individual has exercised legal control over another, or it could be expanded to contain *de facto* control. Furthermore, it is not clear whether there is a difference between the expressions ‘the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’ and ‘abuse of power or position of vulnerability’. In this regard, the *travaux préparatoires* of the TIPP remains silent.<sup>156</sup>

Accordingly, it can be said that these means affect the ability of trafficked persons to make decisions. To be more precise, these means force trafficked persons to take decisions they do not normally have to take when they have free will.<sup>157</sup>

### **2.2.2.3 The ‘Purpose’ Element<sup>158</sup>**

The purpose is the third element that comprises part of the *actus reus* as well as the *mens rea* of TIP.<sup>159</sup> This element has been referred to as the goal, which represents why the TIP is carried out. To be more specific, the main purpose of TIP is exploitation, which includes ‘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>160</sup>

The purpose element provides the *mens rea* which is required in the definition of TIP.<sup>161</sup> Along with this, the purpose of trafficking is to exploit victims. However, the exploitation is not defined in the TIPP; the Protocol simply provides a list of exploitive acts.<sup>162</sup>

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<sup>155</sup> Council of Europe, *Explanatory Report on the Convention on Action against Trafficking in Human Beings*, ETS 197, 16.V.2005 (European Trafficking Convention Explanatory Report) Para. 83, cited in Gallagher, op cit, 32.

<sup>156</sup> Gallagher, op cit, 33.

<sup>157</sup> Paris, op cit, 14.

<sup>158</sup> United Nations Economic and Social Commission for Asia and the Pacific, op cit, (United Nations Publications 2003) 101; Gallagher, op cit, 34; Elliott, op cit, 69-70. This element will be discussed in detail in chapter two (2.2.4). In addition, some components of this element will be discussed in detail in chapter three (3.3.2.3).

<sup>159</sup> Gallagher, op cit, 34.

<sup>160</sup> The TIPP, Art. 3(a); UNODC, ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 2-3; Winterdyk, Reichel, and Perrin, op cit, 8,130,216.

<sup>161</sup> Gallagher, op cit, 34.

<sup>162</sup> The TIPP, Art. 3(a); Gallagher, op cit, 34-35.

Accordingly, TIP requires all these elements. In other words, at least one component of each element of the crime of TIP should exist.<sup>163</sup> However, there is an exception in the case of trafficking in children which does not require the means element.<sup>164</sup> This is because they are not qualified to give informed consent regarding trafficking- in-persons situations.<sup>165</sup> In this regard, the TIPP states that ‘[t]he 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’.<sup>166</sup>

It is noteworthy that despite the fact that the TIPP recognises the special status of children as a vulnerable category, it does not include a specific section addressing trafficking in children.<sup>167</sup> In this regard, it is obvious that, in the matter of trafficking in children, the Protocol does not require the means element in trafficking in children, and it defines a ‘child’.<sup>168</sup> However, the exclusion of a particular section in the TIPP to tackle trafficking in children could be challenged on the basis that most of the states parties to the Protocol already have a legal obligation to prevent TIP in accordance with the Convention on the Rights of the Child, which states that ‘[s]tates 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’.<sup>169</sup>

Consequently, it might be argued that these elements (the action element, the means element, and the purpose element) are what give TIP its particularity. More to the point, it can be understood that TIP is distinct from the smuggling of migrants; this distinction will be examined in the next section.

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<sup>163</sup> The TIPP, Art. 3(c); Healey, op cit, 13, 29; Gallagher, op cit, 31; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 8.

<sup>164</sup> The TIPP, Art. 3(c); Obi N.I. Ebbe and Dilip K. Das (eds), *Global Trafficking in Women and Children* (CRC Press 2007) 9; Gallagher, op cit, 31; Healey, op cit, 13, 29.

<sup>165</sup> Mark Ensalaco, Linda C. Majka, *Children's Human Rights: Progress and Challenges for Children Worldwide* (Rowman & Littlefield 2005) 87.

<sup>166</sup> The TIPP, Art. 3(c).

<sup>167</sup> LeRoy G. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’ (2003) 35(1) *The George Washington International Law Review* 227, 244.

<sup>168</sup> The TIPP, Art. 3(c), Art. 3(d). Art 3(d) defines child as ‘any person under eighteen years of age’; Potts, op cit, 245.

<sup>169</sup> Convention on the Rights of the Child (entered into force 2 September 1990) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) Art. 35; Potts, op cit, 245.

### 2.2.3 Distinguishing between Trafficking in Persons and Smuggling of Migrants<sup>170</sup>

Distinguishing between TIP and the smuggling of migrants is very important, especially for trafficked persons.<sup>171</sup> To be more precise, smuggled persons do not have the same rights as those provided to trafficked persons in accordance with the relevant articles in the main international legal instruments dealing with TIP and smuggling of migrants.<sup>172</sup> These instruments are the TIPP,<sup>173</sup> and the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, which will be referred to hereinafter as the Smuggling of Migrants Protocol.<sup>174</sup> To return to an earlier point, trafficked persons are entitled to special rights, in contrast to smuggled persons.<sup>175</sup> By way of illustration, there is no requirement to permit a smuggled person the right to remain temporarily or permanently in the territory of a state party to the Smuggling of Migrants Protocol.<sup>176</sup> Furthermore, the safety of smuggled persons is not taken into consideration with regard to the repatriation process under the Smuggling of Migrants Protocol.<sup>177</sup> Additionally, special protections in relation to psychological, physical, the remedy right, the personal safety of smuggled persons, the protection of smuggled children, and measures against smugglers are not provided in the Smuggling of Migrants Protocol.<sup>178</sup>

However, it is not easy to differentiate between them as there are a number of differences and similarities between them.<sup>179</sup> For example, trafficking and smuggling are normally used synonymously, and the boundaries between them are sometimes unclear. Along with this,

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<sup>170</sup> The reason for limiting the distinction between the crime of trafficking in persons and other crimes in just one crime, which is the crime of smuggling of migrants, is because; first, the two crimes overlap. Second, it is not easy to draw a line between them. Third, both crimes have their own protocols ('the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children', and 'the Protocol against the Smuggling of Migrants by Land, Sea and Air') and these protocols supplement the United Nations Convention against Transnational Organized Crime.

<sup>171</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4.

<sup>172</sup> Gallagher, op cit, 278-279.

<sup>173</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

<sup>174</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 28 January 2004) GA Res. 55/25, Annex III, UN GAOR, 55th Sess., Supp. No. 49, at 62, UN Doc. A/45/49 (Vol. I) (2001).

<sup>175</sup> Gallagher, op cit, 279. These special rights will be discussed in detail in chapter six (6.5).

<sup>176</sup> Gallagher, op cit, 279.

<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

<sup>179</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4.



both TIP and smuggling of migrants are considered to be modern expressions.<sup>180</sup> To be more specific, TIP and smuggling of migrants are regarded as a result of maltreatment of persons. Moreover, both of them include moving people for profit.<sup>181</sup> It can be said that smuggled persons may become trafficked victims. Additionally, criminals could use the same process for trafficking and smuggling.<sup>182</sup>

However, despite the fact that TIP and smuggling of migrants appear similar, there are differences between them. In particular, the smuggling of migrants was defined according to the Smuggling of Migrants Protocol, as follows: ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’.<sup>183</sup> Nevertheless, TIP was defined in the TIPP.<sup>184</sup> Therefore, it can be noted that the adoption of the Smuggling of Migrants Protocol is considered to be a clear indication of the difference between trafficking and smuggling.<sup>185</sup>

It is worth noting that the meaning of the expression ‘trafficking’ is trade or illicit trade. Consequently, TIP means a form of illicit trade in humans. Moreover, the meaning of the expression ‘smuggling’ is illicit import or export. Accordingly, smuggling of persons is the illicit transportation of humans from one country to another.<sup>186</sup>

It is understood that the smuggling of migrants requires the consent of the smuggled persons to be smuggled, whereas this consent is not given by trafficked victims in TIP. In other words, there is a lack of consent with trafficked persons, whilst smuggled persons consent to be smuggled.<sup>187</sup> More to the point, a smuggled person has free will and has made an autonomous decision.<sup>188</sup>

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<sup>180</sup> Winterdyk, Reichel, and Perrin, op cit, 4-5.

<sup>181</sup> *ibid*, 6, 216.

<sup>182</sup> UNODC, ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4.

<sup>183</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 28 January 2004) GA Res. 55/25, Annex III, UN GAOR, 55th Sess., Supp. No. 49, at 62, UN Doc. A/45/49 (Vol. I) (2001), Art. 3(a).

<sup>184</sup> The definition of trafficking in persons has been examined above in chapter two (2.2.1).

<sup>185</sup> Tomoya Obokata, ‘Trafficking of Human Beings as a Crime against Humanity: Some Implications’ (2005) 54(2) *International and comparative law quarterly* 445, 446.

<sup>186</sup> Anis H. Bajrektarević, ‘Trafficking in and Smuggling of Human Beings-Linkages to Organized Crime-International Legal Measures’ (2000) 8(1-2) *Kriminologija i socijalna integracija* 57, 65.

<sup>187</sup> UNODC, ‘Toolkit to Combat Trafficking in Persons’ (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4; Winterdyk, Reichel, and Perrin, op cit, 26, 216; Healey, op cit, 7; Venla Roth (ed), *Defining Human Trafficking and Identifying Its Victims: A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings* (Martinus Nijhoff Publishers 2011) 97; Susan Kneebone and Julie Debeljak, *Transnational Crime and Human Rights: Responses*

Furthermore, the smuggling of migrants requires the crossing of borders and entering other countries illegally,<sup>189</sup> whereas TIP could take place within one country, and even if it requires the crossing of borders this process could occur legally.<sup>190</sup> For example, trafficked persons could enter a state legally or illegally, whereas smuggled persons always enter a state illegally.<sup>191</sup>

The relationship between smuggler and smuggled migrant ends when the latter arrives at his or her destination; however, the relationship between a trafficker and a victim continues when the victim arrives at the destination where the trafficker is able to exploit the victim.<sup>192</sup> In particular, trafficking includes subsequent exploitation, whereas arriving at the destination ends the smuggling.<sup>193</sup>

TIP aims to obtain illicit profit through exploiting people, whilst smuggling of migrants aims to gain profit from facilitation of the unlawful entry.<sup>194</sup> To be more specific, in smuggling of migrants the profit is generated from moving people, whereas in the TIP this profit is generated from the exploitation.<sup>195</sup>

Trafficked victims might be of any nationality. However, smuggled migrants are almost always foreign nationals<sup>196</sup> or they could be stateless people.<sup>197</sup> In other words, trafficking could occur within states and/or outside states, while smuggling requires international movement.<sup>198</sup> In addition to this, TIP violates trafficked persons' human rights and states'

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*to Human Trafficking in the Greater Mekong Subregion* (Routledge 2012) 124; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 447.

<sup>188</sup> Aiko Joshi, 'The Face of Human Trafficking (Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation)' (2002) 13(1) *Hastings Women's Law Journal* 31, 32.

<sup>189</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4; Winterdyk, Reichel, and Perrin, op cit, 5; Steward H. Oppong, 'Human Trafficking Through Organized Crime' (2012) 2(20) *International Journal of Humanities and Social Science* 37, 37.

<sup>190</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4; Winterdyk, Reichel, and Perrin, op cit, 5.

<sup>191</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 447.

<sup>192</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 4-5; Oppong, op cit, 37.

<sup>193</sup> Healey, op cit, 7; Roth, op cit, 97; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 447.

<sup>194</sup> Winterdyk, Reichel, and Perrin, op cit, 5.

<sup>195</sup> UNODC, 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 5.

<sup>196</sup> Winterdyk, Reichel, and Perrin, op cit, 5, 26.

<sup>197</sup> Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 150.

<sup>198</sup> Roth, op cit, 97; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 447.

territorial integrity by breaching criminal legislation, whereas the smuggling of migrants violates state sovereignty.<sup>199</sup>

Finally, a trafficked person is considered to be a victim, in contrast to a smuggled person, who is regarded as an offender.<sup>200</sup> In particular, TIP includes some elements that are not required in smuggling, such as recruitment without consent, coercion and/or deception and exploitative purpose.<sup>201</sup> Moreover, in contrast to the smuggling of migrants, TIP may take a number of forms. Some of these forms have been explicitly stipulated in the TIPP, while others might be inferred implicitly. These forms will be addressed in the following section.

## **2.2.4 Forms of Trafficking in Persons**

There are a number of forms of TIP which have been stated in the TIPP. These forms are ‘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>202</sup> A point to note, however, is that the TIPP has not defined these forms. These forms have been defined in accordance with other international instruments.<sup>203</sup> In light of the above, the forms of TIP can be listed as follows:

### **2.2.4.1 ‘The Exploitation of the Prostitution of Others or Other Forms of Sexual Exploitation’<sup>204</sup>**

The TIPP deliberately does not define the expressions ‘the exploitation of the prostitution of others’ and ‘other forms of sexual exploitation’, because the protocol does not want to intervene in how these issues are addressed domestically.<sup>205</sup> In this regard, it could be said that these forms of TIP occur when trafficked victim are forced into sexual exploitation situations.<sup>206</sup>

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<sup>199</sup> Winterdyk, Reichel, and Perrin, op cit, 5; Roth, op cit, 96; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 445.

<sup>200</sup> Winterdyk, Reichel, and Perrin, op cit, 130, 217; Kneebone and Debeljak, op cit, 125; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 448.

<sup>201</sup> Winterdyk, Reichel, and Perrin, op cit, 216-217; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 447.

<sup>202</sup> The TIPP, Art. 3(a); Winterdyk, Reichel, and Perrin, op cit, 27.

<sup>203</sup> Healey, op cit, 13-14; Mohamed Y. Mattar, ‘Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: the scope of the problem and the appropriate legislative responses (A Look at the Middle East: Challenges and Legal Perspectives)’ (2003) 26(3) Fordham International Law Journal 721, 725.

<sup>204</sup> The TIPP, Art. 3(a). These forms of trafficking in persons will be further discussed in chapter three (3.3.2.3).

<sup>205</sup> Gallagher, op cit, 38; Mattar, ‘Trafficking in Persons, Especially Women and Children, in Countries of the Middle East’, op cit, 725.

<sup>206</sup> Healey, op cit, 8.

It might be argued that TIP for the purpose of sexual exploitation of women and children is the most common form of TIP<sup>207</sup> and the focus of most research, in contrast to other forms of TIP, which are considered to be often neglected.<sup>208</sup> More to the point, there is often an assumption that TIP is limited to the sex industry.<sup>209</sup> However, this can be challenged on the basis that TIP includes other forms, not just sexual exploitation.<sup>210</sup> Moreover, the Australian experience, by way of illustration, has proved otherwise. It shows that TIP may occur for the purpose of forced labour exploitation in many fields, such as agriculture, domestic servitude, construction, and hospitality.<sup>211</sup> Along with this, it might be argued that if anti-trafficking initiatives focus solely on the TIP for the purpose of sexual exploitation, the other forms of trafficking will be ignored.<sup>212</sup>

#### **2.2.4.2 ‘Forced Labour or Services’<sup>213</sup>**

The inclusion of forced labour in the list of exploitative purposes in the TIPP is considered an important addition because it extends the end targets of TIP to include all the most significant exploitative work exercises, that is not just work in the sex industry.<sup>214</sup> It can be said that this form of TIP entails forcing or threatening a person to provide services or works, denying his or her free will to cease doing so.<sup>215</sup>

Forced labour or services has been defined in ‘the Forced Labour Convention, 1930 (No. 29)’ as follows: ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.<sup>216</sup> Accordingly, it

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<sup>207</sup> UNODC, ‘Global Report on Trafficking in Persons’ (2014) ISBN: 978-92-1-133830-0, e-ISBN: 978-92-1-057108-1, at 9. In accordance with this Report, between 2010 and 2012, (53%) of trafficked victims were trafficked for the purpose of sexual exploitation; Laczko, op cit, 9.

<sup>208</sup> Laczko, op cit, 9.

<sup>209</sup> Healey, op cit, 11-12.

<sup>210</sup> UNODC, ‘Global Report on Trafficking in Persons’ (2014), op cit, 9. In accordance with this Report, between 2010 and 2012, (40%) of trafficked victims were trafficked for the purpose of forced labour, (7%) were subjected to other forms of trafficking in persons; Daan Everts, ‘Human Trafficking: the Ruthless Trade in Human Misery’ (2003) 10 *Brown Journal of World Affairs* 149, 149,151; Pyali Chatterjee, ‘All Missing Cases are Not Human Trafficking but all Human Trafficking are Missing Cases: Critical Analysis’ (2015) 1 *Russian Journal of Sociology* 4, 7.

<sup>211</sup> Healey, op cit, 11-12.

<sup>212</sup> Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 4.

<sup>213</sup> The TIPP, Art. 3(a). These forms of trafficking in persons will be further discussed in chapter three (3.3.2.3).

<sup>214</sup> Gallagher, op cit, 35.

<sup>215</sup> Healey, op cit, 8.

<sup>216</sup> Forced Labour Convention, 1930 (No. 29) (entered into force 1 May 1932) adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, Art. 2(1); Healey, op cit, 14.

might be argued that forced labour or services might occur when the human rights of the victims are violated severely and their freedoms are restricted.<sup>217</sup>

### **2.2.4.3 ‘Slavery, Practices Similar to Slavery, or Servitude’<sup>218</sup>**

Firstly, slavery is regarded as a form of TIP. Slavery has been defined in ‘the Convention to Suppress the Slave Trade and Slavery’ as follows: ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.<sup>219</sup>

Secondly, practices similar to slavery are regarded as a form of TIP. These practices have been addressed under ‘the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’, which will be referred to hereinafter as the 1956 Supplementary Convention.<sup>220</sup> Practices similar to slavery include debt bondage, serfdom, several forms of forced marriage, and illegal adoption.<sup>221</sup>

The first practice similar to slavery is debt bondage, also referred to as bonded labour. This practice has been defined according to the 1956 Supplementary Convention as follows:<sup>222</sup>

[T]he 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 reasonably 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>223</sup>

It can be said that debt bondage as a form of TIP occurs when victims of trafficking cannot repay their debt to traffickers and as a result they are not permitted to leave. Therefore, they remain in a state of slavery.<sup>224</sup> To be more specific, debt bondage occurs when a person borrows money from another person, after which the borrower works for the lender for a small sum of money. However, this amount is insufficient to meet the worker’s financial needs; hence the worker borrows more and the debt is increased as a result. Consequently,

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<sup>217</sup> Healey, op cit, 14.

<sup>218</sup> The TIP, Art. 3(a).

<sup>219</sup> Convention to Suppress the Slave Trade and Slavery (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art. 1(1).

<sup>220</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3; Gallagher, op cit, 36.

<sup>221</sup> Healey, op cit, 14.

<sup>222</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

<sup>223</sup> *ibid*, Art. 1(a).

<sup>224</sup> Winterdyk, Reichel, and Perrin, op cit, 27.

this worker cannot pay off the debt and this debt is passed on to future generations of the worker's family.<sup>225</sup> A well-known example of this is children who are obliged to work for the owner until this debt is paid even though it is virtually impossible to pay it off.<sup>226</sup> In other words, debt bondage takes place as a result of an inherited debt which must be repaid.<sup>227</sup>

The second practice similar to slavery is serfdom. This practice has been defined according to the 1956 Supplementary Convention as follows:<sup>228</sup>

[T]he 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>229</sup>

The third practice similar to slavery is forced marriage.<sup>230</sup> This form of TIP occurs when one or both of the married parties is/are forced into this marriage without their consent or free will.<sup>231</sup> It is noteworthy that forced marriage is different from arranged marriage. By way of illustration, forced marriage is linked to domestic violence, diverse types of sexuality, child marriage, and honour crimes, whereas arranged marriage is linked to dowry. It also is linked with discrimination based on religion, caste, ethnicity, or sexuality.<sup>232</sup> Furthermore, in forced marriage the consent of the marriage parties is absent while arranged marriage includes this consent.<sup>233</sup> To a certain extent, TIP for the purpose of forced marriage is not easy to detect compared with other forms of TIP.<sup>234</sup>

The fourth practice similar to slavery is illegal adoption.<sup>235</sup> This form of TIP includes the kidnapping of children and instances of parents selling their children for money.<sup>236</sup> It is worth

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<sup>225</sup> *ibid*, 87; Vernon Murray and others, 'Victim Intervention Marketing: An Application of Social Activist Marketing in Opposition to Human Trafficking' (2015) 23(3) *Journal of Marketing Theory and Practice* 272, 274.

<sup>226</sup> *ibid*, 92.

<sup>227</sup> Healey, *op cit*, 8. A point to note, however, is that debt bondage is not limited to people; it also affects countries. An example of this is Greece in the Eurozone. For more information see Alexandros Kioupiolis, 'Towards a Regime of Post-political Biopower? Dispatches from Greece, 2010–2012' (2014) 31(1) *Theory, Culture & Society* 143, 149.

<sup>228</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

<sup>229</sup> *ibid*, Art. 1(b).

<sup>230</sup> Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Greenwood Publishing Group 2009)123-124; Healey, *op cit*, 8.

<sup>231</sup> Healey, *op cit*, 8.

<sup>232</sup> Máiréad Enright, 'Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage' (2009) 72(3) *The Modern Law Review* 331, 333.

<sup>233</sup> *ibid*, 339-340.

<sup>234</sup> Winterdyk, Reichel, and Perrin, *op cit*, 217.

<sup>235</sup> Aronowitz, *op cit*125-127; Winterdyk, Reichel, and Perrin, *op cit*, 27.

noting that illegal adoption may fall under the form of practice similar to slavery, because according to the 1956 Supplementary Convention it includes:<sup>237</sup>

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 labour.<sup>238</sup>

However, in accordance with the 1956 Supplementary Convention, illegal adoption is one of the practices similar to slavery. Therefore, it is regarded as a form of TIP. This might be challenged on the basis that the exploitation which constitutes the purpose element in the crime of TIP is not clear in this form of TIP, regardless of whether this exploitation is exercised through the parent or guardian, or the person who receives the child, or both the giver and receiver.<sup>239</sup>

Accordingly, if there is no exploitation in the illegal adoption, this adoption cannot be considered to be TIP. However, many countries and international organisations realise that there is a link between the international adoption of children and TIP.<sup>240</sup> Moreover, illegal adoption can be prosecuted as a crime of TIP according to what is stated by the United Nations Office on Drugs and Crime.<sup>241</sup> Accordingly, it might be claimed that TIP for the purpose of illegal adoption is not easy to detect compared with other forms of TIP.<sup>242</sup> However, it is understood that the exploitation of the adopted children involves subjecting them to a practice similar to slavery. Furthermore, this exploitation occurs when the adopted children are adopted illegally.<sup>243</sup>

Thirdly, servitude is regarded as a form of TIP. A point to note, however, is that under international law the notion of servitude is undefined. However, servitude generally indicates types of exploitation that are considered to be less severe than slavery. From this perspective,

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<sup>236</sup> Winterdyk, Reichel, and Perrin, op cit, 27.

<sup>237</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Gallagher, op cit, 40.

<sup>238</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 1(d).

<sup>239</sup> Gallagher, op cit, 41.

<sup>240</sup> *ibid*, 41.

<sup>241</sup> UNODC, 'Anti-human trafficking manual for criminal justice practitioners' (2009) Module 1: Definitions of trafficking in persons and smuggling of migrants, 7. In this regard, it has been stated that '[i]n some countries, particularly those with an already established adoption market, illicit adoption practices are becoming more common and can be prosecuted under the umbrella of trafficking crimes'; Gallagher, op cit, 41.

<sup>242</sup> Winterdyk, Reichel, and Perrin, op cit, 217.

<sup>243</sup> Gallagher, op cit, 41.

since the meaning of servitude is vague, it overlaps with slavery and practice similar to slavery. Nonetheless, there are some objections to the inclusion of servitude in the exploitative purpose list.<sup>244</sup> Notably, indentured servitude is considered to be a form of unfree labour where the labourer is placed in a vulnerable situation because the indenture agreement can be changed arbitrarily, thus affecting the labourer unfairly.<sup>245</sup>

It is noteworthy that the informal working group of the Ad Hoc Committee at the seventh session suggested, for the purpose of the TIPP, the following definition of servitude: ‘the status or condition of dependency of a person who is [unjustifiably] compelled by another person to render any service and who reasonably believes that he or she has no alternative but to perform the service’.<sup>246</sup> In addition to this, the Ad Hoc Committee at the ninth session has defined servitude as follows:

[T]he condition of a person who is unlawfully compelled or coerced by another to render any service to the same person or to others and who has no reasonable alternative but to perform the service, and shall include domestic servitude and debt bondage.<sup>247</sup>

Accordingly, it should be stressed that the approved text of the TIPP adopted by the General Assembly does not include any definition of servitude.<sup>248</sup>

#### **2.2.4.4 The Removal of Organs<sup>249</sup>**

The removal of organs is regarded as a form of TIP. This form of TIP focuses on body parts but not the person, and the aim of removing and transporting the organ or the organs is to use them for another person’s benefit. However, it could be argued that the person who receives this benefit does not usually know the identity of the donor of the organ(s). Specifically, the

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<sup>244</sup> UNODC, ‘Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2006) 344, footnote 29. In this regard, it has been stated that ‘[a]t the ninth session of the Ad Hoc Committee, most delegations favoured including the reference to “servitude”. Those opposed to the inclusion cited a lack of clarity as to the meaning of the term and duplication with the reference to “slavery or practices similar to slavery”. It was also noted that, if the word “servitude” was to be deleted from this subparagraph, the definition of “servitude” in subparagraph (c) should also be deleted’; Gallagher, op cit, 37.

<sup>245</sup> Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 27-28.

<sup>246</sup> UNODC, ‘Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2006) 342.

<sup>247</sup> *ibid*, 344-345.

<sup>248</sup> *ibid*, 347.

<sup>249</sup> The TIPP, Art. 3(a).



person who receives the organ(s) may not know that TIP has been carried out to obtain this organ or organs from an unwilling trafficked victim.<sup>250</sup>

In this regard, victims trafficked for the purpose of the removal of organs are overwhelmingly recruited from the ranks of the poor by traffickers who are members of organised crime groups. Traffickers force their victims, or entice them by using false promises to persuade them to sell their organs. Victims receive a sum of money that is very small in comparison with the sum paid by recipients for the organs. A proportion of this money goes to the members of the organised criminal network such as brokers and the health-care workers involved in the crime.<sup>251</sup>

In China, tales abound about the execution of prisoners primarily for their organs.<sup>252</sup>

Furthermore, in Africa children disappear, kidnapped by criminals to obtain their organs, while orphans may also be victims of organ harvesting. Moreover, certain people who work with children for adoption at birth, including doctors and nurses, trade in these children.<sup>253</sup>

TIP for the purpose of the removal of organs is considered to be part of TIP in the TIPP.<sup>254</sup> In addition, it should be noted that the TIPP, by including the removal of organs in the list of exploitation purposes, aims to prohibit the exploitation of people for their organs by traffickers.<sup>255</sup> More to the point, TIP for the purpose of the removal of organs is considered a criminal act according to this Protocol.<sup>256</sup> Despite all of this, TIP for the purpose of the removal of organs is not included in the United States Victims of Trafficking and Violence Protection Act (TVPA), which makes the United States the only state that does not recognise TIP for the purpose of the removal of organs as a form of TIP.<sup>257</sup>

Moreover, since 2002 the trade in organs has not been included in the later law of the European Union (EU) as a form of perpetrating TIP.<sup>258</sup> Nevertheless, after the CoE entered

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<sup>250</sup> Winterdyk, Reichel, and Perrin, op cit, 94.

<sup>251</sup> United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts', op cit, 2.

<sup>252</sup> Winterdyk, Reichel, and Perrin, op cit, 94.

<sup>253</sup> *ibid*, 95.

<sup>254</sup> *ibid*, 94.

<sup>255</sup> The TIPP, Art. 3(a); United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts', op cit, 5.

<sup>256</sup> United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts', op cit, 3.

<sup>257</sup> United States of America: Victims of Trafficking and Violence Protection Act of 2000 (28 October 2000) Public Law 106-386 [H.R. 3244]; Winterdyk, Reichel, and Perrin, op cit, 94.

<sup>258</sup> Winterdyk, Reichel, and Perrin, op cit, 106.

into force, trade in organs was included in the EU law as a result of the adaption of a recent proposal in this regard.<sup>259</sup>

Additionally, the TIP for the purpose of the removal of organs is not considered an element of human trafficking according to the EU Framework Decision.<sup>260</sup> Furthermore, there were objections to the inclusion of TIP for the purpose of the removal of organs, because the TIPP deals with TIP for the purpose of exploiting trafficked victims for their organs not trafficking in organs *per se*.<sup>261</sup> Accordingly, it is important to note that TIP for the purpose of the removal of organs is different from trafficking in organs.<sup>262</sup> The TIPP addresses TIP for the purpose of the removal of organs. However, it does not address trafficking in organs alone. In other words, the TIPP applies to trafficked victims who are exploited for their organs but not to trafficking in organs *per se*.<sup>263</sup>

It is clear that the consent to be trafficked for the purpose of the removal of organs is extremely complicated, because the victims of TIP for the purpose of the removal of organs have usually agreed to be trafficked. This consent might be used as a defense in some countries according to their domestic laws.<sup>264</sup> However, the TIPP states that '[t]he 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>265</sup> Therefore, if traffickers have used any of the acts and the means stated in Article 3(a) of the Protocol,<sup>266</sup> the consent of victims will not be taken into consideration.<sup>267</sup>

Along with this, TIP contains stages, and the victims should consent to every stage and the whole process, because the consent of victims to be exploited in one stage is insufficient to absolve the traffickers from legal liability. Moreover, coercion, deception, the abuse of a position of vulnerability, or other means could be exercised by traffickers. In addition, it is

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<sup>259</sup> Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 1 February 2008) ETS 197, 16.V.2005; Winterdyk, Reichel, and Perrin, *op cit*, 107. This proposal is about 'preventing and combating trafficking in human beings and protecting its victims'.

<sup>260</sup> Winterdyk, Reichel, and Perrin, *op cit*, 110.

<sup>261</sup> Gallagher, *op cit*, 39; Seán Columb, 'Beneath the Organ Trade: A Critical Analysis of the Organ Trafficking Discourse' (2015) 63(1-2) *Crime, Law and Social Change* 21, 32.

<sup>262</sup> *ibid*, 40.

<sup>263</sup> The TIPP, Art. 3(a); United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts', *op cit*, 3-4.

<sup>264</sup> *ibid*, 5-6.

<sup>265</sup> The TIPP, Art. 3(b).

<sup>266</sup> The TIPP, Art. 3(a). In accordance with this Article, these acts and means are '[T]he 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'.

<sup>267</sup> Gallagher, *op cit*, 78-79; United Nations Global Initiative to Fight Human Trafficking, 'Human Trafficking for the Removal of Organs and Body Parts', *op cit*, 5.

not possible from a legal perspective to accept being exploited, especially when this exploitation is obtained through inappropriate means.<sup>268</sup>

A point to note, however, is that the consent of a child to be exploited for the purpose of the removal of organs is irrelevant and it is not taken into consideration for absolving traffickers from legal liability.<sup>269</sup> This is because the TIP states that ‘[t]he 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’.<sup>270</sup>

Accordingly, it is worth noting that traffickers may benefit from TIP for the purpose of the removal of organs in many ways, such as selling their victims for their organs. Furthermore, they could be using deception or coercion to remove the organs of their victims. Likewise, traffickers could use fraudulent means against people who agree to sell their organs.<sup>271</sup>

#### **2.2.4.5 Other Forms of Trafficking in Persons**

It is notable that there are other forms of TIP.<sup>272</sup> In this regard, it should be stressed that the TIP uses the expression ‘at a minimum’ in the list of exploitive acts, because it aims to ensure that this list is not limited, and it could include a new or an unnamed sort of exploitation.<sup>273</sup> An example of this is child soldiers. In accordance with the United Nations Children’s Fund, hereinafter referred to as UNICEF, child soldiers means:<sup>274</sup>

[a]ny person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.<sup>275</sup>

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<sup>268</sup> United Nations Global Initiative to Fight Human Trafficking, ‘Human Trafficking for the Removal of Organs and Body Parts’, op cit, 5.

<sup>269</sup> *ibid*, 6.

<sup>270</sup> The TIP, Art. 3(c).

<sup>271</sup> United Nations Global Initiative to Fight Human Trafficking, ‘Human Trafficking for the Removal of Organs and Body Parts’, op cit, 8.

<sup>272</sup> Winterdyk, Reichel, and Perrin, op cit, 27.

<sup>273</sup> The TIP, Art. 3(a); Gallagher, op cit, 35; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 8, 21.

<sup>274</sup> Aronowitz, op cit 103.

<sup>275</sup> Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa. Adopted by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social

This form of trafficking involves the illegal recruitment of children by armed forces through coercion, force, or fraud.<sup>276</sup> Furthermore, in this form of TIP children are forced to serve as soldiers.<sup>277</sup> Additionally, these children are used as human shields, bomb carriers, and for clearing landmines.<sup>278</sup> Notably, a large number of child soldiers all over the world, who are involved in fighting, have been killed or injured. Therefore, this form of trafficking has been condemned internationally. Child soldiers live in hard conditions such as shortage of food, malnutrition, and lack of medical care. Moreover, they are brutally beaten, punished, and humiliated. A point to note, however, is that child soldiers include both boys and girls.<sup>279</sup>

However, it could be argued that some children become soldiers voluntarily for a number of reasons. The first reason is the poor education and work opportunities. The second reason is that some children seek revenge for the killing and torturing of their family members.<sup>280</sup> Accordingly, there are a number of reasons why child soldiers are used as slave labourers. The first is that it is easy to manipulate them. The second is that they are cheap workers.<sup>281</sup>

Another example of other forms of TIP is child camel jockeys. This form of TIP takes place through the abduction or selling of children aged between a year and a half and six years by their own families. Those children are kept in captivity under tight conditions and their captors' keep them underfed to ensure that they are very light, which makes the camels run faster. In addition, the child camel jockeys are tied to the frightened camels; the child screams when the camel starts running and as a result the camel runs faster. This could result in the child falling from the camel causing, death, serious injury, or mutilation. However, it is evident that those children live a life of slavery and they are treated as a commodity.<sup>282</sup>

In this regard, there have been serious efforts to prohibit child camel jockeys. By way of illustration, in 2005 the United Arab Emirates (UAE) introduced legislation prohibiting this

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Reintegration of Child Soldiers in Africa, organized by UNICEF in cooperation with the NGO Sub-group of the NGO Working Group on the Convention on the Rights of the Child, Cape Town, 30 April 1997.

<sup>276</sup> Healey, op cit, 9.

<sup>277</sup> Paris, op cit, 39-40; Kathryn Cullen-DuPont, *Human Trafficking* (Infobase Publishing 2009) 22.

<sup>278</sup> Carol S. Brusca, 'Palermo Protocol: The First Ten Years after Adoption' (2011) 2(3) *Global Security Studies* 8, 13.

<sup>279</sup> Paris, op cit, 39-40; Cullen-DuPont, op cit, 22.

<sup>280</sup> Paris, op cit, 41; Cullen-DuPont, op cit, 22.

<sup>281</sup> Paris, op cit, 43.

<sup>282</sup> *ibid*, 23-25; Mohamed Y. Mattar, 'Trafficking in persons, especially women and children, in countries of the Middle East: the scope of the problem and the appropriate legislative responses.(A Look at the Middle East: Challenges and Legal Perspectives)' (2003) 26(3) *Fordham International Law Journal* 721, 729; Myada O El-Sawi, 'Beyond the "tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39(2) *Georgia Journal of International and Comparative Law* 391, 410.

practice.<sup>283</sup> Furthermore, the UAE has created a rehabilitation programme for all child camel jockeys.<sup>284</sup> A number of measures have been taken by the UAE government to rehabilitate and reintegrate child camel jockeys such as providing shelters for these children, taking care of them, returning them to their countries of origin, and funding programmes for these children's social reintegration and rehabilitation.<sup>285</sup> More to the point, in the same year a number of Arab Gulf countries started to use robotic camel jockeys technology, which replaces the use of children in these races; this eliminates the need to exploit children.<sup>286</sup>

Another example of other forms of TIP is mail order brides. This form of TIP takes place as a result of gender imbalance. An example of this form of TIP is the practice in China where the number of men sharply exceeds the number of women, thus making it difficult for men to find wives. Therefore, they try to buy their wives through 'the bride-selling market'. A point to note, however, is that women in this form of TIP are treated as a commodity and they are at risk and face vulnerable conditions either before or after such marriages.<sup>287</sup>

Another example of other forms of TIP is involuntary domestic servitude. This form of TIP involves detaining domestic workers in exploitative situations in terms of poor working conditions, insufficient wages, and restriction of freedom.<sup>288</sup> However, because this form of trafficking takes place in private places, it is not easy to detect. Additionally, public authorities largely do not regulate this sort of work.<sup>289</sup>

Moreover, it is noticeable that trafficking in children of this kind exists in many countries. By way of illustration, in India children aged 8-10 work for long hours in very difficult work

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<sup>283</sup> United Arab Emirates, Federal Law (No 15 of 2005) in regards to Organizing Participation in Camel Racing; Paris, op cit, 27-29; Brusca, op cit, 16; See Trafficking of children for use as camel jockeys, Information on the United Arab Emirates (UAE) Compliance with ILO Convention No.182 on the Worst Forms of Child Labour (ratified in 2001).

<sup>284</sup> Paris, op cit, 27-29; See Trafficking of children for use as camel jockeys, Information on the United Arab Emirates (UAE) Compliance with ILO Convention No.182 on the Worst Forms of Child Labour (ratified in 2001).

<sup>285</sup> United Nations General Assembly, 'Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (2011) A/HRC/17/35/Add.1, at 23.

<sup>286</sup> Paris, op cit, 27-29; See Trafficking of children for use as camel jockeys, Information on the United Arab Emirates (UAE) Compliance with ILO Convention No.182 on the Worst Forms of Child Labour (ratified in 2001). An example of this is that, in 2006, a race in Kuwait using the technology of robot camel jockeys was held. In this race, teams from (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) participated.

<sup>287</sup> Aronowitz, op cit 121-122.

<sup>288</sup> Healey, op cit, 8.

<sup>289</sup> Cullen-DuPont, op cit, 19; Healey, op cit, 9.

such as making bricks by packing mud, crushing rocks, and loading gravel to construct roads.<sup>290</sup>

Accordingly, it is obvious that the Trafficking in Persons Report has shifted, during the period from 2002 to 2010, from a narrow focus on sex trafficking, broadening its range to recognise the other forms of TIP.<sup>291</sup> In addition, according to the International Labour Organization (ILO), forced labour and involuntary servitude are considered to be the main forms of TIP forms.<sup>292</sup> However, this might be challenged on the basis that according to the Global Report on Trafficking in Persons, which is considered to be the most recent global report on TIP, between 2010 and 2012, 53% of trafficked victims were trafficked for the purpose of sexual exploitation, 40% were trafficked for the purpose of forced labour, 7% for other forms of TIP.<sup>293</sup>

Nevertheless, there is another point of view, which believes that some forms of TIP such as trafficking for labour exploitation, debt bondage, domestic services, begging, and armed conflict, are seldom recognised by law enforcement authorities.<sup>294</sup>

Nonetheless, it is possible to argue that every type of TIP has a treaty basis.<sup>295</sup> In particular, TIP for the purpose of the exploitation of the prostitution of others derives from the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.<sup>296</sup> Furthermore, TIP for the purpose of forced labour or services can be traced to the 1930 ILO Convention No. 29: Forced Labour Convention.<sup>297</sup> In addition, TIP for the purpose of slavery or practices similar to slavery and servitude derive from the 1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.<sup>298</sup> Along with this, TIP for the

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<sup>290</sup> Winterdyk, Reichel, and Perrin, op cit, 92.

<sup>291</sup> *ibid*, 239.

<sup>292</sup> *ibid*, 216.

<sup>293</sup> UNODC, 'Global Report on Trafficking in Persons' (2014), op cit, 9.

<sup>294</sup> Winterdyk, Reichel, and Perrin, op cit, 280.

<sup>295</sup> These bases will be highlighted in detail in chapter two (2.3).

<sup>296</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271; Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) Human Rights Law Review 546, 552.

<sup>297</sup> Forced Labour Convention, 1930 (No. 29) (entered into force 1 May 1932) adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session; Allain, 'Rantsev v Cyprus and Russia', op cit, 552.

<sup>298</sup> Convention to Suppress the Slave Trade and Slavery (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; Allain, 'Rantsev v Cyprus and Russia', op cit, 552.

purpose of the removal of organs comes from the 1997 Council of Europe Convention on Human Rights and Biomedicine.<sup>299</sup>

Now that the forms of TIP have been examined, it is important to note that TIP has its typologies of legal treatment apart from specific types of acts amounting to human trafficking. The next section will discuss these typologies.

### 2.2.5 Typologies of Trafficking in Persons

TIP can be regarded as a crime under international criminal law.<sup>300</sup> Moreover, TIP might be regarded as a transnational organised crime when the commission of this crime is linked with certain situations.<sup>301</sup> In addition to this, trafficking can also be regarded as a crime under national jurisdictions when it occurs in the same state.<sup>302</sup>

It is argued that the obligations of states to address TIP can be considered treaty-based.<sup>303</sup> Nonetheless, there is another point of view which believes that the customary international law might play a significant role in addressing TIP. By way of illustration, a number of

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<sup>299</sup> European Convention For the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (entered into force 1 December 1999) ETS No. 164; Allain, 'Rantsev v Cyprus and Russia', op cit, 552.

<sup>300</sup> Interestingly, it has been stated that the difference between transnational organised crimes and international crimes could be found in the following aspects: Firstly, transnational organised crimes might be dealt with through mutual legal assistance and national prosecutions, whereas international crimes need internationalisation of prosecution. Secondly, international crimes are usually committed by governments, while transnational organised crimes are generally committed by non-state actors. See Tom Obokata, *Transnational Organised Crime in International Law* (HART Publishing 2010) vi-vii. Notably, there are two legal disciplines constituting international criminal law; the first one is international law and the second is domestic criminal law. See Ilias Bantekas and Susan Nash, *International Criminal Law* (Routledge 2009) 1. Additionally, in accordance with Article 5 of 'the Rome Statute of the International Criminal Court', international crimes are limited in four crimes: '(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression', whereas transnational organised crimes, according to Article 2 of 'the United Nations Convention against Transnational Organized Crime', are serious crimes committed by organised criminal group. Trafficking in persons as an international crime will be discussed in detail in chapter five entitled '[t]rafficking in Persons as a Crime against Humanity'.

<sup>301</sup> United Nations Convention against Transnational Organized Crime (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) Art. 3(2). This Article states that 'an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State'. Trafficking in persons as a transnational organised crime will be discussed in detail in chapter four entitled '[t]rafficking in Persons as a Transnational Organised Crime'.

<sup>302</sup> Winterdyk, Reichel, and Perrin, op cit, 27-28. It is noteworthy that transnational crimes differ from national crimes in the sense that transnational crimes have a trans-boundary dimension. See Neil Boister, 'Transnational criminal law' (2003) 14(5) *European Journal of International Law* 953, 955. Trafficking in persons as a crime under national jurisdiction will be discussed in detail in chapter three. Interestingly, the difference between national, transnational, and international crimes can be found in the context of the crime. See Ilias Bantekas and Emmanouela Mylonaki (eds), *Criminological Approaches to International Criminal Law* (Cambridge University Press 2014) 5.

<sup>303</sup> Gallagher, op cit, 132.

human rights treaties have codified the customary prohibition of slavery internationally; this prohibition has been extended to include TIP as a contemporary form of slavery.<sup>304</sup> Consequently, slavery is contrary to customary international law.<sup>305</sup> A counter-argument is that the addressing of TIP is neither treaty-based nor customary-based but, rather soft law-based. This can be illustrated briefly by the TIPP, the main international legal instrument addressing TIP, which uses words such as ‘to consider’, ‘endeavour to’, ‘in appropriate cases’ and ‘to the extent possible’, all of which indicate soft obligations.<sup>306</sup> However, the TIPP is a treaty and it is binding on its states parties.<sup>307</sup>

It is noticeable that the TIPP makes no distinction between types of trafficked persons or genders; the reason why this Protocol emphasises women and children is because trafficked victims are mostly women and children.<sup>308</sup> It is noteworthy that trafficked victims include women, children and men.<sup>309</sup> In this regard, it should be stressed that in some cases the number of male trafficked victims exceeds the number of female trafficked victims. By way of illustration, according to the 2014 Global Report on Trafficking in Persons, between 2010-2012, the number of men and boys who were trafficked for the purpose of forced labour exceeded the number of women and girls who were trafficked for the same purpose. To be more precise, the figures in the Americas were 68% male to 32% female, and the percentage in Europe and Central Asia were 69% male to 32% female.<sup>310</sup>

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<sup>304</sup> *ibid*, 135.

<sup>305</sup> Boleslaw A. Boczek, *International Law: A Dictionary* (Scarecrow Press 2005) 195; Rhona Smith, *Textbook on International Human Rights* (Oxford University Press 2013) 14.

<sup>306</sup> The TIPP, Arts. 6(1), 6(2), 6(3), 6(5), 7(1), 9(2), 10(2), 11(2), and 15(1); Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 164; Gallagher, *op cit*, 139.

<sup>307</sup> Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 183.

<sup>308</sup> Winterdyk, Reichel, and Perrin, *op cit*, 213-214

<sup>309</sup> Daan Everts, ‘Human Trafficking: the Ruthless Trade in Human Misery’ (2003) 10 *Brown Journal of World Affairs* 149, 151.

<sup>310</sup> UNODC, ‘Global Report on Trafficking in Persons’ (2014), *op cit*, 10.



## 2.3 Historical Background of Trafficking in Persons

Having identified trafficking in persons (TIP) in the previous section, it is imperative to highlight how TIP has been dealt with throughout history.<sup>311</sup> Therefore, this section examines the historical background of the fight against the crime of TIP over the course of history, starting with the initial stages of attempts to address TIP. Afterwards, this section will highlight attempts to deal with TIP after the appearance of the League of Nations. This will be followed by the comprehensive efforts to address TIP beginning in 2000.

### 2.3.1 The Initial Stages of Addressing Trafficking in Persons

The expression ‘Trafficking in Persons’ is considered to be relatively new, but what it represents first occurred a long time ago. It can also be said that TIP appeared in the international forum over the last hundred years or so.<sup>312</sup> Furthermore, TIP has a lengthy and complicated legal history.<sup>313</sup> To be more specific, TIP has existed since the nineteenth century as a distinct legal concept. However, it was known then as white slavery.<sup>314</sup> The term ‘white slavery’ was used initially to indicate recruitment for prostitution, fraudulently or forcibly<sup>315</sup> legally sanctioned ‘because whites were the victims’.<sup>316</sup>

Throughout history, TIP for the purpose of labour and other forms of trafficking has existed, and the laws in the nineteenth century defended slavery for labour practices in Western society.<sup>317</sup> Furthermore, trafficking in women and children continues to exist. However, the growing participation of organised crime and the complexity of its methods are new aspects of the practice.<sup>318</sup>

In the nineteenth century, slavery became an international crime, and during the twentieth century the abolition of slavery was promoted. In addition, a number of international legal instruments linked to slavery and crimes related to slavery were developed.<sup>319</sup> The problem of

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<sup>311</sup> This chapter starts with the identification of TIP before dealing with its historical background because this identification is imperative to clarify certain concepts regarding TIP.

<sup>312</sup> Phyllis Coontz and Catherine Griebel, ‘International Approaches to Human Trafficking: The Call for a Gender-Sensitive Perspective in International Law’ (2004) 4(1) *Women’s Health Journal* 47, 48-50.

<sup>313</sup> Gallagher, op cit, 54.

<sup>314</sup> Galma Jahic and James O. Finckenauer, ‘Representations and Misrepresentations of Human Trafficking’ (2005) 8(3) *Trends in Organized Crime* 24, 24.

<sup>315</sup> Gallagher, op cit, 13.

<sup>316</sup> David R. Roediger, *Colored White: Transcending the Racial Past* (University of California Press 2002) 186.

<sup>317</sup> Adam Myers, ‘The Objectification of Women as a Facilitator of Sex Trafficking Demand’ (2011) 8.

<sup>318</sup> Alexis A. Aronowitz, ‘Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets that Drive It and the Organisations that Promote It’ (2001) 9(2) *European Journal on Criminal Policy and Research* 163, 163.

<sup>319</sup> M. Cherif Bassiouni, ‘Enslavement as an International Crime’ (1991) 23(2) *New York University journal of international law and politics* 445, 453-454.

TIP has been a major concern to many countries over two periods during the last hundred years or so. The first time was in the late nineteenth and early twentieth century. In this period, agreements were signed between European states on mutual collaboration for the purpose of concentrating on trafficking in women for the reason of prostitution. The second time was after the appearance of contemporary human rights groups as well as the growth of a women's human rights society.<sup>320</sup>

It is possible to argue that interest in trafficking in women appeared as a result of the combating of white slavery in the United States and Britain. Interestingly, this appeared after the successful elimination of black slavery in most of the northern regions of the United States by 1804, and the end of the slave trade in Africa by 1807. In addition, Britain eliminated the slave trade in 1807 and had emancipated its black slaves in all of its colonies by 1834.<sup>321</sup>

Slavery was addressed in many international instruments such as 'the Peace Treaties of Paris of 1814 and 1815'.<sup>322</sup> Another example is 'the 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV]'.<sup>323</sup> These instruments are important because they represent the initial efforts to suppress the slave trade.<sup>324</sup>

More to the point, in 1822 'the Declaration Respecting the Abolition of the Slave Trade (Congress of Verona)' was signed.<sup>325</sup> This declaration is significant because it represents the intention of the signatories' states, the leading political powers of Europe, to abolish the slave trade. Furthermore, it confirms the opposition of these states to this trade.<sup>326</sup> Additionally, in 1841, 'the 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London)' was signed.<sup>327</sup> This treaty is important for its penal nature. Specifically, it refers to

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<sup>320</sup> Elizabeth M. Bruch, 'Models Wanted: The Search for an Effective Response to Human Trafficking' (2004) 40(1) *Stanford Journal of International Law* 1, 2-3, 6-7.

<sup>321</sup> Adam Myers, 'The Objectification of Women as a Facilitator of Sex Trafficking Demand' (2011) 9.

<sup>322</sup> *Catalogue of Treaties, 1814-1918*, at 7 (U.S. Gov't Printing Office, pub. 1919), cited in Ved P. Nanda and M. Cherif Bassiouni, 'Slavery and Slave Trade: Steps Toward Eradication' (1972) 12 *Santa Clara Lawyer* 424, 426.

<sup>323</sup> *Declaration Relative to the Universal Abolition of the Slave Trade*, 8 February 1815, *Consolidated Treaty Series*, vol. 63, No. 473, cited in Office of the United Nations High Commissioner for Human Rights, 'Abolishing Slavery and its Contemporary Forms' (2002) HR/PUB/02/4, at 3 <[www.ohchr.org/Documents/Publications/slaveryen.pdf](http://www.ohchr.org/Documents/Publications/slaveryen.pdf)> accessed 1 September 2015; Bassiouni, *op cit*, 459. Great Britain, France, Russia, Spain, Austria, Sweden, Prussia, and Portugal were parties and signatories states.

<sup>324</sup> *Catalogue of Treaties, 1814-1918*, at 7 (U.S. Gov't Printing Office, pub. 1919), cited in Nanda and Bassiouni, *op cit*, 426.

<sup>325</sup> U.N. ECOSOC, Ad hoc Committee on Slavery, *The Suppression of Slavery* (Memorandum submitted by the Secretary General), U.N. Doc. ST/SOA/4 (1951) at 5-11, cited in Nanda and Bassiouni, *op cit*, 427; Bassiouni, *op cit*, 460.

<sup>326</sup> Bassiouni, *op cit*, 460.

<sup>327</sup> *Catalogue of Treaties, 1814-1918*, at 36 (U.S. Gov't Printing Office, pub. 1919), cited in Nanda and Bassiouni, *op cit*, 427; Bassiouni, *op cit*, 460.

prohibition, prevention, prosecution, and punishment as established duties.<sup>328</sup> Then, the Treaty of Washington was signed in 1862. This treaty is regarded as one of the most important treaties on slavery at that time.<sup>329</sup> Later, in 1885 ‘the General Act of the Conference Respecting the Congo (General Act of Berlin)’ was signed; in this Act, the United States became a signatory for the first time to the international convention of slavery.<sup>330</sup>

Moreover, in 1890 in the international field 17 nations’ representatives met in Brussels to agree a convention on slave trafficking in Africa.<sup>331</sup> In the same year, ‘the 1890 Convention Relative to the Slave Trade and Importation into Africa of Firearms, Ammunition, Spirituous Liquors (General Act of the Brussels Conference)’ was signed.<sup>332</sup> The later Convention was a bilateral treaty; it pronounced the same purpose as the Brussels conference, which is the elimination of slavery and its trade, but it applied specifically to Great Britain and Spain. Likewise, for the same purpose a treaty between Great Britain and Spain was signed.<sup>333</sup>

In the twentieth century, ‘the 1904 International Agreement for the Suppression of the White Slave Traffic’ was signed.<sup>334</sup> This agreement tried to afford efficient protection for women and girls against trafficking.<sup>335</sup> The agreement was between twelve countries and it aimed to suppress trafficking in women.<sup>336</sup> Then, in 1910, ‘the 1910 International Convention for the Suppression of the White Slave Traffic’ was signed.<sup>337</sup> The significance of this Convention was its penal nature, which was a result of the established duties in regard to prohibition, prevention, prosecution, and punishment.<sup>338</sup> It is noteworthy that both the ‘1904 Agreement’ and ‘the 1910 Convention’ for the reason of suppression of the White Slave Traffic’ were the

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<sup>328</sup> Bassiouni, op cit, 460-461.

<sup>329</sup> Treaty with Great Britain on Suppression of African Slave Trade, 12 Stat. 1225-36, T.S. No. 126 (April 7, 1862), cited in Nanda and Bassiouni, op cit, 427.

<sup>330</sup> Bassiouni, op cit, 460.

<sup>331</sup> Catalogue of Treaties, 1814-1918, at 141 (U.S. Gov’t Printing Office, pub. 1919), cited in Nanda and Bassiouni, op cit, 427.

<sup>332</sup> General Act of the Brussels Conference relating to the African Slave Trade (signed on 2 July 1890) 173 C.T.S. 293, revised by the Convention of St. Germain of (10 September 1919) 8 LNTS 26; Bassiouni, op cit, 462.

<sup>333</sup> The 1890 Treaty between Great Britain and Spain for the Suppression of the African Slave Trade (signed at Brussels on 2 July 1890) Publication Reference: PRO FO 93/99/41 Treaty Series 003/1892 : C. 6592; Bassiouni, op cit, 463.

<sup>334</sup> International Agreement for the Suppression of the White Slave Traffic (entered into force 18 July 1905) 35 Stat. 1979, 1 LNTS 83; Bassiouni, op cit, 463.

<sup>335</sup> Winterdyk, Reichel, and Perrin, op cit, 132.

<sup>336</sup> *ibid*, 210.

<sup>337</sup> International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910) 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20; Winterdyk, Reichel, and Perrin, op cit, 210; Bassiouni, op cit, 464.

<sup>338</sup> Bassiouni, op cit, 464.

first actions taken internationally to address trafficking for the purpose of prostitution or sexual exploitation of women.<sup>339</sup>

Accordingly, it can be seen that slavery prohibitions had reached the customary international law level and had obtained peremptory norm status. Moreover, various treaties and conventions prohibited slavery.<sup>340</sup> The protection against slavery since the late nineteenth century evaluates the customs and confirms the general principles of law, and in accordance with international customary and conventional law, slavery is considered an international crime. More to the point, the prohibition of slavery under the general principles of law reached the peremptory norm standard.<sup>341</sup>

### **2.3.2 Addressing Trafficking in Persons after the Appearance of the League of Nations**

The ways of tackling human trafficking became more structured after the appearance of the League of Nations, which dealt with trafficking in women for reasons of prostitution or sexual exploitation. Likewise, it tackled TIP for the purpose of slavery and forced labour.<sup>342</sup>

The issue of trafficking in women and children was considered seriously by the League of Nations after World War One.<sup>343</sup> In the era of the League of Nations and the United Nations, the number of international instruments addressing TIP has increased. Examples of this include ‘the 1919 Convention Revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890 (Treaty of Saint-Germain-en-Laye)’ which was signed in 1919.<sup>344</sup> This Convention attempted to suppress slavery.<sup>345</sup>

Subsequently, ‘the 1921 International Convention for the Suppression of the Traffic in Women and Children’ was signed in 1921.<sup>346</sup> This Convention avoided any mention of expression ‘white slavery’. Instead, it used the expression ‘immoral trafficking’ to refer to both girls and boys aged under twenty-one years and women aged over twenty-one years if

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<sup>339</sup> Bruch, op cit, 7-9.

<sup>340</sup> Bassiouni, op cit, 492- 493. Interestingly, there is a relationship between treaty and custom as they are sources and components of international law and the international legal order. This relationship has been discussed in the Nicaragua v. USA case. For more information see Martin Dixon, *Textbook on International Law* (Oxford University Press 2013) 39.

<sup>341</sup> Bassiouni, op cit, 492- 493.

<sup>342</sup> Bruch, op cit, 2-3, 6-7.

<sup>343</sup> Jacqueline Bhabha, ‘Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children’ (2000) 7 *The Chicago Journal of International Law* 269, 288.

<sup>344</sup> Bassiouni, op cit, 465

<sup>345</sup> Nanda and Bassiouni, op cit, 428.

<sup>346</sup> International Convention for the Suppression of the Traffic in Women and Children (entered into force 15 June 1922) 9 LNTS 415; Winterdyk, Reichel, and Perrin, op cit, 210; Bassiouni, op cit, 465; Bruch, op cit, 9.

they were deceived or constrained.<sup>347</sup> Afterwards, in 1924, a Temporary Slavery Commission was established by the Council of the League.<sup>348</sup> This Commission reported on the following topics:

[L]egal status of slavery, slave raiding and similar acts, slave acts, slave dealing, practices restrictive of the liberty of the person, domestic or *praedial* slavery (serfdom), compulsory labor, public or private, paid or unpaid, and transition from servile or compulsory labor to free-wage or independent production.<sup>349</sup>

After that, there was an attempt to deal with slavery by including forced labour in the definition of slavery in the 1926 Slavery Convention.<sup>350</sup> It is noteworthy that the 1926 Slavery Convention defines slavery for the first time.<sup>351</sup> Notably, the definition of slavery according to the 1926 Slavery Convention was developed to include a variety of modern types of slavery.<sup>352</sup> What is certain, however, is that a number of elements should be taken into consideration to identify and understand what formalises slavery. The first element concerns whether the person has choice of labour and liberty of movement. The second element refers to whether the person has control over the wages, belongings, and productive capacity that belong to him/her. The third element is whether the person consents to the relationship between him/her and the other person involved in this relationship.<sup>353</sup>

Interestingly, during the first attempt to address TIP the International Labour Organization (ILO) and other international entities did not participate very substantially. This is because the focal point at this stage (1919) was to tackle trafficking in person for the purpose of prostitution and sexual exploitation but not other forms of TIP such as forced labour and slavery.<sup>354</sup> For this reason, the ILO did not pay attention to addressing TIP except in certain cases. Additionally, there was no particular indication about TIP except for the purposes of prostitution and sexual exploitation. Nonetheless, some features of trafficking were covered by the Forced Labour Conventions.<sup>355</sup> By way of illustration, the 1930 Forced Labour

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<sup>347</sup> Gallagher, op cit, 57- 58.

<sup>348</sup> Report of the Temporary Slavery Commission, League of Nations Doc. A.19 (July 25, 1925), cited in Nanda and Bassiouni, op cit, 429.

<sup>349</sup> Nanda and Bassiouni, op cit, 429.

<sup>350</sup> Bassiouni, op cit, 466-467.

<sup>351</sup> *ibid.*

<sup>352</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 162.

<sup>353</sup> Kevin Bales and Peter T. Robbins, "No one shall be held in slavery or servitude": A Critical Analysis of International Slavery Agreements and Concepts of Slavery' (2001) 2(2) Human Rights Review 18, 28.

<sup>354</sup> Bruch, op cit, 23-24.

<sup>355</sup> *ibid.*, 24.

Convention asked states parties to punish unlawful utilisation of forced or compulsory labour.<sup>356</sup>

Furthermore, in 1931, to evaluate the efficiency of the previous Convention, a Committee of Experts on Slavery was appointed by the Council of the League.<sup>357</sup> Later on, in 1933, ‘the 1933 International Convention for the Suppression of the Traffic in Women of Full Age’ was signed.<sup>358</sup> This Convention was important because it had similar penal nature to that of other conventions.<sup>359</sup>

More to the point, in 1947 three international instruments appeared: ‘the 1947 Protocol’,<sup>360</sup> ‘the 1947 International Convention for the Suppression of the Traffic in Women and Children’,<sup>361</sup> and ‘the 1947 International Convention for the Suppression of the Traffic in Women of Full Age’.<sup>362</sup> These international instruments are important because they concentrating on the suppression of trafficking with a special focus on women and children.

It is worth noting that in 1948 the Universal Declaration of Human Rights states that ‘[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms’.<sup>363</sup>

Moreover, three international instruments appeared in 1949 ‘the 1949 Protocol’,<sup>364</sup> ‘the 1949 International Agreement for the Suppression of the White Slave Traffic’,<sup>365</sup> and ‘the 1949

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<sup>356</sup> Forced Labour Convention, 1930 (No. 29) (entered into force 1 May 1932) adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session, Art. 25; Bruch, *op cit*, 24.

<sup>357</sup> Nanda and Bassiouni, *op cit*, 430.

<sup>358</sup> International Convention for the Suppression of the Traffic in Women of Full Age (entered into force. 24 August 1934) 150 LNTS; Winterdyk, Reichel, and Perrin, *op cit*, 210; Bassiouni, *op cit*, 471-472; Bruch, *op cit*, 9.

<sup>359</sup> The 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London); International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910) 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20; Bassiouni, *op cit*, 472.

<sup>360</sup> The 1947 Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, Concluded at Geneva on 30 September 1921, and the Convention for the Suppression of Traffic in Women of Full Age, Concluded at Geneva on 11 October 1933, and (a) Annex to the Protocol to Amend the Convention for the Suppression of the Traffic in Women and Children, Concluded at Geneva on 30 September, 1921, and the Convention for the Suppression of Traffic in Women of Full Age, Concluded at Geneva on 11 October 1933, cited in Bassiouni, *op cit*, 472; Winterdyk, Reichel, and Perrin, *op cit*, 210.

<sup>361</sup> The 1947 International Convention for the Suppression of the Traffic in Women and Children, Concluded at Geneva on 30 September 1921, as Amended by the Protocol Signed at Lake Success, New York, on 12 November 1947, cited in Bassiouni, *op cit*, 473.

<sup>362</sup> The 1947 International Convention for the Suppression of the Traffic in Women of Full Age, Concluded at Geneva on 11 October 1933, as Amended by the Protocol Signed at Lake Success, New York, on 12 November 1947, cited in Bassiouni, *op cit*, 474.

<sup>363</sup> Universal Declaration of Human Rights (adopted by the United Nations General Assembly on 10 December 1948), G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) Art. 4; Nanda and Bassiouni, *op cit*, 431.

<sup>364</sup> The 1949 Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris, on 18 May 1904, and the International Convention for the Suppression of the White Slave Traffic, Signed at Paris, on 4 May 1910, and (a) Annex to the Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, Signed at Paris, on 18 May 1904, and the International

International Convention for the Suppression of the White Slave Traffic'.<sup>366</sup> These international instruments are significant because they focused on the suppression of the White Slave Traffic.

Furthermore, to repress prostitution, the United Nations in 1949 adopted 'the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, hereinafter referred to as the 1949 Trafficking Convention'.<sup>367</sup> This Convention is regarded as one of the most inclusive Convention tackling human trafficking and prostitution.<sup>368</sup> In particular, the aim of this Convention is to inform about the danger of trafficking and to help trafficked persons; it also contains some process for implementation. At the same time, it intends to tackle matters relevant to human trafficking similar to slavery and forced labour, not just prostitution and sexual exploitation which was called 'white slavery'.<sup>369</sup> Furthermore, the 1949 Trafficking Convention applies to both sexes regardless of the age or the consent of the victims or whether internal or cross-border trafficking has taken place.<sup>370</sup>

More conventions were subsequently signed. For example, 'the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others' was signed in 1950.<sup>371</sup> This Convention is significant because it includes a number of duties and rights with regard to TIP such as prosecution duty, punishment duty, extradition rights, and cooperation rights.<sup>372</sup> Furthermore, in 1953, 'the 1953 Protocol'<sup>373</sup> was signed. This Protocol transferred the relevant responsibilities to the United Nations from the League of Nations.<sup>374</sup>

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Convention for the Suppression of the White Slave Traffic, Signed at Paris, on 4 May 1910, cited in Bassiouni, op cit, 475 .

<sup>365</sup> The 1949 International Agreement for the Suppression of the White Slave Traffic, Signed at Paris on 18 May 1904, as Amended by the Protocol signed at Lake Success, New York, 4 May 1949, cited in Bassiouni, op cit, 475.

<sup>366</sup> The 1949 International Convention for the Suppression of the White Slave Traffic, Signed at Paris on 4 May 1910, and as Amended by the Protocol Signed at Lake Success, New York, 4 May 1949, cited in Bassiouni, op cit, 476.

<sup>367</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271; Winterdyk, Reichel, and Perrin, op cit, 210.

<sup>368</sup> Roger J.R. Levesque, *Sexual Abuse of Children: A Human Rights Perspective* (Indiana University Press 1999) 83; Bruch, op cit, 9-11.

<sup>369</sup> Bruch, op cit, 9-11.

<sup>370</sup> Gallagher, op cit, 58- 59.

<sup>371</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271; Bassiouni, op cit, 477.

<sup>372</sup> Bassiouni, op cit, 478.

<sup>373</sup> The 1953 Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926 and (a) Annex to the Protocol Amending the Slavery Convention signed at Geneva on 25 September 1926, cited in Bassiouni, op cit, 478.

<sup>374</sup> Bassiouni, op cit, 478.

Afterwards, in 1956, ‘the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’ was signed.<sup>375</sup> This Convention is significant because it endeavours to extend what falls under the concept of slavery by including slavery-like practices such as debt bondage, serfdom, different types of forced marriage, and illegal adoption.<sup>376</sup> Moreover, in accordance with this Convention, there are obligations upon the states parties to criminalise not only ‘[t]he act of enslaving another person’,<sup>377</sup> but also the slave trade.<sup>378</sup> Furthermore, this Convention has a penal nature through its criminalisation of conducts related to the slave trade, practices similar to slavery, and slavery. It also contains a number of duties such as the duty to protect, and the duty to cooperate. Additionally, in accordance with this Convention the fight against slavery became more structured.<sup>379</sup>

Next, in 1957, ‘the 1957 Convention (No. 105) Concerning the Abolition of Forced Labor’ was signed.<sup>380</sup> This Convention was important because the obligation to take active measures to abolish forced or compulsory labour immediately and completely was imposed upon the states parties.<sup>381</sup> Later, in 1966 ‘the International Covenant on Civil and Political Rights in Article 8 stated that ‘1. No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. 2. No one shall be held in servitude’.<sup>382</sup> The importance of this Article is that it prohibits slavery and servitude.

It can be understood that, as part of the rise of women’s human rights activities internationally in the 1970s, TIP reappeared as an important topic. However, the tackling of TIP became part of women’s human rights.<sup>383</sup> An example of this is ‘the Convention on the Elimination of all forms of Discrimination against Women’ (CEDAW), which was adopted in 1979;<sup>384</sup> this Convention bans trafficking in women in all its forms.<sup>385</sup> Nonetheless, it could

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<sup>375</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3.

<sup>376</sup> *ibid.*, Art. 1; Harmen Van der Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’ (2014) 13(2) Chinese Journal of International Law 297, Para 9.

<sup>377</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Art. 6(1); Wilt, *op cit*, Para 9.

<sup>378</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Arts. 3-4; Wilt, *op cit*, Para 9.

<sup>379</sup> Bassiouni, *op cit*, 481.

<sup>380</sup> Abolition of Forced Labour Convention, C105 (entered into force 17 January 1959) Adoption: Geneva, 40th ILC session: 25 Jun 1957.

<sup>381</sup> Bassiouni, *op cit*, 482.

<sup>382</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) 999 UNTS 171, Art. 8(1,2); Nanda and Bassiouni, *op cit*, 433- 434.

<sup>383</sup> Bruch, *op cit*, 11-16.

<sup>384</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (entered into force 3 September 1981) 1249 UNTS 13; Gallagher, *op cit*, 64- 65; Bruch, *op cit*, 12.



be argued that the scope of the CEDAW exceeds the 1949 Trafficking Convention because the CEDAW not only includes trafficking for the purpose of prostitution but also contains other forms of trafficking such as forced marriage or forced labour.<sup>386</sup>

Furthermore, the tackling of TIP from the women's human rights perspective emerged in 1980 at the Copenhagen Conference, which addressed women victims of trafficking and involuntary prostitution. This was followed by a number of international instruments. The first was the Nairobi Conference in 1985 and second was the World Conference on Human Rights in 1993. In this Conference there was a call for the elimination of TIP. The third was the Fourth World Conference on Women, held in Beijing in 1995. In accordance with this Conference, TIP was declared a violation against women and human rights violation.<sup>387</sup> However, it is noticeable that the focus on TIP, especially women and children, has appeared essentially as a part of the work of governments and Non-Governmental Organisations (NGOs).<sup>388</sup> Accordingly, it can be seen that the addressing of TIP from a women's human rights perspective has demonstrated the substantial attention given to them, which aims to eliminate TIP.<sup>389</sup>

In 1989, the General Assembly adopted 'the Convention on the Rights of the Child' (CRC).<sup>390</sup> This Convention referred to trafficking explicitly<sup>391</sup> and is regarded as a tool for understanding and responding to trafficking and the exploitation of children.<sup>392</sup> Accordingly, in order to monitor its implementation, the CRC has established 'the Committee on the Rights of the Child'. This Committee has recognised that trafficking includes not only trafficking for sexual exploitation but also bonded and forced labour, trafficking for adoption, and trafficking for economic exploitation.<sup>393</sup>

It is noticeable that, for the first time, the CRC provides a specific article that addresses trafficking in children. In particular, it declares that '[s]tates Parties shall take all appropriate

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<sup>385</sup> CEDAW, Art. 6; Gallagher, op cit, 64- 65; Mohamed Y. Mattar, 'Trafficking in persons, especially women and children, in countries of the Middle East: the scope of the problem and the appropriate legislative responses.(A Look at the Middle East: Challenges and Legal Perspectives)' (2003) 26(3) Fordham International Law Journal 721, 723.

<sup>386</sup> Gallagher, op cit, 64- 65.

<sup>387</sup> Bruch, op cit, 11-12.

<sup>388</sup> *ibid*, 13.

<sup>389</sup> *ibid*, 11-16.

<sup>390</sup> Convention on the Rights of the Child (entered into force 2 September 1990) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

<sup>391</sup> *ibid*, Art. 35.

<sup>392</sup> Gallagher, op cit, 65.

<sup>393</sup> *ibid*, 66.

national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form'.<sup>394</sup>

More to the point, 'the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour' was adopted by the ILO in 1999.<sup>395</sup> This Convention tackles child trafficking for various purposes, including prostitution, forced labour, and other exploitation forms.<sup>396</sup> Moreover, the ILO has started to enhance its conception of forced labour, as well as its examination of the connection between forced labour and TIP (both children and adults) by increasing its efforts against trafficking for labour purposes.<sup>397</sup> However, it should be stressed that the aim of this Convention is to prohibit and eliminate 'the worst forms of child labour'.<sup>398</sup>

Finally, in this stage of efforts to address the crime of TIP, some attention has been paid to tackling TIP for the purpose of the removal of organs. To be more precise, in 1996, 'the Convention on Human Rights and Biomedicine' was adopted.<sup>399</sup> This Convention is significant because it includes stipulations that could be used to prevent TIP for the purpose of the removal of organs. In particular, consent is required to carry out the removal of organs. Furthermore, financial gain from the removal of organs is prohibited.<sup>400</sup>

Notably, in accordance with this stage of the historical background of TIP, a number of international legal instruments have played a significant role in addressing the crime of TIP. Specifically, different forms of TIP such as prostitution, sexual exploitation, forced labour, slavery, practices similar to slavery, and the removal of organs, have been dealt with under a variety of international legal instruments. Additionally, these various international legal instruments are relevant to the definition of trafficking and they include early elements of the definition of TIP stated in the TIPP.

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<sup>394</sup> Convention on the Rights of the Child, Art. 35; Jacqueline Bhabha, 'Lone Travelers: Rights, Criminalization, and the Transnational Migration of Unaccompanied Children' (2000) 7 *The Chicago Journal of International Law* 269, 288- 289.

<sup>395</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182 (entered into force 19 November 2000) ILO No. 182, 2133 UNTS161.

<sup>396</sup> *ibid.*, Art. 3; Bruch, *op cit.*, 25; Kendal N. Smith, 'Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery' (2011) 18(3) *George Mason Law Review* 759, 768.

<sup>397</sup> Bruch, *op cit.*, 25-26.

<sup>398</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182 (entered into force 19 November 2000) ILO No. 182, 2133 UNTS161, at Preamble.

<sup>399</sup> European Convention For the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (entered into force 1 December 1999) ETS No. 164.

<sup>400</sup> *ibid.*, Arts. 19-21; Leonard Territo and Rande Matteson, *The International Trafficking of Human Organs: A Multidisciplinary Perspective* (CRC Press 2011) 36.

### 2.3.3 The Comprehensive Addressing of Trafficking in Persons Starting in 2000

It is obvious that there was no inclusive legislation addressing TIP prior to 2000. Traffickers were put on the trial in accordance with involuntary servitude and slavery laws.<sup>401</sup> It can be understood that until the United Nations adopted the TIPP in 2000, TIP was neglected. However, after the adoption of the TIPP, TIP was defined for the first time although not from the human rights perspective. It is noteworthy that there were debates on this definition in terms of which rights would be protected according to this definition, which conducts would be proscribed by this definition, and which victims would be identified as requiring help according to this definition.<sup>402</sup>

The TIPP comprises the preliminary conclusion of worldwide codifications for the repression of TIP.<sup>403</sup> This Protocol aims to cover all aspects of TIP which earlier international instruments had failed to do, particularly the following: The first instrument is ‘the 1904 International Agreement for the Suppression of the White Slave Traffic’;<sup>404</sup> the second instrument is ‘the 1910 International Convention for the Suppression of the White Slave Traffic’;<sup>405</sup> the third instrument is ‘the 1921 International Convention for the Suppression of the Traffic in Women and Children’;<sup>406</sup> the fourth instrument is ‘the 1933 International Convention for the Suppression of the Traffic in Women of Full Age’;<sup>407</sup> and the final instrument is ‘the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others’.<sup>408</sup>

It is noticeable that in the TIPP there is no gender distinction in addressing the crime of TIP. This Protocol includes all people and is not limited to women and children. However, it pays special attention to women and children.<sup>409</sup> Along with this, ‘the Drafting Committee of the Trafficking in Persons Protocol’ agreed to include the modern situations of exploitation such

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<sup>401</sup> Smith, ‘Human Trafficking and RICO’, op cit, 768.

<sup>402</sup> Bruch, op cit, 37.

<sup>403</sup> Winterdyk, Reichel, and Perrin, op cit, 132-133.

<sup>404</sup> International Agreement for the Suppression of the White Slave Traffic (entered into force 18 July 1905) 35 Stat. 1979, 1 LNTS 83; Winterdyk, Reichel, and Perrin, op cit, 133.

<sup>405</sup> International Convention for the Suppression of the White Slave Traffic (adopted 4 May 1910) 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20; Winterdyk, Reichel, and Perrin, op cit, 133.

<sup>406</sup> International Convention for the Suppression of the Traffic in Women and Children (entered into force 15 June 1922) 9 LNTS 415; Winterdyk, Reichel, and Perrin, op cit, 133.

<sup>407</sup> International Convention for the Suppression of the Traffic in Women of Full Age (entered into force. 24 August 1934) 150 LNTS ; Winterdyk, Reichel, and Perrin, op cit, 133.

<sup>408</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271.

<sup>409</sup> Gallagher, op cit, 26.

as forced labour rather than focusing only on traditional forms of trafficking such as prostitution and the sex trade.<sup>410</sup>

It can be seen from the *travaux préparatoires*<sup>411</sup> that virtually all states would prefer the TIPP to address TIP and this should not be limited to trafficking in women and children. Equally importantly, states agreed to pay particular attention to women and children.<sup>412</sup>

A number of instruments related to TIP have appeared following the TIPP. The first Convention is ‘the 2002 South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and Children for Prostitution’ (SAARC). The second instrument is ‘the 2002 Council of the European Union Framework Decision on Trafficking Human Beings’,<sup>413</sup> which notably ended a long debate between several European organisations about the effectiveness of anti-trafficking measures by dealing with trafficking as a problem against all people, not just women and children.<sup>414</sup> The third convention is ‘the 2005 European Convention on Action against Trafficking’.<sup>415</sup>

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<sup>410</sup> *ibid*, 27.

<sup>411</sup> *Travaux Préparatoires for the Organized Crime Convention and Protocols*.

<sup>412</sup> Gallagher, *op cit*, 78.

<sup>413</sup> Council of Europe Convention on Action against Trafficking in Human Beings (CoE) (entered into force 1 February 2008) ETS 197, 16.V.2005; Gallagher, *op cit*, 43.

<sup>414</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) Art. 1 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0629>> accessed 1 September 2015. This Article states that ‘[t]he Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice(3), the Tampere European Council on 15 and 16 October 1999, the Santa Maria da Feira European Council on 19 and 20 June 2000, as listed in the Scoreboard, and the European Parliament in its Resolution of 19 May 2000 on the communication from the Commission "for further actions in the fight against trafficking in women" indicate or call for legislative action against trafficking in human beings, including common definitions, incriminations and sanctions’; Gallagher, *op cit*, 45.

<sup>415</sup> The CoE; Gallagher, *op cit*, 43.

## 2.4 Conclusion

It is noticeable that TIP is regarded as one of the most serious crimes worldwide, and this crime affects most countries nowadays.<sup>416</sup> It might also be said that the practices of TIP have existed for a long time. Therefore, it has become increasingly difficult to ignore the criminalisation of TIP.

Accordingly, this chapter has investigated TIP as a crime under international law in two sections. The first section has dealt with the identification of TIP by highlighting a number of definitions of TIP. These definitions have analysed TIP on the basis of its aspects, limits, and implications. Additionally, these definitions have examined the presence of the main elements of TIP in these definitions.

Arguably, the definition of TIP in the TIPP might be regarded as the best definition for following reasons. To begin with, this definition provides common agreement on the meaning of TIP. Furthermore, the definition of TIP in the TIPP includes a list of exploitative purposes of TIP. However, it should be stressed that this list is not exclusive as it may need to include new types of exploitation. Likewise, this definition considers TIP as a crime against all persons, not just specific categories. Finally, this definition does not require the crossing of borders in order to constitute TIP.

The first section has then addressed the elements of TIP. The first element is the action element. This element contains a variety of activities used by traffickers. The second element is the means element, which is considered to be the distinctive feature of TIP. The third element is the purpose element, which is regarded as the *mens rea* of TIP. Nevertheless, in this regard, it can be said that the purpose of trafficking is to exploit trafficked victims. This section has then distinguished between TIP and smuggling of migrants by examining the similarities and differences between them.

Subsequently, this section has analysed various forms of TIP by highlighting the definitions of these forms in several international legal instruments and has made it clear that TIP might occur for different purposes. Furthermore, this section has observed that forms of TIP are not exclusive.

Finally, this section has concluded with another type of typology of TIP by examining whether TIP is regarded as national if it takes place inside one country, transnational if it is

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<sup>416</sup> UNODC, 'Global Report on Trafficking in Persons' (2014), op cit, 1, 5, 7, 37.

linked with transnational organised crime, or international if it involves crossing borders. Noticeably, through this examination it can be said that TIP might be regarded as national, transnational, or international; it all depends on the circumstances surrounding the commission of this crime. Moreover, this typology has investigated the legal basis of the crime of TIP regardless of whether it is based on a treaty or whether customary international law plays an important role in the fight against TIP, or whether TIP has a soft-law basis because the TIPP indicates soft obligations when it deals with TIP. The investigation of typologies has concluded by arguing that TIP is not limited to women and children; it includes all persons.

The second section has highlighted the historical background of TIP by dealing with the first efforts to fight against TIP in the nineteenth and twentieth centuries. This section has then analysed how addressing TIP became more organised and structured after the appearance of the League of Nations. Subsequently, this section has examined the comprehensive tackling of TIP especially after the appearance of the TIPP.

# **Chapter Three**

## **Trafficking in Persons as a Crime under Jordanian Legislation**

### **3.1 Introduction**

The aim of this chapter is to examine trafficking in persons (TIP) as a crime under Jordanian legislation, mainly the Jordanian Anti-Trafficking in Persons Law (JATIPL),<sup>417</sup> by analysing the legal framework for this crime. In doing so, this chapter will take an in-depth look at three main aspects related to dealing with the crime of TIP in Jordan and whether cumulatively various Jordanian laws comprehensively address the issue of TIP or whether there are gaps and problems.

The first section is about TIP in Jordan with regard to the situation on the ground, the context and the prevalence of trafficking. This section will highlight the initial efforts made to deal with issues related to TIP represented by the enactment of the Jordanian Abolition of Slavery Law,<sup>418</sup> as this Law is regarded as the first Jordanian legislation specifically concerned with a practice related to TIP. Then, this section will analyse how Jordan has been classified as a destination, transit, and origin country for forms of TIP in trafficking-in-persons reports conducted by the United States Department of State. Subsequently, practices used against foreign domestic workers will be analysed. Next, this section will analyse reports of the Jordanian National Centre for Human Rights on issues related to TIP and the Jordanian Anti-Human Trafficking National Committee's Report.

The second section is about identifying the crime of TIP legally in Jordan after the appearance of the JATIPL. This section will deal with two main issues. The first issue is the definition of the crime of TIP in accordance with the JATIPL. This definition will be dealt with by examining two matters: first, the consistency in defining the crime of TIP between the JATIPL and 'the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against

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<sup>417</sup> The Jordanian Anti-Trafficking in Persons Law (JATIPL) (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009.

<sup>418</sup> The Jordanian Abolition of Slavery Law (1929) the Official Gazette (No 223) dated 1 April 2009.

Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP);<sup>419</sup> second, observations related to this definition will be highlighted. The second issue is the individual elements of the crime of TIP according to the JATIPL. In this regard, the action element, the means element, and the purpose element, as the main elements of the crime of TIP, will be examined in detail with an analysis of the components of each element.

The third section is about the criminal investigation and prosecution of the crime of TIP in Jordan. This section will examine three main issues. The first issue is the Jordanian criminal justice system in general, which will be examined by highlighting the independence of the judiciary, criminal judiciary types, criminal jurisdiction types, characteristics and general principles of trial, and ways of appealing criminal sentences. The second issue in this section is criminal investigations into the crime of TIP, which will be explored through an examination of the stages and the elements of these investigations. The third issue in this section is the prosecution of the crime of TIP, which will be addressed by investigating the prerequisites to criminalise the commission of this crime, the results of the prosecution of this crime, and general observations related to examination of the commission of this crime by courts in Jordan.

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<sup>419</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).



### 3.2 Trafficking in Persons in Jordan

In Jordan, the Abolition of Slavery Law was the first law to address issues related to slavery.<sup>420</sup> More specifically, in accordance with this Law, slavery was abolished in all places in Trans-Jordan.<sup>421</sup> Moreover, under this Law, any legitimate court is empowered to issue a certificate of emancipation to persons who have been emancipated by this Law. Furthermore, any contract or agreement to enslave any person for marriage or services or other purposes must be void *at initio*.<sup>422</sup> Along with this, every contract which contains a condition or a pledge to buy or sell or enslave anyone or any other practice to do so is considered to be nullified according to this Law.<sup>423</sup> Finally, a sentence of imprisonment of up to three years might apply if the provisions of this Law have been violated.<sup>424</sup>

It is noteworthy that Jordan was classified as a destination, transit, and origin country in a number of reports on TIP conducted by the United States Department of State.<sup>425</sup> In particular, Jordan was classified as a destination country for a number of forms of TIP,<sup>426</sup> such as forced labour,<sup>427</sup> labour exploitation,<sup>428</sup> involuntary servitude,<sup>429</sup> sex trafficking,<sup>430</sup> and prostitution.<sup>431</sup> Furthermore, Jordan was classified as a transit country for another practice that might be regarded as a form of TIP, which is the offering of marriage to women

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<sup>420</sup> The Jordanian Abolition of Slavery Law (1929); Talal Al-Sharf, *Human Trafficking Crimes: A Comparative Study* (Arabic edn, Darwael 2012) 11. The significance of this source is that it is regarded as one of the first legal studies in relation to the crime of trafficking in persons in Jordan. Additionally, this source is regarded as one of the most authoritative sources in relation to this crime under Jordanian legislation; Zahra T. Salman, *Trafficking in Persons: Trafficking in Persons Protocol and Jordan's Obligations about it - A Comparative Study* (Arabic edn, Darwael 2012) 25. The significance of the latter source is that it aims to analyse the efforts which have been made in Jordan to address the crime of trafficking in persons. Furthermore, it aims to determine whether these efforts are in line with international and national standards in relation to criminalising the crime of trafficking in persons and providing rights to trafficked victims. This source is considered to be one of the most authoritative sources regarding trafficking in persons in Jordan.

<sup>421</sup> The Jordanian Abolition of Slavery Law (1929) Art. 2; Trans-Jordan was established under the British Mandate in 1921. In 1946 Trans-Jordan formally became an independent country called the Hashemite Kingdom of Jordan, for more information see Anne M. Peters and Pete W. Moore, 'Beyond Boom and Bust: External Rents, Durable Authoritarianism, and Institutional Adaptation in the Hashemite Kingdom of Jordan' (2009) 44(3) *Studies in Comparative International Development* 256.

<sup>422</sup> The Jordanian Abolition of Slavery Law (1929) Art. 3.

<sup>423</sup> *ibid.*, Art. 4.

<sup>424</sup> *ibid.*, Art. 5.

<sup>425</sup> United States Department of State (USDS), 'Trafficking in Persons Report (TIPR)' (2005) 233, (2006) 151, (2007) 126, (2008) 152, (2009) 172, (2010) 191, (2011) 207, (2012) 201, (2013) 213, (2014) 222, (2015) 201.

<sup>426</sup> USDS, 'TIPR' (2008) 152, (2009) 172, (2010) 191, (2011) 207-208, (2012) 201, (2013) 213, (2014) 222, (2015) 201.

<sup>427</sup> *ibid.*

<sup>428</sup> USDS, 'TIPR' (2005) 233, (2006) 151, (2007) 126.

<sup>429</sup> USDS, 'TIPR' (2005) 233, (2006) 151, (2007) 126.

<sup>430</sup> USDS, 'TIPR' (2012) 201, (2013) 213, (2014) 222, (2015) 201.

<sup>431</sup> USDS, 'TIPR' (2008) 152, (2009) 172, (2010) 191, (2011) 207-208, (2012) 201, (2013) 214, (2014) 223, (2015) 201.

from Egypt by men from Jordan. After such offers are made conditions of TIP are imposed upon these women such as forced labour or forced prostitution.<sup>432</sup>

In particular, Jordan was classified as a transit country for trafficked victims from South and Southeast Asia who end up working in Iraq involuntarily because they have been deceived in Jordan by fraudulent job offers.<sup>433</sup> In addition, Jordan was classified as a transit country for trafficked men and women for the purpose of forced labour, labour exploitation, sexual exploitation, and sex trafficking.<sup>434</sup> Specifically, Jordan was the route for employment opportunities for men and women from South and Southeast Asia who were exploited for labour in other Middle Eastern countries.<sup>435</sup>

Jordan was also classified as an origin country for trafficked persons: Jordanian low-skilled workers were subjected to TIP for the purpose of forced labour in countries such as Kuwait and Qatar.<sup>436</sup>

It is noteworthy that in Jordan a number of practices are used against foreign domestic workers. These practices could amount to forced labour.<sup>437</sup> The first practice is the illegal withholding of passports and identification documents of the foreign domestic workers by their employers or recruitment agencies. These workers will not be able to move freely without these documents.<sup>438</sup> In this regard, it should be stressed that withholding a passport or a travel document illegally is regarded as a criminal offence in accordance with the Jordanian Passports Law.<sup>439</sup> However, it is to be noted that the enforcement of the prohibition of withholding passports or travel documents illegally is not commonly practiced by the Jordanian authorities.<sup>440</sup>

The second practice is the violation of foreign domestic workers' rights by forcing them to work in jobs and places and for employers other than those previously agreed. The third

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<sup>432</sup> USDS, 'TIPR' (2012) 201, (2013) 214, (2014) 223.

<sup>433</sup> USDS, 'TIPR' (2006) 151, (2007) 126, (2008) 152, (2009) 172.

<sup>434</sup> USDS, 'TIPR' (2006) 151, (2007) 126, (2008) 152, (2009) 172, (2010) 191, (2011) 207, (2012) 201, (2013) 213, (2014) 222.

<sup>435</sup> USDS, 'TIPR' (2010) 191, (2011) 208.

<sup>436</sup> USDS, 'TIPR' (2011) 207, (2012) 201, (2013) 214, (2014) 223.

<sup>437</sup> Mohamed Olwan, 'Trafficking in Persons in Jordan' (2011) CRIMES AS 2011/42, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute 1, 6.

<sup>438</sup> USDS, 'TIPR' (2005) 233, (2006) 151, (2007) 126, (2008) 152, (2009) 172, (2010) 191, (2011) 207, (2012) 201, (2013) 213, (2014) 222, (2015) 202; Olwan, op cit, 7.

<sup>439</sup> The Jordanian Passports Law (No 2 of 1969) page 96 of the Official Gazette (No 2150) dated 16 February 1969, Art. 23(b)(1). It is to be noted that The Jordanian Passports Law does not explain what is meant by the word 'illegally' in this law; Olwan, op cit, 7.

<sup>440</sup> Olwan, op cit, 7.

practice is the subjection of migrant domestic workers to irregular times of working and a variety of tasks. This is regarded as a violation of foreign domestic workers' rights, which could amount to the level of forced labour.<sup>441</sup> The fourth practice is the failure to pay the agreed wages or paying a lower wage than that agreed upon.<sup>442</sup> It is also worth noting that the minimum wage does not apply to domestic workers.<sup>443</sup>

Accordingly, as a result of the abuse and mistreatment of domestic workers, the sending countries, such as Indonesia and the Philippines, have occasionally prohibited their nationals from working in Jordan.<sup>444</sup> For example, a ban was instituted by the Philippines Government on additional Filipino workers wishing to migrate to Jordan to become domestic workers.<sup>445</sup> The reason for this ban was the fact that a large number of Filipino domestic workers had been abused by Jordanian employers.<sup>446</sup> However, a new memorandum of understanding on domestic workers' rights was negotiated by the Philippines government and the Jordanian government. This was important because it was a step to lifting the ban imposed upon domestic workers from the Philippines being employed in Jordan.<sup>447</sup>

Notably, the exploitation of domestic workers could constitute forced labour but not the crime of TIP *per se*. In particular, the presence of the action element, the means element, and the purpose element combined, as the main elements in the crime of TIP, is required for the existence of the crime of TIP.<sup>448</sup>

In 2005, members of a trafficking-in-persons network, which was TIP for the purpose of the removal of organs by exporting these organs to a neighbouring country, were arrested by Jordanian Public Security Directorate officers.<sup>449</sup> In the same year, a cooperation agreement between the Jordanian and Syrian Interior Ministries was signed. In accordance with this agreement, states parties will cooperate to combat organised crime. This agreement is

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<sup>441</sup> USDS, 'TIPR' (2005) 233, (2006) 151, (2007) 126, (2008) 153, (2011) 208, (2012) 201, (2013) 214; Olwan, *op cit*, 7-8.

<sup>442</sup> USDS, 'TIPR' (2005) 233, (2006) 151, (2007) 126, (2008) 152, (2009) 172, (2010) 191, (2011) 207, (2012) 201, (2013) 213, (2014) 222, (2015) 202; Olwan, *op cit*, 8.

<sup>443</sup> The Jordanian Labour Law, as amended (No 8 of 1996) page 1173 of the Official Gazette (No 4113) dated 16 April 1996, at Arts. 3, 52(a); Olwan, *op cit*, 8.

<sup>444</sup> Olwan, *op cit*, 8-9.

<sup>445</sup> This ban was instituted during the reporting period of the USDS's reports concerning trafficking in persons for the years 2008 and 2009 starting from June 2007 and ending in June 2009. See USDS, 'TIPR' (2008) 152, (2009) 172.

<sup>446</sup> USDS, 'TIPR' (2008) 152, (2009) 172.

<sup>447</sup> USDS, 'TIPR' (2012) 203.

<sup>448</sup> Olwan, *op cit*, 9.

<sup>449</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2005) 16. It should be stressed that the report does not specify this neighbour country.

important because it focuses on addressing the crime of TIP by exchanging information on that aspect.<sup>450</sup>

On 14 March, 2006, Jordan deposited the papers required to join the TIPP.<sup>451</sup> This step is significant because the TIPP is considered to be the central and the first international legal tool addressing the crime of TIP comprehensively by covering all this crime's aspects;<sup>452</sup> by depositing the papers required to join the Protocol, Jordan has committed to comply with the international standards in addressing TIP.

Moreover, in 2006, the Jordanian National Center for Human Rights received, for the first time, a number of complaints related to various forms of exploitation of domestic workers and workers in the Jordanian Qualified Industrial Zones (QIZs).<sup>453</sup> Examples of these forms of exploitation might be illustrated as follows: complaints about wages such as delays in payment or non-compliance with the minimum wage; complaints about exploiting migrant workers and children who were forced to work long hours and in dangerous conditions; and complaints about withholding the passports of foreigner workers. These complaints, according to the Jordanian National Center for Human Rights, are considered to be TIP in accordance with the TIPP.<sup>454</sup>

In 2007, ten complaints, which could fall under the notion of TIP, were received by the Jordanian National Center for Human Rights.<sup>455</sup> These complaints were related to the

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<sup>450</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2005) 16.

<sup>451</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001); The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2006) 57.

<sup>452</sup> John Winterdyk, Philip L. Reichel, and Benjamin Perrin (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 236; Mohamed Y. Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law' (2010) UNOV/DM/CMS/EPLS/Electronic Publishing Unit 1, 7; Brusca, op cit, 9.

<sup>453</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2006) 57-58. QIZs were established by the United States Congress in 1996 as an initiative aiming to support the Middle East peace process. In accordance with this initiative, the Jordanian products could be exported to the United States duty-free. However, this initiative requires that inputs from Israel should be contained in the Jordanian exported products, for more information about the Qualified Industrial Zone see <<http://web.ita.doc.gov/tacgi/fta.nsf/7a9d3143265673ee85257a0700667a6f/196ed79f4f79ac0085257a070066961d?OpenDocument>> accessed 1 September 2015.

<sup>454</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2006) 57-58.

<sup>455</sup> The National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (2007) 73. It is noteworthy that this is the only statistic available about receiving complaints related to trafficking in persons by the Jordanian National Center for Human Rights. Therefore, it is difficult to draw a conclusion in this regard.

exploitation of female workers who were forced to work in jobs other than those agreed upon, and the exploitation of factory workers who were forced to work long hours without payment for this extra time and whose movements were restricted by the seizing of their passports.<sup>456</sup> In the same year, a government commission on monitoring TIP for the purpose of the removal of organs was set up. In 2007, this commission has monitored 81 cases of TIP for the purpose of removal of organs.<sup>457</sup>

In the 2008 TIP Report, Jordan was placed, for the first time, on the ‘Tier 2 Watch List’.<sup>458</sup> This happened for a number of reasons. The primary reason was a lawsuit brought against a Jordanian company before a United States (US) court for alleged involvement in TIP. This lawsuit concerned 13 Nepalese workers who were hired to work in Jordan but were sent against their will to undertake forced labour in Iraq; 12 of them died there. It is noteworthy that all the elements of the crime of TIP existed in this lawsuit: the action element (recruitment, transportation, transfer, harbouring and receipt of persons), the means element (coercion), and the purpose element (forced labour).<sup>459</sup>

The second reason for Jordan being placed on the Tier 2 Watch List was accusations against companies based in Amman related to the use of Jordan as a transit country for the purpose of sending Asian labourers to Iraq forcibly.<sup>460</sup> The third reason was Jordan’s failure to provide evidence of its increased efforts to combat TIP, especially the fight against TIP for the purpose of forced labour through law enforcement.<sup>461</sup> The fourth reason was that the efforts made by the Jordanian government to investigate or prosecute considerable allegations in relation to foreign domestic workers, who were exploited in homes in Jordan where they were employed, were considered to be minimal efforts.<sup>462</sup> The fifth reason was that agricultural and domestic workers were not regarded as protected categories subject to the

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<sup>456</sup> The National Center for Human Rights, ‘Status Report of Human Rights in the Hashemite Kingdom of Jordan’ (2007) 73-74.

<sup>457</sup> *ibid.*, 97.

<sup>458</sup> The tiers system will be discussed in chapter four (4.5.3).

<sup>459</sup> June Kane, ‘People on the Move: Human Trafficking and Migration in Jordan, Lebanon and Syria’ (2011) CRIME Research Report 2011/04, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute 1, 11; Integrated Regional Information Networks (IRIN), ‘Jordan: Government under pressure to fight trafficking’ (2008) <<http://www.refworld.org/docid/48ce1d71c.html>> accessed 1 September 2015; Integrated Regional Information Networks (IRIN), ‘Jordan: Government adopts anti-human trafficking law’ (2009) <<http://www.refworld.org/docid/498178901e.html>> accessed 1 September 2015. These are the only citations found for the case.

<sup>460</sup> Integrated Regional Information Networks (IRIN), ‘Jordan: Government adopts anti-human trafficking law’ (2009) <<http://www.refworld.org/docid/498178901e.html>> accessed 1 September 2015.

<sup>461</sup> USDS, ‘TIPR’ (2008) 152.

<sup>462</sup> *ibid.*

Jordanian Labour Law's application.<sup>463</sup> The final reason was that abusive conditions were reported in some factories in the QIZs.<sup>464</sup>

In 2009, the JATIPL was enacted.<sup>465</sup> This Law is significant<sup>466</sup> because it defines the crimes of TIP for the first time.<sup>467</sup> Furthermore, this Law establishes a Jordanian National Committee for the Prevention of Trafficking in Persons, provides it with a number of tasks, and organises its work.<sup>468</sup> Moreover, this Law includes a requirement to establish one or more shelters to protect trafficked persons or those who are affected by the commission of the crime of TIP.<sup>469</sup> In addition to this, a number of penalties for the commission of the crime of TIP are stipulated in this Law.<sup>470</sup> This Law also highlights the powers of the Public Prosecutor, the Attorney General, and the Director of Public Prosecutions with regard to the crime of TIP. An example of these powers is the power to stop prosecuting trafficked victims when they are involved in the commission of this crime.<sup>471</sup> Moreover, confiscation of the proceeds of the crime of TIP has been addressed in this Law.<sup>472</sup> Finally, this Law provides for the implementation of its provisions.<sup>473</sup>

Additionally, in 2009 Jordan was recognised by the USDS as one of the few countries worldwide to have taken commendable initiatives in order to combat TIP. This is due to the establishment of 'the Humanitarian and Legal Assistance Fund' by the Jordanian Ministry of Labour, which aims to support trafficked victims in the QIZs.<sup>474</sup>

In the same year, according to the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan,<sup>475</sup> although no cases of TIP were filed, the report refers to the number of trafficked victims and perpetrators. In particular, in 2009 there were 78 trafficked

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<sup>463</sup> *ibid.*

<sup>464</sup> *ibid.*

<sup>465</sup> Al-Sharf, *op cit*, 11; Salman, *op cit*, 25.

<sup>466</sup> The significance of this Law will be discussed in detail in chapter six (6.2.1).

<sup>467</sup> The JATIPL, Art. 3.

<sup>468</sup> *ibid.*, 4-6. Establishing the JAHTNC will be discussed in detail in chapter six (6.2).

<sup>469</sup> The JATIPL, Art. 7. Establishing a shelter or more to trafficked victims or those who are affected by the commission of the crime of trafficking in persons will be discussed further in chapter six (6.4.2).

<sup>470</sup> The JATIPL, Arts. 8-11, 13, 15. The penalties for the commission of the crime of trafficking in persons will be discussed further in chapter six (6.4.1).

<sup>471</sup> The JATIPL, Art. 12. The issue of stopping the prosecuting of trafficked victims will be further discussed in chapter six (6.5).

<sup>472</sup> The JATIPL, Art. 14.

<sup>473</sup> *ibid.*, Arts. 16-17.

<sup>474</sup> USDS, 'TIPR' (2009) 42-43. 'Employers have deposited some \$336,000 into the fund'.

<sup>475</sup> Anti-Human Trafficking National Committee (JAHTNC), 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 8-10.

male victims and four trafficked female victims. In the same year, the numbers of perpetrators were 42 male perpetrators, and ten female perpetrators.<sup>476</sup>

In 2010, there were 26 cases of TIP. In these cases the numbers of trafficked victims were 30 trafficked male victims and 51 trafficked female victims. Moreover, in these cases there were 46 male perpetrators and eight female perpetrators.<sup>477</sup> After that, in 2011, the number of TIP cases increased to 29 cases. In these cases there were 15 trafficked male victims and 34 trafficked female victims. Furthermore, the perpetrators in these cases were 27 male perpetrators and ten female perpetrators.<sup>478</sup>

Afterwards, in 2012, the number of TIP cases dramatically fell to 12 cases. These cases included a number of victims and perpetrators. Precisely, there were nine trafficked male victims and 15 trafficked female victims. Moreover, there were 11 male perpetrators and two female perpetrators.<sup>479</sup> Subsequently, in 2013, there was a moderate rise in the number of TIP cases. This number escalated to 17 cases. The victims in these cases were 54 trafficked male victims and 27 trafficked female victims. Additionally, in these cases there were 38 male perpetrators and seven female perpetrators.<sup>480</sup>

Accordingly, Jordan is regarded as an origin, a transit, and a destination country for a number of forms of TIP forms. Further, the figures show the scale of the commission of the crime of TIP in Jordan.<sup>481</sup> Therefore, it is imperative to identify the crime of TIP in Jordan.

### **3.3 Identifying the Crime of Trafficking in Persons in Jordan**

This section will examine two main issues. The first issue is the main features in the definition of the crime of TIP in the JATIPL. The second issue concerns the elements of the crime of TIP. Accordingly, this section will examine whether or not the definition of the crime of TIP and the elements required for this crime under the Jordanian legislation are consistent with the international standards in this regard.

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<sup>476</sup> *ibid.*, 8-9. Statistics regarding the number of trafficked victims and perpetrators were determined in accordance with 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan'. For more information on this Report, see chapter six (6.2.14).

<sup>477</sup> *ibid.*

<sup>478</sup> *ibid.*

<sup>479</sup> *ibid.*

<sup>480</sup> *ibid.*

<sup>481</sup> It is worth noting that it is not possible to say what the reasons are for the increasing and decreasing of the number of trafficking in persons' cases stated in the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan, as this report states trends/patterns and does not provide further information in this regard.

### 3.3.1 The Definition of the Crime of Trafficking in Persons in accordance with the Jordanian Legislation

The crime of TIP has been defined in the JATIPL as follows:

polarization, transportation, harbouring or receipt of persons for the purpose of exploitation, whether through 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 the definition of trafficking in persons, exploitation means the exploitation of persons in forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation.<sup>482</sup>

Consequently, it is noticeable that the definition of the crime of TIP in accordance with the JATIPL<sup>483</sup> is relatively consistent with the definition of TIP stated in the TIPP, which is regarded as the most generally accepted definition of TIP internationally.<sup>484</sup> In particular, the definition of the crime of TIP in the JATIPL contains the main elements of TIP required in the TIPP.<sup>485</sup> These elements are; the action element, the means element, and the purpose element.<sup>486</sup>

In light of the definition of the crime of TIP in the JATIPL, there are a number of observations. The first observation is that when the JATIPL defines the crime of TIP, it uses the plural form to refer to trafficked victims by using the expression ‘persons’. Therefore,

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<sup>482</sup> The JATIPL, Art. 3(a)(1), 3(b).

<sup>483</sup> It is noteworthy that for most Jordanian legislation there is not much *travaux préparatoires* of the progresses and negotiations to explain and provide better understanding of the background and the evolution of such legislation.

<sup>484</sup> United Nations Office on Drugs and Crime (UNODC), ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’ (2004) UN Sales No. E.05.V.2, at 267; Winterdyk, Reichel, and Perrin, *op cit*, 236; Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 217; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 7.

<sup>485</sup> The Jordanian Public Security Directorate’s Criminal Investigation Unit, ‘Trafficking in Persons in accordance with the Jordanian Anti-Trafficking in Persons Law and the Rights and Duties of Migrant Workers in accordance with the Jordanian Laws of (Labour, Residence and Foreigners’ Affairs, and Passports) and the Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status’ (Arabic edn, 2011) 6-7. The significance of this source is that it aims to shed light on trafficking in persons under the Jordanian Anti-Trafficking in Persons Law, and the rights and duties of migrant workers under a number of Jordanian laws. However, it should be stressed that there is no case law to support this source.

<sup>486</sup> The TIPP, Art. 3(a); Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 29; Winterdyk, Reichel, and Perrin, *op cit*, 8,130,216; Justin Healey (ed), *Human Trafficking and Slavery* (Spinney Press 2012) 7, 11, 13.



trafficking in one person does not reach the level of TIP according to the JATIPL.<sup>487</sup> Accordingly, it could be argued that as trafficking in one person does not constitute the crime of TIP, there is no punishment for committing this act, as there is no crime without a legal stipulation in accordance with the principle of legality, ‘*nullum crimen, nulla poena sine lege*’.<sup>488</sup> This principle has been affirmed in the Jordanian Penal Code.<sup>489</sup>

However, a possible counter-argument is that the JATIPL tries to be consistent with the definition of TIP stated in the TIPP, and in doing so, it generally uses the words used in that definition under the Protocol. Notably, the Protocol addresses TIP as a transnational crime involving an organised criminal group. Therefore, requiring the crime of TIP to be committed against persons is acceptable in accordance with the Protocol as this Protocol deals with the crime of TIP when it is committed by an organised criminal group containing more than one person who might commit the crime of TIP against more than one person. However, such a requirement might be not acceptable according to the JATIPL as this Law deals with the crime of TIP when it is committed nationally. In this case, this crime might be committed by one person against just one person. Consequently, there is no need to require the commission of the crime of TIP against more than one person by using the word ‘persons’ in the plural form as this may result in the crime of TIP not being subject to punishment when it is committed against one person because there is no legal stipulation.<sup>490</sup> Nevertheless, this might be challenged on the basis that courts in Jordan have consistently tried the crime of TIP without distinguishing whether the crime has been committed against a person or persons.<sup>491</sup> Nonetheless, case law does not have status as a precedent in Jordan.<sup>492</sup>

The second observation is that some forms of TIP in the definition of the crime of TIP in the JATIPL have not been defined in the Jordanian legislation, and they are not even regarded as crimes in accordance with the Jordanian Penal Code. More specifically, Jordanian laws do not define the crime of forced labour or services, which could cause difficulties for criminal

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<sup>487</sup> Wijdan S. Irtemah, *General Provisions of Crimes of Human Trafficking: A Comparative Study* (Arabic edn, Daralthaqafa 2014) 177. The significance of this source is that it is regarded as one of the most comprehensive, specialised, and authoritative studies in relation to the crime of trafficking in persons in Jordan.

<sup>488</sup> Irtemah, op cit, 178.

<sup>489</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 3.

<sup>490</sup> Irtemah, op cit, 387.

<sup>491</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 113/2011) dated 7 February 2011, (No 43/2011) dated 13 June 2011, (No 1377/2011) dated 30 June 2011; Zarqa Court, in its criminal capacity and as a court of first instance, Decision (No 640/2011) dated 20 February 2012.

<sup>492</sup> The Jordanian Civil Code (No 43 of 1976) the Official Gazette (No 2645) dated 1 August 1976, Art 2.

law judges in dealing with these crimes in the matter of understanding what these crimes are and which law might be applied to them.<sup>493</sup>

The third observation is that unlike the TIPP, the JATIPL limits the list of exploitive acts.<sup>494</sup> Precisely, the Protocol uses the expression ‘at a minimum’. Therefore, new acts might be added to the list.<sup>495</sup> This is in contrast with the JATIPL, which mentions the exploitive acts exclusively. In doing so, the JATIPL tightens the scope of the criminalisation of the crime of TIP taking into consideration that new exploitive acts may appear.<sup>496</sup>

It is noteworthy that the JATIPL is consistent with the TIPP in the matter of stating the components of the TIP’ elements without defining any of them.<sup>497</sup> In this regard, it might be argued that not defining these components in the Protocol could be justified on the basis that the TIPP does not want to intervene in how these components will be defined nationally.<sup>498</sup> Nonetheless, not defining these components in the JATIPL could lead to uncertainty of law.<sup>499</sup> However, not defining them may increase enforcement errors,<sup>500</sup> make the adjudication outcome harder to predict,<sup>501</sup> and produce future uncertainty.<sup>502</sup> Additionally, not defining these components could lead to violation of the principle of legality, ‘*nullum crimen, nulla poena sine lege*’.<sup>503</sup> Nevertheless, this could be challenged on the basis that, in criminal matters in Jordan, definition is limited to two situations. The first situation is the resolution of jurisprudential debate.<sup>504</sup> An example of this is the definition of intent in the Jordanian Penal Code;<sup>505</sup> to resolve the jurisprudential debate over the issue of whether the criminal intent requires the availability of both the knowledge and the will to commit the crime or either of them. In this regard, the Jordanian Penal Code supports the view that what is required in the criminal intent is the availability of the will to commit the crime. A point to

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<sup>493</sup> Al-Sharfah, op cit, 11-12.

<sup>494</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(b); Irtemah, op cit, 281.

<sup>495</sup> The TIPP, Art. 3(a); Gallagher, op cit, 35.

<sup>496</sup> Irtemah, op cit, 281.

<sup>497</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1), 3(b).

<sup>498</sup> Gallagher, op cit, 38.

<sup>499</sup> See Anthony D’Amato, ‘Legal Uncertainty’ (1983) 71(1) California Law Review 1.

<sup>500</sup> Giuseppe Dari-Mattiacci and Bruno Deffains, ‘Uncertainty of Law and the Legal Process’ (2007) 163(4) Journal of Institutional and Theoretical Economics 627, 635.

<sup>501</sup> *ibid*, 636.

<sup>502</sup> Ehud Guttel and Alon Harel, ‘Uncertainty Revisited: Legal Prediction and Legal Postdiction’ (2008) 107(3) Michigan Law Review 467, 480.

<sup>503</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 3.

<sup>504</sup> Kamel Al-Saeed, *Explanation of the General Provisions in the Penal Code: A Comparative Study* (Arabic edn, 3rd edn, Daralthaqafa 2011) 38.

<sup>505</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 63. This Article defines the intent as follows ‘the will to commit the crime as defined by law’.

note, however, is that criminal legislation cannot be exhaustively clear, as jurisprudential debate illustrates.<sup>506</sup> The second situation is the alteration of a settled meaning.<sup>507</sup> An example of this is the definition of a state official in the Jordanian Penal Code<sup>508</sup> in broader terms than those used in the Jordanian legislation.<sup>509</sup> In particular, the definition of state official in the Jordanian Penal Code includes ‘any public official in the administrative or judicial authority and any officer who works in the civil or military authorities or any of its members in addition to any worker or employee of the state or the public administration’.<sup>510</sup> However, in accordance with the Jordanian Constitution, a state official is defined as any person who receives his or her salary from public funds.<sup>511</sup> Therefore, the definition stated in the Jordanian Penal Code is clearly more specific and includes more details about who holds a state official position. Accordingly, it can be said that certainty in the Jordanian criminal law does not exclude all doubt.

### **3.3.2 The Elements of the Crime of Trafficking in Persons in accordance with the Jordanian Legislation**

Under the JATIPL, there are three elements to the crime of TIP. These elements are the action element, the means element, and the purpose element.

#### **3.3.2.1 The Action Element of the Crime of Trafficking in Persons in accordance with Jordanian Legislation<sup>512</sup>**

There are a number of actions required for the commission of the crime of TIP, in accordance with the JATIPL, and these actions are ‘polarization, transportation, harbouring or receipt of persons’.<sup>513</sup> Notably, specifying a number of actions performed by traffickers in committing the crime of TIP is consistent with the TIPP. More specifically, when the Protocol defines TIP, it includes actions used to commit the crime of TIP. However, it is clear that not all the

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<sup>506</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 38, 245-246.

<sup>507</sup> *ibid*, 38.

<sup>508</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 169.

<sup>509</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 38.

<sup>510</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 169.

<sup>511</sup> The Jordanian Constitution (1952) page 3 of the Official Gazette (No 1093) dated 8 January 1952, Art. 76.

<sup>512</sup> JAHTNC, ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 3; Mohanad F. Al-Dweikat, *Criminal Investigation in Trafficking in Persons Cases* (Arabic edn, Lemon marketing 2012) 17-18. The significance of this source is that it focuses on the practical aspects of the criminal investigation on trafficking in persons cases. Moreover, this source is considered to be one of the most authoritative sources regarding trafficking in persons in Jordan; Al-Sharfah, op cit, 17; Salman, op cit, 40; Olwan, op cit, 2; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 13. The components of the action element will be discussed sequentially in accordance with their order in the definition of the crime of trafficking in persons under the Jordanian Anti-Trafficking in Persons Law.

<sup>513</sup> The JATIPL, Art. 3(a)(1).

actions stated in the TIPP have been included in the definition of the crime of TIP in the JATIPL.<sup>514</sup>

In other words, unlike the TIPP, which uses the expressions ‘recruitment, transportation, transfer, harbouring and receipt of persons’ as the components of the action element in the definition of TIP,<sup>515</sup> the JATIPL uses the expressions ‘polarization, transportation, harbouring and receipt of persons’ as the components of the action element in the definition of the crime of TIP.<sup>516</sup> It is noteworthy that limiting the actions used in TIP might be criticised on the basis that other actions may occur under the TIPP that are not included in the Jordanian legislation. If so, these actions will not be regarded as components of the action element as they will have been omitted from the definition of TIP. Therefore, it is suggested that the list of the components of the action element not be limited.

### **3.3.2.1.1 Polarization of Persons for the Purpose of Trafficking in Persons**

To begin with, unlike the TIPP, which uses the expression ‘recruitment’ in the definition of TIP as the first action,<sup>517</sup> the JATIPL uses the expression ‘polarization’ without defining it.<sup>518</sup> However, the polarization of persons has been defined in accordance with Jordanian jurisprudence as follows: the recruitment and use of persons as commodities for the purpose of exploitation and gaining profits, either legally or illegally, by subjecting trafficked persons to traffickers and forcing trafficked persons to do as demanded by traffickers.<sup>519</sup>

However, the use of the expression ‘polarization’ in the JATIPL rather than the expression ‘recruitment’, which has been used in the TIPP, has been challenged on the basis that the expression ‘polarization’ is narrower than the expression ‘recruitment’, which includes luring and seducing victims. In addition to this, the use of the expression ‘polarization’ has also been criticised because it is not exactly consistent with the definition of TIP in the TIPP and, therefore, creates some ambiguity. Hence, it is better to use the expression ‘recruitment’ than the expression ‘polarization’ in the JATIPL in order to comply with the TIPP.<sup>520</sup> Moreover,

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<sup>514</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 17.

<sup>515</sup> The TIPP, Art. 3(a).

<sup>516</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 18; Salman, op cit, 69.

<sup>517</sup> The TIPP, Art. 3(a).

<sup>518</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 18; Salman, op cit, 69. It is worth noting that polarization might be regarded as a term of art in the JATIPL.

<sup>519</sup> The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 13.

<sup>520</sup> Al-Sharf, op cit, 20-21.

the JATIPL uses the expression ‘polarization’ in the plural form. Therefore, polarizing one person does not amount to the level of the crime of TIP in accordance with the JATIPL.<sup>521</sup>

It is noteworthy that there is a legal dilemma in relation to polarization as the first component of the action element in the definition of the crime of TIP in the JATIPL.<sup>522</sup> Specially, polarization contains a stage of looking for a victim for the purpose of exploitation. This stage is regarded as a preparatory work. Notably, the JATIPL does not address preparatory work in its provisions. Therefore, as a result of the absence of any provision related to the issue of preparatory work in the JATIPL, the general rules in the Jordanian Penal Code will be applied in this situation.<sup>523</sup>

Interestingly, according to the general rules of the Jordanian Penal Code, the stage of looking for victims is considered to be preparatory work, and there is no punishment for engaging in preparatory work *per se* unless this preparatory work is considered to be a criminal agreement with the aim of committing felonies against people; if so, the preparatory work becomes an *actus reus* because it is preparatory to a felony, and not just to a misdemeanor. Accordingly, it should be stressed that, according to the Jordanian Penal Code, the criminal agreement should be between two persons or more for the purpose of committing felonies.<sup>524</sup> It is noteworthy that the reason for decriminalising engagement in preparatory works *per se* is to encourage the perpetrator to abandon the criminal activity he/she is intending to commit.<sup>525</sup> For instance, no punishment is incurred by someone who decides to kill another person, buys a weapon, learns how to use it, and starts to monitor the intended victim,<sup>526</sup> because these acts are preparatory works and there is no punishment for engaging in these works unless they are regarded as a crime *per se*.<sup>527</sup> However, when the preparatory works endanger society, they will be punished as they are regarded as separate crimes.<sup>528</sup> By way of illustration, entering a

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<sup>521</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 25.

<sup>522</sup> Al-Sharf, op cit, 22; Salman, op cit, 70-71; Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 33.

<sup>523</sup> *ibid.*

<sup>524</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 69, 157; Al-Sharf, op cit, 22; Salman, op cit, 70-71.

<sup>525</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 212; Mohamed Al-Jabour, *Alwaseet in the Penal Law: General Section* (Arabic edn, Darwael 2012) 213.

<sup>526</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 212.

<sup>527</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 69.

<sup>528</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 212-213.

place of residence or any of its attachments to commit a crime is considered to be a crime regardless of whether the intended crime is actually committed.<sup>529</sup>

To return to an earlier point, it is important to note that in the matter of criminal agreement there is a contradiction between the Jordanian Penal Code and the JATIPL.<sup>530</sup> More specifically, in accordance with the JATIPL the crime of TIP is considered to be a misdemeanour unless it is coupled with aggravating circumstances.<sup>531</sup> Therefore, any preparatory work to commit the crime of TIP is not regarded as a crime *per se*<sup>532</sup> because, according to the general rules, criminalising preparatory work requires a criminal agreement with the aim of committing felonies against people.<sup>533</sup> Nevertheless, if the crime of TIP is coupled with aggravating circumstances, this crime becomes a felony, and as a result any preparatory work undertaken to commit this crime becomes an *actus reus*. However, this might be challenged on the basis that if two persons have a criminal agreement to commit the crime of TIP without any aggravating circumstances related to this crime, it is inconceivable that those persons should be put on trial for engaging in punishable preparatory work as the aggravating circumstance of the crime of TIP requires that it be committed by a criminal group containing three persons or more. This contradicts the general rules of the Jordanian Penal Code, which requires the engagement of two or more persons in the criminal agreement to be criminalised.<sup>534</sup>

Finally, it should be stressed that there are a number of conditions required to criminalise polarization as the first component of the action element in the definition of the crime of TIP in the JATIPL. The first condition is that the offender should carry out physical activity aiming to polarize persons.<sup>535</sup> The second condition is that the offender should use any of the means stated in the definition of the crime of TIP in the JATIPL. These means are: ‘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’.<sup>536</sup>

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<sup>529</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 347(1); Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 213; Al-Jabour, op cit, 213.

<sup>530</sup> Al-Sharf, op cit, 22; Salman, op cit, 70-71.

<sup>531</sup> The JATIPL, Arts. 8-10

<sup>532</sup> Al-Sharf, op cit, 22-23; Salman, op cit, 70-71.

<sup>533</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 157.

<sup>534</sup> The JATIPL, Arts. 3, 9; The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 69, 157; Al-Sharf, op cit, 22-23; Salman, op cit, 70-71.

<sup>535</sup> Al-Sharf, op cit, 24-25.

<sup>536</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 26.

The third condition is that the offender should have a general *mens rea* and a special *mens rea*.<sup>537</sup> The general *mens rea* has been addressed in the Jordanian Penal Code under the topic of the intent.<sup>538</sup> The intent has been defined as follows: ‘the will to commit the crime as defined by law’.<sup>539</sup> Interestingly, the general *mens rea* has two elements. The first element is the knowledge about the elements of the crime committed, such as the knowledge about the place, the time, and the subject of the crime.<sup>540</sup> The second element is the will to commit the crime.<sup>541</sup> However, some crimes require a special *mens rea* in addition to the general *mens rea* otherwise, they will not be criminalised.<sup>542</sup> This special *mens rea* ‘is the reason making the perpetrator commit the crime, or it is the ultimate result that is intended to be achieved by the perpetrator’.<sup>543</sup> The special *mens rea* is usually based on a provision requiring the availability of this special *mens rea* explicitly.<sup>544</sup>

Accordingly, it can be stated that the general *mens rea* required in the crime of TIP should include two main elements. The first element is that the offender should know that he/she is committing the crime of TIP. The second element is that the offender should have the will to commit the crime of TIP. Moreover, the crime of TIP requires a special *mens rea*.<sup>545</sup> Precisely, the offender should have the intent to exploit the victims in any of the following forms of exploitation: ‘forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation’.<sup>546</sup>

### **3.3.2.1.2 Transportation of Persons for the Purpose of Trafficking in Persons**

Transportation of persons for the purpose of TIP is the second component of the action element in the definition of TIP in the JATIPL. A point to note, however, is that although the JATIPL criminalises transportation of persons for the purpose of TIP, it does not define it. However, the transportation of persons for the purpose of TIP has been defined in accordance with Jordanian jurisprudence as follows: moving people from one place to another nationally or internationally regardless of the method or the way used, be it legal or illegal.

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<sup>537</sup> Al-Sharfah, op cit, 26.

<sup>538</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 245; Al-Jabour, op cit, 239.

<sup>539</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 63;

<sup>540</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 245; Al-Jabour, op cit, 239.

<sup>541</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 245-249; Al-Jabour, op cit, 246.

<sup>542</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 67(2); Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 254-255; Al-Jabour, op cit, 256.

<sup>543</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 67(1).

<sup>544</sup> Al-Jabour, op cit, 256.

<sup>545</sup> Al-Sharfah, op cit, 26; Irtemah, op cit, 274.

<sup>546</sup> The JATIPL, Art. 3(b); Al-Sharfah, op cit, 26.

Additionally, the movement might be spatial by moving victims from one place to another nationally or internationally. Furthermore, the movement might be vocational if the traffickers switch their victims from legal careers to illegal careers.<sup>547</sup>

It is noteworthy that unlike the TIPP, which uses the expressions ‘transportation’ and ‘transfer’ when it defines TIP, the JATIPL uses only the expression ‘transportation’.<sup>548</sup> However, this might be challenged on the basis that the expression ‘transportation’ includes the expression ‘transfer’.<sup>549</sup> Particularly, the notion of transfer in accordance with Jordanian jurisprudence, in relation to TIP, might be understood as progress in transporting people as a result of TIP more than once.<sup>550</sup>

It is noticeable that the the JATIPL criminalises the transportation of persons for the purpose of TIP regardless of the distance travelled to transport trafficked persons to exploit them, and regardless of the arrival of the trafficked victims at their final destination.<sup>551</sup> Moreover, the transportation could take place in a number of ways. The first way is the direct way, where the traffickers themselves transport their victims. The second way occurs when traffickers facilitate the trafficking-in-persons process without transporting the trafficked persons directly by providing trafficked victims with tickets and passports necessary for travelling to their destination or paying the expenses for such travel. The third way involves organised criminal groups transporting trafficked persons from one place to another on behalf of the traffickers.<sup>552</sup>

It is evident that a number of conditions are required to criminalise transportation as the second component of the action element in the definition of the crime of TIP in the JATIPL. The first condition is that the offender should transport a living person regardless of whether this transportation has taken place legally or illegally, and regardless of whether the final destination has been reached or not.<sup>553</sup> The second condition is that the offender should use any of the means of TIP such as ‘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

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<sup>547</sup> Al-Dweikat, op cit, 18; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 13.

<sup>548</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1).

<sup>549</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1).

<sup>550</sup> Al-Sharf, op cit, 28; Irtemah, op cit, 193.

<sup>551</sup> Al-Sharf, op cit, 30.

<sup>552</sup> *ibid*, 32.

<sup>553</sup> *ibid*, 33.



control over another person'.<sup>554</sup> The third condition is that the offender should have a general *mens rea* and a special *mens rea*. The general *mens rea* requires the availability of two elements. The first element is that the offender should know that he/she is committing the crime of TIP. The second element is that the offender should have the will to commit this crime.<sup>555</sup> The special *mens rea* requires the offender to have had the intent to exploit the trafficked victims in any form of TIP.<sup>556</sup>

It should be stressed that there is a special case of TIP in relation to transportation of persons for the purpose of TIP. This special case is trafficking in pregnant women for the purpose of exploiting their fetuses. In particular, this kind of TIP could happen in two ways. The first way is that the pregnant woman is forced by traffickers to travel from one country to another for the purpose of exploiting her fetus. The second way is that the pregnant woman travels willingly to sell her fetus.<sup>557</sup>

Interestingly, the dilemma about this kind of TIP is that the crime of TIP has to be committed against a living person, and in this kind of TIP the crime is committed against a fetus who has not yet acquired legal protection; for this legal protection the Jordanian legislation requires that the fetus be born fully alive.<sup>558</sup> However, it should be stressed that the Jordanian Penal Code protects fetuses by criminalising abortion but without addressing whether or not abortion is prohibited at all stages of pregnancy.<sup>559</sup> To return to an earlier point, the purpose of TIP, in this special case, is to exploit the fetus after he/she is born alive, rather than the exploitation of the mother of the fetus. Therefore, there is no real exploitation of the fetus yet because the fetus is not born yet. Nonetheless, there is arguably exploitation of the mother for the purpose of her giving birth. In addition to this, it is very difficult to prove the crime of TIP, in this special case, because there may be no evidence that the mother was pregnant when she travelled and then returned without her child, whose existence is difficult to prove.<sup>560</sup>

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<sup>554</sup> *ibid*, 34.

<sup>555</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 321-325.

<sup>556</sup> The JATIPL, Art. 3(b); Al-Sharf, *op cit*, 34.

<sup>557</sup> Al-Sharf, *op cit*, 34.

<sup>558</sup> The Jordanian Civil Code (No 43 of 1976) Art. 30(1); Al-Sharf, *op cit*, 34-35.

<sup>559</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 321-325.

<sup>560</sup> Al-Sharf, *op cit*, 34-35.

### 3.3.2.1.3 Harboursing of Persons for the Purpose of Trafficking in Persons

The third component of the action element in the definition of TIP in the JATIPL is the harbouring of persons for the purpose of TIP. The JATIPL criminalises the harbouring of persons without defining it.<sup>561</sup> However, in accordance with Jordanian jurisprudence the harbouring of persons for the purpose of TIP can be defined as follows: providing accommodation for trafficked persons during the process of TIP by traffickers or dealers working with the traffickers.<sup>562</sup> Furthermore, harbouring may include offering jobs to trafficked persons to induce them to be trafficked. A point to note, however, is that although these jobs may look like legal jobs, they are in fact considered a type of exploitation of trafficked victims, because these jobs will lead to trafficking-in-persons situations.<sup>563</sup>

Along with this, the harbouring process for trafficked persons may contain a number of illegal practices that facilitate this process. An example of this is the seizing of identity documents of trafficked persons or destroying them.<sup>564</sup> More to the point, TIP requires the provision of accommodation for trafficked persons whether during the transportation process of trafficked persons or during the process of exploiting them, and regardless of whether this accommodation is regarded as temporary or permanent accommodation.<sup>565</sup>

It should be stressed that the criminalising harbouring of persons for the purpose of TIP requires a number of conditions. The first condition is that the trafficker should keep the trafficked victims in detention temporarily or permanently. The second condition is that the offender should have general and special *mens rea*. The general *mens rea* includes the knowledge and the intent elements. The special *mens rea* requires the intent to exploit the trafficked victims in any form of TIP. The third condition is that the offender should keep more than one person in detention.<sup>566</sup> Therefore, it can be said that there is a gap in the JATIPL in situations where just one person is being subjected to harbouring.

### 3.3.2.1.4 Receipt of Persons for the Purpose of Trafficking in Persons

Receipt of persons for the purpose of TIP is the fourth component of the action element in the definition of TIP in accordance with the JATIPL. Although the JATIPL criminalises the

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<sup>561</sup> The JATIPL, Art. 3(a)(1).

<sup>562</sup> Al-Dweikat, op cit, 18; The Jordanian Public Security Directorate's Criminal Investigation Unit, op cit, 14.

<sup>563</sup> *ibid.*

<sup>564</sup> Al-Sharf, op cit, 41.

<sup>565</sup> *ibid.*, 36.

<sup>566</sup> *ibid.*, 41.

receipt of persons for the purpose of TIP, this Law does not define it.<sup>567</sup> Nevertheless, receipt of persons for the purpose of TIP has been defined according to Jordanian jurisprudence as follows: the receipt of trafficked persons by traffickers or brokers and the facilitation of what is needed for trafficked persons such as the provision of accommodation and nutrition by the traffickers and brokers for the purpose of exploiting the trafficked persons later.<sup>568</sup>

Further, a number of conditions are required to criminalise the receipt of persons for the purpose of TIP. The first condition is that traffickers should receive trafficked persons or proceed with any of the procedures required for that receipt such as paying the receiving costs.<sup>569</sup> The second condition is that the offender should use any means of TIP to receive persons.<sup>570</sup> The third condition is that the offender, in committing the crime of TIP, should have a general *mens rea* with both its elements: the knowledge and the will to commit the crime of TIP. Furthermore, under the third condition a special *mens rea* is required. More specifically, the offender should have the intent to receive persons for the purpose of exploiting trafficked victims for any of the purposes of TIP.<sup>571</sup>

### **3.3.2.2 The Means Element of the Crime of Trafficking in Persons in accordance with Jordanian Legislation<sup>572</sup>**

When the JATIPL defines the crime of TIP, this definition includes a number of means which are used by traffickers in the process of TIP.<sup>573</sup> These means represent the method used by traffickers in TIP.<sup>574</sup> It is noteworthy that the JATIPL is consistent with the TIPP in the matter of limiting the means used to commit the crime of TIP.<sup>575</sup> According to the JATIPL, these means are ‘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

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<sup>567</sup> The JATIPL, Art. 3(a)(1).

<sup>568</sup> Al-Dweikat, op cit, 18; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 14.

<sup>569</sup> Al-Sharf, op cit, 45.

<sup>570</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 45.

<sup>571</sup> The JATIPL, Art. 3(b); Al-Sharf, op cit, 46.

<sup>572</sup> JAHTNC, ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 3; Al-Dweikat, op cit, 18-19; Al-Sharf, op cit, 48; Salman, op cit, 40-41; Olwan, op cit, 2; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 14. The components of the means element will be discussed sequentially in accordance with their order in the definition of the crime of trafficking in persons under the Jordanian Anti-Trafficking in Persons Law.

<sup>573</sup> The JATIPL, Art. 3(a)(1).

<sup>574</sup> Winterdyk, Reichel, and Perrin, op cit, 8, 130, 216.

<sup>575</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1); Irtemah, op cit, 121.

person'.<sup>576</sup> It might be argued, however, that the crime of TIP could be committed by using means other than those stated in the Protocol or the JATIPL.<sup>577</sup> Therefore, it is recommended that the components of the means element not be limited to certain means, as new means may appear.

### **3.3.2.2.1 Threat or Use of Force or other Forms of Coercion of Persons for the Purpose of Trafficking in Persons**

First, it is important to note that the JATIPL does not define threat or use of force or other forms of coercion as illegal practices falling under the first component of the means element in the definition of the crime of TIP. However, under the Jordanian Civil Code the meaning of these illegal practices has been clarified as 'forcing a person to work without consent'.<sup>578</sup>

Furthermore, threat or use of force or other forms of coercion, as the first component of the means element, takes place when traffickers compel trafficked persons to comply with their orders. In this case, trafficked persons have no free will because they are under threat of harm by the traffickers if they do not comply with the traffickers' orders.<sup>579</sup> In other words, TIP is a crime directed against persons' freedom.<sup>580</sup>

A point to note, however, is that, in accordance with the JATIPL, threatening is considered an aggravating circumstance in the commission of the crime of TIP. In this regard, the JATIPL states that if the crime of TIP is committed through the use of a weapon or a threat to use a weapon, the sentence for this crime will be imprisonment with hard labour for up to ten years and a fine ranging from 5,000 to 20,000 Jordan *Dinar*.<sup>581</sup> Accordingly, it should be stressed that if the crime of TIP is committed without any aggravating circumstances the sentence for this crime will be imprisonment for a period of time not less than six months, or a fine ranging from 1,000 to 5,000 Jordan *Dinar*, or both.<sup>582</sup>

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<sup>576</sup> The JATIPL, Art. 3(a)(1).

<sup>577</sup> Irtemah, op cit, 121.

<sup>578</sup> The Jordanian Civil Code (No 43 of 1976) Art. 135; Al-Sharfah, op cit, 49.

<sup>579</sup> The Jordanian Public Security Directorate's Criminal Investigation Unit, op cit, 14.

<sup>580</sup> Boretzky A Vladimirovich, Djorobekova A Mamajunusovna, and Pen S Gennadjevich, 'Investigation of Trafficking: Establishing the Circumstances Subject to a Proof' (2015) 8(6) Journal of Sustainable Development 111, 113.

<sup>581</sup> The JATIPL, Art. 9. As of September 2015, the Jordanian Dinar is approximately equal to 0.91 GBP - British Pound <<http://www.xe.com/currencyconverter/convert/?Amount=1&From=JOD&To=GBP>> accessed 1 September 2015.

<sup>582</sup> The JATIPL, Art. 8.

A threat or the use of force or other forms of coercion as a means of TIP does not require the use of a particular measure of violence or force by traffickers. What matters in this regard is that a threat or use of force or other forms of coercion should affect the free will of the trafficked persons.<sup>583</sup> However, it should be stressed that threats or the use of force or other forms of coercion should be made before or at the time that any of the following actions are committed, ‘polarization, transportation, harbouring or receipt of persons’ for the purpose of TIP, because if the threat or use of force or other forms of coercion occurs after those actions, these means will not be taken into consideration as means of TIP.<sup>584</sup>

### 3.3.2.2 Abduction of Persons for the Purpose of Trafficking in Persons

The abduction of persons for the purpose of TIP is the second component of the means element in the definition of the crime of TIP in the JATIPL. It is true that this Law criminalises the abduction of persons for the purpose of TIP without defining it.<sup>585</sup> Nonetheless, Jordanian jurisprudence defines abduction of persons for the purpose of TIP as follows: taking trafficked persons far from their original homeland forcibly for the purpose of forcing them to implement whatever they were asked to do.<sup>586</sup>

Further, abduction is considered as a crime *per se* in accordance with the Jordanian Penal Code, regardless of whether it is coupled with the use of fraud or coercion.<sup>587</sup> It is important to distinguish between abduction as a crime *per se* and abduction as a means of the commission of the crime of TIP in order to determine which law is applicable to the crime committed. In this regard, it should be stressed that the norm for distinguishing between them can be found in the purpose of the abduction. Precisely, if the purpose of the abduction is to take away the abducted person, this act constitutes the crime of abduction, and the case will be tried under the Jordanian Penal Code.<sup>588</sup> Nevertheless, if the purpose of the abduction is to exploit the abducted person for any of the purposes of TIP using any action of TIP, this act constitutes the crime of TIP, and this crime will be tried under the JATIPL.<sup>589</sup>

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<sup>583</sup> Al-Sharfah, op cit, 52.

<sup>584</sup> *ibid*, 53; Irtemah, op cit, 206.

<sup>585</sup> The JATIPL, Art. 3(a)(1).

<sup>586</sup> The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 14.

<sup>587</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 291, 302.

<sup>588</sup> *ibid*, Arts. 291, 302; Irtemah, op cit, 220.

<sup>589</sup> The JATIPL, Art. 3(a)(1), 3(b); Irtemah, op cit, 220.

### 3.3.2.2.3 Fraud or Deception of Persons for the Purpose of Trafficking in Persons

The third component of the means element in the definition of the crime of TIP in the JATIPL contains two illegal practices; fraud or deception of persons for the purpose of TIP. Obviously, fraud and deception have been criminalised in the JATIPL but this Law does not define them.<sup>590</sup> Equally importantly, the Jordanian Penal Code addresses fraud and deception as illegal practices but it does not define them.<sup>591</sup>

Accordingly, it can be said that there is no legal definition of fraud and deception in the Jordanian legislation. However, fraud and deception perpetrated in the course of the crime of TIP could be defined as follows: lying or using false promises, with the support of external tools, to mislead trafficked persons for the purpose of their exploitation by traffickers.<sup>592</sup>

Two conditions are required for the criminalisation of fraud and deception of persons for the purpose of TIP. The first condition is that fraud and deception should not be based on a real fact, or, if they are, they should aim to change the fact. An example of this is the use of advertisements for fake job opportunities and fraudulent job offers.<sup>593</sup> The second condition is the use of fraud and deception. Fraud and deception should be tools used with the aim of committing the crime of TIP through any of the actions of TIP for the purpose of exploiting trafficked victims in any of the purposes of TIP.<sup>594</sup>

It is important to differentiate between fraud as a crime *per se* and fraud as a means of carrying out the crime of TIP. This differentiation is significant because it determines which law might be applied. In this respect, it can be said that the norm for differentiating between fraud as a crime *per se* and fraud as a means of perpetrating the crime of TIP is the result sought (or the purpose). In other words, if the criminal result of fraud is to cause another person to deliver any moveable or immovable property or any document including ‘an undertaking or a remission from dept’, these acts constitute the crime of fraud, and the Jordanian Penal Code will be applied.<sup>595</sup> However, if the criminal result of fraud is to put the victim under the control of the perpetrator and convince him/her to perform any act that

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<sup>590</sup> The JATIPL, Art. 3(a)(1).

<sup>591</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 292(1), 302, 417.

<sup>592</sup> The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 14-15.

<sup>593</sup> Al-Sharfat, op cit, 68-71.

<sup>594</sup> *ibid*, 71-72.

<sup>595</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 417; Irtemah, op cit, 228.

enables the perpetrator to exploit this victim, this act constitutes the crime of TIP, and the JATIPL will be applied.<sup>596</sup>

#### **3.3.2.2.4 The Abuse of Power**

In accordance with the JATIPL, the abuse of power is the fourth component of the means element in the definition of the crime of TIP. It is evident that the abuse of power has been criminalised in the JATIPL but the abuse of power as a means of TIP has not been defined in the previous Law.<sup>597</sup> There is an argument about the meaning of this power; is it a legal power or an actual power or an administrative power? The expression ‘the abuse of power’ is used in the Jordanian legislation generally.<sup>598</sup> Therefore, this power could be a legal power as a matter of interpretation.<sup>599</sup> An example of the abuse of legal power in the course of TIP would be a guardian selling a person under his or her guardianship.<sup>600</sup> Another example would be a husband using his power over his wife to exploit her in TIP for the purpose of prostitution.<sup>601</sup> Furthermore, this power could be an actual power.<sup>602</sup> An example of the abuse of an actual power in the course of TIP would be the owner of the house committing the crime of TIP against his or her housemaid.<sup>603</sup> Another example would be a tutor exploiting his or her student in any form of TIP.<sup>604</sup> Finally, this power could be an administrative power.<sup>605</sup> An example of the abuse of the administrative power in the course of TIP would be an official in immigration and passports administration using his or her subordinates to facilitate trafficking-in-persons operations.<sup>606</sup>

It should be stressed that the JATIPL is consistent with the TIPP in the matter of the use of the expression ‘the abuse of power’ generally. More specifically, neither of them determines whether this power is regarded as a legal power or an actual power or an administrative

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<sup>596</sup> The JATIPL, Art. 3(a)(1), 3(b); Irtemah, op cit, 228.

<sup>597</sup> The JATIPL, Art. 3(a)(1).

<sup>598</sup> Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73.

<sup>599</sup> The Jordanian Civil Code (No 43 of 1976) Arts 123, 133, 142; Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73; Irtemah, op cit, 229.

<sup>600</sup> Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73.

<sup>601</sup> Irtemah, op cit, 229.

<sup>602</sup> Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73; Irtemah, op cit, 229.

<sup>603</sup> Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73.

<sup>604</sup> Irtemah, op cit, 229.

<sup>605</sup> Al-Dweikat, op cit, 19; Al-Sharf, op cit, 73; Irtemah, op cit, 229.

<sup>606</sup> Irtemah, op cit, 229.

power.<sup>607</sup> However, there is a view that the power used by traffickers to traffic persons is the power of any person who has connections with others through subordinate relationships.<sup>608</sup>

A number of conditions are required in order for the abuse of power, as a means of TIP, to be criminalised. The first condition is that the offender should have legal, actual, or administrative power. The second condition is that any action of TIP should be exercised by the offender.<sup>609</sup> The third condition is that the offender should have the intention as the *mens rea* to commit the crime of TIP.<sup>610</sup>

Finally, it is worth noting that the abuse of power is regarded as an aggravating circumstance coupled with the commission of the crime of TIP under the JATIPL.<sup>611</sup>

### **3.3.2.2.5 The Abuse of a Position of Vulnerability of Trafficked Persons**

The abuse of a position of vulnerability of trafficked persons is the fifth component of the means element in the definition of the crime of TIP in the JATIPL. As with the other elements discussed above, the JATIPL criminalises the abuse of a position of vulnerability of trafficked persons, but it does not define this kind of abuse.<sup>612</sup> Indeed, the abuse of a position of vulnerability of trafficked persons as a means of TIP occurs through the exploitation of trafficked victims because of circumstances related to their economic, social, health, and mental status.<sup>613</sup>

It should be stressed that not including a specific definition of the expression ‘the abuse of a position of vulnerability’ in the JATIPL has been criticised on the basis that failure to define the expression conflicts with the principle of legality and leads to a contradiction with general principles of criminalisation, which are required for crimes and punishments to be clear and to avoid vagueness in the criminal law. Failure to clarify the concept of the abuse of a position of vulnerability of trafficked persons could lead to the expansion of the criminalisation of any act that might fall under this concept, and it could give judges a wide

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<sup>607</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(a)(1); Al-Sharfat, op cit, 73.

<sup>608</sup> Al-Dweikat, op cit, 19.

<sup>609</sup> The JATIPL, Art. 3(a)(1), 3(b); Al-Sharfat, op cit, 74; Salman, op cit, 81.

<sup>610</sup> The JATIPL, Art. 3(a)(1); Al-Sharfat, op cit, 74; Salman, op cit, 81.

<sup>611</sup> The JATIPL, Art. 9(b)(6), 9(b)(6).

<sup>612</sup> *ibid*, Art. 3(a)(1); Irtemah, op cit, 230.

<sup>613</sup> Al-Dweikat, op cit, 19; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 15.



scope of interpretation of what is meant by the abuse of a position of vulnerability of trafficked persons.<sup>614</sup>

However, the JATIPL gives an example of the abuse of a position of vulnerability of trafficked persons. Precisely, according to this Law, if the crime of TIP has been committed against any disabled persons, this will be regarded as an aggravating circumstance coupled with the commission of this crime, which will increase the sentence imposed upon the trafficker, who abuses the position of vulnerability of the trafficked disabled persons.<sup>615</sup> Notably, although the position of vulnerability is not defined in Jordanian legislation, this position has been addressed in a number of situations in the Jordanian Penal Code when it addresses the status of disabled persons.<sup>616</sup> The first situation is the raping of a disabled woman.<sup>617</sup> The second situation is the commission of an indecent assault against a disabled person.<sup>618</sup> The third situation is the exploitation of the need of a disabled person.<sup>619</sup>

Another example of the abuse of a position of vulnerability of trafficked persons, in the JATIPL is the abuse of any person under the age of 18 years for the purpose of TIP. This abuse is also regarded as an aggravating circumstance coupled with the commission of the crime of TIP.<sup>620</sup>

It is noteworthy that the JATIPL has been criticised because it does not mention other forms of abuse of a position of vulnerability of trafficked persons such as the abuse of the position of vulnerability of trafficked victims due to their old age.<sup>621</sup> However, it is important to note that the Jordanian Penal Code has criminalised a number of forms of the abuse of a position of vulnerability such as abusing the position of vulnerability of victims due to physical, psychological, and mental illness.<sup>622</sup>

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<sup>614</sup> Al-Sharfat, op cit, 78; Irtemah, op cit, 233.

<sup>615</sup> The JATIPL, Art. 9.

<sup>616</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 293, 418.

<sup>617</sup> *ibid*, Art. 293. In accordance with this article raping a disabled woman will be punished by the punishments stated in Article 292 of the Jordanian Penal Code. These punishments are 1- Temporary imprisonment with hard labour for a period not less than 15 years. 2- Death penalty, if the disabled victim is a girl who did not reach 15 years of age. 3- Imprisonment with hard labour for a period not less than 20 years, if the disabled victim is a female who has reached 15 years of age and under 18 years.

<sup>618</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 297. In accordance with this article committing an indecent assault against a disabled person will be punished by temporary imprisonment with hard labour.

<sup>619</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 418. In accordance with this article exploiting the need of a disabled person will be punished by imprisonment from six months to three years and by a fine from 200-500 Jordan *Dinar*.

<sup>620</sup> The JATIPL, Arts. 3(a)(2), 9(b)(2).

<sup>621</sup> Al-Sharfat, op cit, 79; Irtemah, op cit, 233.

<sup>622</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 293.

Several conditions are required to criminalise the abuse of a position of vulnerability of trafficked persons. The first condition is that the trafficked victim should be vulnerable and the trafficker should know about this status.<sup>623</sup> The second condition is that the trafficker should abuse the position of vulnerability of the trafficked victim using any action of TIP.<sup>624</sup> The third condition is that the abuse of the position of vulnerability of the trafficked victim should lead to his/her exploitation in any purpose of TIP.<sup>625</sup>

### **3.3.2.2.6 Giving or Receiving of Payments or Benefits to Achieve the Consent of a Person Having Control over another Person**

According to the JATIPL, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person is the sixth component of the means element in the definition of the crime of TIP. Notably, this means has been criminalised in the JATIPL but this Law does not define this means.<sup>626</sup>

The giving or receiving of payments or benefits to achieve the consent of a person having control over another person occurs when the trafficker gives payments or benefits to a person who has control over another person for the purpose of exploiting the trafficked person in ‘forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation’.<sup>627</sup> Furthermore, this means also occurs when some people, who have power over other people, exceed their power in a way contrary to legislation, customs, traditions, and cultures. An example of this would be a husband forcing his wife into prostitution.<sup>628</sup> A point to note, however, is that it is difficult to distinguish between this component of the means element and ordinary employment, in the sense that it is hard to prove whether the person has been forced to work or has done the work willingly.

It is important to note that, in accordance with the JATIPL, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person requires the giving or receiving of payments or benefits. Therefore, a pledge to give or

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<sup>623</sup> Al-Sharf, op cit, 79; Irtemah, op cit, 234.

<sup>624</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 79.

<sup>625</sup> The JATIPL, Art. 3(b); Al-Sharf, op cit, 79; Irtemah, op cit, 234.

<sup>626</sup> The JATIPL, Art. 3(a)(1).

<sup>627</sup> Al-Sharf, op cit, 80-82.

<sup>628</sup> The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 15.

receive payments or benefits is not enough to criminalise the commission of the crime of TIP.<sup>629</sup>

It is noticeable that this means of TIP requires that the giving or receiving of payments or benefits to achieve the consent of a person having control over another person should aim to exploit victims of TIP.<sup>630</sup> In other words, the aim of this means is to achieve any of the purposes of TIP by exploiting trafficked victims.

It is noticeable that all the means included in the means element under the definition of the crime of TIP under the Jordanian Anti Trafficking in Persons Law are regarded as illegal means *per se*. Therefore, it is suggested that the scope of the means element be widened to include any means, be they legal or illegal. This could play a significant role in addressing the crime of TIP by not limiting the scope of this crime to certain categories of illegal means. In this regard, it can be said that the Syrian Legislative Decree on the Crimes of Trafficking in Persons is regarded as a good example of widening the scope of the means element, as it does not require the means used in TIP to be illegal. However, these illegal means could be regarded as aggravating circumstances coupled with the commission of the crime of TIP.<sup>631</sup> Consequently, it is recommended that a similar approach be adopted in the JATIPL by not limiting the means element in the illegal means in this Law, and considering any illegal means used to commit the crime of TIP as aggravating circumstances coupled with the commission of the crime of TIP.

### **3.3.2.3 The Purpose Element of the Crime of Trafficking in Persons in accordance with Jordanian Legislation<sup>632</sup>**

The definition of the crime of TIP in the JATIPL includes the purpose of the commission of this crime. This purpose is to exploit trafficked persons. This exploitation includes the

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<sup>629</sup> The JATIPL, Art. 3(a)(1); Al-Sharf, op cit, 80-82; Irtemah, op cit, 237.

<sup>630</sup> Al-Sharf, op cit, 82-83.

<sup>631</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, at Art. 4; Mohamed Y. Mattar, 'Human Rights Legislation in the Arab World: The Case of Human Trafficking (Successes and Failures in International Human Trafficking Law)' (2011) 33(1) Michigan Journal of International Law 101, 113-114.

<sup>632</sup> JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 3; Al-Dweikat, op cit, 24-26; Al-Sharf, op cit, 85; Salman, op cit, 41; Olwan, op cit, 2; The Jordanian Public Security Directorate's Criminal Investigation Unit, op cit, 16. The components of the purpose element will be discussed sequentially in accordance with their appearance in the definition of the crime of trafficking in persons under the JATIPL.

exploitation of persons in ‘forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation’ as alternative possibilities.<sup>633</sup>

Consequently, it can be said that the requirement for the trafficked victims to have been exploited leads to a tightening of the scope of criminalisation of the crime of TIP and may also help the traffickers to avoid punishment, because if the intent to exploit the trafficked victim is not proved, there will be no conviction for the commission of the crime of TIP.<sup>634</sup> However, they may be guilty of other crimes.

A point to note, however, is that although the JATIPL criminalises the exploitation of people in TIP, it does not criminalise any person who uses trafficked persons’ services resulting from the commission of the crime of TIP.<sup>635</sup> In this regard, it is worth noting that the Council of Europe Convention on Action against Trafficking in Human Beings addresses the criminalisation of the use of trafficked victim’s services when the user knows that these services have resulted from exploiting trafficked victims.<sup>636</sup> Furthermore, the Syrian Legislative Decree on the Crimes of Trafficking in Persons has an exceptional approach among Arab laws in dealing with the issue of the use of services resulting from the commission of the crime of TIP. In this regard, criminal liability will be extended to clients, users, or purchasers of these services. The importance of this approach is that it discourages the demand for services of TIP.<sup>637</sup> Therefore, it is suggested that a similar provision be adopted in the JATIPL.

### **3.3.2.3.1 Forced Labour or Services**

Forced labour or services is the first component of the purpose element in the definition of the crime of TIP in the JATIPL. It is clear forced labour or services regarded as an illegal practice according to the JATIPL. However, this Law does not define this practice.<sup>638</sup>

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<sup>633</sup> The JATIPL, Arts. 3(a)(1), 3(b).

<sup>634</sup> Irtemah, *op cit*, 276.

<sup>635</sup> *ibid*, 241-242.

<sup>636</sup> Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 1 February 2008) ETS 197, 16.V.2005, Art. 19. This Article states that ‘[e]ach Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings’.

<sup>637</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, Art. 9(2); Mattar, ‘Human Rights Legislation in the Arab World’, *op cit*, 116.

<sup>638</sup> The JATIPL, Art. 3(b); Irtemah, *op cit*, 324.

It should be stressed that forcing a person to work without his/her consent and without the existence of compelling circumstances is regarded as a constitutional violation breaching the constitutional rights of the individual. Precisely, the Jordanian Constitution confirms that compulsory labour should not be imposed upon any person except in a state of necessity, or as a result of a conviction by a court.<sup>639</sup> Furthermore, forcing a person to work without the person's consent and without the existence of compelling circumstances violates Jordanian Labour Law. Jordanian Labour Law does not permit any person to be forced to work without the person's consent unless there is a necessity to prevent the occurrence of an accident or rectify the results of this accident, or if there is a *Force Majeure*,<sup>640</sup> such as 'a state of war, the occurrence of a public danger, or fire, flood, famine, earthquake, serious epidemic',<sup>641</sup> requiring such work. However, it should be stressed that this work should not exceed the worker's capacity, and it should be within the necessity of the circumstances.<sup>642</sup>

Notably, forced labour, as a form of exploitation in the crime of TIP, might include forcing workers to work without wages, the delay of payment of wages, forcing workers to work for a wage less than the wage agreed upon or for a wage less than that required to be paid.<sup>643</sup> Equally importantly, forced services could include forcing workers to do work different from that agreed upon, forcing workers to work for different employers from those they have agreed to work for, forcing workers to work more than the scheduled working hours agreed upon, forcing workers to continue working after the end of the contract period, and denial of the workers' rights to a weekly day of rest and annual leave.<sup>644</sup>

It should be stressed that, in regard to labour or services, foreign workers in Jordan should obtain permission from the Minister of Labour or anyone authorised by the Minister of Labour. This permission should include the career being pursued by the foreign workers. Interestingly, the Jordanian Labour Law criminalises the use of foreign workers without obtaining permission, using workers to work in careers other those permitted, or using workers for work with different employers from those agreed upon. Should any of these cases occur, the employer who has abused the foreign workers will have to pay a fine (ranging

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<sup>639</sup> The Jordanian Constitution (1952) page 3 of the Official Gazette (No 1093) dated 8 January 1952, Art. 13.

<sup>640</sup> The Jordanian Labour Law, as amended (No 8 of 1996) page 1173 of the Official Gazette (No 4113) dated 16 April 1996, at Art. 17.

<sup>641</sup> The Jordanian Constitution (1952) Art. 13(1).

<sup>642</sup> The Jordanian Labour Law, as amended (No 8 of 1996) Art. 17.

<sup>643</sup> *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 33.

<sup>644</sup> *ibid*, 33.

from 200-500 Jordanian *Dinar*), and the foreign workers will be deported.<sup>645</sup> Accordingly, it might be argued that criminalising the previous practices provides protection to foreign workers. However, this might be challenged on the basis that this criminalisation may subject foreign workers, in many cases, to exploitation as these workers are restricted to working for the same employer.<sup>646</sup>

Finally, it is significant to distinguish between forced labour as a form of TIP and other similar practices such as labour exploitation. The significance of this is that this distinction plays an important role in determining the law applicable to the case in question. For example, if foreign workers have been subjected to labour exploitation subsequent to their arrival in Jordan without being subjected to situations of TIP, the Jordanian Labour Law will be applied rather than the JATIPL.<sup>647</sup> This is because the commission of the crime of TIP requires the availability of three elements - the action element, the means element, and the purpose element.<sup>648</sup> Notably, in the previous example, the foreign workers have been exploited subsequent to their arrival in Jordan. This means that just one element of TIP has been satisfied, which is the purpose element. Therefore, as the action and means elements have not been met in the previous example, it can be said that the crime of TIP has not been committed. Accordingly, this situation will be subject to the Jordanian Labour Law.

### **3.3.2.3.2 Slavery or Servitude**

The second alternative component of the purpose element in the definition of the crime of TIP in the JATIPL contains two illegal practices; slavery and servitude. Slavery and servitude have not been defined in this Law. However, the JATIPL criminalises slavery and servitude.<sup>649</sup>

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<sup>645</sup> The Jordanian Labour Law, as amended (No 8 of 1996) Art. 12; Al-Sharfat, op cit, 132.

<sup>646</sup> Al-Sharfat, op cit, 132.

<sup>647</sup> June Kane, 'People on the Move: Human Trafficking and Migration in Jordan, Lebanon and Syria' (2011) CRIME Research Report 2011/04, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute 1, 11.

<sup>648</sup> Joanne V. Leun and Anet V Schijndel, 'Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat against Trafficking in Human Beings and Migration Control' (2015) 20 International Journal of Law, Crime and Justice 1, 2.

<sup>649</sup> The JATIPL, Art. 3(b); Irtemah, op cit, 332.

Slavery and servitude had been criminalised even before the appearance of the JATIPL in the Jordanian Abolition of Slavery Law.<sup>650</sup> This Law criminalises a number of practices related to slavery and servitude such as the buying, selling, and trading of human beings.<sup>651</sup>

What is certain, however, is that unlike the TIPP, the JATIPL does not consider practices similar to slavery to be a component of the purpose element in the definition of the crime of TIP.<sup>652</sup> A point to note, however, is that the Jordanian Abolition of Slavery Law address practices similar to slavery by nullifying any agreement or contract to enslave any persons for the purpose of marriage.<sup>653</sup> Additionally, it addresses these practices by nullifying all contracts containing a condition or a pledge to buy or sell or enslave any person or any other practice that has the same purpose.<sup>654</sup> Therefore, as these practices are known under the Jordanian Abolition of Slavery Law, it is recommended that they be added as a component of the purpose element in the definition of the crime of TIP in the JATIPL.<sup>655</sup>

### 3.3.2.3.3 Removal of Organs

The removal of organs is the third alternative component of the purpose element in the definition of the crime of TIP in the JATIPL. This component has been criminalised but not defined in this Law.<sup>656</sup> It should be stressed that the Jordanian legislation addresses the issues related to human organs in a specific law. This law is the Jordanian Law of Utilizing Organs of the Human Body.<sup>657</sup> This Law defines the removal of organs as the removal of a human organ from a living or dead person in order to manufacture or plant this human organ in the body of another living person.<sup>658</sup>

A point to note, however, is that the JATIPL and the Utilizing of Human Organs Law only partly overlap. By way of illustration, were a person to sell his/her organs in exchange for money willingly, this act would not fall under the notion of the crime of TIP. This act

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<sup>650</sup> The Jordanian Abolition of Slavery Law (1929); *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 33.

<sup>651</sup> The Jordanian Abolition of Slavery Law (1929) Art. 5.

<sup>652</sup> The TIPP, Art. 3(a); The JATIPL, Art. 3(b); Irtemah, op cit, 336.

<sup>653</sup> The Jordanian Abolition of Slavery Law (1929) Art. 3; Irtemah, op cit, 336.

<sup>654</sup> The Jordanian Abolition of Slavery Law (1929) Art. 4; Irtemah, op cit, 336-337.

<sup>655</sup> Irtemah, op cit, 345.

<sup>656</sup> The JATIPL, Art. 3(b); Irtemah, op cit, 314.

<sup>657</sup> The Jordanian Law of Utilizing Organs of the Human Body, as amended (No 23 of 1977) page 1320 of the Official Gazette (No 2703) dated 1 June 1977.

<sup>658</sup> *ibid*, Art. 2.

constitutes the offence of donating an organ in exchange for money in accordance with the Jordanian Law of Utilizing Organs of the Human Body.<sup>659</sup>

A number of questions might be raised about the applicable law in some cases related to removal of organs. The first question is whether trafficking in organs of a dead person is considered to be a crime of TIP under the JATIPL or a crime of trespass on the sanctity of the dead under the Jordanian Penal Code.<sup>660</sup> The second question is whether killing a person for the purpose of obtaining his/her organs is considered to be a crime of TIP coupled with aggravating circumstances falling under the JATIPL or a murder coupled with aggravating circumstances falling under the Jordanian Penal Code.<sup>661</sup>

The third question concerns whether, in the event that the removal of organs causes a permanent disability, this is regarded as a crime of TIP falling under the JATIPL or a crime of causing permanent disability under the Jordanian Penal Code.<sup>662</sup> The fourth question concerns whether, in the event that the removal of organs causes death, this is regarded as a crime of TIP falling under the JATIPL or a crime of beating leading to death, which falls under the Jordanian Penal Code,<sup>663</sup> or a crime of deliberate killing, when ‘the criminal consequence of the act exceeded the intent of the perpetrator, provided that the perpetrator expected such consequence and accepted the risk of its occurrence’, under the Jordanian Penal Code.<sup>664</sup>

In this regard, it should be stressed that there are numerous problems related to the crime of TIP as this crime contains criminal acts that are subject to different punitive provisions. Therefore, to determine the punitive provisions for those committing the crime of TIP, it is necessary to address two kinds of multiplicities in the *actus reus* in the crime of TIP. The first kind is the materialist multiplicity of crimes. The second kind is the moral multiplicity of crimes.<sup>665</sup>

The materialist multiplicity of crimes in the course of the crime of TIP arises because of the commission of an action with various criminal descriptions.<sup>666</sup> The materialist multiplicity of

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<sup>659</sup> *ibid*, Art. 4(c); Al-Sharfah, *op cit*, 114-115.

<sup>660</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 277(1); Al-Sharfah, *op cit*, 115.

<sup>661</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 328(2); Al-Sharfah, *op cit*, 115-116.

<sup>662</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 335; Al-Sharfah, *op cit*, 117.

<sup>663</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 330; Al-Sharfah, *op cit*, 117.

<sup>664</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 64; Al-Sharfah, *op cit*, 117.

<sup>665</sup> Irtemah, *op cit*, 377-381.

<sup>666</sup> *ibid*, 378.



crimes has been addressed in the Jordanian Penal Code.<sup>667</sup> An example of it in the *actus reus* in the crime of TIP is the use of the Internet to exploit girls under 18 years of age for the purpose of prostitution.<sup>668</sup> This *actus reus* is regarded as a crime punishable by temporary imprisonment for a period of not less than two years and by a fine of 1,000-5,000 Jordan *Dinar* in accordance with the Jordanian Law of Information Systems on Crimes.<sup>669</sup> Additionally, this *actus reus* is also regarded as a crime punishable by temporary imprisonment with hard labour for a period of not more than ten years and by a fine of 5,000-20,000 Jordan *Dinar* according to the JATIPL.<sup>670</sup> Therefore, in accordance with the Jordanian Penal Code,<sup>671</sup> the court, in its verdict, should state all the descriptions of the act and impose the severest penalty upon the offender.<sup>672</sup>

The moral multiplicity of crimes in the course of the crime of TIP occurs when the perpetrator commits various acts, each of which is regarded as a crime *per se*.<sup>673</sup> For example, a perpetrator wishing to exploit girls for the purpose of prostitution will take a number of actions. The first action is to recruit these girls using fake job opportunities in a certain country. The second action is to transport them. The third action is to forge their passports to enable them to enter the destination country. These actions are considered independent crimes. In particular, the first two actions construct the crime of TIP, and the third action constructs the crime of forging a passport.<sup>674</sup> Therefore, by applying the general principle of the moral multiplicity of crimes stated in the Jordanian Penal Code to the previous example, the court ‘has to include a penalty for each crime and only the greatest penalty shall be imposed’,<sup>675</sup> or the court is allowed ‘to combine the penalties in a way that the total number of the temporary penalties only exceed the maximum penalty prescribed for the severest crime by one-half’.<sup>676</sup>

It should be stressed that two issues need to be addressed, in regard to TIP for the purpose of removal of organs, in the JATIPL. The first issue is the legal responsibility of medical personnel who exploit trafficked victims for their organs. In this regard, it is obvious that the

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<sup>667</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 57(1).

<sup>668</sup> Irtemah, op cit, 378-379.

<sup>669</sup> The Jordanian Law of Information Systems on Crimes (No 30 of 2010) page 5334 of the Official Gazette (No 5056) dated 16 September 2010, Act. 8(b).

<sup>670</sup> The JATIPL, Art. 9(b)(2).

<sup>671</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 57(1).

<sup>672</sup> Irtemah, op cit, 379.

<sup>673</sup> *ibid*, 379.

<sup>674</sup> *ibid*, 380-381.

<sup>675</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 72(1).

<sup>676</sup> *ibid*, Art. 72(2).

JATIPL does not include any provision for criminalising any medical personnel involved in TIP for the purpose of removal of organs. The Jordanian Law of Utilizing Organs of the Human Body deals with the removal of organs in specific conditions and criminalises the donation of human organs for material benefits or profits.<sup>677</sup>

The second issue is the legal responsibility of the buyer or the consumer of human organs obtained from trafficked persons. In this respect, it is clear that the JATIPL does not address the criminal responsibility of the buyer or consumer of human organs. However, it might be argued that the buyer or consumer of human organs could be subjected to the criminal participation rules on the basis that the crime was a result of offenders' cooperation and effort, as each one of them has a particular role in committing the crime.<sup>678</sup>

#### **3.3.2.3.4 Prostitution and any other Forms of Sexual Exploitation**

Prostitution and any other forms of sexual exploitation are the fourth alternative component of the purpose element in the definition of the crime of TIP in the JATIPL. Although the JATIPL criminalises prostitution and any other form of sexual exploitation, it neither defines nor determines these forms of sexual exploitation.<sup>679</sup> However, prostitution might be defined in accordance with Jordanian jurisprudence as the selling of any kind of sexual service.<sup>680</sup> Additionally, sexual exploitation might be defined according to Jordanian jurisprudence as the exploitation of persons through sexual activities for a reward or any other benefits.<sup>681</sup>

It is noteworthy that the Jordanian Penal Code does not use the expression 'prostitution', although it criminalises a number of sexual crimes such as adultery, asking for an indecent act, attacking by violence or intimidation the honour of a person, inciting immorality, violation of general ethics and public moral norms, and running a brothel.<sup>682</sup> Accordingly, it is clear that the Jordanian Penal Code criminalises the activities associated with prostitution.<sup>683</sup> However, the expression 'prostitution' has been used in other legislation. An example of this is the Jordanian Law of Information Systems on Crimes.<sup>684</sup> This Law uses the expression 'prostitution' when it criminalises the use of the Internet or any other information

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<sup>677</sup> The Jordanian Law of Utilizing Organs of the Human Body, as amended (No 23 of 1977) Art. 4.

<sup>678</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 308.

<sup>679</sup> The JATIPL, Art. 3(b); Al-Sharfat, op cit, 87.

<sup>680</sup> Al-Dweikat, op cit, 26; The Jordanian Public Security Directorate's Criminal Investigation Unit, op cit, 17.

<sup>681</sup> Al-Dweikat, op cit, 26; The Jordanian Public Security Directorate's Criminal Investigation Unit, op cit, 17.

<sup>682</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 282, 305, 309-319.

<sup>683</sup> Al-Sharfat, op cit, 94.

<sup>684</sup> The Jordanian Law of Information Systems on Crimes (No 30 of 2010).

system to promote prostitution.<sup>685</sup> Furthermore, the expression ‘prostitution’ has also been used in the Jordanian Juvenile Law when it addresses the issue of who needs protection and care. In doing so, this Law refers to any juvenile who carries out any act related to prostitution, or does any service for another person who is involved in prostitution.<sup>686</sup> Moreover, the Jordanian Cassation Court has used the expression ‘prostitution’ to indicate illegal sexual intercourse, running a brothel, and profiting from prostitution.<sup>687</sup>

Consequently, it could be said that what is criminalised in accordance with the JATIPL is TIP for the purpose of prostitution or any other forms of sexual exploitation without determining what is meant by prostitution or what these forms of sexual exploitation are.<sup>688</sup> It should be stressed that the failure to determine what is meant by prostitution or what the forms of sexual exploitation consist of in the JATIPL has been criticised on the basis that it could lead to ambiguity and uncertainty about these forms of exploitation, and it may widen the scope of judges’ interpretation of what is meant by prostitution or what the forms of sexual exploitation are when they are addressing the crime of TIP. By way of illustration, the JATIPL does not consider the use of the Internet to promote prostitution and any other forms of sexual exploitation, as forms of the crime of TIP, as an aggravating circumstance in the commission of such a crime.<sup>689</sup>

### **3.4 Criminal Investigation and Prosecution of the Crime of Trafficking in Persons in Jordan**

This section will examine three main issues. First, the Jordanian criminal justice system; second, criminal investigations of the crime of TIP in Jordan; and third, the prosecution of the crime of TIP in Jordan.

#### **3.4.1 The Jordanian Criminal Justice System**

This section will discuss the Jordanian criminal justice system by shedding light on the independence of the judiciary, criminal judiciary types, criminal jurisdiction types, characteristics and general principles of trial, and ways of appealing criminal sentences.

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<sup>685</sup> *ibid*, Art. 9.

<sup>686</sup> The Jordanian Juvenile Law (No 24 of 1968) page 555 of the Official Gazette (No 2089) dated 16 April 1968, Art. 31(2).

<sup>687</sup> Jordanian Cassation Court, Decision (No 1674/2008) dated 23 December 2008.

<sup>688</sup> Al-Sharfat, *op cit*, 96-97.

<sup>689</sup> *ibid*, 103.

### 3.4.1.1 The Independence of the Judiciary

The independence of the judiciary has a significant role in society by providing justice, rights, and freedom for citizens. In this regard, it should be stressed that this principle has been affirmed in Jordanian legislation.<sup>690</sup> In particular, the Jordanian Constitution addresses the independence of the judiciary in a number of articles. Article 27 states that '[t]he Judicial Power is independent and shall be exercised by the courts of law in their varying types and degrees. All judgments shall be given in accordance with the law and pronounced in the name of the King'.<sup>691</sup> Article 97 states that '[j]udges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law'.<sup>692</sup> Article 101 states that '[t]he courts shall be open to all and shall be free from any interference in their affairs'.<sup>693</sup> Accordingly, it is evident that the judiciary is independent and the courts are not subjected to interference in their affairs.<sup>694</sup>

The Jordanian Judicial Independence Law also addresses the independence of the judiciary in a number of articles. Article 3 states that '[j]udges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law'.<sup>695</sup> This Article guarantees the independence of judges by confirming the constitutional right of judicial independence.<sup>696</sup> Article 17 states that '[j]udges may not undertake commercial business, act as members of a board of directors of a company, institution or authority, or take on any job or career under penalty of law'.<sup>697</sup> This Article guarantees the impartiality of judges;<sup>698</sup> by ensuring that they are dependent only on the Judicial Council in their administrative and financial matters.<sup>699</sup> This is consistent with the United Nations Basic Principles on the Independence of the Judiciary, which affirms that states have a duty to

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<sup>690</sup> Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 8.

<sup>691</sup> The Jordanian Constitution (1952) Art. 27.

<sup>692</sup> *ibid.*, Art. 97.

<sup>693</sup> *ibid.*, Art. 101(1).

<sup>694</sup> Muddather Abu-Karaki, Raed S. Faqir and Majed A. Marashdah, 'Democracy & Judicial Controlling in Jordan: A Constitutional Study' (2011) 4(2) *Journal of Politics and Law* 180, 183.

<sup>695</sup> The Jordanian Judicial Independence Law (No 15 of 2001) page 1279 of the Official Gazette (No 4480) dated 18 March 2001, Art. 3.

<sup>696</sup> The Jordanian Constitution (1952) Art. 97.

<sup>697</sup> The Jordanian Judicial Independence Law (No 15 of 2001) Art. 17(a).

<sup>698</sup> Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 12-13.

<sup>699</sup> Abu-Karaki, Faqir and Marashdah, *op cit.*, 184. '[j]ordan's Judicial Council represents the judiciary's highest administrative body and has the legal authority to oversee the affairs of all judges in the country on matters related to: employment, discipline, accountability, transportation, promotions, loans, mandates and retirement' for more information see <<http://www.jc.jo/en/about>> accessed 1 September 2015.

provide sufficient resources to judiciary in order to enable it to perform its roles properly.<sup>700</sup> Finally, it should be stressed that judges can be removed from their posts if they breach the duties of their posts, such as delaying decisions in cases under their examination, favouring certain litigants, or disclosing secret information regarding trials.<sup>701</sup>

### 3.4.1.2 Criminal Judiciary Types

In accordance with the Jordanian Constitution there are three categories of courts: civil courts, religious courts, and special courts.<sup>702</sup> Civil courts have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or against the government, except those matters in respect of which jurisdiction is vested in religious or special courts in accordance with the provisions of the Constitution or any other legislation in force.<sup>703</sup> Furthermore, the Jordanian criminal judiciary contains two types of criminal courts. The first type is regular criminal courts. The second type is special criminal courts.<sup>704</sup>

The regular criminal courts have the main and comprehensive jurisdiction over criminal litigation and they are established according to public law. An example of these courts is the Magistrates Courts.<sup>705</sup> A point to note, however, is that the crime of TIP falls under the jurisdiction of the regular criminal courts.

Furthermore, there are special criminal courts that are regarded as a part of the judicial authority. These courts exercise their jurisdiction in accordance with special laws.<sup>706</sup> Moreover, these courts are created to prosecute specific people and crimes. Examples of these courts are the Police Court and the State Security Court.<sup>707</sup> In particular, the Police Court exercises its jurisdiction over public security personnel or persons of similar status who

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<sup>700</sup> Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, at Art. 7 <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>> accessed 1 September 2015.

<sup>701</sup> The Jordanian Judicial Independence Law (No 15 of 2001) Arts. 37-38.

<sup>702</sup> The Jordanian Constitution (1952) Art. 99.

<sup>703</sup> *ibid*, Art. 102; Abu-Karaki, Faqir and Marashdah, *op cit*, 181.

<sup>704</sup> The Jordanian Constitution (1952) Art. 99; The Jordanian Law of the Establishment of Regular Courts (No 17 of 2001) page 1308 of the Official Gazette (No 4480) dated 18 March 2001, Art. 2; Mohammad S. Namor, *Principles of Penal Procedures: Explanation of Penal Procedure Principles Law* (Arabic edn, 3rd edn, Daralthaqafa 2013) 413.

<sup>705</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, *op cit*, 669-670; Namor, *op cit*, 413.

<sup>706</sup> Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 16; Al-Saeed, *Explanation of the Code of Criminal Procedure*, *op cit*, 670-671; Namor, *op cit*, 413.

<sup>707</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, *op cit*, 670-671; Namor, *op cit*, 413.

have committed a crime or crimes subject to criminal conviction.<sup>708</sup> The State Security Court exercises its jurisdiction over certain criminal cases in accordance with its law such as treason, espionage, money laundering, terrorism, and counterfeiting of banknotes.<sup>709</sup> However, this court does not exercise its jurisdiction over specific people based on creed, religion, specific political orientation, race, or colour.<sup>710</sup>

### 3.4.1.3 Criminal Jurisdiction Types

There are four requirements for criminal courts to have criminal jurisdiction over criminal cases. The first requirement is that the court should have a *ratione temporis*. The second requirement is that the court should have a *ratione personae*. The third requirement is that the court should have a *ratione materiae*. The fourth requirement is that the court should have a *ratione loci*.<sup>711</sup>

According to the *ratione temporis*, the courts have jurisdiction only over crimes committed after the entry into force of criminal laws.<sup>712</sup> In this regard, the Jordanian Constitution addresses the issue of the entry into force of Jordanian laws. In doing so, it states that '[a] law shall come into force after its promulgation by the King and the lapse of thirty days from the date of its publication in the Official Gazette unless it is specifically provided in that law that it shall come into force on any other date'.<sup>713</sup>

In accordance with the general rule of the *ratione personae*, if the crime is committed in Jordan, the offender will be prosecuted in Jordan and the Jordanian laws will be applied. Additionally, according to the *ratione personae* the same judiciary will apply to all offenders committing the same crime without any discrimination.<sup>714</sup> However, there are exceptions to the general rule. Specifically, when persons of special character or status have committed certain crimes, special courts will have jurisdiction over these persons and these crimes.<sup>715</sup> This can be illustrated by the Military Courts. These courts have jurisdiction over military

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<sup>708</sup> Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 21.

<sup>709</sup> The Jordanian State Security Court Law (No 17 of 1959) page 529 of the Official Gazette (No 1429) dated 1 July 1959, Art 3; Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 35.

<sup>710</sup> Euro-Mediterranean Human Rights Network, 'The Independence and Impartiality of the Judiciary-Jordan' (2008) 35.

<sup>711</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 675; Namor, op cit, 416.

<sup>712</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 3; Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 72-73; Al-Jabour, op cit, 79-80.

<sup>713</sup> The Jordanian Constitution (1952) Art. 93(2).

<sup>714</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 675; Namor, op cit, 417.

<sup>715</sup> Namor, op cit, 424.

personnel when they have committed certain crimes subject to the Jordanian Law of the Establishment of Military Courts.<sup>716</sup>

In the *ratione materiae*, criminal courts exercise their jurisdiction according to the type of crimes committed. More specifically, the gravity of the crime is what determines the *ratione materiae* and as a result which court has jurisdiction over the crime committed.<sup>717</sup> The Jordanian Penal Code classifies the crimes in accordance with their punishments. Therefore, the crimes in the Jordanian criminal legal system are felony, misdemeanour, and irregularity.<sup>718</sup> The punishments for felony are ‘death penalty, life imprisonment with hard labour, life detention, temporary imprisonment with hard labour, and temporary detention’.<sup>719</sup> The punishments for misdemeanour are ‘imprisonment and fine’.<sup>720</sup> The punishments for irregularity are ‘exasperating imprisonment and fine’.<sup>721</sup>

It is to be noted that there are two types of courts according to the *ratione materiae*. The first type is regular courts such as Magistrates Courts, First Instance Courts, Appeal Courts, and the Cassation Court.<sup>722</sup> The second type is special courts such as the High Criminal Court which has a *ratione materiae* over certain crimes such as murder, rape, indecent assault, criminal abduction, and the attempt to commit any of these crimes.<sup>723</sup>

The *Ratione loci* rules apply finally after the application of the *ratione personae* and *ratione materiae* rules. The *Ratione loci* rules determine which geographical court has jurisdiction over the crime committed. Courts in the *ratione loci* have geographic borders. The courts cannot exceed them.<sup>724</sup> The *Ratione loci* rules ease the access to courts where there is an equitable geographic distribution of courts.<sup>725</sup> Notably, the Jordanian Code of Criminal

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<sup>716</sup> The Jordanian Law of the Establishment of Military Courts (No 23 of 2006) page 791 of the Official Gazette (No 4751) dated 16 March 2006, Arts. 7-8; Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 677; Namor, op cit, 419.

<sup>717</sup> Namor, op cit, 424.

<sup>718</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 14-27; Namor, op cit, 424.

<sup>719</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 14.

<sup>720</sup> *ibid*, Art. 15.

<sup>721</sup> *ibid*, Art. 16.

<sup>722</sup> The Law of Magistrate Courts (No 15 of 1952) the Official Gazette (No 1102) dated 1 January 1952; The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) page 311 of the Official Gazette (No 1539) dated 16 March 1961, Arts. 140, 256, 270; The Jordanian Law of the Establishment of Regular Courts (No 17 of 2001) page 1308 of the Official Gazette (No 4480) dated 18 March 2001; Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 684-686; Namor, op cit, 425-428.

<sup>723</sup> The Jordanian Law of High Criminal Court (No 19 of 1986) page 3380 of the Official Gazette (No 457) dated 16 March 1986, Art. 4; The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 292-303, 326- 328, 330, 338; Namor, op cit, 428-430.

<sup>724</sup> Namor, op cit, 436, 438.

<sup>725</sup> Euro-Mediterranean Human Rights Network, ‘The Independence and Impartiality of the Judiciary-Jordan’ (2008) 38.

Procedures determines the rules governing the *ratione loci*.<sup>726</sup> Therefore, when the crime is committed, the court which has jurisdiction over this crime may be the court located at the scene of the crime, or the court located at the perpetrator's home, or the court where the perpetrator was arrested. A point to note, however, is that in terms of which court will exercise jurisdiction, priority will be given to the court where the lawsuit is initially instituted.<sup>727</sup> Moreover, when there is an attempt to commit a crime, the crime is considered to have been committed in any place where any attempt has taken place.<sup>728</sup> Furthermore, in the case of continuous and permanent crimes, the place of the commission of these crimes is considered to be where any of the components of these crimes or the state of continuity occurred.<sup>729</sup>

Additionally, according to the *ratione loci* rules, the judicial authorities in the capital are considered the competent authorities for the prosecution of crimes committed abroad when the Jordanian laws should be applied to such crimes,<sup>730</sup> and when the perpetrator does not have a known place of residence in Jordan and he/she was not arrested in the Kingdom.<sup>731</sup> Along with this, it is possible to institute a lawsuit before the Jordanian judiciary if a crime is committed through electronic means and if this crime has a complete or partial impact on the Kingdom, or any of its nationals.<sup>732</sup>

#### **3.4.1.4 Characteristics and General Principles of Trial**

There are a number of characteristics and general principles governing trials in accordance with the Jordanian criminal justice system. These characteristics and general principles are public hearings, restricting the court with lawsuit limits, recording the trial procedures, oral trial procedures, and attendance at trial procedures by litigant parties.

The public hearing is the first characteristic and general principle governing trials in accordance with the Jordanian criminal justice system. This principle means that the public are at liberty to attend trials.<sup>733</sup> The principle of public hearing has been asserted in Jordanian

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<sup>726</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 5.

<sup>727</sup> *ibid*, Art. 5(1).

<sup>728</sup> *ibid*, Art. 5(2).

<sup>729</sup> *ibid*.

<sup>730</sup> *ibid*, Art. 5(3). These crimes in accordance with Article 9 of the Jordanian Penal Code are 'crimes against the state security, crimes of counterfeited the state seal, currency, banknotes or Jordanian or foreign bank securities which are legally traded or circulated in the Kingdom'.

<sup>731</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 5(3).

<sup>732</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 5(4).

<sup>733</sup> Namor, *op cit*, 459-461.



legislation.<sup>734</sup> The second characteristic and general principle is the restriction of the court with lawsuit limits. This principle means that the court dealing with the lawsuit should comply in its verdict with litigant parties and the facts of the lawsuit brought before it. In other words, the court must base its judgement on the submissions of the parties.<sup>735</sup> This principle has been confirmed in the Jordanian Code of Criminal Procedure.<sup>736</sup> However, an exception to this principle should be stressed. This exception is that if any litigant party commits a crime in the court during the trial, the court may prosecute this party immediately and issue a judgement against this party.<sup>737</sup>

Recording of the trial procedures is the third characteristic and general principle.<sup>738</sup> This principle means that the trial procedures should be registered in the trial minutes.<sup>739</sup> The principle of recording the trial procedures has been affirmed in the Jordanian Code of Criminal Procedure.<sup>740</sup> The fourth characteristic and general principle is that of oral trial procedures.<sup>741</sup> This principle has been asserted in the Jordanian Code of Criminal Procedure, which states that ‘[t]he judge may not depend except on the evidence that have been presented during the trial which have been interrogated by the litigant parties in public’.<sup>742</sup> Attendance at trial procedures by litigant parties is the fifth characteristic and general principle. This principle means that the court should enable the litigant parties to attend all procedures taken by the court.<sup>743</sup> This principle has been confirmed in the Jordanian Code of Criminal Procedure.<sup>744</sup> However, in some situations, the defendant may not attend in person and he/she may deputise an attorney.<sup>745</sup> It should be noted that the offering of assistance services or legal counselling has not been addressed comprehensively in the Jordanian legislation.<sup>746</sup> Precisely, offering assistance services or legal counselling in the Jordanian Code of Criminal Procedures is limited to two situations. The first situation is when the crimes committed are punishable by the death penalty, life imprisonment with hard labour, or

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<sup>734</sup> The Jordanian Constitution (1952) Art. 101(3); The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Arts. 171, 213(2), 266.

<sup>735</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 584; Namor, op cit, 466.

<sup>736</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Arts. 166(1), 206(1).

<sup>737</sup> *ibid*, Art. 142(1); Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 584.

<sup>738</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 602-607; Namor, op cit, 470-471.

<sup>739</sup> Namor, op cit, 470.

<sup>740</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Arts. 214.

<sup>741</sup> Al-Saeed, *Explanation of the Code of Criminal Procedure*, op cit, 576-580; Namor, op cit, 462-464.

<sup>742</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 148(1).

<sup>743</sup> Namor, op cit, 464.

<sup>744</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 212(1).

<sup>745</sup> *ibid*, Art. 168(1).

<sup>746</sup> Euro-Mediterranean Human Rights Network, ‘The Independence and Impartiality of the Judiciary-Jordan’ (2008) 39.

life detention. The second situation is when the accused is financially unable to appoint an attorney.<sup>747</sup> Nevertheless, in accordance with the Jordanian Bar Association Law, the President of the Bar may assign an attorney to defend any person able to prove to the President that he/she is unable financially to appoint an attorney.<sup>748</sup> It should be stressed this Law does not specify which types of cases would fall under this assignation.

### 3.4.1.5 Ways to Appeal Criminal Sentences

There are two procedures for appealing criminal sentences. The first way is the normal appeal. These are subdivided into Demur and Appealing. The second way is the alternative appeal. These are subdivided into Cassation, Cassation by a Written Order, and Retrial.<sup>749</sup>

Demur is the first type of normal appeal. It is limited to judgement in *absentia*. Demur should be submitted to the same court that issued the judgement subjected to demur.<sup>750</sup> It is to be noted that if the demur is accepted, the judgement in *absentia* will be regarded as though it had never occurred.<sup>751</sup> However, if the demur is rejected, such a rejection might be subjected to appeal.<sup>752</sup>

Appealing is the second normal type of appeal. It gives the Appeal Court, as the second instance court, the power to amend or annul the judgements of courts of the first instance, where required.<sup>753</sup> Notably, there are a number of judgements that might be subjected to appeal.<sup>754</sup> It is noteworthy that if the appeal is accepted, the Appeal Court rules on the basis of the lawsuit or it returns the lawsuit to the court issuing the judgement with the instructions that must be followed.<sup>755</sup>

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<sup>747</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 208(1).

<sup>748</sup> The Jordanian Bar Association Law (No 11 of 1972) page 666 of the Official Gazette (No 2357) dated 1 January 1972, at Art. 100(7).

<sup>749</sup> Namor, op cit, 545.

<sup>750</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 184; Namor, op cit, 548.

<sup>751</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 187.

<sup>752</sup> *ibid*, Arts. 188.

<sup>753</sup> Namor, op cit, 558.

<sup>754</sup> Article 256 of the Jordanian Code of Criminal Procedures, it states that '[t]he following judgments might be appealed: 1- The judgments issued by any court of first instance by its criminal or first instance capacity. 2- The magisterial judgments which the magisterial court stipulate that they are appealed in the court of appeal. 3- The judgments or decisions which are considered as appealable according to the stipulation of a special test by virtue of another law'.

<sup>755</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 269.

Cassation is the first alternative type of appeal. In accordance with this method, some judgements<sup>756</sup> might be subjected to the power of the higher court (the Cassation Court) in order to check their legitimacy. Should these judgements be found to be against the law, they will be nullified.<sup>757</sup> It is worth noting that there are a number of reasons justifying the use of this alternative type of appeal.<sup>758</sup> It should be stressed that if the cassation is accepted, the Cassation Court will overrule the appealed judgement and return the documents to the court that issued the judgement to review the lawsuit.<sup>759</sup>

Cassation by a Written Order is the second alternative appeal method. This requires a procedure, a judgement, or a decision to be inconsistent with the law; they are final, and they have not been reviewed by the Cassation Court. If so, the Minister of Justice might send a written order to the head of public prosecution service, instructing him/her to present the lawsuit to the Cassation Court.<sup>760</sup> Notably, if the Cassation by a Written Order is accepted, the Cassation Court nullifies the appealed procedure, or the appealed judgement, or the appealed decision.<sup>761</sup>

Retrial is the third alternative type of appeal. It is used to correct judicial mistakes in criminal judgements acquiring the final degree.<sup>762</sup> A number of situations might be subjected to retrial.<sup>763</sup> It is noteworthy that, should the Cassation Court accept the retrial, it will refer the

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<sup>756</sup> Article 270 of the Jordanian Code of Criminal Procedures states that ‘all the judgments and criminal decisions issued by the court of appeal and the decisions of prohibiting the trial issued by the attorney general in the criminal cases’.

<sup>757</sup> Namor, op cit, 585.

<sup>758</sup> Article 274 of the Jordanian Code of Criminal Procedures states that ‘[b]ringing appeal for cassation shall not be approved unless for the following reasons: First: A) Violating the procedures that should be followed by law at the risk of the revocation. B) Violating the other procedures if the opponent party has requested to follow them and the court has not fulfilled his request, and were not corrected in the following trial stages. Second: Violating the law, misapplying or misinterpreting it. Third: Violating the rules of jurisdiction or if the court has trespassed its legal authority. Fourth: Omitting the judgment in one of the requests or judging what exceeds the request of the opponent party. Fifth: The issuance of two contradictory judgments in one incident. Sixth: The judgment does not contain the causes entailing the judgment, the causes are not sufficient, or the causes are ambiguous’.

<sup>759</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 284.

<sup>760</sup> *ibid*, Art. 291(1); Namor, op cit, 612.

<sup>761</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 291(3).

<sup>762</sup> Namor, op cit, 621.

<sup>763</sup> Article 292 of the Jordanian Code of Criminal Procedures indicates to these situations ‘A) If someone was sentenced for committing the crime of murder and evidence has proved that the alleged murdered is alive. B) If someone was sentenced for committing a felony or delict, and another person was sentenced after that for the same crime, and the two judgments could not be matched which has resulted in supporting the innocence of one of the sentenced persons. C) If someone was sentenced and after the issuance of judgment, the witness who has given a testimony against him in the trial was sentenced for false testimony, then the testimony of that witness shall not be taken in the new trial. D) If after the judgment, a new incident occurred or was apparent or documents that were unknown at the time of trial was exhibited which would lead to proving the innocence of the sentenced’.

lawsuit to a court in the same degree as the court that issued the judgement subjected to retrial.<sup>764</sup> It is worth noting that Jordan does not use juries as triers of facts.

### **3.4.2 Criminal Investigation of the Crime of Trafficking in Persons in Jordan**

This section will examine criminal investigation of the crime of TIP in Jordan by analysing the stages of the criminal investigation in the crime of TIP, and the elements of the criminal investigation of this crime.

#### **3.4.2.1 The Stages of the Criminal Investigation of the Crime of Trafficking in Persons**

There are three main stages in the criminal investigation of the crime of TIP. The first stage is the collecting of evidence. In this stage, the police carry out all the procedures required to detect the possibility that the crime of TIP has been committed and identify those who may be involved in the commission of this crime by examining the notifications submitted by victims and/or any other party. All procedures undertaken should be recorded in the evidence collection minutes.<sup>765</sup> It is noteworthy that ‘investigating the crimes, collecting its evidence, arresting its perpetrators, and referring them to the court which has jurisdiction over punishing them’, the main components of the evidence- collecting stage, have been affirmed in the Jordanian Code of Criminal Procedures.<sup>766</sup>

The second stage in the criminal investigation of the crime of TIP is the preliminary investigation stage. In this stage, police officers investigate whether the cases before them amount to the level of the crime of TIP. In doing so, they have powers similar to those of investigating judges and public prosecutors.<sup>767</sup> Examples of these powers include investigating complaints,<sup>768</sup> interviewing witnesses,<sup>769</sup> and inspecting and seizing materials related to the crime.<sup>770</sup> To return to an earlier point, police officers in this stage, in accordance with the evidence collected in the evidence collection stage, may establish a criminal case of TIP, or they may decide that the evidence collected is insufficient to establish that the crime of TIP has been committed.<sup>771</sup> In the preliminary investigation stage it is vital to ensure that no one is prosecuted unless there is strong evidence for conviction

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<sup>764</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 296.

<sup>765</sup> Al-Dweikat, op cit, 13.

<sup>766</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 8(1).

<sup>767</sup> Al-Dweikat, op cit, 14.

<sup>768</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Arts. 52-67.

<sup>769</sup> *ibid*, Arts. 68-80.

<sup>770</sup> *ibid*, Arts. 81-92.

<sup>771</sup> Al-Dweikat, op cit, 14.

based on facts. This preserves the interests of individuals and the judiciary by saving time and efforts when there is not enough evidence for a conviction.<sup>772</sup>

The third stage in the criminal investigation of the crime of TIP is the final investigation stage. This kind of investigation occurs in the court that is trialling the case of TIP. It is noteworthy that the process followed in the trial of those accused of the crime of TIP is no different from those followed in trials held for other criminal cases.<sup>773</sup> In this stage the evidence of the crime committed is examined. Then, a verdict on the trial will be issued, be it a conviction or a declaration of innocence or non-liability.<sup>774</sup> In other words, '[t]he court shall judge the conviction if the act was proven, the guiltlessness if there is no evidence or they are not sufficient, and shall judge the non-liability if the act does not constitute a crime or is not entailing a punishment'.<sup>775</sup>

#### **3.4.2.2 The Elements of the Criminal Investigation in the Crime of Trafficking in Persons**

There are a number of elements in the criminal investigation of the crime of TIP. The first element involves proving the occurrence of the crime of TIP. The criminal investigator should check any notifications about the occurrence of this crime, as these notifications could be false or fictitious.<sup>776</sup> Additionally, the criminal investigator should determine whether the acts committed might be regarded as a crime, an attempt to commit a crime, or merely preparatory acts.<sup>777</sup>

The second element is the determination of where the crime of TIP has been committed. This element is considered important for ensuring the success of the investigation of cases of TIP by examining the place where this crime has been committed and the material evidence relating to it. The crime of TIP has a special nature as it may be committed for different purposes set out in the legislation. Therefore, the place where the crime of TIP has been committed and the material evidence in the case could play an important role in revealing the purpose of this crime. By way of illustration, the crime of TIP for the purpose of forced labour or services is usually committed in a secluded place with poor sanitary conditions and

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<sup>772</sup> Kamel Al-Saeed, *Explanation of the Code of Criminal Procedure: An Analytical, Developmental, and Comparative Study in Jordanian, Egyptian, Syrian, and Other Laws* (Arabic edn, 2nd edn, Daralthaqafa 2008) 414.

<sup>773</sup> Al-Dweikat, op cit, 15.

<sup>774</sup> Namor, op cit, 404.

<sup>775</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 236(2).

<sup>776</sup> Al-Dweikat, op cit, 16.

<sup>777</sup> Namor, op cit, 331.

overcrowding. In contrast, the crime of TIP for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation is usually committed in luxury bedrooms.<sup>778</sup> It is noteworthy that the location of the crime plays an important role in determining the competent court in accordance with the *ratione loci* rules.<sup>779</sup>

The third element is the determination of when the crime of TIP has been committed. This might be achieved by obtaining information about the occurrence of the crime of TIP from trafficked victims, witnesses, and experts at the scene of the crime.<sup>780</sup> Furthermore, determining the time when the crime was committed is significant as it is used to determine the statute of limitations for the crime committed.<sup>781</sup> In this regard, it should be stressed that the JATIPL does not address the issue of the statute of limitations for the commission of the crime of TIP. Therefore, the general rules in the Jordanian Code of Criminal Procedures will be applied in this situation. In accordance with these rules, ten years is the period of time required for a felony to be extinguished,<sup>782</sup> while three years are required for a misdemeanour to be extinguished.<sup>783</sup> Therefore, the statute of limitation for the crime of TIP when this crime is coupled with aggravating circumstances is ten years, as the crime of TIP is regarded as a felony when it is coupled with these aggravating circumstances.<sup>784</sup> On the other hand, if the crime of TIP is not coupled with these circumstances, the statute of limitation for this crime will be three years, as the crime of TIP is considered to be a misdemeanour when it is not coupled with these aggravating circumstances.<sup>785</sup>

The fourth element is the determination of how the crime of TIP has been committed. It should be stressed that it is important to determine how the crime of TIP has been committed because the special nature of the crime of TIP requires that this crime be committed using any of the following specific types of actions: ‘polarization, transportation, harbouring, or receipt of persons’<sup>786</sup> through any of the following means ‘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

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<sup>778</sup> Al-Dweikat, op cit, 17.

<sup>779</sup> Namor, op cit, 332.

<sup>780</sup> Al-Dweikat, op cit, 17.

<sup>781</sup> Namor, op cit, 332.

<sup>782</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 338.

<sup>783</sup> *ibid*, Art. 339.

<sup>784</sup> The JATIPL, Art. 8.

<sup>785</sup> *ibid*, Art. 9.

<sup>786</sup> Al-Dweikat, op cit, 17.

vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’.<sup>787</sup>

The fifth element is the determination of why the crime of TIP has been committed. It can be said that the crime of TIP is committed to exploit trafficked persons for any of the following purposes: ‘forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation’.<sup>788</sup>

### 3.4.3 Prosecution of the Crime of Trafficking in Persons

It should be stressed that there are two prerequisites for establishing the commission of the crime of TIP. The first prerequisite is the availability of the material element. In particular, the material element in the crime of TIP includes three components. The first component is the *actus reus*. This *actus reus* requires the use of any of the actions of TIP.<sup>789</sup> The second component of the material element is the use of any of the means of TIP.<sup>790</sup> The third component of the material element is the victim of the crime of TIP. Precisely, the crime of TIP requires the victim to be a living person or persons.<sup>791</sup>

The second prerequisite for establishing the commission of the crime of TIP is the mental element. Precisely, the mental element in the crime of TIP includes two components. The first component is the general *mens rea*. This general *mens rea* should in turn include two elements. The first element is that the offender should know that he/she is committing the crime of TIP.<sup>792</sup> It is evident that in the Jordanian Penal Code there is no exception to the principle of the assumption of knowledge of the law.<sup>793</sup> It is worth noting that this Law has affirmed the principle of *ignorantia juris non excusat*.<sup>794</sup> Therefore, in accordance with the principle of the assumption of knowledge of the law, *mens rea* does not require the offender to have a real knowledge about the provision criminalising the act, as this knowledge is presumed and ignorance of the law is not an excuse.<sup>795</sup> The second element in the general *mens rea* is that the offender should have the intent to commit the crime of TIP.<sup>796</sup>

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<sup>787</sup> The JATIPL, Art. 3(a)(1).

<sup>788</sup> The JATIPL, Art. 3(b).

<sup>789</sup> *ibid*, Art. 3(a)(1); Al-Dweikat, *op cit*, 22.

<sup>790</sup> The JATIPL, Art. 3(a)(1); Al-Dweikat, *op cit*, 22.

<sup>791</sup> Al-Dweikat, *op cit*, 22.

<sup>792</sup> *ibid*, 22-24.

<sup>793</sup> Al-Saeed, *Explanation of the General Provisions in the Penal Code*, *op cit*, 259; Al-Jabour, *op cit*, 241.

<sup>794</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 85.

<sup>795</sup> Al-Jabour, *op cit*, 241.

<sup>796</sup> Al-Dweikat, *op cit*, 22-24.

The second component in the mental element in the crime of TIP is the special *mens rea*. This special *mens rea* can be illustrated by the intent of the offender to exploit trafficked persons for any purposes of TIP.<sup>797</sup>

It should be stressed that the prosecution of the crime of TIP is subject to the same rules of criminal prosecution stated in the Jordanian Code of Criminal Procedures. These rules are differentiated on the basis of whether the crime committed is a misdemeanour or a felony. Therefore, on the one hand, if the crime committed is a misdemeanour the court should receive a delict indictment from the public prosecutor, in relation to the crime committed, in order to try the accused.<sup>798</sup> The accused will then be asked about the accusation.<sup>799</sup> Two possible scenarios may ensue from the response of the accused to the accusation. First, if the accused confesses, he/she will be convicted and sentenced unless there are sufficient reasons for the court not to do so.<sup>800</sup> Second, if the accused refuses to respond to the accusation, or denies it, or the court is not convinced by the confession made by the accused, the court will begin to hear the evidence on the crime in question.<sup>801</sup> On the other hand, if the crime committed is a felony the court must receive a decision to prosecute from the attorney general in order to start the trial.<sup>802</sup> After that, similar trial procedures to the one in relation to prosecuting a misdemeanour will be followed.<sup>803</sup>

Accordingly, the prosecution of the crime of TIP may result in any of the following situations. The first situation is that the court may decide that the defendant is innocent because ‘there is no evidence or they are not sufficient’ to pass a judgement on the commission of the crime of TIP.<sup>804</sup> The second situation is that the court may decide that the defendant is not criminally liable because the act does not constitute the crime of TIP.<sup>805</sup> The third situation is that the court may decide that the defendant is guilty of the crime of TIP.<sup>806</sup>

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<sup>797</sup> The JATIPL, Art. 3(b); Al-Dweikat, op cit, 24.

<sup>798</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 166(1).

<sup>799</sup> *ibid*, Art. 172(1).

<sup>800</sup> *ibid*, Art. 172(3).

<sup>801</sup> *ibid*, Art. 172(4).

<sup>802</sup> *ibid*, Art. 206.

<sup>803</sup> *ibid*, Art. 216.

<sup>804</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 113/2011) dated 7 February 2011; Amman Court, in its criminal capacity and as a court of first instance, Decision (No 1377/2011) dated 30 June 2011; Zarqa Court, in its criminal capacity and as a court of first instance, Decision (No 640/2011) dated 20 February 2012.

<sup>805</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 43/2011) dated 13 June 2011; East Amman Court, in its criminal capacity and as a court of first instance, Decision (No. 227/2011) dated 30 November 2011.

<sup>806</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/5/141/2011) dated 20 June 2011; Mafraq Court, in its criminal capacity and as a court of first instance, Decision (No 21/4/73/2011)



The fourth situation is that the court sentences not only the legal person but also its representative who committed the crime of TIP. It is noteworthy that the sentences for the legal person include a fine, suspension from work, deregistration, and dissolution.<sup>807</sup> The fifth situation is that the court may sentence the defendant *in absentia* for the commission of the crime of TIP.<sup>808</sup>

It is noteworthy that courts in Jordan are not consistent in their examination of the commission of the crime of TIP. In particular, there are two observations on this examination. The first observation is that the court may decide that the defendant is guilty. However, it may not examine the elements of the crime of TIP in its verdict. In this regard, the court states the definition of the crime of TIP, and it states the provision criminalising the act committed. Then it pronounces its verdict.<sup>809</sup> In other words, it can be said that there is a lack of justification in the judgement.

The second observation is that the court may decide that the defendant is guilty. In doing so, the court, in its verdict, states the definition of the crime of TIP, and states the provision criminalising the act committed. After that, it examines the elements of the crime of TIP. However, in this examination, the court does not specify all the elements of the crime of TIP. For example, the court may not address the means used<sup>810</sup> or the purpose of the exploitation.

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Interestingly, the Jordanian Appeal Court not only assures the importance of examining the elements of the crime of TIP<sup>812</sup> but also revokes verdicts of courts of first instance when these courts do not review and discuss the elements of the crime of TIP, as the verdict should

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dated 14 December 2011; Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/4/1012/2012) dated 16 April 2012; Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/4/1041/2012) dated 17 April 2012; Mafraq Court, in its criminal capacity and as a court of first instance, Decision (No 266/2012) dated 30 September 2012.

<sup>807</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/5/730/2012) dated 8 November 2012.

<sup>808</sup> It is noteworthy that there is no case law available regarding the sentencing of the defendant *in absentia* for the commission of the crime of TIP.

<sup>809</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/4/1012/2012) dated 16 April 2012; Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/4/1041/2012) dated 17 April 2012.

<sup>810</sup> Amman Court, in its criminal capacity and as a court of first instance, Decision (No 5/5/141/2011) dated 20 June 2011.

<sup>811</sup> Mafraq Court, in its criminal capacity and as a court of first instance, Decision (No 21/4/73/2011) dated 14 December 2011; Mafraq Court, in its criminal capacity and as a court of first instance, Decision (No 266/2012) dated 30 September 2012.

<sup>812</sup> The Amman Appeal Court, Decision (No 3744/2012) dated 29 January 2012; The Amman Appeal Court, Decision (No 32209/2012) dated 7 October 2012; The Amman Appeal Court, Decision (No 28333/2012) dated 8 October 2012.

include the reasons for the conviction or the acquittal.<sup>813</sup> In other words, if courts of first instance do not review and discuss the elements of the crime attributed to the accused, their verdicts will lack the reasoning that is required in any verdict issued by such courts, as every verdict should include ‘the reasons entailing the conviction or guiltlessness’.<sup>814</sup>

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<sup>813</sup> The Amman Appeal Court, Decision (No 23643/2012) dated 3 July 2012; The Amman Appeal Court, Decision (No 37255/2012) dated 21 November 2012; The Amman Appeal Court, Decision (No 29575/2012) dated 2 December 2012.

<sup>814</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 237(1).

### 3.5 Conclusion

This chapter has examined TIP as a crime under Jordanian legislation in three sections. The first section has dealt with TIP in Jordan. In this section, the initial and subsequent efforts made to deal with TIP have been discussed. Additionally, this section has analysed reports related to TIP in Jordan. In particular, reports on TIP from the United States Department of State, the Jordanian National Centre for Human Rights' reports, and the Jordanian Anti-Human Trafficking National Committee's report have been analysed. Furthermore, the withholding of passports and identification documents of foreign domestic workers, the violation of foreign domestic workers' rights, and the failure to pay the agreed wages or paying a lower wage than agreed are identified as the main practices used against foreign domestic workers, which could amount to the level of forced labour. They have all been examined in this section.

The second section has taken an in-depth look at the identification of the crime of TIP in Jordan. In doing so, the definition of the crime of TIP has been dealt with by examining the extent to which the definition in the JATIPL is aligned with the definition in the TIPP. In this respect, it can be stated that the Jordanian definition is relatively consistent with the Protocol definition. However, this consistency could lead to uncertainty in the law as each legal instrument has its particularity. In other words, the TIPP addresses the crime of TIP when this crime is committed transnationally, while the JATIPL deals with this crime when it is committed at the national level.

Moreover, this section has highlighted the use of the plural form to refer to trafficked victims, the failure to explain the purposes of TIP in the Jordanian legislation, and the limited list of exploitive acts. These are the main observations related to the Jordanian definition of the crime of TIP. Subsequently, this section has carefully analysed the elements of the crime of TIP. A point to note, however, is that the components of these elements have not been defined in the JATIPL, which may lead to the violation of the principles of legality '*nullum crimen, nulla poena sine lege*'.

The third section has addressed the criminal investigation and prosecution of the crime of TIP in Jordan by highlighting the main characteristics of the Jordanian criminal justice system. In doing so, this section has investigated issues related to this system. The first issue is the independence of the judiciary, which has been affirmed in the Jordanian legislation. The

second issue is the criminal judiciary types relating to the categories of courts, with a special focus on the regular and special criminal courts. The third issue is the types of criminal jurisdiction, illustrated by an analysis of the four types of jurisdiction; the *ratione temporis*, *ratione personae*, *ratione materiae*, and *ratione loci*. The fourth issue is the characteristics and general principles of trial, illustrated by five characteristics and general principles: public hearings, restricting the court with lawsuit limits, recording the trial procedures, oral trial procedures, and attendance at trial procedures by litigant parties. The fifth issue investigated in this section is the ways of appealing criminal sentences, including the normal and alternative ways of appealing criminal sentences.

The third section has also examined criminal investigation of the crime of TIP by dealing with the collection of evidence stage, the preliminary investigation stage, and the final investigation stage, which are the main stages of the investigation of this crime. This section then dealt with proving the occurrence of the crime and determining where, when, how, and why the crime of TIP has been committed, which are the main elements of the criminal investigation of the crime of TIP. Finally, this section has addressed the prosecution of the crime of TIP by highlighting the importance of the availability of the material and mental elements in the commission of the crime of TIP, as the special nature of this crime requires it to have both an *actus reus* and a *mens rea* as its main prerequisites. These prerequisites can be found in the action element, the means element, and the purpose element of the crime of TIP. Then, four situations related to the prosecution of the crime of TIP have been examined. Subsequently, this section has examined the Jordanian case law related to the prosecution of the crime of TIP.

# Chapter Four

## Trafficking in Persons as a Transnational Organised Crime

### 4.1 Introduction

The aim of this chapter is to analyse trafficking in persons (TIP) as a transnational organised crime. In doing so, this chapter will answer the following two questions. Firstly, what is meant by TIP as a transnational organised crime? Secondly, how might the crime of TIP be addressed by dealing with it as a transnational organised crime, what are the challenges to addressing it, and how might these challenges be overcome?

The first question will be answered in the first three main sections of this chapter. More specifically, the first section examines the concept of transnational organised crime by making two observations about the expression ‘transnational organised crime’ and then analysing this concept in accordance with ‘the United Nations Convention against Transnational Organized Crime’ (UNCTOC).<sup>815</sup>

In the second section, the transnational nature of TIP will be examined by confirming that the implementation of the UNCTOC and ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP)<sup>816</sup> require the availability or recognition of the transnational nature of the offence. Later in this section, the availability of the transnational element will be shown in the process, operations and networks of TIP.

The third section deals with the jurisdiction over TIP as a transnational organised crime by examining the criminal jurisdiction of individual states over the offence. In doing so, a

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<sup>815</sup> United Nations Convention against Transnational Organized Crime (UNCTOC) (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

<sup>816</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (TIPP) (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

number of jurisdictions or jurisdictional principles over TIP will be discussed, such as territorial jurisdiction, flag principle jurisdiction, passive personality principle jurisdiction, active personality principle jurisdiction, effects-based jurisdiction, and universal jurisdiction. Afterward, this chapter examines the possibility of exercising the principle of individual criminal responsibility over the commission of the crime of TIP.

The second question will be answered in the fourth and the fifth sections of this chapter. Precisely, in the fourth section attempts to address TIP as a transnational organised crime will be examined through international, regional, and national perspectives, as well as the role of international organisations in addressing TIP as a transnational organised crime. Subsequently, the fifth section will deal with the key legal challenges to addressing TIP as a transnational organised crime and how these challenges might be overcome. This chapter concludes that addressing TIP as a transnational organised crime requires a holistic approach. Therefore, international legal cooperation is needed to achieve this.

## 4.2 The Concept of Transnational Organised Crime

This section will define the expressions ‘transnational crime’ and ‘organised crime’. Further, it will focus on the concept of transnational organised crime in accordance with the UNCTOC.

Transnational organized crime is considered as one of the major threats to human security, impeding the social, economic, political and cultural development of societies worldwide. It is a multi-faceted phenomenon and has manifested itself in different activities, such as, drug trafficking, trafficking in human beings.<sup>817</sup>

This prompts two observations. The first observation is that it is its transnational nature that distinguishes this crime from national or international crime.<sup>818</sup> The second is that it is its organised nature that distinguishes this crime from random or disorganised crime.<sup>819</sup>

In 1975, the expression ‘transnational crime’ was defined at the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders as a crime ‘which spans the borders of two or more countries’.<sup>820</sup> Later, the UN defined transnational crime as ‘offences whose inception, prevention and/or direct or indirect effects involved more than one country’.<sup>821</sup> Notably, both definitions consider transnational crime as a crime involving at least two countries.

Equally importantly, the concept of organised crime can be understood as a set of actors or as a set of activities. In particular, the first understanding of organised crime is as a set of actors. This might be illustrated as entities with a hierarchical and centralised corporate construction

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<sup>817</sup> United Nations Office on Drugs and Crime and organised crime (2010), cited in Maggy Lee, *Trafficking and Global Crime Control* (SAGE 2011) 84-85.

<sup>818</sup> Margaret E. Beare, *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption* (University of Toronto Press 2003) 121. Interestingly, it has been stated that the difference between transnational organised crimes and international crimes could be found in the following aspects: Firstly, transnational organised crimes might be dealt with through mutual legal assistance and national prosecutions, whereas international crimes need internationalisation of prosecution. Secondly, international crimes are usually committed by governments, while transnational organised crimes are generally committed by non-state actors. See Tom Obokata, *Transnational Organised Crime in International Law* (HART Publishing 2010) vi-vii. Additionally, in accordance with Article 5 of ‘the Rome Statute of the International Criminal Court’, international crimes are limited in four crimes: ‘(a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression’, whereas transnational organised crimes, according to Article 2 of ‘the United Nations Convention against Transnational Organized Crime’, are serious crimes committed by organised criminal group.

<sup>819</sup> Beare, op cit, 121.

<sup>820</sup> A/CONF.56/3 (1-12 September 1975) Para 22, cited in Obokata, *Transnational Organised Crime in International Law*, op cit, 28.

<sup>821</sup> A/CONF.169/15/Add.1 (4 April 1995) Para 9, cited in Obokata, *Transnational Organised Crime in International Law*, op cit, 29.

operating across borders. Moreover, according to this understanding, organised crime can be carried out through collaboration between diverse combinations such as networks of persons.<sup>822</sup> The second understanding of organised crime is as a set of activities. In this understanding, what is important is the organised nature of the unlawful activities rather than the identities of those involved in these activities.<sup>823</sup>

There have been a number of attempts to provide a legal definition of organised crime. In 1990, organised crime was defined by the Eighth Congress on the Prevention of Crime and the Treatment of Offenders as ‘large-scale and complex criminal activities carried out by tightly or loosely organized associations and aimed at the establishment, supply and exploitation of illegal markets at the expense of society’.<sup>824</sup> It is noteworthy that organised crime according to this definition must be committed by persons who belong to criminal associations. Likewise, exploitation of an illegal market by organised crime is required in order to satisfy this definition. Thirdly, the final requirement for the definition of organised crime is that organised crime should be committed on a large-scale.<sup>825</sup>

In 1998, ‘criminal organisation’ was defined as follows:<sup>826</sup>

[A] structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.<sup>827</sup>

Accordingly, it is noticeable that according to this definition the structured association should have existed for some time. However, this definition has not specified whether or not the offence can be committed over a short period of time. Furthermore, it requires that the offences committed should lead to a serious sentence. Moreover, according to this definition

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<sup>822</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 14, 16.

<sup>823</sup> *ibid*, 19.

<sup>824</sup> United Nations, ‘Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders’ (1990) A/CONF.144/7, Para. 12; Obokata, *Transnational Organised Crime in International Law*, op cit, 24.

<sup>825</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 24.

<sup>826</sup> *ibid*, 25.

<sup>827</sup> The Council of the European Union, ‘Joint Action of 21 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, 98/733/JHA’ Art. 1.



material benefits do not necessarily have to be obtained.<sup>828</sup> However, it is to be noted that the Joint Action has defined ‘criminal organisation’ rather than organised crime.

Indeed, a similar approach can be found in the UNCTOC. This Convention does not define organised crime; it defines serious crime committed through an organised criminal group. Therefore, it does not define the distinctive kinds of crimes that such organised groups commit;<sup>829</sup> rather, it defines or prescribes a category of serious crime without defining this in any great detail.<sup>830</sup> Accordingly, it might be argued that, in accordance with the Convention, when organised criminal groups commit serious crime, this constitutes organised crime.<sup>831</sup> In this regard, the Convention states the following:

“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 other material benefit; (b) “Serious crime” shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’.<sup>832</sup>

It is noticeable that this definition contains the following elements. The first element is that cooperation among three or more individuals should exist. The second element is that the cooperation among those persons should exist for a length of time. The third element is that this cooperation should involve the commission of serious criminal offences. The fourth element is that the obtaining of profits is considered to be the aim of this cooperation among those persons.<sup>833</sup> Furthermore, this definition is similar to the definition of ‘criminal

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<sup>828</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 25.

<sup>829</sup> Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 30; Obokata, *Transnational Organised Crime in International Law*, op cit, 26.

<sup>830</sup> Laurence Husson, ‘Trafficking of Human Beings from a Human Rights Perspective. Towards a Holistic Approach, Tom Obokata’ (2011) (15) *Moussons : Recherche en Sciences Humaines sur l’Asie du Sud-Est*, 30.

<sup>831</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 30.

<sup>832</sup> The UNCTOC, Art. 2(a), 2(b).

<sup>833</sup> Council of Europe, ‘Organised crime situation report 2005; Focus on the threat of economic crime’ (2005) 21; Anis H. Bajrektarević, ‘Trafficking in and Smuggling of Human Beings-Linkages to Organized Crime-International Legal Measures’ (2000) 8(1-2) *Kriminologija i socijalna integracija* 57, 65.

organisation' that has been adopted by the Joint Action, whereas the UNCTOC definition requires that the serious crime yield benefits, be they financial or material.<sup>834</sup>

In light of the UNCTOC definition, two important observations should be taken into consideration. The first observation is that the UNCTOC uses the expression 'organised criminal group' rather than the expression 'organised crime'. This may indicate that it is the organised nature of the group that counts, rather than the organised nature of the crime itself.<sup>835</sup> The second observation is that the UNCTOC requires the organised crime to have yielded financial or material benefits.<sup>836</sup>

However, it should be stressed that the concept of organised crime is considered ambiguous for a number of reasons. The first reason is that this concept changes over time. Specifically, what might be regarded by society as an organised crime because of its particularly dangerous character at a certain period of time may not be considered as such in another period of time as there may be different institutional and political interests. The second reason is that organised crime occurs in changing environments. Therefore, it takes different forms in various societies because of its dynamic process. The third reason is that the notion of organised crime may be misleading because some serious crimes might be regarded as more organised than others.<sup>837</sup>

To a certain extent, it can be said that the definition provided in the Convention may fit the complex nature of organised crime, because this definition is considered sufficiently broad. In addition to this, the definition is a significant step to addressing organised crime in an inclusive way.<sup>838</sup> It is noteworthy that the definition of organised crime in accordance with the UNCTOC has been agreed globally, and it therefore reflects a compromise of views.<sup>839</sup>

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<sup>834</sup> The UNCTOC, Art. 2(a); The Council of the European Union, 'Joint Action of 21 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, 98/733/JHA' Art. 1; Obokata, *Transnational Organised Crime in International Law*, op cit, 26.

<sup>835</sup> The UNCTOC, Art. 2(a); Obokata, *Transnational Organised Crime in International Law*, op cit, 27-28.

<sup>836</sup> The UNCTOC, Art. 2(a); Obokata, *Transnational Organised Crime in International Law*, op cit, 28.

<sup>837</sup> Council of Europe, 'Organised crime situation report 2005; Focus on the threat of economic crime' (2005) 19.

<sup>838</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 37.

<sup>839</sup> Council of Europe, 'Organised crime situation report 2005; Focus on the threat of economic crime' (2005) 5,18.

### 4.3 The Transnational Nature of Trafficking in Persons

This section analyses the transnational nature of TIP as an important requirement for implementation of the UNCTOC and the TIPP. Afterwards, this section indicates the availability/scope of the transnational element in the process, operations, and networks of TIP.

It is important to note that the implementation of the UNCTOC requires that the offence be transnational in nature.<sup>840</sup> Under the Convention, the transnational concept has been expanded to include criminal actors besides criminal activities.<sup>841</sup> Furthermore, the TIPP does not apply to the crime of TIP unless this crime is regarded as transnational in nature.<sup>842</sup> In other words, the TIPP is considered a supplementary to the UNCTOC. Therefore, the application of the Protocol is restricted to transnational crimes involving organised criminal groups.<sup>843</sup> Although the UNCTOC and the TIPP require the crime in question (the crime of TIP) to be transnational in nature,<sup>844</sup> this transnational nature of the crime does not necessarily have to be present in order to establish this crime under national laws.<sup>845</sup> In this regard, the UNCTOC states that ‘[t]he 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’.<sup>846</sup> Additionally, the Protocol explicitly requires states parties to adopt legislation and other measures criminalising the intentional commission of TIP.<sup>847</sup>

Obviously, TIP can be considered transnational in nature if it is committed in any of the following situations:

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<sup>840</sup> The UNCTOC, Art. 3; Obokata, *Transnational Organised Crime in International Law*, op cit, 28.

<sup>841</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 29.

<sup>842</sup> Article 4 of the Protocol states that: ‘[t]his Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences’; Mohamed Y. 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’ (2005) 14 *Tulane Journal of International and Comparative Law* 357, 413.

<sup>843</sup> Harmen Van der Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’ (2014) 13(2) *Chinese Journal of International Law* 297, Para 10.

<sup>844</sup> The UNCTOC, Art. 3(1)(b); The TIPP, Art. 4; Mohamed Y. Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’ (2010) UNOV/DM/CMS/EPLS/Electronic Publishing Unit 1, 9.

<sup>845</sup> Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 9.

<sup>846</sup> The UNCTOC, Art. 34(2).

<sup>847</sup> The TIPP, Art. 5(1); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 268.

(a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.<sup>848</sup>

The transnational element in TIP can be illustrated by the process of TIP. In particular, this process includes the movement of trafficked persons through origin, transit, and destination countries. An example of what is meant by the transnational element in TIP is TIP for the purpose of the removal of organs. In this form of TIP, origin, transit, and destination countries could be involved in the process of TIP. To be more specific, trafficked persons, who give their organs, are recruited from poor countries. Then, the organs taken from the trafficked persons are intended to be used for the benefit of recipients in rich countries. After that, transplantation of the organs takes place in third countries. In this example, the transnational element of TIP is exemplified by what happened in the origin country (the poor country), the destination country (the rich country), and the transit country (the third country).<sup>849</sup>

Moreover, the transnational nature of TIP can be exemplified by the operations of TIP. These operations range from the simple, which may involve the trafficking of one person by one trafficker in one country, to the more complex, which may involve the trafficking of large numbers of persons by organised criminal groups transnationally.<sup>850</sup> It is noteworthy that the TIP links TIP and transnational organised crime, as transnational trafficking generally involves a necessary degree of organisation.<sup>851</sup>

Furthermore, the transnational nature of TIP can be demonstrated by trafficking-in-persons networks.<sup>852</sup> To be precise, TIP occurs through networks.<sup>853</sup> Therefore, these networks must

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<sup>848</sup> The UNCTOC, Art. 3(2)

<sup>849</sup> Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 220.

<sup>850</sup> *ibid*, 221.

<sup>851</sup> The TIP, Art. 1; John Winterdyk, Philip L. Reichel, and Benjamin Perrin (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 237.

<sup>852</sup> United Nations Interregional Crime and Justice Research Institute 'UNICRI', *Trafficking in Women from Romania into Germany: Comprehensive Report*, Turin, Italy (March, 2005) at 69, cited in Allum and Gilmour, *op cit*, 222.

<sup>853</sup> Ernesto U. Savona and Sonia Stefanizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer Science & Business Media 2007) 63.

cooperate to succeed in their operations. Notably, a number of networks are involved in TIP.<sup>854</sup>

The first type of network contains individual traffickers' organisations or small groups of organised offenders who are engaged in TIP domestically or internationally on a small scale. In this type of network, traffickers control the whole trafficking-in-persons operation including recruiting, transporting, and exploiting trafficked persons. Moreover, the members of these groups could include friends or family members. Additionally, these groups have limited activities and tasks.<sup>855</sup>

The second type of network is entrepreneurial trafficking organisations. These organisations are considered to be small organisations with limited numbers of perpetrators. Therefore, as they are small, the number of persons trafficked by these organisations is also limited. Furthermore, the method used by these organisations to traffic persons is based on country-to-country trafficking.<sup>856</sup> An example of how this kind of organisation operates is the Mishulovich case. In this case, four Latvian women were recruited to work in Chicago. They were subsequently enslaved by their traffickers (four accomplices) who imprisoned and forced them to work on tasks other than what had been agreed. Notably, as a result of this exploitation, the traffickers gained significant profits.<sup>857</sup>

The third type of network includes medium-sized groups of organised offenders engaged in TIP. These groups are more sophisticated than the small trafficking-in-persons networks but they do not amount to international criminal organisations. Likewise, these groups are often TIP regionally and comprise more than five members.<sup>858</sup>

The fourth type of network is transnational networks. These networks control all aspects of TIP. More to the point, in the transnational networks the number of offenders and the

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<sup>854</sup> UNICRI, *Trafficking in Women from Romania into Germany: Comprehensive Report*, Turin, Italy (March, 2005) at 69, cited in Allum and Gilmour, *op cit*, 222; Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Sports 2009) 129.

<sup>855</sup> UNICRI, *Trafficking in Women from Romania into Germany: Comprehensive Report*, Turin, Italy (March, 2005) at 69, cited in Allum and Gilmour, *op cit*, 222; Alexis A. Aronowitz, *Human Trafficking, Human Misery: The Global Trade in Human Beings* (Greenwood Publishing Group 2009) 66-67.

<sup>856</sup> Friesendorf, *op cit*, 130-131.

<sup>857</sup> International Helsinki Federation for Human Rights (IHF), 'A Form of Slavery: Trafficking in Women in OSCE Member States' (2000) 38 <<http://www.refworld.org/docid/46963afd0.html>> accessed 1 September 2015; Elena V. Tiurukanova and the Institute for Urban Economics for the UN/IOM Working Group on Trafficking in Human Beings, 'Human Trafficking in the Russian Federation: Inventory and Analysis of the Current Situation and Responses' (2006) 24; Friesendorf, *op cit*, 130-131.

<sup>858</sup> UNICRI, *Trafficking in Women from Romania into Germany: Comprehensive Report*, Turin, Italy (March, 2005) at 69, cited in Allum and Gilmour, *op cit*, 222.

geographical range of their operations are considered large. Therefore, it is understood that transnational networks are trafficking in a large number of persons.<sup>859</sup>

The fifth type of network is hybrid groups. These networks include entrepreneurs and criminal groups who cooperate to traffic persons. It is noticeable that these hybrid groups are the most common group in the trafficking-in-persons field.<sup>860</sup>

The sixth type of network encompasses highly structured groups of organised offenders. These groups control the whole process of TIP with an expanded network and are involved in TIP internationally.<sup>861</sup>

It is noteworthy that the existence of trafficking-in-persons networks depends on the role of these networks. In this regard, it might be said that a demand-driven network is an example of the role of trafficking-in-persons networks. In particular, the existence of this network is dependent on the demand for trafficked persons because the role of the demand-driven network is to achieve this demand. For instance, if a plantation owner asks traffickers to supply foreign workers, the role of demand-driven networks will be to provide this employer with those trafficked foreign workers.<sup>862</sup> Furthermore, a distribution network is regarded as another example of the role of trafficking-in-persons networks. In this type of network, trafficked victims are supplied to domestic agents by recruiters. These trafficked victims are then supplied to exploiters by the domestic agents.<sup>863</sup> Accordingly, the supply and demand elements can be found in the role of these networks. However, these networks may be more or less involved in these elements.

There are a number of supporting units inside the large trafficking-in-persons networks facilitating the trafficking-in-persons process.<sup>864</sup> Specifically, those units provide a number of services for the trafficking-in-persons operation, such as funding and overseeing the trafficking-in-persons operation, recruiting trafficked persons, transporting trafficked persons, corrupting public officials, laundering the proceeds of trafficking-in-persons crimes, providing a number of services such as accommodation and safe shelter, and finally gathering

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<sup>859</sup> Friesendorf, op cit, 131.

<sup>860</sup> *ibid*, 132-133.

<sup>861</sup> UNICRI, *Trafficking in Women from Romania into Germany: Comprehensive Report*, Turin, Italy (March, 2005) at 69, cited in Allum and Gilmour, op cit, 222.

<sup>862</sup> Shiro Okubo and Louise Shelley (eds), *Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives* (Routledge 2011) 187-188.

<sup>863</sup> *ibid*, 188.

<sup>864</sup> Aronowitz, op cit 67-68.

information to facilitate the trafficking-in-persons operation, such as information about law enforcement activities, and border controls.<sup>865</sup>

Accordingly, it is noticeable that trafficking-in-persons operations range from simple operations involving the trafficking of one person in one country to highly sophisticated operations that involve the trafficking of a huge number of victims through many countries over a lengthy period of time.<sup>866</sup> Furthermore, criminal networks may be involved in legal or illegal activities in the process of trafficking.<sup>867</sup> Moreover, the function of organised criminal groups is similar to that of any legal enterprise, as they all aim to gain profits.<sup>868</sup> Criminal networks range from small networks, which operate in accordance with their opportunities and needs, to large transnational networks exercising more control over the entire process. These networks range from those that aim to achieve one purpose to those that are involved in many activities, of which trafficking may be one.<sup>869</sup> Accordingly, it can be said that the definition of organised criminal group stated in the UNCTOC does not distinguish between groups involved in the commission of transnational organised crime. Therefore, it would be better to consider aggravated forms of transnational organised crime when this crime is committed through more structured and sophisticated organised criminal groups.

#### **4.4 Jurisdiction over Trafficking in Persons as a Transnational Organised Crime**

In this section, the jurisdiction over TIP as a transnational organised crime will be addressed by shedding light on two main issues related to this jurisdiction. The first issue is criminal jurisdiction over TIP as a transnational organised crime. The second issue is individual criminal responsibility for TIP as a transnational organised crime.

##### **4.4.1 Criminal Jurisdiction over Trafficking in Persons as a Transnational Organised Crime**

States are required or permitted to exercise criminal jurisdiction under international law in accordance with a number of jurisdictional principles governing certain situations. These

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<sup>865</sup> *ibid*, 68; Shiro Okubo and Louise Shelley (eds), *Human Security, Transnational Crime and Human Trafficking: Asian and Western Perspectives* (Routledge 2011) 188; Bajrektarević, *op cit*, 67-68.

<sup>866</sup> Aronowitz, *op cit* 65.

<sup>867</sup> Council of Europe, 'Organised crime situation report 2005; Focus on the threat of economic crime' (2005) 51.

<sup>868</sup> Bajrektarević, *op cit*, 66.

<sup>869</sup> Council of Europe, 'Organised crime situation report 2005; Focus on the threat of economic crime' (2005) 51.

principles are territorial jurisdiction, flag principle jurisdiction, passive personality principle jurisdiction, active personality principle jurisdiction, effects-based jurisdiction, and universal jurisdiction.<sup>870</sup> These principles are significant because the international community and states have accepted them. However, it should be stressed that the exercising of any or all of them is subject to the states' domestic systems.<sup>871</sup>

Criminal jurisdiction over transnational organised crime is considered a necessary step in addressing this crime. It is understood that, in line with state sovereignty, as a particular principle in the international law, territorial jurisdiction is regarded as the main jurisdiction which should be exercised over crimes. In addition to this, the exercise of jurisdiction over crimes committed on board a vessel or aircraft in specific cases is considered to be an extension of the exercising of jurisdiction over transnational organised crime. In this regard, the UNCTOC contains detailed guidance.<sup>872</sup> Precisely, in accordance with the UNCTOC, states parties have jurisdiction over the crime of TIP as a transnational organised crime in the following cases. First, this crime must have been committed in that country's territory in line with the principle of territorial jurisdiction. Or, second, this crime must have been committed 'on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed'.<sup>873</sup>

However, limiting the jurisdiction over transnational organised crime in territorial and flag principle jurisdictions might be challenged on the basis that the transnational nature of organised crime makes it difficult to apply just the two kinds of jurisdiction, since transnational organised crime could occur in other states rather than the territorial or flag states, or it could involve criminal groups from other states.<sup>874</sup> Therefore, the UNCTOC recognises other kinds of jurisdiction (extra-territorial jurisdiction).<sup>875</sup> The first kind of jurisdiction is the passive personality principle; in this jurisdiction, states parties might exercise their jurisdiction where one of their nationals has been the victim of transnational

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<sup>870</sup> These jurisdictions and situations will be further discussed under this subsection.

<sup>871</sup> Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 652.

<sup>872</sup> Article 15(1) of the UNCTOC states that: '[e]ach State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when: (a) The offence is committed in the territory of that State Party; or (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed'; Obokata, *Transnational Organised Crime in International Law*, op cit, 47.

<sup>873</sup> The UNCTOC, Art. 15(1).

<sup>874</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 47.

<sup>875</sup> The UNCTOC, Art. 15(2); Obokata, *Transnational Organised Crime in International Law*, op cit, 47.



organised crime.<sup>876</sup> In applying the passive personality principle over TIP as a transnational organised crime, it can be said that states parties to the TIPP may exercise their jurisdiction if any of their nationals has been trafficked.

The second kind of jurisdiction is the active personality principle; in this jurisdiction, states parties may exercise their jurisdiction over their offending nationals when they commit transnational organised crime.<sup>877</sup> In applying the active personality principle over TIP as a transnational organised crime, it can be said that states parties of the TIPP may exercise their jurisdiction if any of their nationals have committed TIP as a transnational organised crime.

The third kind of jurisdiction is effects-based jurisdiction; in this jurisdiction, states parties may exercise their jurisdiction over transnational organised crime committed outside their territory in cases where this crime has an impact on these states.<sup>878</sup> In applying this jurisdiction over TIP as a transnational organised crime, it can be said that states parties to the TIPP may exercise their jurisdiction if the crime of TIP has been committed outside their territory and said crime has an impact on these states.

Most importantly, at this point it is necessary to ask whether universal jurisdiction might be exercised over organised crime. To answer this question, it is necessary to consider the reason for exercising universal jurisdiction. In this regard, it is understood that universal jurisdiction is exercised when a particular conduct needs to be suppressed by the international community as a part of its interest, thus permitting any country to exercise its legislation to punish a crime even if this country does not have any territorial or nationality jurisdiction over this crime. However, it can be argued that universal jurisdiction is considered to be criminal jurisdiction established on the nature of the crime. Therefore, it is not suitable for organised crime because the international community does not strictly consider organised crime generally to be a crime of concern in the sense of it having sufficient gravity. Nevertheless, opposing arguments also exist.<sup>879</sup>

It should be stressed that there are a number of reasons why universal jurisdiction should be exercised over organised crime. The first is to avoid leaving organised crime unpunished where states are unable or unwilling to tackle this crime, especially in the absence of an

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<sup>876</sup> The UNCTOC, Art. 15(2)(a); Obokata, *Transnational Organised Crime in International Law*, op cit, 47.

<sup>877</sup> The UNCTOC, Art. 15(2)(b); Obokata, *Transnational Organised Crime in International Law*, op cit, 47.

<sup>878</sup> The UNCTOC, Art. 15(2)(c); Obokata, *Transnational Organised Crime in International Law*, op cit, 47-48.

<sup>879</sup> In this regard, it has been argued that the nature of the crime is not the only element that justifies the exercise of universal jurisdiction. Obokata, *Transnational Organised Crime in International Law*, op cit, 48-49.

international tribunal with jurisdiction over organised crime. The second reason is that there is a common interest in the international community and among countries to prevent and suppress organised crime, especially as a result of globalisation of economies and related travel and because any state is actually or potentially affected by it. This interest could be demonstrated by adopting and ratifying the UNCTOC.<sup>880</sup>

It is noteworthy that universal jurisdiction over foreign nationals in accordance with the UNCTOC is not considered mandatory. In particular, the Convention uses the word ‘may’ when it addresses the establishing of criminal jurisdiction over foreign nationals, which does not reflect mandatory obligations.<sup>881</sup> What is certain, however, is that universal jurisdiction is not denied by the UNCTOC. To be more specific, exercising universal jurisdiction over transnational organised crime has been explicitly authorised by the Convention. The UNCTOC states that ‘[w]ithout prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law’.<sup>882</sup> It is noticeable that universal jurisdiction has become a part of states’ domestic legislation in line with certain crimes. An example of this is the Austrian Crime Code, which considers TIP to be a crime that could be subjected to universal jurisdiction.<sup>883</sup>

It is noteworthy that, in accordance with the universality principle, universal jurisdiction could be established by the community of nations over a number of crimes of universal concern. In this regard, it can be said that TIP as a crime against humanity falls under the category of crimes of universal concern. Therefore, universal jurisdiction might be exercised over the crime of TIP.<sup>884</sup> However, this could be challenged on the basis that universal jurisdiction is considered the exception not the norm in the matter of jurisdiction, because territorial integrity and non-intervention are regarded as the applicable principles in the

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<sup>880</sup> *ibid.*, 50.

<sup>881</sup> Article 15(4) of the UNCTOC states that: ‘[e]ach State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her’; Obokata, *Transnational Organised Crime in International Law*, op cit, 52.

<sup>882</sup> The UNCTOC, Art. 15(6); Obokata, *Transnational Organised Crime in International Law*, op cit, 52.

<sup>883</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 53.

<sup>884</sup> Mohamed Y. 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’ (2005) 14 *Tulane Journal of International and Comparative Law* 357, 417. Trafficking in persons as a crime against humanity will be discussed in detail in chapter five entitled.

matter of jurisdiction, and therefore special justification is needed concerning transnational organised crime.<sup>885</sup>

#### **4.4.2 Individual Criminal Responsibility for Trafficking in Persons as a Transnational Organised Crime**

Individual criminal responsibility has been established in accordance with international criminal law. Precisely, this principle has been addressed in the Charter of the International Military Tribunal (IMT).<sup>886</sup> Since then, a number of statutes have addressed this principle,<sup>887</sup> in particular the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>888</sup> the International Criminal Tribunal for Rwanda (ICTR),<sup>889</sup> and the Rome Statute of the International Criminal Court (RSICC).<sup>890</sup>

It should be stressed that the principle of individual criminal responsibility considers any person liable to punishment when this person commits a crime under international law.<sup>891</sup> It is to be noted that the application of this principle requires the conduct to be a crime under international law. More specifically, the crime is considered to be a crime under international law if the international community is sufficiently shocked by the seriousness of this crime.<sup>892</sup> Moreover, the principle of individual criminal responsibility creates two outcomes. Firstly, all states may exercise universal jurisdiction over criminals who commit crimes under international law. Secondly, international tribunals may exercise jurisdiction over those criminals.<sup>893</sup>

Accordingly, it is possible to argue that transnational criminal law does not include organised crime as a crime under international law. Therefore, the principle of individual criminal responsibility cannot be applied to criminals who commit TIP as a transnational organised crime. Furthermore, the international tribunals cannot have jurisdiction over criminals who

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<sup>885</sup> The UNCTOC, Art. 4 ; Obokata, *Transnational Organised Crime in International Law*, op cit, 53.

<sup>886</sup> Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement") (entered into force 8 August 1945) 82 UNTS. 279. Art. 6; Obokata, *Transnational Organised Crime in International Law*, op cit, 94.

<sup>887</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 94.

<sup>888</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (entered into force 25 May 1993) UN Doc. S/RES/827, and amended by UN Doc. S/RES/1166, 13 May 1998, Art 7(1).

<sup>889</sup> Statute of the International Criminal Tribunal for Rwanda (entered into force 8 November 1994) UN Doc. S/RES/955, Art. 6(1).

<sup>890</sup> Rome Statute of the International Criminal Court (last amended 2010) adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (entered into force 1 July 2002) ISBN No. 92-9227-227-6, Art. 25(2).

<sup>891</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 94.

<sup>892</sup> *ibid*, 95. This aspect will be discussed in detail in chapter 5 (5.2).

<sup>893</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 95.

commit TIP as a transnational organised crime unless it is considered a crime against humanity.<sup>894</sup> Moreover, the establishing of criminal responsibility could be hindered nationally and internationally by a number of practices such as the granting of immunity and the mitigating of sentences; these practices are stipulated in several conventions.<sup>895</sup>

#### **4.5 Addressing Trafficking in Persons as a Transnational Organised Crime**

Addressing TIP as a transnational organised crime requires the implementation of a number of measures. Firstly, it is essential to recognise the problem of TIP and develop the necessary skills to investigate and prevent it.<sup>896</sup> Secondly, there is a need to enhance international cooperation in the fight against TIP.<sup>897</sup> In particular, TIP often occurs in more than one country. Therefore, to tackle this crime it is necessary to unify efforts among the countries where TIP takes place because this crime is like a chain that must be addressed as a whole in all the countries involved.<sup>898</sup>

In other words, it is not sufficient to address TIP only in the destination countries and ignore this issue in the origin and transit countries.<sup>899</sup> An example of this cooperation is the ‘European Union Joint Investigation Team’ which has been established to promote collaboration in efforts to tackle the crime of TIP. Precisely, a joint investigation between the United Kingdom (UK) police and the Romanian national police led to the discovery of trafficking in Roma children. This discovery was the result of a number of efforts. Firstly, the UK authorities investigated the illegal entry of Roma children into the UK in 2006. Secondly ‘Operation Golf’ was initiated to combat the increased number of thefts committed in the UK by Roma children in 2007. Thirdly, the Romanian national police investigated the disappearance of a number of Roma children from the town of Tandarei.<sup>900</sup>

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<sup>894</sup> *ibid*, 95-96.

<sup>895</sup> The UNCTOC, Art. 26(2-3); Rome Statute of the International Criminal Court, Art. 110(2); Obokata, *Transnational Organised Crime in International Law*, op cit, 98-99.

<sup>896</sup> Allum and Gilmour, op cit, 227.

<sup>897</sup> *ibid*, 227-228; Gavril Paraschiv, ‘Conceptualizing Transnational Organized Crime’ (2013) 8(2) *Economics, Management and Financial Markets* 173, 175.

<sup>898</sup> United Nations Office on Drugs and Crime (UNODC), ‘Global Report on Trafficking in Persons’ (2012) ISBN: 978-92-1-130309-4, at 90 <<http://www.refworld.org/docid/50c850312.html>> accessed 1 September 2015; Allum and Gilmour, op cit, 227-228; Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2012) 354-355.

<sup>899</sup> Allum and Gilmour, op cit, 227-228.

<sup>900</sup> *ibid*, 228.

The third measure is to tackle TIP as a business.<sup>901</sup> More specifically, TIP can be conducted like any business that is subject to supply and demand elements with the aim of generating profits.<sup>902</sup> Therefore, TIP might be addressed from a cost-benefit perspective by increasing the risks and costs of trafficking and reducing the profits derived from trafficking. This might be achieved by confiscating the profits and assets of the crime of TIP and compensating the trafficked victims.<sup>903</sup> In this regard, it should be stressed that the UNCTOC addresses the issues of confiscation and compensation. However, it subjects them to the domestic legal systems in the states parties.<sup>904</sup>

Accordingly, it can be understood that a holistic approach is required to address TIP as a transnational organised crime, which requires international legal cooperation. This approach should include a number of mechanisms. The first mechanism requires an international response to TIP as a transnational organised crime. The second mechanism requires regional responses to TIP as a transnational organised crime. The third mechanism requires states' cooperation to address TIP as a transnational organised crime. The fourth mechanism requires cooperation among international organisations to address TIP as a transnational organised crime.

#### **4.5.1 The International Responses to Address Trafficking in Persons as a Transnational Organised Crime**

There are two key international instruments for addressing TIP as a transnational organised crime. The first instrument is the UNCTOC. The second instrument is the TIPP. These two instruments and the relationship between them will be discussed in the following section.

##### **4.5.1.1 United Nations Convention against Transnational Organized Crime (UNCTOC)**

As a response to TIP, the UNCTOC has emerged as the first international legal instrument aiming to tackle transnational organised crimes.<sup>905</sup> In particular, the UNCTOC has increased the number of measures taken by states.<sup>906</sup> Additionally, this Convention tries to eliminate the

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<sup>901</sup> *ibid*, 229.

<sup>902</sup> Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 155.

<sup>903</sup> Article 4 of the TIPP states that: '[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered'; Allum and Gilmour, *op cit*, 229.

<sup>904</sup> The UNCTOC, Arts. 12, 14(2), 25(2).

<sup>905</sup> Jennifer L. Enck, 'The United Nations Convention Against Transnational Organized Crime: Is it all that it is Cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans' (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 370, 375.

<sup>906</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 74.

impediments to transnational cooperation.<sup>907</sup> It is noticeable that under this Convention states parties have an obligation to enact national legislation consistent with this Convention to prohibit and prosecute transnational organised crimes.<sup>908</sup> Moreover, the UNCTOC links TIP and transnational organised crimes.<sup>909</sup>

The application of the Convention requires three prerequisites. Firstly, the offence should have the aspect of transnationality. Secondly, there should be involvement by an organised criminal group.<sup>910</sup> Thirdly, the offence should be considered a serious crime.<sup>911</sup> Accordingly, it is noticeable that, as a result of the broad meaning of those prerequisites, states may use the Convention to tackle a variety of contemporary criminal activities such as TIP.<sup>912</sup>

It should be stressed that the implementation of the UNCTOC is subjected to monitoring. Precisely, in accordance with the UNCTOC, '[a] Conference of the Parties to the Convention', referred to hereinafter as the COP, has been established to review the implementation of the Convention.<sup>913</sup> The COP reviews the implementation of the Convention by setting questionnaires with the aim of collecting information on the implementation of the UNCTOC and its protocols. Subsequently, the COP analyses the information received and produces a report on this information. To a certain extent, this report is considered descriptive and it primarily lists the information recorded by states in their questionnaires rather than making recommendations about good practice.<sup>914</sup>

It is noteworthy that the role of the COP, in monitoring the implementation of the UNCTOC, has been challenged on the basis that the COP is considered a political body, which renders it reluctant to breach state sovereignty by exerting intense pressure on states in the matter of compliance with the UNCTOC. Another challenge to the role of the COP is that states parties do not cooperate adequately in their response to the questionnaires.<sup>915</sup>

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<sup>907</sup> United Nations Office on Drugs and Crime (UNODC), 'Toolkit to Combat Trafficking in Persons' (2008) 8.

<sup>908</sup> *ibid.*, 11.

<sup>909</sup> Winterdyk, Reichel, and Perrin, *op cit.*, 236.

<sup>910</sup> Article 2(a) of the UNCTOC defines an organized criminal group as follows 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.

<sup>911</sup> Article 2(b) of the UNCTOC defines serious crime as follows 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty'.

<sup>912</sup> Gallagher, *op cit.*, 74-75.

<sup>913</sup> The UNCTOC, Art. 32(1); Obokata, *Transnational Organised Crime in International Law*, *op cit.*, 208.

<sup>914</sup> Obokata, *Transnational Organised Crime in International Law*, *op cit.*, 208-209.

<sup>915</sup> *ibid.*, 209.

It might be argued that the UNCTOC is not fully achieving its intention, especially its main focus on tackling TIP, because this Convention is unable to accommodate the differences among states parties; these differences will affect international efforts to combat transnational organised crime, especially TIP. Accordingly, it is understood that the UNCTOC might achieve its aim of addressing TIP by adopting three strategies.<sup>916</sup> Firstly, states parties should adopt legislative and administrative measures in line with their domestic legal systems to fight against transnational organised crime. Furthermore, these states must fulfil their obligations by both legislating and enforcing the law.<sup>917</sup>

Secondly, the UNCTOC should adopt a system of punishment that takes into consideration the gravity of the crimes committed. Equally importantly, this system should increase the efficiency of law enforcement to the maximum and deter the perpetration of crimes. However, it is noticeable that the UNCTOC has not developed any kind of international punishment system.<sup>918</sup> Thirdly, the UNCTOC should adopt better protection for trafficked persons by increasing measures to protect victims. Nonetheless, it could be argued that the Convention in this regard depends on the single efforts of the states parties, ignoring the differences among these states.<sup>919</sup>

#### **4.5.1.2 Trafficking in Persons Protocol (TIPP)<sup>920</sup>**

The idea of the TIPP arose from Argentina's concerns about trafficking in minors and its frustration at the slow progress being made in attempts to address child pornography and prostitution in the negotiation progress in the additional Protocol of the Convention on the Rights of the Child.<sup>921</sup> It is noteworthy that Argentina's proposal was related to trafficking in women and children. However, it can be said that most states include all persons in the TIPP and do not limit their concerns to women and children. Nevertheless, women and children have been given particular attention in the matter of protection.<sup>922</sup>

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<sup>916</sup> Enck, *op cit*, 370-371.

<sup>917</sup> The UNCTOC, Art. 34(1); Enck, *op cit*, 390.

<sup>918</sup> The UNCTOC, Art. 11; Enck, *op cit*, 391.

<sup>919</sup> Enck, *op cit*, 392.

<sup>920</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

<sup>921</sup> Gallagher, *op cit*, 77.

<sup>922</sup> *ibid*, 78.

It is evident that the TIPP is consistent with the existing principles of international law and does not conflict with them. More specifically, the Protocol uses a savings clause which confirms that the rights, responsibilities, and obligations of individuals and states in accordance with international law will not be affected by the Protocol.<sup>923</sup> In particular, tackling TIP has a long history, and a number of international instruments have sought to deal with this problem.<sup>924</sup> Therefore, the TIPP should take into consideration those instruments in the fight against TIP and interact with them.<sup>925</sup>

The importance of this Protocol is that it is a tool used by the United Nations to highlight the problem of TIP.<sup>926</sup> Moreover, the TIPP is considered to be an important achievement in addressing all aspects of TIP globally.<sup>927</sup> Furthermore, the TIPP is considered to be the first instrument to apply ‘the three Ps’ approach in the fight against TIP.<sup>928</sup> Precisely, the first ‘P’ represents protection,<sup>929</sup> which aims to protect trafficked victims by assisting them. This assistance and protection allows them to stay in the receiving country. An example of this is the ‘T’ visa which is granted by the United States (US) to trafficked persons who want to stay in the US in exchange for information against their traffickers.<sup>930</sup> This visa achieves two goals. Firstly, it offers a provisional safe haven for trafficked persons. Secondly, it increases the efficiency of law enforcement in the fight against TIP by detecting, investigating and prosecuting the crime of TIP. However, this offer of the right to remain may cause a dilemma. On the one hand, illicit migration may result from this policy; on the other hand, if the receiving country repatriates the victims, it may place them in danger of retaliation by the traffickers. Nevertheless, this could be challenged on the basis that when the receiving state

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<sup>923</sup> The TIPP, Art. 14; UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 255; Gallagher, op cit, 87-88.

<sup>924</sup> The historical back ground of trafficking in persons and the international legal instruments which dealt with trafficking in persons have been discussed earlier in chapter two (2.3).

<sup>925</sup> The TIPP, Art. 14; UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 255.

<sup>926</sup> Lars Eggertsen, ‘Comparing U.S. Policy with Israel, Jordan, and Syria: Does Diplomacy Play a Role in Human Trafficking Policy in the Middle East?’ (2012) 2(15) *International Journal of Humanities and Social Science* 1, 2.

<sup>927</sup> Winterdyk, Reichel, and Perrin, op cit, 236; Carol S. Brusca, ‘Palermo Protocol: The First Ten Years after Adoption’ (2011) 2(3) *Global Security Studies* 8, 9.

<sup>928</sup> Winterdyk, Reichel, and Perrin, op cit, 236.; LeRoy G. Potts, ‘Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons’ (2003) 35(1) *The George Washington International Law Review* 227, 239; Myada O El-Sawi, ‘Beyond the “tiers” of Human Trafficking Victims: Islamic Law’s Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law’ (2011) 39(2) *Georgia Journal of International and Comparative Law* 391, 396.

<sup>929</sup> International Organization for Migration (IOM), ‘Handbook on Performance Indicators for Counter-Trafficking Projects’ (2008) ISBN 978-92-9068-440-4, at 5-6; Potts, op cit, 239-241.

<sup>930</sup> Potts, op cit, 239-241; Brusca, op cit, 16.



grants permission to trafficked victims to stay in its territory, this will legitimise their status and at the same time protect them from the traffickers' retaliation.<sup>931</sup>

It is noteworthy that the TIPP deals with the protection of trafficked victims by adopting a number of measures to protect the identity and privacy of trafficked victims by using confidential legal proceedings to the extent that they are compatible with domestic legislation. However, it could be argued that the confidentiality of legal proceedings may affect the defence's constitutional or other rights such as the right to confront witnesses and the right to the disclosure of information.<sup>932</sup>

The second 'P' represents prosecution,<sup>933</sup> which aims to prosecute traffickers by adopting all necessary measures to criminalise the crime of TIP. It is important for states parties to the TIPP to have anti-trafficking-in-persons legislation to prevent traffickers from finding any safe havens where TIP is not criminalised.<sup>934</sup>

The third 'P' represents prevention,<sup>935</sup> which aims to prevent TIP. This prevention requires cooperation among states parties to tackle TIP from the countries of origin through the transit countries, ending up in the destination countries.<sup>936</sup> It is evident that comprehensive strategies to prevent TIP in the states parties have been adopted in the TIPP. It is noticeable that the Protocol goes further than simply taking preventive measures against organised crime; it deals with TIP by adopting measures against TIP in accordance with states parties' obligations under this Protocol.<sup>937</sup> These measures have been stated in Article 9 of the Protocol.<sup>938</sup> However, this might be challenged on the basis that most of these measures do not require legislation. In particular, states parties should take some action to deal with each point of TIP. Therefore, these actions are not required to be specific about details, thus enabling them to adopt the most suitable measures.<sup>939</sup> Accordingly, states parties have a

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<sup>931</sup> Potts, *op cit*, 239-241.

<sup>932</sup> UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', *op cit*, at 283-284.

<sup>933</sup> IOM, 'Handbook on Performance Indicators for Counter-Trafficking Projects' (2008) ISBN 978-92-9068-440-4, at 6; Potts, *op cit*, 241.

<sup>934</sup> Potts, *op cit*, 241.

<sup>935</sup> IOM, 'Handbook on Performance Indicators for Counter-Trafficking Projects' (2008) ISBN 978-92-9068-440-4, at 5; Potts, *op cit*, 242.

<sup>936</sup> Potts, *op cit*, 242.

<sup>937</sup> The TIPP, Art. 9; UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', *op cit*, at 296-297.

<sup>938</sup> The TIPP, Art. 9. Examples of these measures are research, mass media campaigns, information, and economic and social initiatives to address TIP.

<sup>939</sup> The TIPP, Art. 9; UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', *op cit*, at 296-297.

degree of discretion in applying these measures. However, the Protocol does not specify what points or issues each state is free to decide upon.<sup>940</sup>

It is evident that preventing TIP, protecting trafficked persons, and promoting cooperation are the main purposes of this Protocol. Obviously, in line with those purposes particular attention has been given to women and children.<sup>941</sup> Interestingly, the definition of TIP stated in the TIPP is considered the first definition of TIP to have been agreed internationally.<sup>942</sup> More specifically, this definition aims to provide a consensus on the concept of TIP internationally.<sup>943</sup>

The implementation of the TIPP requires the involvement of transnationality and an organised criminal group committing the offences. However, this might be challenged on the basis that this involvement does not constantly apply in fact concerning human trafficking. In particular, the commission of the crime of TIP domestically in states parties does not require the involvement of transnationality and an organised criminal group because this Protocol protects victims regardless of the involvement of transnationality and an organised criminal group.<sup>944</sup>

Moreover, in accordance with the TIPP, states parties should adopt legislation and other measures to criminalise the commission of the crime of TIP intentionally.<sup>945</sup> Additionally, states parties should criminalise the act of attempting to commit TIP. However, not all states parties to this Protocol are applying the concept of ‘attempting’ widely in their criminal justice systems.<sup>946</sup> In particular, the purpose of the TIPP of subjecting the concept of the

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<sup>940</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 297.

<sup>941</sup> The TIPP, Art. 2; UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 257; United Nations General Assembly, ‘Transnational organized crime: resolution/ adopted by the General Assembly’ (1999) A/RES/53/111. Para. 10 <<http://www.refworld.org/docid/3b00f52b46.html>> accessed 1 September 2015.

<sup>942</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 267; Winterdyk, Reichel, and Perrin, op cit, 236; Allum and Gilmour, op cit, 217; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 7.

<sup>943</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 269.

<sup>944</sup> The UNCTOC, Arts. 2-3, 34(2); The TIPP, Art. 4; UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 257-259, 275-276.

<sup>945</sup> The TIPP, Art. 5(1); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 268.

<sup>946</sup> The TIPP, Art. 5(2)(a); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 271. This issue will be discussed in chapter six (6.4.1).

‘attempt’ to the legal systems in the states parties is creating a general obligation for these states to criminalise the attempt to commit the offence of TIP. Nevertheless, this is not fully mandatory for these states, because the Protocol uses the words ‘[s]ubject to the basic concepts of its legal system’. Accordingly, it can be said that if the application of the attempt is not consistent with the requirements of states parties’ basic systems, the states parties’ obligations to establish the ‘attempt’ as a criminal offence are not fully mandatory.<sup>947</sup>

Notably, the other measures that should be adopted by states parties to criminalise the crime of TIP require criminal legal bases in the states parties. However, this might be challenged on the basis that these measures are considered to be necessitated and additional to the presence of legislation. Legislation requires implementation; thus, the existence of legislation does not necessarily indicate the position on the ground.<sup>948</sup> In addition, it is the combined trafficking elements that need to be criminalised, rather than the individual elements of trafficking.<sup>949</sup> In other words, the existence of a component of each element of the crime of TIP is required.<sup>950</sup>

Equally importantly, in accordance with the TIPP states parties have an obligation to take all necessary measures to enable trafficked victims to present their views and concerns, taking into consideration the rights of the defence. It is understood that this presentation is different from asking trafficked victims to give testimony against their traffickers in the sense that providing evidence of guilt could be subjected to the confidentiality of legal proceedings.<sup>951</sup> Therefore, it can be said that such a presentation is important because it enables trafficked victims to express themselves.

Furthermore, it is clear that the views and concerns of the trafficked persons should be presented against their traffickers in accordance with Article 6(2) of the TIPP. In this regard, states parties are required to defer the deportation of trafficked victims when those victims are considered illegal migrants until they have presented their views and concerns.<sup>952</sup> It is

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<sup>947</sup> The TIPP, Art. 5(2)(a); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 271.

<sup>948</sup> UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 276.

<sup>949</sup> *ibid*, at 268.

<sup>950</sup> The TIPP, Art. 3(c); Gallagher, op cit, 31; Justin Healey (ed), *Human Trafficking and Slavery* (Spinney Press 2012) 13, 29; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 8.

<sup>951</sup> The TIPP, Art. 6(2); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 284.

<sup>952</sup> The TIPP, Art. 6(2); UNODC, ‘Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto’, op cit, at 286-287.

important to ensure that trafficked persons are not deported or repatriated until they have participated in the legal process against their traffickers.<sup>953</sup>

Notably, a list of support measures for trafficked persons is included in the TIPP.<sup>954</sup> This support for trafficked victims may have a positive impact because it encourages them to participate in investigations and prosecutions of their traffickers. However, this support should not be contingent upon the trafficked victims' cooperation in legal proceedings against their traffickers.<sup>955</sup> This is because trafficked victims may have reasons not to give evidence, such as fear of reprisals against family members.<sup>956</sup>

What is certain, however, is that, in the matter of the safety of the trafficked victims, the obligations of states parties in accordance with the TIPP is limited to ensuring the physical safety of those victims through all necessary measures. However, it could be argued that the obligations of states parties to assist and protect the trafficked victims in line with the UNCTOC exceed those required by the TIPP. To be more specific, according to the Convention, states parties 'shall take appropriate measures within [their] means to provide assistance and protection to victims'. In contrast, the obligations of states parties to the Protocol state that '[e]ach state party shall endeavour to provide for the physical safety of victims of trafficking in persons'. Nevertheless, this might be challenged on the basis that the obligations in the Protocol are considered more specific than those contained in the Convention.<sup>957</sup>

It is noteworthy that although the TIPP deals with the possibility of the trafficked persons obtaining compensation for having been trafficked, the source of the compensation is not specified by the Protocol.<sup>958</sup>

Indeed, the sharing of information among states parties is required in accordance with the TIPP. Furthermore, this process does not require legislative action. Accordingly, it can be

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<sup>953</sup> UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 311.

<sup>954</sup> In accordance with Article 6(3) of the TIPP, this list includes: '(a) Appropriate housing; (b) Counselling 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'.

<sup>955</sup> The TIPP, Art. 6(3); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 287-288.

<sup>956</sup> Louise I. Shelley, *Human Trafficking: a Global Perspective* (Cambridge University Press 2010) 110.

<sup>957</sup> The UNCTOC, Art. 25(1); The TIPP, Art. 6(5); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 285.

<sup>958</sup> The TIPP, Art. 6(6); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 286.

said that confidentiality rights could be affected by the sharing of information. However, this might be challenged on the basis that the obligations of states parties to share the information are subject to their domestic legislation and data protection and privacy rules. More specifically, the use of the received information should be in line with the restrictions imposed by the sending state. Critically, it is not easy to ensure this absolute confidentiality because in criminal cases the disclosure of this information could help the accused to prove his or her innocence, and such disclosure may be required in accordance with constitutional obligations. Nevertheless, the information disclosed should not be made public. In addition, sensitive information might be subject to prior consultation. Likewise, a proper balance is required between secrecy and disclosure of information.<sup>959</sup> Therefore, the timing of disclosure is important as premature disclosure may hinder the investigation.

It is notable that, in accordance with the TIPP, states parties must cooperate with entities such as NGOs, relevant organisations, and civil society organisations for the purpose of preventing TIP and assisting trafficked persons. These entities may be able to take legal action against traffickers on behalf of trafficked persons since those persons are likely to be too afraid to do so by themselves. Therefore, measures might be amended by states parties if necessary in order to provide these entities with the security and resources required for them to achieve their purposes,<sup>960</sup> including standing as private prosecutors.

#### **4.5.1.3 The Relationship between the UNCTOC and the TIPP**

The relationship between the UNCTOC and the TIPP is governed by a number of basic principles stated in both instruments. By way of illustration, a state should be a party to the UNCTOC if it wishes to be a party to the TIPP.<sup>961</sup> Furthermore, these two instruments should be interpreted jointly.<sup>962</sup> To be more specific, any interpretation of the Protocol must take the

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<sup>959</sup> The TIPP, Art. 10; UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 307,309.

<sup>960</sup> The TIPP, Arts. 6(3), 9(3); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 313.

<sup>961</sup> *ibid*, Arts. 1, 14(2); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 253-257; Gallagher, op cit, 73.

<sup>962</sup> The UNCTOC, Art. 37; The TIPP, Arts. 1, 14(2); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 253-257; Gallagher, op cit, 73.

UNCTOC into consideration.<sup>963</sup> Moreover, offences that are criminalised pursuant to the TIPP will be encompassed automatically by the scope of the Convention.<sup>964</sup>

Interestingly, two main elements should be taken into consideration in clarifying the relationship between the UNCTOC and the TIPP. The first element is the levels of obligation. It is notable that there are different levels of obligations for the states parties to the UNCTOC and the TIPP.<sup>965</sup> In particular, some provisions include mandatory obligations for states parties. By way of illustration, the Convention's use of the words 'state party shall adopt' reflects the mandatory nature of these obligations.<sup>966</sup> Another kind of obligation found in the Protocol is the obligation of states parties to make positive efforts. An example of this obligation is the use of the words 'state party shall endeavour'.<sup>967</sup> The final kind of obligations on the states parties is considered optional. This kind of obligation gives these states the choice of whether to comply with these optional obligations or not. It can be stated that the use of the words 'state party may consider the possibility of' is a good example of this kind of obligation.<sup>968</sup>

The second element is interpretative materials; it should be noted that the UNCTOC and the TIPP might be subject to a number of interpretative materials that analyse their provisions legally. The first material is the *Travaux Préparatoires* for the Organised Crime Convention and its Protocols, which is considered to be the official records of its negotiations process.<sup>969</sup> The second material is the Legislative Guide to the Convention and its Protocols, which has been issued by the United Nations Office for Drugs and Crime.<sup>970</sup> The third material is Article 31 of Vienna Convention on the Law of Treaties. This Article contains the general rule of interpretation for treaties, such as the interpretation of a treaty in good faith.<sup>971</sup>

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<sup>963</sup> The UNCTOC, Art. 37; The TIPP, Arts. 1, 14(2); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 253-257.

<sup>964</sup> The UNCTOC, Art. 37; The TIPP, Arts. 1, 14(2); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 253-257; Gallagher, op cit, 74.

<sup>965</sup> Gallagher, op cit, 72.

<sup>966</sup> The UNCTOC, Arts. 5, 6, 8, 15, 23; Gallagher, op cit, 72.

<sup>967</sup> The TIPP, Art. 6(5); Gallagher, op cit, 72.

<sup>968</sup> The UNCTOC, Art. 12(7); Gallagher, op cit, 72.

<sup>969</sup> United Nations Office on Drugs and Crime, 'Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (2006); Gallagher, op cit, 72.

<sup>970</sup> UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at; Gallagher, op cit, 72.

<sup>971</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31.

Accordingly, it should be stressed that the UNCTOC and its Protocol may not achieve its aim of tackling TIP adequately unless all nations support it and make efforts in this regard.<sup>972</sup> Therefore, even if only a small number of states fail to implement it, the Convention's aims may be frustrated.

#### **4.5.2 The Regional Responses to Address Trafficking in Persons as a Transnational Organised Crime**

In this subsection, the European Union's efforts to address TIP will be examined as an example of the regional responses to TIP by shedding light on the European Union's components and policies and the significant steps that have been taken to address TIP as a transnational organised crime. This section focuses on the European Union (EU) because of the notable efforts its members have made to address the crime of TIP. Furthermore, Jordan is not only regarded as a partner country to the EU,<sup>973</sup> but also has an 'advanced status' partnership in accordance with 'Second EU-Jordan European Neighbourhood Policy Action Plan'.<sup>974</sup> This partnership is important because it enables the Jordanian development goals to be achieved.<sup>975</sup> Notably, to a certain extent, the efforts to address TIP fall under these goals.

Bilateral and multilateral cooperation among countries plays an important role in addressing TIP.<sup>976</sup> This can be illustrated by the EU's efforts to address TIP. In particular, attempts to tackle TIP in the EU comprise three components. The first component concerns international cooperation in addressing TIP within the EU. The second component is about legal measures against TIP. The third component is about raising awareness, gathering information about TIP, and funding programmes with the aim of combating TIP. It is noteworthy that the EU policy of addressing TIP contains the three 'Ps' approach. The first 'P' is prevention; in this regard, the EU works with the resource countries, where the victims are trafficked, to prevent the crime of TIP. The second 'P' is protection; in this respect, the EU aims to protect trafficked victims by allowing them to stay in the EU area as a safe haven for them. The third

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<sup>972</sup> Enck, *op cit*, 393.

<sup>973</sup> European Commission, 'The Commission sets out cooperation priorities for the Eastern and the Southern Neighbourhood for coming years' (2014) IP/14/977, at 1-2; European Commission, 'Statement: EU and Jordan sign Memorandum on further cooperation' (2014) STATEMENT/14/316, at 1.

<sup>974</sup> European Commission, 'Programming of the European Neighbourhood Instrument (ENI) - 2014-2020: Single Support Framework for EU support to Jordan (2014-2017)' 2; Council of the European Union, 'Eleventh meeting of the EU-Jordan Association Council Statement by the European Union' (2014) ST 14134/14, Para 2.

<sup>975</sup> European Commission, 'Programming of the European Neighbourhood Instrument (ENI) - 2014-2020: Single Support Framework for EU support to Jordan (2014-2017)' 3.

<sup>976</sup> Potts, *op cit*, 247-248.

‘P’ is prosecution; in this regard, the EU works to criminalise the crime of TIP in the EU area.<sup>977</sup>

Additionally, significant steps have been adopted by the EU to address TIP. The first significant step was the adoption of the Maastricht Treaty.<sup>978</sup> In accordance with this treaty, a number of efforts related to TIP have been adopted.<sup>979</sup> More specifically, the Maastricht Treaty is the legal basis for the Convention on the Establishment of the European Police Office, which will be referred to hereinafter as the Europol Convention.<sup>980</sup> The Europol Convention plays a significant role in addressing TIP. Precisely, it highlights the important role of the European Police Office (Europol) in combating and preventing TIP.<sup>981</sup> Europol should cooperate with states parties to the Treaty on EU to improve efforts to combat and prevent serious international crime, such as the crime of TIP, from being committed by structured, organised criminal groups.<sup>982</sup>

Another effort to address TIP in the EU can be illustrated by the adoption of the Resolution on Trafficking in Human Beings by the European Parliament.<sup>983</sup> The resolution is important because it asserts that TIP is a serious violation of human rights, and there is an urgent need for more criminal law measures. Furthermore, in line with this resolution trafficked persons are considered to be victims. Therefore, member states of the European Parliament are required to take all necessary measures to protect the dignity and safety of trafficked persons, allowing them to stay in their territories and providing them with legal and social support and the necessary protection.<sup>984</sup>

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<sup>977</sup> Steward Harrison Oppong, ‘Human Trafficking Through Organized Crime’, (2012) Vol. 2 No. 20 International Journal of Humanities and Social Science 37, 42.

<sup>978</sup> Treaty on European Union (Maastricht Treaty)(entered into force 1 November 1993) Official Journal of the European Union C 191/1 Official Journal of the European Communities C 325/5; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 87.

<sup>979</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 87.

<sup>980</sup> Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) Official Journal C 316, 27/11/1995 P. 0002 – 0032; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 87.

<sup>981</sup> Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) Art. 2(1); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 88.

<sup>982</sup> Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) Art. 2(1).

<sup>983</sup> Resolution on trafficking in human beings, Official Journal C 032 , 05/02/1996 P. 0088; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 88.

<sup>984</sup> Resolution on trafficking in human beings, Official Journal C 032 , 05/02/1996 P. 0088; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 89.



Furthermore, the adoption of the ‘Daphne Initiative’ is considered to be another significant effort to address TIP by the European Parliament.<sup>985</sup> Precisely, in line with this initiative a number of measures to address TIP have been adopted.<sup>986</sup> These measures have been overviewed by the European Commission.<sup>987</sup>

Another effort to address TIP in the European Union is the European Commission’s adoption of the ‘Communication from the Commission to the Council and the European Parliament on Trafficking in Women for the Purpose of Sexual Exploitation’.<sup>988</sup> This document recognises TIP as a human rights issue in the same way that the Resolution of the European Parliament did. Additionally, this document highlights the need to promote policies and action plans against TIP.<sup>989</sup>

Another significant effort to address TIP in the EU can be demonstrated by the adoption of the ‘Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation’.<sup>990</sup> In line with this declaration, various measures nationally and regionally need to be taken to address TIP. The first measure is cooperation to prevent, prosecute and investigate TIP. The second measure is the facilitation of communication. The third measure is to assist trafficked victims.<sup>991</sup>

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<sup>985</sup> The Daphne Initiative: Measures for Combating Violence against Children, Young Persons and Women, Call for Proposals, Official Journal of the European Union C 136/14 (1/5/97), cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 91.

<sup>986</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 91.

<sup>987</sup> European Commission, ‘Daphne: External Evaluators’ report on the 1999 Initiative’ (2001) Daphne 1999 ex-post evaluation, at 3. In this regard, it has been stated that ‘[t]he 1999 Daphne Initiative has co-financed 53 projects: 19 addressed the issues of violence relating to both women and children; 17 dealt with violence, and sexual abuse and exploitation of children; and 17 projects focused on violence and sexual exploitation of women. The rich diversity of these projects embraced activities across the 15 Member States and beyond. Areas of activities are grouped in the following categories: - research and studies: 12 projects; research and educational material: 3 projects; training and training packages: 14 projects; networking and information sharing: 7 projects; information and awareness raising campaigns: 12 projects and operational models and programming aids: 5 projects’.

<sup>988</sup> Commission of the European Communities, ‘Communication from the Commission to the Council and the European Parliament: On Trafficking in Women for the Purpose of Sexual Exploitation’ (1996) COM (96) 567 final; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 89.

<sup>989</sup> Commission of the European Communities, ‘Communication from the Commission to the Council and the European Parliament: On Trafficking in Women for the Purpose of Sexual Exploitation’ (1996) COM (96) 567 final, at 3, 6; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 89.

<sup>990</sup> The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation (26/4/97), cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 89.

<sup>991</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 89.

Another significant effort to address TIP in the EU can be illustrated by the adoption of two joint actions. The first joint action is ‘the Joint Action of 29 November 1996’.<sup>992</sup> This joint action has been referred to as the ‘STOP Programme’. This programme started in 1996 and finished in 2000. This programme was significant because it aimed to create a framework to address TIP. This framework provided training and meetings for officials, the judiciary and civil servants; research was conducted and information on TIP was disseminated and exchanged.<sup>993</sup>

The second joint action is the ‘Joint Action of 24 February 1997’. This joint action is important because it requires member states to the Maastricht Treaty to make TIP for the purpose of sexual exploitation a criminal offence. Along with this, member states are required to enhance enforcement actions against TIP.<sup>994</sup>

In light of the first step to addressing TIP in the EU, the EU approach aimed to enhance cooperation among member states in accordance with their judicial authorities and law enforcement.<sup>995</sup>

The second significant step to addressing TIP in the EU was the adoption of the Treaty of Amsterdam.<sup>996</sup> This treaty plays an important role in addressing TIP by approximating member states’ legislation.<sup>997</sup> This important role can be illustrated by the adoption of the ‘Council Framework Decision on combating trafficking in human beings’.<sup>998</sup> This framework decision is considered important for the following reasons. Firstly, in accordance with this framework decision, it was recognised that functional cooperation among member states in the EU to address TIP was inadequate because those states have different legislation in practice.<sup>999</sup> Secondly, this framework decision has required member states to reassess their

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<sup>992</sup> Joint action 96/700/JHA, of 29 November 1996, adopted by the Council pursuant to Article K.3 of the Treaty on European Union, establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children (Official Journal L 322, 12.12.1996); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 90.

<sup>993</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 90-91.

<sup>994</sup> Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (Official Journal L 63 of 04.03.1997); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 91.

<sup>995</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 92.

<sup>996</sup> Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts (entered into force 1 May 1999); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 93.

<sup>997</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 93.

<sup>998</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 93.

<sup>999</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 93.

level of cooperation in addressing TIP; they had previously been reluctant to cooperate in this area as it is regarded as having national security implications.<sup>1000</sup>

In light of the second step to address TIP in the EU, the STOP II Programme replaced the STOP Programme. The new programme has recognised the human rights aspect of TIP.<sup>1001</sup> However, a ‘framework programme on police and judicial cooperation in criminal matters’ (AGIS) replaced the STOP II Programme. The AGIS initiative financed ten projects related to TIP.<sup>1002</sup>

Another effort to address TIP in the EU in accordance with the second step can be illustrated by the extension of the Daphne Initiative.<sup>1003</sup> This Initiative funded three projects related to trafficking in women and children.<sup>1004</sup> Moreover, these efforts to address TIP were followed by the establishment of an ‘Expert Group on Trafficking in Human Beings’ by the European Commission.<sup>1005</sup> This group plays an important role by advising the European Commission on action developed against TIP in the EU.<sup>1006</sup>

In light of the EU’s efforts to address TIP, it could be argued that although the European Parliament and the European Commission have stressed the importance of the integration of the human rights of trafficked persons in the EU policy on TIP, those rights are not fully protected in practice.<sup>1007</sup> More specifically, in accordance with the ‘Council Framework

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<sup>1000</sup> *ibid*, 93.

<sup>1001</sup> Official Journal of the European Communities, ‘Council Decision of 28 June 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for persons responsible for combating trade in human beings and the sexual exploitation of children (Stop II): (2001/514/JHA)’ (2001) L 186/7; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 95.

<sup>1002</sup> Official Journal of the European Communities, ‘Council Decision of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS): (2002/630/JHA)’ (2002) L 203/5; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 95.

<sup>1003</sup> Decision No. 293/2000/EC of the European Parliament and of the Council of January 24 2000 adopting a programme of Community action (the Daphne programme)(2000 to 2003) on preventive measures to fight violence against children, young persons and women, Official Journal of the European Union L34/1 (9/2/00), cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 96; Decision No 803/2004/EC of the European Parliament and of the Council of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), Official Journal of the European Union L 143/1 (30/4/04), cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 96.

<sup>1004</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 96.

<sup>1005</sup> The Commission of the European Communities, ‘Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group to be known as the “Experts Group on Trafficking in Human Beings”’ (2003/209/EC) Official Journal L 079 , 26/03/2003 P. 0025 – 0027; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 96.

<sup>1006</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 96.

<sup>1007</sup> *ibid*, 100.

Decision on Standing of Victims in Criminal Proceedings’,<sup>1008</sup> member states are obliged to provide protection to trafficked persons who take part in criminal proceedings against their traffickers. However, this might be challenged on the basis that this framework decision does not oblige those states to provide broader protection to trafficked persons outside of these criminal proceedings.<sup>1009</sup>

However, it can be said that, to a certain extent, the EU’s efforts in addressing TIP comply with the purposes of the UNCTOC and the TIPP.<sup>1010</sup> This can be illustrated by the comprehensive approach adopted in the EU to address the crime of TIP. This approach includes international cooperation, legal measures, raising awareness, gathering information, and funding programmes aimed at combating TIP.

Interestingly, another example of the regional responses to the need to address TIP as a transnational organised crime is the manner in which this crime has been addressed in the Arab world. It is noteworthy that the Arab Charter on Human Rights<sup>1011</sup> prohibits TIP. More specifically, the Charter not only prohibits the forms of TIP stated in the TIPP, such as forced labour, the prostitution of others, and sexual exploitation,<sup>1012</sup> but also prohibits other forms of TIP,<sup>1013</sup> such as ‘trafficking in human organs’<sup>1014</sup> and ‘the exploitation of children in armed conflict’.<sup>1015</sup> It is to be noted that a distinction between TIP and slavery has been made in the Charter. However, the Charter prohibits both practices.<sup>1016</sup> In particular, the ownership and control are the main elements governing the distinction between TIP and slavery. In other words, a trafficked victim may be under a trafficker’s control but not in a trafficker’s ownership. Therefore, it can be said that where there is control over a person, there is a situation of TIP, and where there is ownership of a person there is a slavery situation.<sup>1017</sup>

Accordingly, it should be noted that although the Arab Charter on Human Rights prohibits TIP, it does not address the issue of the protection of trafficked victims explicitly. However,

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<sup>1008</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 100.

<sup>1009</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 100.

<sup>1010</sup> The UNCTOC, Art. 1; The TIPP, Art 2.

<sup>1011</sup> League of Arab States, Arab Charter on Human Rights (entered into force 15 March 2008).

<sup>1012</sup> The TIPP, Art. 3(a); League of Arab States, Arab Charter on Human Rights (entered into force 15 March 2008) Arts, 9-10.

<sup>1013</sup> Mohamed Y. Mattar, ‘Human Rights Legislation in the Arab World: The Case of Human Trafficking (Successes and Failures in International Human Trafficking Law)’ (2011) 33(1) Michigan Journal of International Law 101, 110.

<sup>1014</sup> League of Arab States, Arab Charter on Human Rights, Art, 9.

<sup>1015</sup> *ibid*, Art, 10.

<sup>1016</sup> *ibid*, Art, 10(1); Mattar, ‘Human Rights Legislation in the Arab World’, op cit, 109.

<sup>1017</sup> Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 17-18; Mattar, ‘Human Rights Legislation in the Arab World’, op cit, 109.

in this regard, it can be said that this protection might be inferred implicitly from Article 43 of the Charter, which ensures the importance of the rights protected by the international human rights instrument. Therefore, the rights stated in the TIPP regarding the protection of trafficked victims might be applied for states parties to the Charter that are also states parties to the Protocol.<sup>1018</sup> An example of this is the Syrian Legislative Decree, which states that, ‘in all cases where the law is silent, and there is no explicit provision therein, the relevant substantive rules embodied in international laws and conventions in force for Syria shall apply’.<sup>1019</sup> Consequently, trafficked victims can benefit from the rights stated in the TIPP, regardless of whether these rights have been stipulated in the Syrian law or not, since Syria is a state party to the Protocol.<sup>1020</sup>

#### **4.5.3 The Obligations of States to Address Trafficking in Persons as a Transnational Organised Crime in Accordance with International Law**

This subsection details the specific obligations imposed on states to address TIP as a transnational organised crime. It then emphasises the significant role played by the US in addressing TIP.

Certain legal obligations are imposed on states irrespective of whether they are origin, transit, or destination states in relation to TIP.<sup>1021</sup> The first obligation imposed upon states in relation to TIP is to prohibit TIP. In particular, states are obliged to prohibit TIP in their national legislation in accordance with international human rights law as a result of the prohibition of TIP explicitly in a number of human rights instruments.<sup>1022</sup> However, whether obligations accepted internationally by states automatically become part of the national legal order depends on whether the state adheres to *monism* or *dualism*.<sup>1023</sup>

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<sup>1018</sup> Mattar, ‘Human Rights Legislation in the Arab World’, op cit, 110. It should be stressed that the issue of the protection of victims of trafficking in persons has been addressed in Part II of the TIPP in Arts 6-8.

<sup>1019</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, cited in Mattar, ‘Human Rights Legislation in the Arab World’, op cit, 111.

<sup>1020</sup> Mattar, ‘Human Rights Legislation in the Arab World’, op cit, 111.

<sup>1021</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 147.

<sup>1022</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271, Arts. 1-4; Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) UNTS, vol. 1249, p. 13., Arts. 6, 12; Convention on the Rights of the Child (entered into force 2 September 1990) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) Art. 35; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (entered into force 18 January 2002) Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, Arts. 1, 3; Charter of Fundamental Rights of the European Union (entered into force 1 December 2009) Official Journal of the European Union C 364/1, Art. 5(3); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 148.

<sup>1023</sup> The issue of *monism* and *dualism* will be further discussed in chapter six (6.2.6).

The second obligation imposed on states in relation to TIP is to investigate, prosecute and penalise TIP. It is noteworthy that the obligation of states to investigate and prosecute TIP requires the establishment of criminal jurisdiction over the crime of TIP.<sup>1024</sup>

The third obligation imposed upon states in relation to TIP is to protect trafficked victims.<sup>1025</sup> This obligation has been affirmed in various human rights instruments.<sup>1026</sup> The protection of trafficked victims may take a number of forms. An example of this is the application of the principle of *non-refoulement* under refugee law to trafficked victims. This principle might be applied when the states of origin of trafficked persons are unable or unwilling to protect them or when trafficked persons are subjected to degrading or inhuman treatment, or to torture when those victims return to their states of origin. It is noteworthy that the principle of *non-refoulement* might be secured by giving trafficked victims permission to stay in the destination states temporarily, as long as the threat in the home state persists, or permanently.<sup>1027</sup>

Another example of the obligation imposed on states in relation to protecting trafficked victims is the securing of voluntary repatriation rights of trafficked victims who want to return to their states. In this case, the states of destination and the states of origin have legal obligations to trafficked victims. Precisely, the states of destination should facilitate this voluntary return and the states of origin should not refuse to receive trafficked victims who return voluntarily. In addition to this, the states of origin should provide those victims with all the support they need and protect them from any kind of retaliation by the traffickers.<sup>1028</sup>

Giving trafficked victims the right to participate in the processes against their traffickers is considered to be another obligation imposed upon states in relation to protecting trafficked

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<sup>1024</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 150-151.

<sup>1025</sup> *ibid*, 153.

<sup>1026</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271, Arts. 16, 17, 19; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (entered into force 18 January 2002) Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, Arts. 8-10; Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 1 February 2008) ETS 197, 16.V.2005, Arts. 10-17; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 153.

<sup>1027</sup> The TIP, Art. 14(1); Convention relating to the Status of Refugees (entered into force 1 December 2009) 189 UNTS 150; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 155-156.

<sup>1028</sup> The TIP, Art. 8; International Covenant on Civil and Political Rights (entered into force 23 March 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171, Art.12; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 157-158.

victims.<sup>1029</sup> In particular, allowing trafficked victims to participate in these processes permits their voices to be heard and it has a therapeutic value by helping them to deal with their trauma and anger effectively.<sup>1030</sup>

States have other obligations to protect trafficked victims. The first obligation is to secure the health of trafficked victims by securing their equal access to health facilities.<sup>1031</sup> The second obligation is to secure their access to consular assistance.<sup>1032</sup> The third obligation is to secure compensation for trafficked victims.<sup>1033</sup> In this regard, it is important to note that this obligation is imposed mainly on states of origin as a result of their failure to protect trafficked victims by preventing TIP. However, it is evident that if states of transit or destination fail to protect trafficked victims, this duty of compensation may be imposed on them.<sup>1034</sup>

It is noteworthy that promoting the prevention of indirect crime at the national level is one of the main aims of Transnational Criminal Law. In this regard, the UNCTOC and the TIPP require states parties to outlaw a number of practices associated with organised crime. The Protocol, in this sense, addresses the crime of TIP when it is committed intentionally.<sup>1035</sup> However, it could be argued that although it is a significant step to oblige states parties to address organised crime and related acts in accordance with their national legislation, two problems arise from this. The first problem is that national legislation defines crime in line with its social, political, and cultural traditions. Therefore, certain acts may be considered crimes in accordance with some states parties' jurisdiction but not all of them. By way of illustration, standards of *mens rea* may vary.<sup>1036</sup> The second problem is that there are

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<sup>1029</sup> The TIPP, Art. 6(2)(b); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 158.

<sup>1030</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 158; Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (Oxford University Press 1995) 19.

<sup>1031</sup> The TIPP, Art. 6(3)(c); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 158.

<sup>1032</sup> The TIPP, Art. 6(3)(b); See also Vienna Convention on Consular Relations (entered into force 19 March 1967) 596 UNTS 261. This Convention is mainly about the consular; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 159.

<sup>1033</sup> The TIPP, Art. 6(6); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 160.

<sup>1034</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 26, The right to seek just and adequate reparation or satisfaction (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 153 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 215 (2003) at 2; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 160.

<sup>1035</sup> The UNCTOC, Art. 5(1); The TIPP, Art. 5(1); UNODC, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto', op cit, at 276; Obokata, *Transnational Organised Crime in International Law*, op cit, 40.

<sup>1036</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 44.

different levels of punishment internationally. In particular, criminals may be punished more severely in some countries than in others.<sup>1037</sup>

An interesting example of a state's effort to address TIP as a transnational organised crime is provided by the US.<sup>1038</sup> The US has played a significant role in addressing TIP internationally by issuing the Trafficking in Persons Reports.<sup>1039</sup> The Trafficking in Persons Report was introduced in 2001.<sup>1040</sup> It contains information about TIP collected from US embassies worldwide, international organisations, and NGOs.<sup>1041</sup>

It is noticeable that the US Trafficking in Persons Report characterises countries in accordance with their efforts to address TIP.<sup>1042</sup> In other words, in this report, the US Department of State measures how countries respond to TIP annually.<sup>1043</sup> Furthermore, in line with this report, countries are categorised into origin, transit, or destination countries.<sup>1044</sup> Moreover, in accordance with this report there are three tiers<sup>1045</sup> for measuring the compliance of states with the minimum standards of the Victims of Trafficking and Violence Protection Act of 2000 (TVPA);<sup>1046</sup> this Act plays a significant role in the fight against the crime of TIP by working on preventing and eliminating this crime as well as protecting trafficked persons.<sup>1047</sup> In particular, Tier 1 contains the countries that are fully compliant with

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<sup>1037</sup> *ibid*, 44-45.

<sup>1038</sup> Enck, *op cit*, 391.

<sup>1039</sup> Kathryn Cullen-DuPont, *Human Trafficking* (Infobase Publishing 2009) 58.

<sup>1040</sup> Winterdyk, Reichel, and Perrin, *op cit*, 239; Eggertsen, *op cit*, 2.

<sup>1041</sup> Winterdyk, Reichel, and Perrin, *op cit*, 239; Dianne Scullion, 'Assessing the Extent of Human Trafficking: Inherent Difficulties and Gradual Progress' (2015) 3(1) *Social Inclusion* 1, 2.

<sup>1042</sup> *ibid*, 239; Frances P. Bernat and Tatyana Zhilina, 'Human Trafficking: The Local Becomes Global' (2010) 20(1-2) *Women & Criminal Justice* 2, 2; El-Sawi, *op cit*, 397.

<sup>1043</sup> Enck, *op cit*, at 391; Bernat and Zhilina, *op cit*, 5; El-Sawi, *op cit*, 397.

<sup>1044</sup> Bernat and Zhilina, *op cit*, 5.

<sup>1045</sup> Cullen-DuPont, *op cit*, 59; Winterdyk, Reichel, and Perrin, *op cit*, 240-241; Maggy Lee, *Trafficking and Global Crime Control* (SAGE 2011) 92; Bernat and Zhilina, *op cit*, 5.

<sup>1046</sup> United States of America: Victims of Trafficking and Violence Protection Act of 2000 (28 October 2000) Public Law 106-386 [H.R. 3244] at Sec. 108. It states that '(a) MINIMUM STANDARDS. For purposes of this division, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following: (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault. (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense. (4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons'; Maggy Lee, *Trafficking and Global Crime Control* (SAGE 2011) 92; Bernat and Zhilina, *op cit*, 5.

<sup>1047</sup> Lindsey King, 'International Law and Human Trafficking' (2013) *Topical Research Digest: Human Rights and Human Trafficking* 88, 89; Yuka K. Doherty and Angelique Harris, 'The Social Construction of Trafficked



the minimum standards of TVPA.<sup>1048</sup> Tier 2 contains the countries that are not fully compliant with the minimum standards of the Act but are trying to do so or are making significant progress in this regard.<sup>1049</sup> The Tier 2 Watch List contains a number of countries that have been given an opportunity to meet the minimum standards of TVPA before being subjected to sanctions.<sup>1050</sup> Tier 3 contains the countries that are neither fully compliant with the minimum standards of TVPA nor making significant efforts in this regard.<sup>1051</sup>

In accordance with this report, countries which do not comply with the US minimum standards in addressing TIP may be subjected to diplomatic pressure and economic sanctions.<sup>1052</sup> However, it could be argued that the imposition of diplomatic pressure and economic sanctions on the countries that do not comply with the US standards in addressing TIP may affect the countering of TIP internationally because these countries will seek to meet the US standards in the first place rather than addressing TIP appropriately.<sup>1053</sup> In other words, the US is seen as a ‘global sheriff’. Therefore, countries are seeking to comply with the US standards in addressing the crime of TIP to avoid diplomatic pressure and economic sanctions from the US.<sup>1054</sup>

Accordingly, it should be stressed that there are a number of criticisms of the Trafficking in Persons Report. Firstly, the Trafficking in Persons Report is considered a limited tool.<sup>1055</sup> Precisely, the contribution of this report to addressing TIP is limited to two aspects. The first aspect is to enable the international community to better understand the issues related to TIP. The second aspect is to enhance the current responses to TIP.<sup>1056</sup>

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Persons: An Analysis of the UN Protocol and the TVPA Definitions’ (2015) 26(1) *Journal of Progressive Human Services* 22, 24.

<sup>1048</sup> United States Department of State (USDS), ‘Trafficking in Persons Report (TIPR)’ (2002) 9, (2003) 15, (2004) 28, (2005) 28, (2006) 29, (2007) 27, (2008) 35, (2009) 49, (2010) 47, (2011) 13, (2012) 40, (2013) 44, (2014) 43, (2015) 47; Bernat and Zhilina, *op cit*, 5; Eggertsen, *op cit*, 2.

<sup>1049</sup> USDS, ‘TIPR’ (2002) 9-10, (2003) 15, (2004) 28, (2005) 28, (2006) 29, (2007) 27, (2008) 35, (2009) 49, (2010) 47, (2011) 13, (2012) 40, (2013) 44, (2014) 43, (2015) 47; Bernat and Zhilina, *op cit*, 5; Eggertsen, *op cit*, 2.

<sup>1050</sup> USDS, ‘TIPR’ (2004) 28, (2005) 28, (2006) 29, (2007) 27, (2008) 35, (2009) 49, (2010) 47, (2011) 13-14, (2013) 44, 46, (2014) 43, (2015) 47; Eggertsen, *op cit*, 2.

<sup>1051</sup> USDS, ‘TIPR’ (2002) 10, (2003) 15, (2004) 28, (2005) 28, (2006) 29, (2007) 27, (2008) 35, (2009) 49, (2010) 47, (2011) 14, (2012) 43, (2013) 46, (2014) 43, (2015) 47; Bernat and Zhilina, *op cit*, 5; Eggertsen, *op cit*, 2.

<sup>1052</sup> United States of America: Victims of Trafficking and Violence Protection Act of 2000 (28 October 2000) Public Law 106-386 [H.R. 3244] at Sec. 110(a); Winterdyk, Reichel, and Perrin, *op cit*, 239, 241; Cullen-DuPont, *op cit*, 59; Enck, *op cit*, 391.

<sup>1053</sup> Winterdyk, Reichel, and Perrin, *op cit*, 252.

<sup>1054</sup> *ibid*, 241.

<sup>1055</sup> *ibid*, 252; Eggertsen, *op cit*, 2.

<sup>1056</sup> Winterdyk, Reichel, and Perrin, *op cit*, 252.

The second criticism is that the US, in accordance with this report, was not allocated to any tier until 2010. However, between 2007 and 2009, the Trafficking in Persons Report started to assess US efforts to address TIP but without ranking the US under any tier,<sup>1057</sup> while from 2010 until 2015 the US was allocated to Tier 1.<sup>1058</sup>

The third criticism is the shortage of analysis and evidence in this report. The fourth criticism is that the processes of data collection are considered insufficient and arbitrary.<sup>1059</sup> The fifth criticism is the lack of transparency in this report. In short, this report is open to the suspicion of having been affected by political interests.<sup>1060</sup>

However, it could be argued that despite the criticism of US efforts to address TIP, the sanctions imposed by the US on countries that do not comply with the minimum standards are regarded as a powerful means of increasing the determination of countries to address TIP.<sup>1061</sup>

The provision of anti-trafficking funds is considered another significant role that has been played by the US to address TIP internationally. More specifically, a number of anti-trafficking-in-persons programmes and projects have been funded by the US internationally. In this regard, it can be said that the significance of funding anti-trafficking initiatives is that the scope of this funding is considered to be wide, including a number of efforts and organisations aiming to address TIP. More specifically, 73 international projects were funded. The total funding for these projects was \$16.5 million.<sup>1062</sup>

Accordingly, it can be said that US efforts to address the crime of TIP are considered a good example of a national initiative seeking to address this crime.<sup>1063</sup>

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<sup>1057</sup> USDS, 'TIPR' (2007) 49, (2008) 51, (2009) 57; Cullen-DuPont, *op cit*, 58; Eggertsen, *op cit*, 2.

<sup>1058</sup> USDS, 'TIPR' (2010) 338, (2011) 372, (2012) 359, (2013) 381, (2014) 397, (2015) 352.

<sup>1059</sup> Winterdyk, Reichel, and Perrin, *op cit*, 241.

<sup>1060</sup> *ibid*, 241; Brusca, *op cit*, 17.

<sup>1061</sup> Cullen-DuPont, *op cit*, 60; Eggertsen, *op cit*, 2.

<sup>1062</sup> Cullen-DuPont, *op cit*, 61.

<sup>1063</sup> Jane Kim, 'Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute' (2011) Columbia Law School Gender and Sexuality Online (GSL Online), Accepted Paper 1, 2-3 <<http://ssrn.com/abstract=1779263>> accessed 1 September 2015.

#### 4.5.4 The Role of International Organisations in Addressing Trafficking in Persons as a Transnational Organised Crime

In this subsection, the role of international organisations in addressing TIP as a transnational organised crime will be examined by shedding light on the role of a number of organisations in the UN system.

International organisations play an important role in the fight against transnational organised crime.<sup>1064</sup> Although the UN Charter does not indicate transnational organised crime explicitly, its purpose could fit transnational organised crime. More specifically, Article 1 of the Charter deals with the UN purposes, and one of these purposes is ‘[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character’. Accordingly, addressing transnational organised crime might be categorised under this purpose as this crime, to a certain extent, has these characteristics.<sup>1065</sup>

Accordingly, a number of organisations in the UN system have played a significant role in addressing TIP.<sup>1066</sup> The first organisation is the United Nations Office on Drugs and Crime (UNODC).<sup>1067</sup> The UNODC was playing an important role in the fight against transnational organised crime even before the appearance of the UNCTOC.<sup>1068</sup> In 1999 the ‘Global Programme Against Trafficking in Human Beings’ was launched by the UNODC.<sup>1069</sup> This global programme is significant because it aims to reinforce efforts to combat TIP nationally and internationally.<sup>1070</sup>

The second organisation is the International Organisation for Migration (IOM).<sup>1071</sup> This organisation has played a significant role in addressing TIP since 1994.<sup>1072</sup> The IOM

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<sup>1064</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 106-107.

<sup>1065</sup> Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16, Art. 1(3); Obokata, *Transnational Organised Crime in International Law*, op cit, 107.

<sup>1066</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 104.

<sup>1067</sup> ‘UNODC is a global leader in the fight against illicit drugs and international crime’ <<http://www.unodc.org/unodc/about-unodc/index.html?ref=menutop>> accessed 1 September 2015; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 104.

<sup>1068</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 211.

<sup>1069</sup> ‘The Global Programme against Trafficking in Human Beings was designed by the Centre for International Crime Prevention (CICP), in collaboration with the United Nations Interregional Crime and Justice Research Institute (UNICRI), to assist Member States to combat the growing involvement of organized crime groups in what amounts to a new slave trade’ <<http://www.uncjin.org/CICP/Folder/traff.htm>> accessed 27 February 2015; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 104.

<sup>1070</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 104.

<sup>1071</sup> ‘IOM is the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental and non-governmental partners’ <<http://www.iom.int/cms/about-iom>> accessed 3 January 2014; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 107; Obokata, *Transnational Organised Crime in International Law*, op cit, 107.

considers TIP a human rights issue. Therefore, the focus of the IOM is not limited to the trafficking in persons' process but includes trafficked persons' human rights.<sup>1073</sup> However, it should be stressed that the IOM is mainly concerned with trafficking in migrants and protecting their rights when they are caught.<sup>1074</sup>

Furthermore, in its endeavour to address TIP, the IOM has released the 'Handbook on Performance Indicators for Counter-Trafficking Projects'.<sup>1075</sup> Notably, the protection of trafficked victims and the prevention and prosecution of TIP as part of the Counter-Trafficking Projects are measured by this handbook because these three practices are considered the best for countering the crime of TIP.<sup>1076</sup> More specifically, the difference between the IOM's approach to combating TIP and those of other existing instruments and/or organisations is that the IOM mainly focuses on the migration aspect.<sup>1077</sup>

The third organisation is the International Labour Organisation (ILO).<sup>1078</sup> The ILO has played a significant role in addressing TIP.<sup>1079</sup> In accordance with the ILO, TIP is considered a 'degrading misuse of human resources resulting in undignified and unproductive work'.<sup>1080</sup> It is noteworthy that the focus of the ILO in addressing TIP is on serious violations of human rights, such as forced and child labour, as well as migrant workers who have been abused.<sup>1081</sup>

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<sup>1072</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 107; Obokata, *Transnational Organised Crime in International Law*, op cit, 107.

<sup>1073</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 108.

<sup>1074</sup> International Organisation for Migration, 'Role of IOM with regard to trafficking in migrants and the safeguarding of migrants rights' (Resolution No 908 (LXIX) of 30 November 1994); Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 108.

<sup>1075</sup> IOM, 'Handbook on Performance Indicators for Counter-Trafficking Projects' (2008) ISBN 978-92-9068-440-4; Winterdyk, Reichel, and Perrin, op cit, 235.

<sup>1076</sup> IOM, 'Handbook on Performance Indicators for Counter-Trafficking Projects' (2008) ISBN 978-92-9068-440-4, at 1; Winterdyk, Reichel, and Perrin, op cit, 235-236.

<sup>1077</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 108; Obokata, *Transnational Organised Crime in International Law*, op cit, 222-223; International Organisation for Migration, 'Role of IOM with regard to trafficking in migrants and the safeguarding of migrants rights' (Resolution No 908 (LXIX) of 30 November 1994).

<sup>1078</sup> 'The main aims of the ILO are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues' <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>> accessed 1 September 2015; International Labour Organisation, *Unbearable to Human Hearts: Child Trafficking and Action to Eliminate It* (2002) vii, cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 111.

<sup>1079</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 107.

<sup>1080</sup> International Labour Organisation, *Unbearable to Human Hearts: Child Trafficking and Action to Eliminate It* (2002) vii, cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 111.

<sup>1081</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 112.

The fourth organisation is the International Criminal Police Organization (INTERPOL).<sup>1082</sup> This organisation has played a significant role in the application of the UNCTOC with regard to mutual assistance.<sup>1083</sup> In particular, in 1989 INTERPOL created the Organized Crime Branch as a result of the threat and growth of criminal organisations. The Organized Crime Branch launched a project called ‘Marco Polo’ in 1996. This project aimed to conduct a study about the involvement of organised criminal groups in TIP. This study has been used by INTERPOL to supply its member states with a better understanding of the relationship between TIP and organised criminal groups.<sup>1084</sup>

Another example of the significant role played by the UN in addressing TIP is the United Nations Inter-Agency Project on Trafficking of Human Beings in the Greater Mekong Sub-Region (UNIAP), which aims to prevent and suppress TIP.<sup>1085</sup> In brief, the activities of UNIAP in addressing TIP include three stages. The first stage focuses on small projects and networks that aim to protect people at risk of TIP. By way of illustration, more than 97 thousand children in Myanmar have been given vocational and educational training to protect them from TIP.<sup>1086</sup>

In the second stage, the ‘Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region’<sup>1087</sup> was developed by UNIAP, after which the UNIAP states parties signed this instrument.<sup>1088</sup> This memorandum of understanding is concerned with the suffering caused by TIP in the Greater Mekong Sub-region. Furthermore, it condemns the fact that some people, especially women and children, are subjected to TIP. Additionally, it recognises that there are certain reasons why people are vulnerable to exploitation through trafficking, such as poverty and inequalities. It also recognises the need

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<sup>1082</sup> ‘INTERPOL is the world’s largest international police organization’ <<http://www.interpol.int/About-INTERPOL/Overview>> accessed 1 September 2015; Obokata, *Transnational Organised Crime in International Law*, op cit, 217.

<sup>1083</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 217.

<sup>1084</sup> Bajrektarević, op cit, 58-59.

<sup>1085</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 105-107; Obokata, *Transnational Organised Crime in International Law*, op cit, 220.

<sup>1086</sup> Save the Children UK Southeast Asia & the Pacific Regional Office, First Progress Report to UNIAP/UNOPS (August 2002), cited in Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 106; Obokata, *Transnational Organised Crime in International Law*, op cit, 221.

<sup>1087</sup> Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (Adopted 29 November 2004) INT-2004-IA-93359; Obokata, *Transnational Organised Crime in International Law*, op cit, 221; Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 107. The Greater Mekong Sub-region contains the following countries ‘Cambodia, the People’s Republic of China (PRC, specifically Yunnan Province and Guangxi Zhuang Autonomous Region), Lao People’s Democratic Republic (Lao PDR), Myanmar, Thailand, and Viet Nam’ <<http://www.adb.org/countries/gms/main>> accessed 1 September 2015.

<sup>1088</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 221.

to adopt effective measures to secure justice by protecting trafficked victims and imposing proportionate punishments for the commission of the crime of TIP.<sup>1089</sup> Interestingly, this Memorandum of Understanding is not considered to be legally binding as it is not a source of law, just good practice. Therefore, it has been recognised by UNIAP states parties that additional efforts are required to enhance the fight against TIP.<sup>1090</sup>

Institutionalising and consolidating numerous initiatives were the aims of the third stage. An example of this is the ‘Strategic Information Response Network’, which has attempted to counter TIP by sharing information about trafficking among relevant actors.<sup>1091</sup>

Accordingly, it should be stressed that the role of UNIAP in addressing TIP is regarded as significant for two reasons. The first reason is that UNIAP is considered to be a project, not an agency. In particular, unlike the UN agencies, respective mandates do not limit and define UNIAP’s tasks.<sup>1092</sup> The second reason is that UNIAP might enhance a holistic approach to addressing TIP because it does not limit these efforts to one aspect.<sup>1093</sup> In other words, the UN agencies addressing TIP focus on one aspect. By way of illustration, the IOM focuses on the migration aspect of TIP.<sup>1094</sup> Meanwhile, the labour aspect is the main focus of the ILO in its attempts to address TIP.<sup>1095</sup> Finally, the UNODC focuses on the organised crime aspect of TIP.<sup>1096</sup>

It is noteworthy that the important role of UNIAP in addressing TIP may be hindered by the lack of funding required to implement the initiatives for countering TIP. Therefore, UNIAP seeks funds from a number of states. Nevertheless, this may politicise UNIAP and make it compliant with these states’ agendas. However, this political interference might be reduced

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<sup>1089</sup> Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (Adopted 29 November 2004) INT-2004-IA-93359.

<sup>1090</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 221.

<sup>1091</sup> United Nations Inter-Agency Project on Human Trafficking (UNIAP), ‘Introduction to Siren: Strategic Information Response Network’ (2007) GMS-01; Obokata, *Transnational Organised Crime in International Law*, op cit, 222.

<sup>1092</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 222.

<sup>1093</sup> *ibid*, 222-223.

<sup>1094</sup> *ibid*, 108; Obokata, *Transnational Organised Crime in International Law*, op cit, 222-223; International Organisation for Migration, Role of IOM with regard to trafficking in migrants and the safeguarding of migrants rights, Resolution No 908 (LXIX) of 30 November 1994.

<sup>1095</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 111-112; Obokata, *Transnational Organised Crime in International Law*, op cit, 223.

<sup>1096</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 222-223.

where the UN to provide financial assistance to the UNIAP rather than relying on states' voluntary contributions.<sup>1097</sup>

It is understood that the important role of international organisations in the fight against transnational organised crime requires the granting of immunity for these organisations and their personnel.<sup>1098</sup> This immunity has been addressed in a number of conventions such as 'the Convention on the Privileges and Immunities of the United Nations 1946',<sup>1099</sup> and 'the Convention on the Privileges and Immunities of the Specialized Agencies 1947'.<sup>1100</sup>

Here, it is necessary to ask what might happen were the international organisations' personnel, who have immunity, to commit transnational organised crime. To answer this question, it is necessary to consider the nature of this immunity. More specifically, it is evident that, in accordance with the Charter of the UN, international organisations' personnel have functional immunity.<sup>1101</sup> This means that this immunity will be waived by the Secretary General of the UN in the event of the commission of transnational organised crime when this immunity obstructs the course of justice.<sup>1102</sup> In this regard, it has been stated that 'United Nations personnel do not enjoy immunity from arrest or interrogation for alleged acts unrelated to their official duties which are unlawful in the Member State where they are committed, or alleged to have been committed'.<sup>1103</sup> Accordingly, when this immunity is waived, international organisations' personnel will be regarded as criminals who are subject to national tribunals and courts' jurisdiction.<sup>1104</sup>

In light of the role of international organisations in addressing TIP, it can be stated that those organisations have a wide scope of activities, enabling them to adopt a holistic approach in the fight against TIP. Furthermore, norms and standards related to TIP set by those international organisations are more acceptable to the international community because it is

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<sup>1097</sup> *ibid*, 222.

<sup>1098</sup> *ibid*, 106-108.

<sup>1099</sup> Convention on the Privileges and Immunities of the United Nations (entered into force 17 September 1946) 90 UNTS 327; Obokata, *Transnational Organised Crime in International Law*, *op cit*, 108.

<sup>1100</sup> Convention on the Privileges and Immunities of the Specialized Agencies (entered into force 2 December 1948) 33 UNTS 261; Obokata, *Transnational Organised Crime in International Law*, *op cit*, 108.

<sup>1101</sup> Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16, Art. 105(2); Tom Obokata, *Transnational Organised Crime in International Law* (HART Publishing 2010) 108.

<sup>1102</sup> Obokata, *Transnational Organised Crime in International Law*, *op cit*, 109.

<sup>1103</sup> The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat, A/CN.4/L.118 and Add.1 and 2 (1967), reprint in the Yearbook of the International Law Commission (1967), vol. II, 265, para 249, cited in Obokata, *Transnational Organised Crime in International Law*, *op cit*, 109.

<sup>1104</sup> Obokata, *Transnational Organised Crime in International Law*, *op cit*, 109.

easier to adopt those norms and standards after codifying them in treaties.<sup>1105</sup> However, the significant role of international organisations in addressing TIP might be challenged on the basis that the effectiveness of activities that are used to address TIP by these organisations differs from one organisation to another. Furthermore, to a certain extent, those organisations are competing rather than cooperating. By way of illustration, programmes have been implemented by the ILO and NGOs in some states without cooperation with the UN.<sup>1106</sup>

## **4.6 The Key Legal Challenges in Addressing Trafficking in Persons as a Transnational Organised Crime**

There are a number of key legal challenges in addressing TIP as a transnational organised crime. These challenges will be addressed in this section by shedding light on two main issues. The first issue is the key legal challenges facing efforts to address TIP as a transnational organised crime. The second issue is the operational challenges.

### **4.6.1 The Key Legal Challenges Facing the Addressing of Trafficking in Persons as a Transnational Organised Crime**

TIP is considered a complex crime<sup>1107</sup> as it takes place across borders and involves criminal groups who run these operations. Therefore, states should cooperate to tackle this transnational crime.<sup>1108</sup>

There are a number of key legal challenges in addressing TIP as a transnational organised crime. Firstly, TIP as a transnational organised crime may be subjected to prescription. In particular, it is not possible for law enforcement authorities to initiate prosecution after a certain period of time has passed since the commission of the crime. To a certain extent, the UNCTOC attempts to address the issue of the limitation period by obliging states parties to adopt domestic legislation stipulating a long limitation period for crimes covered by this Convention.<sup>1109</sup>

The second challenge facing the addressing of TIP as a transnational organised crime is the granting of immunity to diplomats and government officials when those persons become part

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<sup>1105</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, op cit, 116.

<sup>1106</sup> *ibid*, 117.

<sup>1107</sup> Friesendorf, op cit, 128-129.

<sup>1108</sup> United Nations Office on Drugs and Crime (UNODC), 'Toolkit to Combat Trafficking in Persons' (2nd edn 2008) ISBN 978-92-1-133789-1, Sales No. E.08.V.14, at 7; Friesendorf, op cit, 128-129.

<sup>1109</sup> The UNCTOC, Art. 11(5); Obokata, *Transnational Organised Crime in International Law*, op cit, 68.



of transnational organised crime. In this regard, a distinction between functional immunity and personal immunity is required. By way of explanation, unlike personal immunity, functional immunity is not regarded as a complex issue in the matter of the prosecution of transnational organised crime. To be more specific, the commission of transnational organised crime is considered ‘an act of private nature’ that is not subject to functional immunity.<sup>1110</sup> Personal immunity is more complex in the matter of fighting against transnational organised crime because it includes official and private acts. Therefore, if the person who has personal immunity has committed transnational organised crime, he/she will not be held legally liable for this crime.<sup>1111</sup>

It is significant that if personal immunity has been abused to commit transnational organised crime, a number of procedures could be followed to hold the abuser accountable. Firstly, the sending state could waive the immunity of the person committing transnational organised crime; hence, this person will be subject to the receiving state’s jurisdiction.<sup>1112</sup> However, this could be challenged on the basis that the waiver of the immunity is regarded as optional rather than mandatory for the sending state.<sup>1113</sup> Secondly, the receiving state does not have to accept the immunity when this immunity is not waived by the sending state willingly, if one of its immune personnel has committed transnational organised crime. In line with this, the sending state is obliged to recall this person or terminate his/her duties. Accordingly, if the sending state does not comply with its obligations, the recognition of personal immunity might be rejected by the receiving state.<sup>1114</sup>

The third challenge facing the addressing of TIP as a transnational organised crime is that developing states may be reluctant to address organised crime because, in doing so, a convenient source of income generated from this crime will be cut.<sup>1115</sup> In other words, in some countries experiencing problems with TIP there is evidence of governmental officials actively supporting TIP. For example, in Thailand, India, and Cambodia, officials were involved in TIP.<sup>1116</sup>

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<sup>1110</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 70.

<sup>1111</sup> *ibid*, 69-72.

<sup>1112</sup> Vienna Convention on Diplomatic Relations (entered into force 24 April 1964) 500 UNTS 95, Art. 32(1); Obokata, *Transnational Organised Crime in International Law*, op cit, 72.

<sup>1113</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 73.

<sup>1114</sup> Vienna Convention on Diplomatic Relations (entered into force 24 April 1964) 500 UNTS 95, Art. 9; Obokata, *Transnational Organised Crime in International Law*, op cit, 73.

<sup>1115</sup> Obokata, *Transnational Organised Crime in International Law*, op cit, 79.

<sup>1116</sup> Potts, op cit, 234.

The fourth challenge facing the addressing of TIP as a transnational organised crime is that TIP, in contrast with other transnational crimes, is treated with leniency. Specifically, convicted traffickers receive lenient punishments such as a short term of imprisonment or a small fine. It might be argued that there are two reasons for this leniency. Firstly, law enforcement officers do not deal with TIP seriously because they think that TIP is the same as prostitution and they believe that trafficked victims participate in this crime willingly. Secondly, traffickers have undermined the legal system's ability to combat TIP by using massive corruption.<sup>1117</sup>

Accordingly, it is important to note that the application of a comprehensive approach to addressing TIP may be hindered by a number of challenges.<sup>1118</sup> The first challenge is the lack of research and knowledge about TIP.<sup>1119</sup> An important point in this regard is that research and knowledge about TIP have increased since the TIPPA was adopted.<sup>1120</sup> However, this might be challenged on the basis that not all of this research and knowledge is considered to be reliable data on TIP.<sup>1121</sup> In particular, the quality of this data is uneven because some of these data have not been obtained by a solid methodology and scientific rigour.<sup>1122</sup> In other words, research on TIP is not very systematic and there is limited empirical research on TIP.<sup>1123</sup>

It is noteworthy that research and knowledge are necessary to respond to TIP because of their role in addressing TIP nationally, regionally, and internationally. Furthermore, this research and knowledge provide a better understanding of the nature and scope of TIP.<sup>1124</sup> It can be understood that the lack of research and knowledge about TIP hinders international

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<sup>1117</sup> Maggy Lee, *Human trafficking* (Willan Publishing 2007) 132.

<sup>1118</sup> United Nations Office on Drugs and Crime (UNODC), 'International Framework for Action: To Implement the Trafficking in Persons Protocol' (2009) 5 <<http://www.refworld.org/docid/4ad871540.html>> accessed 1 September 2015; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 88.

<sup>1119</sup> UNODC, 'International Framework for Action', op cit, 5; United Nations High Commissioner for Refugees (UNHCR), 'Prevent. Combat. Protect: Human Trafficking' (2011) 97-98 <<http://www.refworld.org/docid/4edcbf932.html>> accessed 1 September 2015; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 89; Susan Kneebone, 'Special Section: Developing Frameworks for the Protection of Trafficked Persons' (2015) 53(4) *International Migration* 3, 3.

<sup>1120</sup> UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 89; See also for information about data and research on trafficking in persons Elzbieta M. Gozdiak, *Data and Research on Human Trafficking: Bibliography of Research-Based Literature* (DIANE Publishing 2011).

<sup>1121</sup> UNHCR, 'Prevent. Combat. Protect: Human Trafficking' (2011) 100 <<http://www.refworld.org/docid/4edcbf932.html>> accessed 1 September 2015; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 89.

<sup>1122</sup> UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 89.

<sup>1123</sup> Elzbieta M. Gozdiak, *Data and Research on Human Trafficking: Bibliography of Research-Based Literature* (DIANE Publishing 2011) 43.

<sup>1124</sup> UNODC, 'International Framework for Action', op cit, 5-6; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 89.

cooperation by limiting the effectiveness and scope of efforts to address TIP as a result of adopting a different approach in response to TIP. In short, in some countries only particular forms of TIP, particular categories of trafficked victims, and particular categories of offenders are acknowledged.<sup>1125</sup>

The second challenge hindering the implementation of a comprehensive approach to address TIP is the lack of capacity-building and development in relation to TIP.<sup>1126</sup> This can be illustrated by the lack of legislation addressing TIP in some countries. It is noteworthy that addressing TIP as a transnational organised crime requires cooperation among countries, including harmonisation of definitions and mutual legal assistance with evidence, in order to strengthen capacity-building because isolated responses are insufficient to respond to TIP.<sup>1127</sup> Addressing the crime of TIP in just one place will divert this crime to another place as a result of the transnational nature of this crime.<sup>1128</sup> Therefore, a holistic approach to capacity-building to respond to TIP is required.<sup>1129</sup> It is to be noted that the need for capacity-building to address TIP has been highlighted internationally.<sup>1130</sup>

The third challenge hindering the implementation of a comprehensive approach to address TIP is the lack of evaluation and monitoring of TIP.<sup>1131</sup> It is understood that, to address TIP, it is necessary to evaluate trends and patterns related to the implementation of trafficking-in-persons strategies, programmes, policies, and data collection nationally, regionally and internationally, as well as to evaluate difficulties in gathering evidence of effective or best practices.<sup>1132</sup> Evaluation and monitoring play a significant role in addressing TIP as they can provide a suitable response to this crime.<sup>1133</sup> However, it could be argued that evaluation and

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<sup>1125</sup> UNODC, 'International Framework for Action', op cit, 5.

<sup>1126</sup> *ibid*, 6; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90.

<sup>1127</sup> UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90.

<sup>1128</sup> UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90; Allum and Gilmour, op cit, 227-228; Jean Allain, *Slavery in International Law: Of Human Exploitation and Trafficking* (Martinus Nijhoff Publishers 2012) 354-355.

<sup>1129</sup> UNODC, 'International Framework for Action', op cit, 6-7; UNHCR, 'Prevent. Combat. Protect: Human Trafficking' (2011) 48 <<http://www.refworld.org/docid/4edcbf932.html>> accessed 1 September 2015; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90.

<sup>1130</sup> The Open-ended Interim Working Group of Government Experts on Technical Assistance in priority areas (CTOC/COP/WG.2/2007/2), cited in UNODC, 'International Framework for Action', op cit, 6; United Nations, 'Conference of the Parties to the United Nations Convention against Transnational Organized Crime: Report on the meeting of the Open-ended Interim Working Group of Government Experts on Technical Assistance held in Vienna from 3 to 5 October 2007' (2007) CTOC/COP/2008/7, at 6(b).

<sup>1131</sup> UNODC, 'International Framework for Action', op cit, 7; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90.

<sup>1132</sup> UNODC, 'International Framework for Action', op cit, 7; UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90.

<sup>1133</sup> UNODC, 'Global Report on Trafficking in Persons' (2012), op cit, 90-91.

monitoring are linked to the implementation of specific projects. Therefore, the outcome of the evaluation and monitoring disappears after these projects are concluded because evaluation and monitoring are not considered to be ‘institutionalized functions of national authorities’.<sup>1134</sup> The UNCTOC establishes a conference of the parties to monitor its implementation, which can help to address the lack of institutionalisation at national level.<sup>1135</sup> In this regard, it should be stressed that in the first session of this conference a programme aiming to periodically review the implementation of the TIPP has been established.<sup>1136</sup>

#### **4.6.2 Addressing the Challenges Facing the Addressing of Trafficking in Persons as a Transnational Organised Crime**

It is understood that, to overcome the challenges to the fight against TIP, the following measures need to be taken.<sup>1137</sup> The first measure is to both legislate for and prosecute the crime of TIP.<sup>1138</sup> In particular, this prosecution requires a number of actions. The first action is to strengthen and/or develop legal frameworks nationally in order to comply with international standards in addressing TIP, especially the TIPP. This could be done by criminalising the crime of TIP nationally as it is defined in the TIPP, subjecting this crime to appropriate sanctions commensurate with its gravity, confiscating the proceeds of TIP, and protecting the rights of trafficked victims.<sup>1139</sup> The second action is to enforce anti-trafficking-in-persons legislation nationally by taking all necessary measures to strengthen capability in the fight against TIP.<sup>1140</sup> The third action is to establish dedicated institutions to tackle TIP, such as establishing specialist police units to combat TIP.<sup>1141</sup>

It is noteworthy that although many states have criminalised TIP, this crime is still insufficiently prosecuted, and the number of people convicted of committing the crime of TIP

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<sup>1134</sup> *ibid.*, 91.

<sup>1135</sup> The UNCTOC, Art. 32(1); Obokata, *Transnational Organised Crime in International Law*, op cit, 208-209.

<sup>1136</sup> UNODC, ‘International Framework for Action’, op cit, 7; United Nations, ‘Conference of the Parties to the United Nations Convention against Transnational Organized Crime: Annotated provisional agenda and proposed organization of work’ (2004) CTOC/COP/2004/1.

<sup>1137</sup> UNODC, ‘International Framework for Action’, op cit, 9.

<sup>1138</sup> The TIPP, Art. 5; UNODC, ‘International Framework for Action’, op cit, 10.

<sup>1139</sup> UNODC, ‘International Framework for Action’, op cit, 10.

<sup>1140</sup> *ibid.*

<sup>1141</sup> *ibid.*

is considered to be low.<sup>1142</sup> Furthermore, a comprehensive legal framework covering the TIP provisions does not exist in many states.<sup>1143</sup>

The second measure that might be used to address the challenges facing the fight against TIP is to protect trafficked victims.<sup>1144</sup> The provision of this protection requires a number of actions. The first action is to take all necessary measures to protect, assist, and identify trafficked victims by adopting, amending, developing, strengthening and/or enforcing the legislation aimed at protecting trafficked victims. The second action is to establish or strengthen referral mechanisms nationally in order to protect and assist trafficked victims. This might be achieved by referring any case of TIP, where appropriate, to the asylum system. The third action is to apply ‘international standards and a human rights-based approach’ to trafficked victims in order to protect and assist them.<sup>1145</sup> It is worth noting that, despite the importance of identifying trafficked victims, many trafficked victims are not identified.<sup>1146</sup> Consequently, they will not be protected.<sup>1147</sup>

The third measure that might be used to address the challenges facing the fight against TIP is to prevent TIP.<sup>1148</sup> More specifically, this prevention requires a number of actions. The first action is to take all necessary measures to prevent trafficking and protect trafficked persons by amending or adopting relevant legislation and establishing comprehensive programmes and policies for this prevention and protection. The second action is to publicly ensure the coherence of policies addressing TIP. The third action is to reduce the vulnerability of trafficked victims by developing or strengthening appropriate measures to do so.<sup>1149</sup> However, it could be argued that prevention strategies to tackle TIP are not entirely integrated with wider policies on TIP. Furthermore, much of the planning and research on prevention strategies for TIP lacks evidence and impact evaluations.<sup>1150</sup>

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<sup>1142</sup> United Nations Office on Drugs and Crime (UNODC), ‘Global Report on Trafficking in Persons’ (2014) ISBN: 978-92-1-133830-0, e-ISBN: 978-92-1-057108-1, at 1, 13, 52; UNODC, ‘International Framework for Action’, op cit, 10.

<sup>1143</sup> UNODC, ‘International Framework for Action’, op cit, 10.

<sup>1144</sup> The TIP, Art. 6, UNODC, ‘International Framework for Action’, op cit, 10.

<sup>1145</sup> UNODC, ‘International Framework for Action’, op cit, 11.

<sup>1146</sup> The issue of identifying trafficked victims might be addressed legislatively by introducing standards according to which trafficked victims might be identified.

<sup>1147</sup> *ibid*, 10.

<sup>1148</sup> The TIP, Art. 9; UNODC, ‘International Framework for Action’, op cit, 11.

<sup>1149</sup> UNODC, ‘International Framework for Action’, op cit, 11.

<sup>1150</sup> *ibid*.

## 4.7 Conclusion

Transnational organised crime is considered a new type of crime facilitated by the globalisation of culture and technology.<sup>1151</sup> This crime threatens stability and security worldwide. This can be illustrated by the threat posed by transnational organised criminal groups to states' sovereignty.<sup>1152</sup> Notably, transnational criminal law represented by the UNCTOC is insufficient to tackle organised crime. In particular, a holistic approach is required to address organised crime. This approach should address a number of issues such as the causes of organised crime, ways of supplementing the fight against transnational organised crime by other international law branches, and assisting states more coherently in the fight against organised crime through entities such as international organisations, regional organisations, NGOs, and civil society organisations.<sup>1153</sup>

TIP is regarded as a transnational crime.<sup>1154</sup> Therefore, addressing TIP as a transnational organised crime requires cooperation among different actors at all levels nationally, regionally, and internationally.<sup>1155</sup> However, TIP does not always amount to the level of transnational organised crime.<sup>1156</sup> It might be argued that the relationship between TIP and organised crime is insufficient to give a clear image of TIP since this crime is not committed solely by organised criminal groups - it could be committed by other offenders. For example, friends, families, and relatives could commit the crime of TIP. In addition to this, international peacekeeping missions, job recruitment and marriage consultant agencies may be involved in TIP. Importantly, it is understood that focusing on organised criminal groups as the only actors involved in TIP could result in other actors involved in TIP being ignored.<sup>1157</sup>

Accordingly, this chapter has investigated TIP as a transnational organised crime in five main sections. The first section has examined the concept of transnational organised crime by

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<sup>1151</sup> Michael J. Palmiotto (ed), *Combating Human Trafficking: A Multidisciplinary Approach* (CRC Press 2014) 41; Gavril Paraschiv, 'Conceptualizing Transnational Organized Crime' (2013) 8(2) *Economics, Management and Financial Markets* 173, 175.

<sup>1152</sup> *ibid*, 176.

<sup>1153</sup> Obokata, *Transnational Organised Crime in International Law*, *op cit*, 80-81.

<sup>1154</sup> Mohamed Y. 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' (2005) 14 *Tulane Journal of International and Comparative Law* 357, 413.

<sup>1155</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 116.

<sup>1156</sup> Christal Morehouse, *Combating Human Trafficking: Policy Gaps and Hidden Political Agendas in the USA and Germany* (Springer Science & Business Media 2009) 99.

<sup>1157</sup> Laurence Husson, 'Trafficking of Human Beings from a Human Rights Perspective. Towards a Holistic Approach, Tom Obokata' (2011) (15) *Moussons : Recherche en Sciences Humaines sur l'Asie du Sud-Est*, 32.

clarifying that this concept consists of transnational crime and organised crime. The concept of transnational organised crime has been analysed in light of the UNCTOC's provisions.

The second section has dealt with the UNCTOC and the TIPP and how these international instruments require that the crime be transnational in nature. Afterwards, this section has examined the transnational element in the crime of TIP and how this element exists in the process, operations, and networks involved in TIP.

The third section has investigated the criminal jurisdiction over TIP as a transnational organised crime by examining the possibility of expanding the jurisdiction over TIP as a transnational organised crime to include the passive personality principle jurisdiction, the active personality principle jurisdiction, the effects-based jurisdiction, and the universal jurisdiction, and not limiting the jurisdiction over this crime to the territorial and flag principle jurisdictions because of the transnational nature of TIP. Next, this section has confirmed that the principle of individual criminal responsibility does not apply to the crime of TIP as a transnational organised crime.

The fourth section has addressed TIP as a transnational organised crime by confirming that, to address TIP as a transnational organised crime, it is necessary to adopt a holistic approach including both national legislation and operational international responses to this crime represented by the adoption of the UNCTOC and the TIPP. Furthermore, this approach requires regional responses to TIP, such as the EU's efforts to address TIP. In addition to this, the obligation of states to address TIP has been examined as a part of the holistic approach by dealing with the obligations imposed on states to address TIP and the significant role of the US in addressing TIP as an example of national efforts to address TIP as a transnational organised crime. Moreover, the role of international organisations in addressing TIP as a transnational organised crime as part of the holistic approach has been discussed by shedding light on the role of a number of international organisations in the UN system in addressing TIP as a transnational organised crime.

The fifth section has discussed the key legal challenges facing those who are attempting to address TIP as a transnational organised crime, and how prosecution, protection, and prevention might play a significant role in overcoming these challenges.

## Chapter Five

# Trafficking in Persons as a Crime against Humanity

### 5.1 Introduction

The aim of this chapter is to examine whether or not the International Criminal Court (ICC) is considered an effective organ for addressing trafficking in persons (TIP) as a crime against humanity by answering the following questions. Firstly, in which situations might TIP be considered a crime against humanity falling under the ICC jurisdiction? Secondly, what elements are required in TIP in order for it to be classified as a crime against humanity? Thirdly, what reasons justify considering the ICC as a more capable organ for addressing TIP as a crime against humanity? Fourthly, how might the ICC exercise its jurisdiction over TIP as a crime against humanity?

The first question will be answered in the first section by examining when TIP might amount to the level of crimes against humanity falling under the jurisdiction of the ICC by investigating the relationship between TIP and enslavement.

The second question will be answered in the second section by analysing the elements required in TIP in order for it to be classified as a crime against humanity, starting with an analysis of the exercise of the power attached to the right of ownership over a person or persons as the main element. After that, the second element, the widespread or systematic attack against a civilian population, will be discussed by dealing with certain issues related to this element such as the definition of ‘attack’, ‘widespread’, ‘systematic’, and ‘civilian population’. In addition, the differences in the meanings of ‘crimes against humanity’ and ‘war crimes’ will be examined. Subsequently, the *mens rea* element will be investigated in this section by examining whether the intent to commit crimes against a civilian population is required or not.

The third question will be answered in the third section by analysing the reasons for considering the ICC to be a more capable organ for addressing TIP as a crime against humanity. The first reason is that the ICC is considered more capable of achieving justice than national criminal justice systems, which may be affected by corruption, retaliation, intimidation, and bribes. The second reason is that victims have the opportunity to participate



in the trial related to their allegations. The third reason is that national jurisdictions may be unable to address crimes committed in more than one country. However, it should be stressed that there are a number of grounds for challenging the notion of the ICC as a more capable organ.

The fourth question will be answered in the fourth section by investigating the ways in which the ICC might exercise its jurisdiction over TIP as a crime against humanity. In this section, three methods will be discussed. Firstly, a state party may refer a crime to the prosecutor; this requires that the state be a state party to the Rome Statute of the International Criminal Court (RSICC). Secondly, the Security Council may refer a crime to the prosecutor under Chapter VII of the Charter of the United Nations; this requires that the crime, which is referred by the Security Council, amount to the level of a threat to international peace and security. Thirdly, the prosecutor may commence an investigation on his/her own initiative; this requires that the prosecutor examine the information before asking the Pre-Trial Chamber to authorise the investigation.

## 5.2 Trafficking in Persons as a Crime against Humanity Falling Under the Notion of Enslavement

This section will focus on when TIP might be considered a crime against humanity falling under the jurisdiction of the ICC. In doing so, this section will deal with the relationship between TIP and enslavement. However, it should be stressed that this section will only focus on enslavement, taking into account that there are other situations that might be categorised under the concept of TIP as a crime against humanity, such as other inhumane acts, sexual slavery or enforced prostitution. Interestingly, the reason for limiting the main focus of this section to enslavement is that the notion of enslavement might be expanded to include other notions associated with the crime of TIP.<sup>1158</sup> Therefore, the main focus of this section will be on TIP as a crime against humanity under the category of enslavement. This is because TIP has been explicitly listed under the category of enslavement in the RSICC. However, the RSICC does not define TIP. Therefore, this section will examine the extent to which TIP satisfies the legal definition of enslavement.

First, '[e]nslavement means establishing or maintaining over persons a status of slavery, servitude or forced labor contrary to well-established and widely recognized standards of international law'.<sup>1159</sup> Additionally, since 1945, enslavement has been regarded as crime against humanity, and it contains slavery, slavery-like practice, and forced labour.<sup>1160</sup>

Moreover, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), in *Kunarac et al*, states that: '[f]urther indications of enslavement include exploitation; the exaction of forced or compulsory labour or service'.<sup>1161</sup> Additionally, the inclusion of 'slavery, servitude or forced labour' under the concept of enslavement has been affirmed in Article 18(D) of the 1996 Draft Code.<sup>1162</sup>

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<sup>1158</sup> Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 178.

<sup>1159</sup> 1996 Draft Code of Crimes Against the Peace and Security of Mankind with commentaries, U.N. Doc. A/51/10 at 48, cited in John C. Green, 'A Proposal Leading to an International Court to Combat Trafficking in Human Beings' (2011) Third Annual Interdisciplinary Conference on Human Trafficking 1, 26.

<sup>1160</sup> Gallagher, op cit, 190.

<sup>1161</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 542.

<sup>1162</sup> The Report of the International Law Commission on the work of its forty-eighth session, 6 May- 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No.10, art 18(10)(d); Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Hart 2008) 192- 193. In this regard, it has been stated that '[e]nslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognized standards of international law'. The draft code 'applies to the crimes against the peace and security of mankind'. Additionally, the draft code is the outcome of many years'

The definition of enslavement according to the Trial Chamber of the ICTY as a reflection of customary international law was accepted by the Appeals Chamber in *Kunarac et al.* In this regard, it states:<sup>1163</sup>

[T]he traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery” has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.<sup>1164</sup>

Accordingly, it can be understood that the difference between traditional slavery and modern-day slavery is a matter of degree but not a matter of substance.<sup>1165</sup> Furthermore, it can be argued that the concept of slavery has developed to include TIP.<sup>1166</sup> To be more precise, understanding what constitutes slavery from a legal perspective has evolved to include contemporary types of exploitation and TIP. Therefore, TIP has been visualised as a type of slavery because slavery includes TIP.<sup>1167</sup> In this regard, it should be stressed that it is difficult to draw the line between TIP and slavery because of the expansion of the notion of slavery.<sup>1168</sup> Furthermore, it might be argued that TIP could amount to the level of slavery when a trafficker claims control over a trafficked person, as the trafficker owns the trafficked persons as a commodity.<sup>1169</sup>

However, this could be challenged on the basis that the relation between TIP and slavery is not clear in international law.<sup>1170</sup> This might be because some aspects of TIP in some situations might include slavery, but others will not. It is noteworthy that the notion of slavery could extend to include practices such as forced labour, prostitution and debt bondage which are considered to be associated with TIP, but other aspects of TIP do not obviously fall

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work by the International Law Commission. For more information see <[http://www.eisil.org/index.php?t=link\\_details&id=604&cat=456](http://www.eisil.org/index.php?t=link_details&id=604&cat=456)> accessed 1 September 2015.

<sup>1163</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 117; Gallagher, op cit, 186.

<sup>1164</sup> *ibid.*

<sup>1165</sup> Gallagher, op cit, 186. For more information about the relationship between slavery and trafficking in persons see chapter five (5.3.1).

<sup>1166</sup> Gallagher, op cit, 190.

<sup>1167</sup> Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 3; Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a More Holistic Approach* (Martinus Nijhoff Publishers 2006) 112; Human Rights Review, ‘Article 4: Freedom from slavery and forced labour’ (2012) Human Rights Review 136, 137, 140.

<sup>1168</sup> Harmen Van der Wilt, ‘Trafficking in Human Beings, Enslavement, Crimes Against Humanity: Unravelling the Concepts’ (2014) 13(2) Chinese Journal of International Law 297, (2014) 13(2) Chinese Journal of International Law 297, Para. 39.

<sup>1169</sup> *ibid.*

<sup>1170</sup> Gallagher, op cit, 177.

within the idea of ownership.<sup>1171</sup> A counter-argument is that there is an obvious relationship between TIP and slavery. For example, the organised movement of persons for the purpose of exploitation across borders is involved in both TIP and slavery practices. Furthermore, both TIP and slavery aim to make profits and exercise control over people. Moreover, both TIP and slavery violate human rights massively and systematically. In particular, references to TIP and slavery are used interchangeably in the international legal framework,<sup>1172</sup> as they include the exploitation of people for profit.<sup>1173</sup>

Accordingly, it is possible to argue that, according to the 1926 Slavery Convention, any practice regardless of its designation might be considered slavery if it involves any or all of the powers attached to the right of ownership.<sup>1174</sup> Equally importantly, there is a substantive relation between TIP and slavery. This relation can be seen from the definition of trafficking in the ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP), as the definition includes slavery in the list of exploitative acts.<sup>1175</sup>

There are indications of the relation between TIP and slavery in a number of international instruments. An example of this is the Council of Europe Convention on Action against Trafficking in Human Beings (CoE), which states that ‘trafficking in human beings may result in slavery for victims’.<sup>1176</sup> Another example of the relation between TIP and slavery can be found in the Charter of Fundamental Rights of the EU.<sup>1177</sup> According to this Charter, the prohibition of TIP falls under the prohibition of slavery and forced labour.<sup>1178</sup>

It is noteworthy that the European Court of Human Rights acknowledges that the expression ‘trafficking in persons’ has not been used in Article 4 of the European Convention on Human Rights. Article 4 states that ‘1. No one shall be held in slavery or servitude. 2. No one shall be

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<sup>1171</sup> *ibid*, 178.

<sup>1172</sup> *ibid*, 177.

<sup>1173</sup> Justin Healey (ed), *Human Trafficking and Slavery* (Spinney Press 2012) 8.

<sup>1174</sup> Convention to Suppress the Slave Trade and Slavery (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art. 1; Gallagher, *op cit*, 180.

<sup>1175</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001) Art. 3; Gallagher, *op cit*, 189.

<sup>1176</sup> Council of Europe Convention on Action Against Trafficking in Human Beings (entered into force 1 Feb 2008) ETS 197, 16.V.2005, at Preamble; Gallagher, *op cit*, 190.

<sup>1177</sup> Charter of Fundamental Rights of the European Union (entered into force 1 December 2009) Official Journal of the European Union C 364/1; Gallagher, *op cit*, 190.

<sup>1178</sup> Gallagher, *op cit*, 190.

required to perform forced or compulsory labour'.<sup>1179</sup> However, the European Court of Human Rights claims that, according to the Vienna Convention on the Law of Treaties, the interpretation of a treaty according to the general rules of interpretation must be consistent with the ordinary meaning in line with the object and purpose of the treaty.<sup>1180</sup> Therefore, it is unnecessary to classify whether or not the action is considered to be slavery, forced and compulsory labour, or servitude; it is more important that the court has considered TIP, as defined in the TIPP and CoE, to be a practice that falls within the ambit of Article 4 of the European Convention on Human Rights.<sup>1181</sup>

It is worth noting that, in accordance with the European Court of Human Rights, TIP 'is based on the exercise of powers attaching to the right of ownership'.<sup>1182</sup> Accordingly, it is obvious that TIP, according to the Court, is based on slavery because the 1926 Convention to Suppress the Slave Trade and Slavery defines 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', which is considered to be the substance of what has been approached by the Court in terms of TIP.<sup>1183</sup> This could be criticised on the basis that the European Court of Human Rights narrows the scope of the list of exploitative purposes in the TIPP by limiting TIP to one practice, which is slavery, ignoring other practices.<sup>1184</sup> To be more precise, in accordance with the TIPP the list of exploitative purposes includes the following: '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>1185</sup>

It has become clear that the European Court of Human Rights, in *Rantsev v. Cyprus and Russia*,<sup>1186</sup> in dealing with TIP, has not explained the elements of TIP and how these

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<sup>1179</sup> Ireland: Act No. 20 of 2003, European Convention on Human Rights Act 2003 (published 30 June 2003) Art 4 <<http://www.refworld.org/docid/47a708170.html>> accessed 1 September 2015; Jean Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10(3) Human Rights Law Review 546, 551.

<sup>1180</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 31; Allain, 'Rantsev v Cyprus and Russia', op cit, 551.

<sup>1181</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, Para. 282 <<http://www.refworld.org/docid/4b4f0b5a2.html>> accessed 1 September 2015; Allain, 'Rantsev v Cyprus and Russia', op cit, 551.

<sup>1182</sup> *Rantsev v. Cyprus and Russia*, op cit, Para. 281; Allain, 'Rantsev v Cyprus and Russia', op cit, 553.

<sup>1183</sup> Convention to Suppress the Slave Trade and Slavery (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, Art. 1(1); Allain, 'Rantsev v Cyprus and Russia', op cit, 553.

<sup>1184</sup> Vladislava Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30(2) Netherlands Quarterly of Human Rights 163, 170.

<sup>1185</sup> The TIPP, Art. 3(a).

<sup>1186</sup> *Rantsev v. Cyprus and Russia*, op cit.

elements are linked to Article 4 of the European Convention on Human Rights.<sup>1187</sup> Accordingly, it could be argued that TIP does not overlap with Article 4 of the European Convention on Human Rights, because the TIPP prohibits certain actions and means that lead to the exploitation of trafficked victims, while this Article prohibits the actual abuses.<sup>1188</sup> Furthermore, the exploitation, which falls under Article 4 of the European Convention on Human Rights, should be linked with the action and means elements of TIP.<sup>1189</sup>

It can be argued that slavery should not be given a broad meaning beyond the limits drawn by the 1926 Slavery Convention.<sup>1190</sup> To be more precise, it is significant to realise that exploitative and harsh conditions do not amount to slavery.<sup>1191</sup> Equally importantly, the European Court of Human Rights does not use the terms ‘trafficking in persons’ and ‘slavery’ synonymously; it has merely expanded the ambit of Article 4 by making this Article applicable to any form of exploitation. The significance of this is that exploitation is considered to be the purpose of TIP.<sup>1192</sup>

Nonetheless, it should be stressed that the European Court of Human Rights does not clarify how Article 4 of the European Convention on Human Rights includes TIP in its scope.<sup>1193</sup> In this regard, it is possible to argue that TIP could be incorporated under Article 4, as several concepts in relation to slavery have been encompassed by this Article such as ‘servitude’ and ‘forced or compulsory labour’.<sup>1194</sup> Furthermore, the European Court of Human Rights does not indicate the category under which TIP might fall.<sup>1195</sup>

Furthermore, it is noticeable that TIP has not been defined in the RSICC and its elements of crimes. However, it could be said that there is a reference to TIP in the definition of enslavement in the RSICC.<sup>1196</sup> The RSICC defines enslavement as follows: ‘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

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<sup>1187</sup> Stoyanova, *op cit*, 194.

<sup>1188</sup> *ibid*, 184.

<sup>1189</sup> *ibid*, 172-173.

<sup>1190</sup> *R. v. Tang*, [2008] HCA 39, Australia: High Court, 28 August 2008, Para. 32 <<http://www.refworld.org/docid/4b9618ed2.html>> accessed 1 September 2015; Allain, ‘Rantsev v Cyprus and Russia’, *op cit*, 554.

<sup>1191</sup> *R. v. Tang*, *op cit*, Para. 32.

<sup>1192</sup> Allain, ‘Rantsev v Cyprus and Russia’, *op cit*, 555.

<sup>1193</sup> Gallagher, *op cit*, 189.

<sup>1194</sup> Ireland: Act No. 20 of 2003, European Convention on Human Rights Act 2003 (published 30 June 2003) Art 4 <<http://www.refworld.org/docid/47a708170.html>> accessed 1 September 2015; Wilt, *op cit*, Para 33.

<sup>1195</sup> Wilt, *op cit*, Para 33.

<sup>1196</sup> Gallagher, *op cit*, 215; Clare F. Moran, ‘Human Trafficking and the Rome Statute of the International Criminal Court’ (2014) 3 *The Age of Human Rights Journal* 32, 34.

children'.<sup>1197</sup> It has been argued that this definition is similar to the definition of enslavement in the 1926 Slavery Convention, with the addition of the following clause: 'in the course of trafficking in persons, in particular women and children'.<sup>1198</sup>

In this regard, the inclusion of TIP as one of the forms of enslavement in the ICC jurisdiction aims to expand the traditional shape of slavery.<sup>1199</sup> In other words, enslavement, which is considered a crime against humanity, includes TIP.<sup>1200</sup> Furthermore, the modern types of slavery were included in the definition of enslavement as a crime against humanity.<sup>1201</sup>

Accordingly, it is possible to argue that as the ICC has jurisdiction over the enslavement as a crime against humanity, it could exercise its jurisdiction over the crime of TIP, as TIP is regarded as a component of the definition of enslavement.<sup>1202</sup> In particular, the RSICC's definition of enslavement includes TIP as a reference to enslavement. Therefore, TIP may amount to the level of a crime against humanity if it contains the main elements required for crimes against humanity according to the RSICC.<sup>1203</sup>

However, it is important to note that there are a number of elements required for TIP to become a crime against humanity.

### **5.3 The Elements which are Required in the Crime of Trafficking in Persons in Order for it to be Classified as a Crime against Humanity**

A number of key elements are required for the act to be elevated to the level of a crime against humanity as an example of enslavement. Therefore, the argument is that if TIP can in certain circumstances be considered enslavement, it is a crime against humanity. Consequently, this section will analyse in more detail the elements of enslavement that might

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<sup>1197</sup> Rome Statute of the International Criminal Court (last amended 2010) adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (entered into force 1 July 2002) ISBN No. 92-9227-227-6, Art. 7(2)(c).

<sup>1198</sup> Gallagher, *op cit*, 184- 185.

<sup>1199</sup> Triffterer and Ambos, *op cit*, 194.

<sup>1200</sup> Tomoya Obokata, 'Trafficking of Human Beings as a Crime against Humanity: Some Implications' (2005) 54(2) *International and comparative law quarterly* 445, 445.

<sup>1201</sup> Triffterer and Ambos, *op cit*, 194.

<sup>1202</sup> The RSICC, Arts. 5, 7(1)(c).

<sup>1203</sup> Gallagher, *op cit*, 184; Mohamed Y. Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: the scope of the problem and the appropriate legislative responses (A Look at the Middle East: Challenges and Legal Perspectives)' (2003) 26(3) *Fordham International Law Journal* 721, 721; Mohamed Y. Mattar, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?' (2002) *The Protection Project* 1, 2-3; Mohamed Y. Mattar, 'State Responsibilities in Combating Trafficking in Persons in Central Asia' (2005) 27(2) *Loyola of Los Angeles International & Comparative Law Review* 145, 166.

be present in the context of TIP.<sup>1204</sup> Nonetheless, the ICC referred to these elements when it dealt with enslavement as a crime against humanity, and these elements are as follows:<sup>1205</sup>

### **5.3.1 ‘The Perpetrator Exercised Any or All of the Powers Attaching to the Right of Ownership over One or More Persons’<sup>1206</sup>**

First, the right of ownership is the main element in enslavement.<sup>1207</sup> In this regard, the ICTY Trial Chamber, in *Kunarac et al*, has noted that ‘the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers’.<sup>1208</sup> Interestingly, the power attached to the right of ownership is not specified in the 1926 Slavery Convention.<sup>1209</sup> However, it has been argued that it is not true that TIP is ‘based on the exercise of powers attaching to the right of ownership’, it is slavery, not TIP, that is ‘based on the exercise of powers attaching to the right of ownership’.<sup>1210</sup> To be more precise, ownership and control distinguish TIP from slavery in the sense that ownership is the main element in slavery whereas control is the main element in TIP.<sup>1211</sup>

According to ‘the 1953 Slavery Report’, the powers attached to the right of ownership have the following characteristics: the person might be subjected to purchase; the master has total control over the person; the master owns the produce of the person’s labour without any compensation proportionate to the amount of the labour; the possession of the person might be transferred from one person to another; the person under control cannot terminate his/her situation by his/her will because this situation is permanent; and this situation is inherited or

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<sup>1204</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 451.

<sup>1205</sup> In accordance with Art. 7(1)(c) of the International Criminal Court’ Elements of Crimes these elements are as follows: ‘1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty. 2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population’.

<sup>1206</sup> The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11, Art. 7(1)(c)(1).

<sup>1207</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 449.

<sup>1208</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 540; Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford University Press 2005) 179.

<sup>1209</sup> Gallagher, op cit, 179.

<sup>1210</sup> Stoyanova, op cit, 185.

<sup>1211</sup> Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, op cit, 17-18.



could be inheritable.<sup>1212</sup> However, control seems to be common to both slavery and TIP. This can be illustrated by investigating the factors that determine whether enslavement has been committed or not. Accordingly, it can be said that enslavement encompasses control and ownership, having power over or constraining a person's autonomy, freedom of option or activity, the obtaining of profits by the offender, and the absence of the victim's consent and free will.<sup>1213</sup> Furthermore, enslavement could be determined by several factors such as the following: different types of control, absence of freedom of movement and choice, earnings accrued by the offender, coercion, deception, confinement, threat, use of force, intimidation, false promises, imprisonment, weakness of victims, the abuse of authority, prohibition of escape, and assurance of exclusivity.<sup>1214</sup>

TIP might also be considered slavery if the same traffickers persist in exploiting and exercising ownership over the victims under their control. Nevertheless, when traffickers lose this control, TIP cannot be considered slavery. Accordingly, it is noticeable that the control element is decisive.<sup>1215</sup>

Moreover, the duration of the exercising of the powers attached to the right of ownership might be considered another factor in enslavement. In this regard, the Trial Chamber, in *Kunarac et al*, stated that '[t]he duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved'.<sup>1216</sup>

Additionally, the subsequent exploitation of victims may be an element of TIP. This element requires that a subsequent exploitation be exercised. However, this might be challenged on the basis that the exploitation of trafficked persons does not always take place subsequent to TIP because the authorities in the destination country could intercept the act of TIP. Therefore, later exploitation may be a sufficient element of TIP, not a necessary element.<sup>1217</sup>

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<sup>1212</sup> UN Economic and Social Council, "Slavery, the Slave Trade and Other Forms of Servitude: Report of the Secretary-General," UN Doc. E/2357, Jan. 27, 1953 (ECOSOC 1953 Slavery Report), at 48, cited in Gallagher, *op cit*, 183-184.

<sup>1213</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 120; Mettraux, *op cit*, 179.

<sup>1214</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 119; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 163.

<sup>1215</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', *op cit*, 449.

<sup>1216</sup> *ibid*, Para. 542.

<sup>1217</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', *op cit*, 450.

It might be argued that, under customary international law, enslavement as a crime against humanity must involve the practising of control over a person to be indictable.<sup>1218</sup> The European Court of Human Rights states the following:

[T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions. It is described ... as the modern form of the old worldwide slave trade.<sup>1219</sup>

It is noticeable that the European Court of Human Rights considers the exercising of the powers attached to the right of ownership, *de facto*, but not *de jure*, as the main element of TIP. It is worth noting that, in accordance with this element, trafficked persons are regarded as commodities. Alongside this, the Court described TIP as modern-day slavery. *De facto* control, therefore, is sufficient to bring trafficking within the concept of slavery.

### **5.3.2 ‘The Conduct was Committed as Part of a Widespread or Systematic Attack Directed against a Civilian Population’<sup>1220</sup>**

This element contains three main components: the attack, widespread or systematic, and any civilian population.

#### **5.3.2.1 The Attack**

The expression ‘attack’ has been defined by the RSICC as follows: ‘a course of conduct involving the multiple commission of acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.<sup>1221</sup> Furthermore, ‘[t]he

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<sup>1218</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96–23-T and IT-96–23/1-T (22 February 2001) Para. 539.

<sup>1219</sup> *Rantsev v. Cyprus and Russia*, op cit, Para. 281; Gallagher, op cit, 188.

<sup>1220</sup> The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11.

<sup>1221</sup> The RSICC, Art 7(2)(a).

concept of attack may be defined as an unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc'.<sup>1222</sup>

Moreover, in *Naletilić et al*, the Trial Chamber states that:

The attack has been defined as a course of conduct involving the commission of acts of violence. The attack can precede, outlast, or continue during the armed conflict, but need not be a part of the conflict under customary international law.<sup>1223</sup>

It might be argued that there is a difference between the meaning of an 'attack' in crimes against humanity and the laws of war on the basis that the attack in the crimes against humanity is not limited by hostilities. Moreover, the attack could include the maltreatment of individuals who are not participating in hostilities. Along with this, an attack on a civilian population as a crime against humanity does not necessarily involve a violation of the laws of war as, according to the definition of crimes against humanity, the attack *per se* is not a crime against humanity.<sup>1224</sup> More to the point, the expression 'attack' is distinct from and independent of armed conflict and is not restricted to this conflict. Likewise, the attack could include any maltreatment of the civilian population.<sup>1225</sup> Moreover, the expression 'attack' is not limited to military attacks.<sup>1226</sup> Accordingly, it is understood that the concept of attack in line with crimes against humanity includes not only the use of armed force but also any mistreatment of civilian populations.<sup>1227</sup> Furthermore, in the context of crimes against humanity the attack should target a civilian population.<sup>1228</sup>

In *Tadic*, a distinction has been made between 'attack on the civilian population' and 'an armed conflict'. To be more specific, crimes against humanity could occur in armed conflicts and in times of peace.<sup>1229</sup> It can be understood that these differences show that crimes against humanity, in accordance with customary international law, could be perpetrated separately

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<sup>1222</sup> Prosecutor v. *Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) Para. 581.

<sup>1223</sup> Prosecutor v. *Naletilić et al* (Trial Judgement) IT-98-34-T (31 March 2003) Para. 233; Mettraux, op cit, 156; William Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006) 194.

<sup>1224</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 416; Mettraux, op cit, 157.

<sup>1225</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 194.

<sup>1226</sup> Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia 2002) 477-478.

<sup>1227</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 86.

<sup>1228</sup> *ibid*, Para. 91.

<sup>1229</sup> Prosecutor v. *Tadic* (Appeal Judgement) IT-94-1-A (15 July 1999) Para. 251; Mettraux, op cit, 156.

from armed conflict.<sup>1230</sup> Along with this, the attack may include hostilities, mistreatment, an enumerated crime, an unlawful act, and the exertion of pressure. Moreover, the attack should deliberately target a civilian population rather than being launched against them incidentally.<sup>1231</sup>

Furthermore, the expression ‘attack’ has widespread and systematic features, and a civilian population should be targeted by this attack.<sup>1232</sup> The court should also ensure that the attack in the crime against humanity is deliberately directed against a civilian population.<sup>1233</sup> Nevertheless, it is not necessary to show that the whole population was targeted by the attack.<sup>1234</sup> To be more specific, the attack should be huge in scale against a civilian population, as is required in the definition of crimes against humanity.<sup>1235</sup> However, it should be stressed that the attack can be considered a widespread attack when a sufficient number of individuals have been targeted by this attack.<sup>1236</sup>

Additionally, the involvement of any violent force, armed hostilities or military forces is not required in the attack; any mistreatment of a civilian population is sufficient.<sup>1237</sup> A solitary act against a civilian population may bring charges of individual criminal responsibility against the perpetrator who committed this act as a part of widespread or systematic attack. However, if this solitary act takes place outside the widespread or systematic attack, it is not considered a crime against humanity. Along with this, the liability does not require the commission of many offences by the perpetrator.<sup>1238</sup>

A point to note, however, is that the attack requires that the acts of a perpetrator be part of it to be considered a crime against humanity. More to the point, the crimes committed before or after the attack might be considered crimes against humanity if there is a link between them and the main attack against the civilian population.<sup>1239</sup> Similarly, the attack should be directed against individuals such as non-combatants, combatants who have surrendered, those

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<sup>1230</sup> Mettraux, op cit, 156.

<sup>1231</sup> Mohamed E. Badar and William Schabas, ‘From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against humanity’ (2004) 5(73) San Diego International Law Journal 73, 105-108.

<sup>1232</sup> William Schabas, *An introduction to the International Criminal Court* (4th edn, Cambridge University Press 2011) 111.

<sup>1233</sup> Mettraux, op cit, 158.

<sup>1234</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 190.

<sup>1235</sup> Mettraux, op cit, 161.

<sup>1236</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 90.

<sup>1237</sup> Triffterer and Ambos, op cit, 174,176.

<sup>1238</sup> Prosecutor v. *Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Para. 649; Boot, op cit, 478-479.

<sup>1239</sup> Mettraux, op cit, 162-163.

incapable of combat, or any civilian population.<sup>1240</sup> In addition to this, the acts, according to the RCICC and its Elements of Crimes, should take place within an attack, and these acts may formalise the attack.<sup>1241</sup>

The ‘attack on a civilian population’ element may be present in the crime of TIP as a crime against humanity when a number of persons are trafficked through multiple commissions of the crime of TIP. Furthermore, this multiplicity of commissions may be present when this crime is committed against trafficked persons over a number of years or when it is committed continuously even against one person.<sup>1242</sup> Moreover, the attack in the crime of TIP may be committed by criminal groups as a criminal enterprise directed against vulnerable victims.<sup>1243</sup>

### 5.3.2.2 Widespread or Systematic

First, it is important to note that the act should be widespread or systematic. However, it is not required to be both of them.<sup>1244</sup> In this regard, it should be stressed that there is an overlap between the factors of ‘widespread’ and ‘systematic’.<sup>1245</sup> To be more precise, this overlap between them can be found in the following factors: ‘[t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes’.<sup>1246</sup>

It is worth noting that the expression ‘widespread’ can be defined as follows: ‘massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’.<sup>1247</sup> In particular, the expression ‘widespread’ refers to the size of the attack and the number of casualties.<sup>1248</sup> In this regard, it could be said that

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<sup>1240</sup> Prosecutor v. *Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) Para. 582.

<sup>1241</sup> The RSICC, Art. 7(2)(a); The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11, Art. 7(1)(c); Triffterer and Ambos, op cit, 175.

<sup>1242</sup> Jane Kim, ‘Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute’ (2011) Columbia Law School Gender and Sexuality Online (GSL Online) 1, 22-23 <<http://ssrn.com/abstract=1779263>> accessed 1 September 2015; Joshua N. Aston and Vinay N. Paranjape, ‘Human Trafficking and Its Prosecution: Challenges of the ICC’ (2011) Social Science Research Network, Working Paper 1, 6 <<http://ssrn.com/abstract=2203711>> accessed 1 September 2015.

<sup>1243</sup> Kim, op cit, 23; Aston and Paranjape, op cit, 6.

<sup>1244</sup> Prosecutor v. *Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) Para. 579.

<sup>1245</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 192.

<sup>1246</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 95.

<sup>1247</sup> Prosecutor v. *Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) Para. 580.

<sup>1248</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 428; Mettraux, op cit, 170; Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 192; Badar and Schabas, op cit, 109-111; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 451.

the attack should be committed against a large number of victims or should contain a group of inhumane acts in order to reach the level of ‘widespread’.<sup>1249</sup> Therefore, it can be understood that secluded acts committed by offenders do not reach the level of widespread.<sup>1250</sup> This has been affirmed in *Kunarac et al.*<sup>1251</sup> In other words, it is noticeable that the widespread element requires the attack to occur on a large scale and to be directed against a number of victims. This excludes random and isolated acts committed by an offender acting on his/her own initiative and directed against a single victim.<sup>1252</sup>

However, this could be challenged on the basis that even a secluded act might be considered a crime against humanity in the case of the use of terror to establish a political system.<sup>1253</sup> Furthermore, a solitary act of extraordinary magnitude could reach the level of widespread.<sup>1254</sup> Along with this, a geographic range is not required for the ‘widespread’ element of the crime.<sup>1255</sup>

It is noticeable that the expression ‘widespread’ replaces the expression ‘large-scale’ which has replaced the expression ‘mass scale’. In this regard, it is noteworthy that the 1991 Draft Code of Crimes used the expression ‘mass crime’. Moreover, the International Law Commission used the expression ‘large-scale’ in the 1996 Draft Code of Crimes which precludes a secluded act perpetrated by the offender against a single victim.<sup>1256</sup> Furthermore, the International Law Commission clarified the replacement of the expression ‘mass-scale’, which was used by the Draft Code of Crimes in 1991, with the expression ‘large-scale’, which was used by the Draft Code of Crimes in 1996, by explaining that the expression ‘large-scale’ is wider and covers a variety of situations including a large number of victims.<sup>1257</sup>

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<sup>1249</sup> Badar and Schabas, op cit, 110; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 452.

<sup>1250</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 451-452.

<sup>1251</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96–23-T and IT-96–23/1-T (22 February 2001) Para. 428; Mettraux, op cit, 170. In *Kunarac et al*, Para. 428 states that ‘[t]he adjective “widespread” connotes the large-scale nature of the attack and the number of its victims. The Commentary of the International Law Commission in its Draft Code of Crimes against Peace and Security of Mankind describes this as follows: Inhumane acts [must] be committed on a large scale meaning that the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim’.

<sup>1252</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96–23-T and IT-96–23/1-T (22 February 2001) Paras. 427-428.

<sup>1253</sup> Badar and Schabas, op cit, 109-111.

<sup>1254</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 452.

<sup>1255</sup> Badar and Schabas, op cit, 109-111.

<sup>1256</sup> Triffterer and Ambos, op cit, 178.

<sup>1257</sup> *ibid.*

Accordingly, it is argued that TIP contains the widespread element.<sup>1258</sup> This element can be illustrated by highlighting the effect of TIP worldwide. In particular, it could be said that TIP affects all countries all over the world.<sup>1259</sup> To be more specific, available data indicates that victims from at least from 152 countries have been trafficked in 124 countries worldwide.<sup>1260</sup> In this respect, it is noticeable that TIP is surpassed only by the smuggling of drugs and the illegal trade in weapons in terms of profit, which has attracted the attention of the international community to this serious crime.<sup>1261</sup> More to the point, up to 800,000 trafficked persons cross international borders yearly.<sup>1262</sup> Moreover, approximately 2.5 million people are trafficked for the purpose of forced labour annually, according to ILO.<sup>1263</sup> Furthermore, TIP has been recognised by the UN as a serious type of organised crime that has an impact on source, transit, and destination countries equally.<sup>1264</sup> What is more, the acts of TIP are directed against many vulnerable individuals or groups.<sup>1265</sup> Additionally, there are sometimes link between the attacks and a wider trafficking-in-persons market or between the attacks and trafficking-in-persons operations. Therefore, the widespread element can be satisfied in this case as a result of the number of trafficked persons exploited and the range of these operations.<sup>1266</sup> Accordingly, it might be argued that the widespread element, as an element of crimes against humanity, is present in the crime of TIP, which could raise the crime of TIP to the level of crimes against humanity. However, it can be argued that the generally covert nature of TIP makes the satisfaction of the widespread element less likely in practice.

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<sup>1258</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 453.

<sup>1259</sup> Healey, op cit, 7; Aiko Joshi, 'The Face of Human Trafficking (Sexual Slavery: The Trafficking of Women and Girls into the United States for Sexual Exploitation)' (2002) 13(1) *Hastings Women's Law Journal* 31, 31; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 445; Bernat and Zhilina, op cit, 3; Myada O. El-Sawi, 'Beyond the "tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39(2) *Georgia Journal of International and Comparative Law* 391, 393.

<sup>1260</sup> United Nations Office on Drugs and Crime (UNODC), 'Global Report on Trafficking in Persons' (2014) ISBN: 978-92-1-133830-0; e-ISBN: 978-92-1-057108-1, at 5 <<http://www.refworld.org/docid/5492a3d94.html>> accessed 1 September 2015.

<sup>1261</sup> John Winterdyk, Philip L. Reichel, and Benjamin Perrin (eds), *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press 2011) 3, 15, 69; Joshi, op cit, 40; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 445.

<sup>1262</sup> Winterdyk, Reichel, and Perrin, op cit, 129; Joshi, op cit, 31; Steward H. Oppong, 'Human Trafficking Through Organized Crime' (2012) 2(20) *International Journal of Humanities and Social Science* 37, 37; Amy Whitman and David H. Gray, 'Transnational Human Trafficking' (2015) 6(3) *Global Security Studies* 11, 13.

<sup>1263</sup> See Andrees Beate, *forced labour and human trafficking: A handbook for labour inspectors* (Geneva: ILO International Labour Office (2008), cited in Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 217.

<sup>1264</sup> The Twelfth United Nations Congress on Crime Prevention and Criminal Justice, A/CONF.213/L.2/Add.3, Salvador, Brazil, 12-19 April 2010, at Para. 6, (full footnote), cited in Allum and Gilmour, op cit, 217.

<sup>1265</sup> Aston and Paranjape, op cit, 6.

<sup>1266</sup> Kim, op cit, 25.

Additionally, '[t]he concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'.<sup>1267</sup> More to the point, the expression 'systematic' indicates a manner of behaviour or methodical policy which requires very organised and coordinated implementation of the policy under an advanced plan.<sup>1268</sup> As an illustration, in *Kunarac et al*, the Trial Chamber states that '[t]he adjective "systematic" signifies the organised nature of the acts of violence and the improbability of their random occurrence'.<sup>1269</sup>

A number of elements are required in a systematic attack. The first element is a political objective. This element requires an ideology or a plan in the attack. Moreover, this element also requires that the aim of this attack be to demolish, aggrieve or debilitate a community. The second element is the commission of a criminal act. This commission should target civilian groups and be linked to inhumane acts continuously and repeatedly on a large scale. The third element is the preparation and use of public or private significant resources, regardless of whether these resources are considered military or non-military. The fourth element is that 'high-level political and/or military authorities' are implicated in the methodical plan's establishment and definition.<sup>1270</sup>

Interestingly, it is the attack, rather than the individual acts, that is required to be widespread or systematic. Moreover, according to both customary international law and the Statutes of the Tribunals, the acts in questions do not require a policy or plan because policies and plans are not considered legal elements of crimes against humanity.<sup>1271</sup> However, this could be challenged on the basis that the RSICC requires state or organisational policy to preclude isolated or random acts from the ambit of crimes against humanity.<sup>1272</sup>

In '[t]he case law of the *ad hoc* Tribunals' there is no distinction between systematic, policy, and plan. The Trial Chamber in *Tadic* and *Kordic* indicated the policy or plan in respect of

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<sup>1267</sup> Prosecutor v. *Akayesu* (Trial Judgement) ICTR-96-4-T (2 September 1998) Para. 580.

<sup>1268</sup> Badar and Schabas, *op cit*, 111-112.

<sup>1269</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 429; Mettraux, *op cit*, 171.

<sup>1270</sup> Prosecutor v. *Blaskic* (Trial Judgement) IT-95-14-T (3 March 2000) Para. 203; Prosecutor v. *Kordic et al* (Trial Judgement) IT-95-14/2-T (26 February 2001) Para. 179; Boot, *op cit*, 479; Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, *op cit*, 193.

<sup>1271</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 98; Mettraux, *op cit*, 172; Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, *op cit*, 193; Triffterer and Ambos, *op cit*, 179-180; Schabas, *An introduction to the International Criminal Court*, *op cit*, 112.

<sup>1272</sup> The RSICC, Art 7(2)(a); Triffterer and Ambos, *op cit*, 179-180; Schabas, *An introduction to the International Criminal Court*, *op cit*, 111-112.



the definition of the element of ‘systematic’.<sup>1273</sup> Furthermore, the Report of the International Law Commission in the work of its forty-eighth session stated that “committed in a systematic manner” mean[s] pursuant to a preconceived plan or policy’.<sup>1274</sup> Similarly, the expressions ‘systematic’, ‘policy’, and ‘plan’ have the same meaning.<sup>1275</sup>

It is noticeable that crimes against humanity could be perpetrated as part of the policy of both states and organisations (non-state) according to Article 7 of the RSICC. Nonetheless, they must have enhanced or induced the attack directed against a civilian population.<sup>1276</sup> Moreover, it is clear that Article 7(2)(a) of the RSICC requires a state or organisational policy in the attack. However, this Article is formulated and interpreted widely to comprise acts perpetrated by non-state actors. A well-known example of this is the International Law Commission’s statement that some people have the ability to implement a widespread policy of terror and are able to commit violent acts. Likewise, the international community affirmed that non-state actors were capable of perpetrating crimes against humanity.<sup>1277</sup>

It is worth noting that the policy stated in the RSICC could be defined broadly because TIP is regarded as an organised crime. Therefore, the execution of this crime requires planning in accordance with a policy. However, specific rules do not have to be included in this policy.<sup>1278</sup>

The RSICC refers to organisational policy without specifying any particular group. Interestingly, the capacity to commit a widespread or systematic attack against any civilian population is required in any group in order to meet the requirement of organisational policy.<sup>1279</sup> It should be stressed that any group of persons able ‘to commit a widespread or systematic attack against a civilian population’ might be included under the concept of organisational policy.<sup>1280</sup> An example of this is the engagement of ISIS and Boko Haram in trafficking in women and children.<sup>1281</sup> In this regard, the ICC, in *Bemba*, states the following:

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<sup>1273</sup> Prosecutor v. *Blaskic* (Trial Judgement) IT-95-14-T (3 March 2000) Para. 580; Prosecutor v. *Kordic et al* (Trial Judgement) IT-95-14/2-T (26 February 2001) Para. 182; Boot, op cit, 481.

<sup>1274</sup> 1996 ILC Draft Code of Crimes, UN Doc. A/51/10 (1996), cited in Boot, op cit, 481.

<sup>1275</sup> Boot, op cit, 481.

<sup>1276</sup> Prosecutor v. *Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Paras. 654-655; Boot, op cit, 483-484.

<sup>1277</sup> Prosecutor v. *Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Para. 648; Prosecutor v. *Blaskic* (Trial Judgement) IT-95-14-T (3 March 2000) Para. 206; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 452-453.

<sup>1278</sup> Aston and Paranjape, op cit, 7-8.

<sup>1279</sup> Aston and Paranjape, op cit, 8.

<sup>1280</sup> Kim, op cit, 26.

<sup>1281</sup> The Daily Beast, ‘ISIS, Boko Haram, and the Growing Role of Human Trafficking in 21st Century Terrorism’ (2014) <<http://www.thedailybeast.com/articles/2014/12/26/isis-boko-haram-and-the-growing-role-of-human-trafficking-in-21st-century-terrorism.html>> accessed 1 September 2015.

[T]he requirement of a “State or organizational policy” implies that the attack follows a regular pattern. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.<sup>1282</sup>

Furthermore, the ICTY, in *Blaskic*, states that ‘individuals “with de facto power or organized in criminal gangs” are just as capable as State leaders of implementing a large-scale policy of terror and committing mass acts of violence’.<sup>1283</sup>

However, it should be noted that there are a number of considerations used by the ICC in determining whether or not a group might be qualified ‘as an organization under the Statute’.<sup>1284</sup> In this regard, it should be stressed that the determination of these considerations is made on ‘a case by-case basis’. Moreover, these considerations are not framed by a rigid legal definition, and they do not have to be achieved exhaustively.<sup>1285</sup>

Organisation and planning exists in the crime of TIP.<sup>1286</sup> To be more specific, the nature of the crime of TIP requires not only the securing and monitoring of the trafficked victims but also the involvement of the traffickers and the exploiters in the exploitation of trafficked persons.<sup>1287</sup> Furthermore, the state’s policy may be present in the crime of TIP when the state fails to take actions against this crime.<sup>1288</sup>

As noted above, it is noticeable that the systematic element exists in the crime of TIP. In particular, the systematic element can be found in the involvement of organised criminal groups in the crime of TIP.<sup>1289</sup> It is noteworthy that organised manners and strategies are used by traffickers in their commission of the crime of TIP. This makes their attacks against

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<sup>1282</sup> Prosecutor v. *Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009) Para.81.

<sup>1283</sup> Prosecutor v. *Blaskic* (Trial Judgement) IT-95-14-T (3 March 2000) Para. 205.

<sup>1284</sup> In the Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya) ICC-01/09 (31 March 2010) Para. 93 states that these consideration *inter alia* are: ‘(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria’.

<sup>1285</sup> Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an investigation into the situation in the Republic of Kenya) ICC-01/09 (31 March 2010) Para. 93.

<sup>1286</sup> Kim, op cit, 26.

<sup>1287</sup> *ibid*, 27.

<sup>1288</sup> *ibid*, 27-28.

<sup>1289</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 453.

trafficked persons systematic in nature.<sup>1290</sup> It should be noted that the systematic manner of the crime of TIP is demonstrated when traffickers commit this crime repeatedly.<sup>1291</sup> Furthermore, TIP is regarded as a business with a highly strategic and organised nature for the purpose of obtaining ownership through control and power.<sup>1292</sup> Additionally, TIP is considered systematic because traffickers' acts are committed repeatedly and continuously in order to exploit trafficked persons whether by exploiting the same or new victims.<sup>1293</sup> Therefore, to a certain extent the systematic element, as an element of crimes against humanity, is present in the crime of TIP. This may raise this crime to the level of crimes against humanity.

### 5.3.2.3 Any Civilian Population

The ICTY Trial Chamber, in *Kunarac et al*, has defined civilian population as follows 'all persons who are civilians as opposed to members of the armed forces and other legitimate combatants'.<sup>1294</sup> Moreover, Article 50 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts,<sup>1295</sup> deals with 'civilians' and 'civilian population'.<sup>1296</sup>

It is noteworthy that the aim of using the expression 'civilian' is to show the difference between non-combatants and the members of armed forces.<sup>1297</sup> Likewise, the expression 'civilian' may include people who protect themselves or their community with the use of arms. An example of this is 'sole policeman or local defence guard'.<sup>1298</sup> Additionally, the expression 'population' refers to a sufficient number of people but not the whole

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<sup>1290</sup> Aston and Paranjape, op cit, 6.

<sup>1291</sup> *ibid*, 7.

<sup>1292</sup> Kim, op cit, 24.

<sup>1293</sup> *ibid*.

<sup>1294</sup> *Prosecutor v. Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 425; Mettraux, op cit, 166.

<sup>1295</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force on 7 December 1979) 1125 UNTS 3.

<sup>1296</sup> *ibid*, Art. 50. In this regard, this Article states that '1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character'; Triffterer and Ambos, op cit, 180.

<sup>1297</sup> Badar and Schabas, op cit, 101-102.

<sup>1298</sup> Final Report of the Commission of Experts Established Pursuant to the Security Council Resolution 780, U.N. SCOR, 49th Sess, Annex, at 21, U.N Doc. S/1994/674 (1994), at 22, cited in Badar and Schabas, op cit, 102.

population.<sup>1299</sup> Moreover, the use of the term ‘population’ is intended to preclude isolated acts.<sup>1300</sup>

To be more specific, a civilian population contains all individuals who are not members of the armed forces or legitimate combatants, and the attack should be mounted against them, which precludes combatants from being considered victims of crimes against humanity.<sup>1301</sup> Furthermore, a civilian population includes people from any nationality, stateless persons, persons who have participated in acts of resistance, and prior combatants.<sup>1302</sup>

Notably, the population size should be taken into consideration. By way of illustration, a small number of victims are not considered a population unless the crimes committed against them are regarded as a part of a wider criminal campaign.<sup>1303</sup> Moreover, it is noticeable that the victim does not have to be a member of a specific targeted category other than a population in general to prove the existence of crimes against humanity. What is required is that the victim was a civilian targeted by the attack directed against a civilian population.<sup>1304</sup>

What is certain, however, is that the civilian population must be the main subject of the attack. In addition, crimes against humanity might be targeted at any civilian population regardless of whether the perpetrator’s nationality is the same as or different from the victims or even if the victims are stateless.<sup>1305</sup> Likewise, the crimes against humanity could be committed against citizens or foreign nationals. Those civilians should be the main object of the attack.<sup>1306</sup>

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<sup>1299</sup> Prosecutor v. *Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Para. 644; Mettraux, op cit, 167; Badar and Schabas, op cit, 104.

<sup>1300</sup> Boot, op cit, 485; Triffterer and Ambos, op cit, 180.

<sup>1301</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 435; Mettraux, op cit, 168.

<sup>1302</sup> Prosecutor v. *Tadic* (Opinion and Judgment) IT-94-1-T (7 May 1997) Paras. 637-638; Boot, op cit, 486; Triffterer and Ambos, op cit, 181;

<sup>1303</sup> Mettraux, op cit, 166.

<sup>1304</sup> *ibid*, 167.

<sup>1305</sup> *ibid*, 164-165.

<sup>1306</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 189-190.

### 5.3.3 ‘The Perpetrator Knew that the Conduct was Part of or Intended the Conduct to be Part of a Widespread or Systematic Attack Directed against a Civilian Population’.<sup>1307</sup>

First, the RSICC defines knowledge as follows: ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly’.<sup>1308</sup> In addition to this, the RSICC in Article 7 requires the attack to be committed with knowledge of the widespread or systematic nature of the attack and knowledge of the criminal activity that formalises a portion of the attack, for the reason of the requirement of the *mens rea* in accordance with crimes against humanity. In this regard, it should be stressed that the *mens rea* in regard to crimes against humanity has been defined as ‘knowledge of the context of a widespread or systematic attack directed against a civilian population’.<sup>1309</sup>

Furthermore, the offender must know that his/her acts comprise part of the attack against a civilian population, or accept the risk that the acts may be part of the attack. However, this does not entail detailed knowledge about the attack.<sup>1310</sup> Notably, the perpetrator’s knowledge of his/her participation might be deduced from circumstantial evidence. In other words, the accused does not necessarily have to have detailed knowledge and approval of the attack overall.<sup>1311</sup> By way of explanation, the perpetrator should at least be aware of the attack against the civilian population, but there is no requirement to prove that the perpetrator knew about the characteristics or details of the attack.<sup>1312</sup>

It is noteworthy that, to satisfy the mental element of a crime against humanity, it is necessary for the offender to have knowledge of the attack, beside the common knowledge and intention of committing crimes against humanity. Likewise, if a person contributes to crimes against humanity but is unaware that the attack is part of a widespread or systematic attack against a civilian population, he/she may be guilty of other crimes but not crimes against

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<sup>1307</sup> The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11.

<sup>1308</sup> The RSICC, Art. 30(3).

<sup>1309</sup> Prosecutor v. *Kordic et al* (Trial Judgement) IT-95-14/2-T (26 February 2001) Para. 211; Badar and Schabas, op cit, 138.

<sup>1310</sup> Prosecutor v. *Kunarac et al* (Trial Judgment) IT-96-23-T and IT-96-23/1-T (22 February 2001) Para. 434; Mettraux, op cit, 173; Triffterer and Ambos, op cit, 182; Badar and Schabas, op cit, 117; Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 452

<sup>1311</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 194-195.

<sup>1312</sup> Boot, op cit, 491.

humanity under the RSICC.<sup>1313</sup> In this regard, it is worth noting that this knowledge is considered to be the *mens rea* element in accordance with the RCICC and its Elements of Crimes.<sup>1314</sup>

Along with this, the motive for crimes against humanity is not mentioned in its definition. Furthermore, this motive, in general, is not required in crimes against humanity.<sup>1315</sup> Nevertheless, the motive may be relevant to suitable punishment of the crime.<sup>1316</sup> In other words, the occurrence of the crimes against humanity is not determined by this motive, and this motive is regarded as an irrelevant element in crimes against humanity<sup>1317</sup> unless evidence of motive contributes to evidence of knowledge.

It is noticeable that the case law used the term ‘discriminatory intent’ to refer to crimes against humanity which had to be perpetrated ‘on national, political, ethnic, racial, or religious ground[s]’.<sup>1318</sup> Likewise, discriminatory intent is not required for crimes against humanity under customary law except for what is perpetrated in a particular case. To be more specific, the discriminatory intent is only required in the crime of persecution.<sup>1319</sup>

Discriminatory intent is not required for the acts committed according to customary international law, and the perpetrator’s personal motive for the attack against a civilian population is considered irrelevant in the matter of determining the occurrence of crimes against humanity. Nonetheless, this intent is still required for acts of persecution.<sup>1320</sup> In this regard, the Appeal Chamber in *Kunarac et al* states that ‘the motives of the accused for

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<sup>1313</sup> Schabas, *An introduction to the International Criminal Court*, op cit, 114.

<sup>1314</sup> The RSICC, Art. 30; The International Criminal Court Elements of Crimes (adopted at the 2010 Review Conference are replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010) International Criminal Court publication, RC/11, Art. 7(1)(c).

<sup>1315</sup> The RSICC, Art. 7(1); Prosecutor v. *Tadic* (Appeal Judgement) IT-94-1-A (15 July 1999) Para. 248; Schabas, *An introduction to the International Criminal Court*, op cit, 114-115.

<sup>1316</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, ‘Rules of Procedure and Evidence’ (Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept 2002, Official Records, UN Doc. ICC-ASP/1/3) Part II.A, Rule 145 (2)(v); Schabas, *An introduction to the International Criminal Court*, op cit, 114-115; Mettraux, op cit, 173-174.

<sup>1317</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 103; Triffterer and Ambos, op cit, 182.

<sup>1318</sup> Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 196.

<sup>1319</sup> Prosecutor v. *Tadic* (Appeal Judgement) IT-94-1-A (15 July 1999) Para. 283; Prosecutor v. Blaskic (Trial Judgement) IT-95-14-T (3 March 2000) Para. 244; Prosecutor v. *Todorovic* (Sentencing Judgement) IT-95-9/1-S (31 July 2001) Para. 113; Schabas, *The UN International Criminal Tribunals: the Former Yugoslavia, Rwanda and Sierra Leone*, op cit, 197.

<sup>1320</sup> Triffterer and Ambos, op cit, 182.

taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons'.<sup>1321</sup>

To be more specific, there are two points of view among delegations at the Rome Conference concerning discriminatory intent in crimes against humanity. The first holds that discriminatory intent is required as an element in crimes against humanity. The second, which represents the majority of delegations, states that discriminatory intent is not required as an element of the crime. Alongside this, the discriminatory intent is required under customary international law for persecution as an inhumane act but not for other crimes against humanity.<sup>1322</sup>

Accordingly, it can be said that TIP contains the *mens rea* element. In particular, traffickers know that the attacks are directed against a civilian population. Likewise, the act of TIP that is committed for material and financial gain is consistent with crimes against humanity, which may be perpetrated for personal purposes.<sup>1323</sup> Furthermore, when the commission of the crime of TIP is linked with the element of organisation and as part of a criminal enterprise, it can be said that the traffickers are aware of the purposes and nature of the attacks.<sup>1324</sup> Moreover, it can be assumed that when traffickers participate in trafficking-in-persons operations, they know that these operations will lead to trafficking-in-persons situations.<sup>1325</sup>

Consequently, it can be said that TIP may satisfy the definition of enslavement as an example of a crime against humanity; on the other hand, it may not do so, in which case jurisdiction at national level is the only way to address it.

#### **5.4 The Reasons that Justify Considering the ICC as a more Capable Organ for Addressing Trafficking in Persons as a Crime against Humanity**

This section aims to set out the reasons that justify considering the ICC as a more capable organ for addressing TIP as a crime against humanity by shedding light on three reasons taking into account that the ICC jurisdiction is a complementary to national criminal

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<sup>1321</sup> Prosecutor v. *Kunarac et al* (Appeal Judgment) IT-96-23 and IT-96-23/1-A (12 June 2002) Para. 103.

<sup>1322</sup> Badar and Schabas, *op cit*, 100.

<sup>1323</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', *op cit*, 453.

<sup>1324</sup> Aston and Paranjape, *op cit*, 9.

<sup>1325</sup> *ibid*, 28-29.

jurisdictions and that this jurisdiction is limited to ‘the most serious crimes of international concern’.<sup>1326</sup> However, in this section a number of grounds for challenging the notion that the ICC is a more capable organ will be also discussed.

There are three main reasons which justify considering the ICC as a more capable organ for addressing TIP as a crime against humanity. Firstly, national criminal justice systems may be affected by corruption, retaliation, intimidation, and bribery committed by traffickers. This is in contrast with the criminal justice systems under the ICC, which is considered to be an independent international judicial organ. Therefore, criminals cannot easily control and dominate it.<sup>1327</sup>

Accordingly, it is noteworthy that official corruption, which is considered an important factor in increased organised criminal activities, may have an impact on national criminal justice systems by affecting political and social stability.<sup>1328</sup> In this regard, it should be stressed that TIP and corruption are strongly linked. In particular, trafficking flourishes where public officials are corrupt.<sup>1329</sup> The link between TIP and corruption is not particularly clear, for the following reasons. The first reason is corrupt officials’ reticence about their activities. The second reason is the undercover nature of TIP and corruption operations. The third reason is trafficked persons’ hesitancy in reporting their situation to the authorities because they fear that these authorities may be involved in TIP. The fourth reason is the difficulty of obtaining information about the corruption related to TIP and its complicity with organised crime. The fifth reason is researchers’ failure to take into consideration the relationship between traffickers and corrupt officials when they conduct studies on TIP.<sup>1330</sup> The sixth reason is the tendency for the effect of corruption on TIP to be neglected in the matter of implementing and developing anti-trafficking-in-persons measures and policies.<sup>1331</sup>

A point to note, however, is that the involvement of corrupt officials in TIP can be illustrated in two ways. The first way is the direct way; in this way, corrupt officials run trafficking-in-persons operations and activities by themselves or participate with a criminal gang by

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<sup>1326</sup> The RSICC, Art 1.

<sup>1327</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, op cit, 454.

<sup>1328</sup> Edgardo Buscaglia, ‘An Analysis of Judicial Corruption and its Causes: An Objective Governing-Based Approach’ (2001) 21(2) *International Review of Law & Economics* 233, 234.

<sup>1329</sup> Cornelius Friesendorf (ed), *Strategies Against Human Trafficking: The Role of the Security Sector* (National Defence Academy and Austrian Ministry of Defence and Sports 2009) 83.

<sup>1330</sup> *ibid*, 83-84.

<sup>1331</sup> United Nations Office on Drugs and Crime, ‘The Role of Corruption in Trafficking in Persons’ (Vienna 2011) Issue Paper 1, 3.



providing traffickers with the assistance required to complete their tasks. The second way is the indirect way; in this way corrupt officials use trafficked persons or any person who might be suspected of being trafficked in one of the forms of TIP. Furthermore, corrupt officials may refuse to conduct investigations into trafficking- in-persons allegations or they may develop personal and political connections with traffickers, thereby influencing their investigations. In addition, corrupt officials may enact legislation conducive to TIP or refuse to pass legislation aimed at restraining TIP. Accordingly, it might be argued that the intent of the state officials to obtain benefits from their action or inaction in regard to TIP must be proved in order to establish the presence of corruption.<sup>1332</sup>

Furthermore, in the matter of retaliation as an element that may affect efforts to address the crime of TIP under national criminal justice systems, it could be said that trafficked persons may think that appealing to the police will not benefit them. In addition to this, law enforcement officers may cooperate with traffickers to re-victimise trafficked persons. Moreover, trafficked persons who try to escape may be subjected to intense punishment. More to the point, trafficked persons may believe that asking for help is a selfish action because the traffickers may retaliate against their family members.<sup>1333</sup> A point to note, however, is that retaliation at national level might still occur even with the involvement of the ICC.

The second reason why the ICC might be considered a more capable organ for addressing TIP as a crime against humanity is that trafficked victims are able to take part in trial procedures against traffickers. In addition, during the investigation victims might make representations that enable the Pre-Trial Chamber to decide whether to issue an authorisation of investigation or not. In this regard, the RSICC states: '[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence'.<sup>1334</sup> The prosecutor may obtain information from victims. This information is considered an important source in the preliminary examination stage and prior to an effective investigation. More to the point, in the Pre-Trial Chamber, victims are able to make representations. In this respect, the Rules of Procedure and Evidence state that 'victims may make representations in writing

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<sup>1332</sup> Friesendorf, op cit, 86-87.

<sup>1333</sup> Louise I. Shelley, *Human Trafficking: a Global Perspective* (Cambridge University Press 2010) 110.

<sup>1334</sup> The RSICC, Art. 15(3); Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 454.

to the Pre-Trial Chamber'.<sup>1335</sup> However, it is noteworthy that the determination of the value of information provided by victims is the job of the Pre-Trial Chamber and the prosecutor.<sup>1336</sup>

Furthermore, in the trial, victims are able to present their interests and views.<sup>1337</sup> By way of illustration, the RSICC states:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>1338</sup>

Accordingly, it is noticeable that, in criminal procedures, the personal interest of the victims who are affected and harmed is taken into consideration. However, it has been argued that this personal interest will be not taken into account if victims are not interested in prosecuting and investigating the persons who harmed them. Critically, this might be challenged on the basis that the personal interest exists in victims because they have made serious efforts to bring their allegations before the ICC.<sup>1339</sup> What is certain, however, is that victims who wish to take part in the trial proceedings must send a written application to 'the Victims Participation and Reparations Section ('VPRS') of the Registry';<sup>1340</sup> the registrar will then send the application to the competent chamber. After that, a copy of this application should be provided to the defence and the prosecutor by the registrar for the purpose of making observations. Afterwards, the competent chamber examines the application. In doing so, it has the right to reject the application on its own or in accordance with a request by any party; alternatively, it may accept the application. In this case, the competent chamber has to allow the victims to present their views and concerns.<sup>1341</sup>

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<sup>1335</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Rules of Procedure and Evidence' (Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept 2002, Official Records, UN Doc. ICC-ASP/1/3) Rule. 50(3).

<sup>1336</sup> Triffterer and Ambos, *op cit*, 590.

<sup>1337</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', *op cit*, 454.

<sup>1338</sup> The RSICC, Art. 68(3).

<sup>1339</sup> Triffterer and Ambos, *op cit*, 1286-1287.

<sup>1340</sup> Lucia Catani, 'Victims at the International Criminal Court Some Lessons Learned from the Lubanga Case' (2012) 10(4) *Journal of International Criminal Justice* 905, 908.

<sup>1341</sup> The RSICC, Art. 68(3); Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Rules of Procedure and Evidence' (Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept 2002, Official Records, UN Doc. ICC-ASP/1/3) Rule. 89; Catani, *op cit*, 908.

In addition, if victims' personal interests have been affected, the ICC should allow them to present their concerns and views, and the ICC should consider these concerns and views. In this respect, legal representatives are permitted to present these concerns and views.<sup>1342</sup> Furthermore, the participation of the victims should be linked with the charges within the jurisdiction of the ICC.<sup>1343</sup> However, this might be challenged on the basis of Rule 85(a) which states the following: "'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>1344</sup> Therefore, this could be interpreted as an indication that the participation of the victims should not be limited to just the crimes committed against them, as they have been harmed as a result of the commission of crimes under the ICC's jurisdiction.<sup>1345</sup>

Victims' personal interest embraces certain rights such as the right to receive justice in the form of a determination of guilt and the right to reparations. Equally importantly, victims might prove their claims by providing a number of documents. In addition, the participation of victims might be directed by another person acting on their behalf or with their consent.<sup>1346</sup>

The participation in the procedures is considered to be a right for victims to present their concerns and views.<sup>1347</sup> This right might be practiced by victims in the trial. Furthermore, intervention in the procedures is a right for victims before the ICC.<sup>1348</sup> Accordingly, it is noticeable that the ICC has two obligations. The first obligation is to give victims permission to present their concerns and views. The second obligation is for the ICC to examine these concerns and views. Interestingly, the right to intervene should be used correctly by victims or their representatives. In this regard, the judges have the right to control the use of this right by ensuring that victims or their representatives are using it correctly. However, this control should not deny victims or their representatives the chance to exercise their rights.<sup>1349</sup>

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<sup>1342</sup> The RSICC, Art. 68(3); Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 827.

<sup>1343</sup> Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 829-830.

<sup>1344</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Rules of Procedure and Evidence' (Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept 2002, Official Records, UN Doc. ICC-ASP/1/3) Rule. 85(a); Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 829-830.

<sup>1345</sup> Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 829-830.

<sup>1346</sup> *ibid*, 829, 831.

<sup>1347</sup> Triffterer and Ambos, op cit, 1287.

<sup>1348</sup> *ibid*, 1288.

<sup>1349</sup> *ibid*, 1289.

Additionally, victims might be compensated. In this respect, the RSICC states that '[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.<sup>1350</sup>

Accordingly, the compensation extends not only to victims but also to their families.<sup>1351</sup> The Rules of Procedure and Evidence defines victims as follows:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.<sup>1352</sup>

It is clear that the expression 'benefit of victims' according to the 'Assembly of State Parties' has been interpreted to include two components; material support and reparations.<sup>1353</sup> Reparations embrace five categories, as stated by the 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law'. These categories are restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>1354</sup>

Consequently, it should be noted that, by examining how victims are able to take part in trial procedures before the ICC and the rules governing victims' participation in the trial, lessons can be drawn in order to understand how trafficked victims might participate against traffickers. Furthermore, these procedures and rules might be adopted in national legislations in order to enable trafficked victims to participate in trials against traffickers by using the applicable rules in the ICC as a role model where possible.

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<sup>1350</sup> The RSICC, Art. 79(1); Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 454.

<sup>1351</sup> Triffterer and Ambos, op cit, 1441.

<sup>1352</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, 'Rules of Procedure and Evidence' (Report of the Assembly of States Parties to the Rome Statute of the International Criminal Court: First Session, 3–10 Sept 2002, Official Records, UN Doc. ICC-ASP/1/3) Rule. 85.

<sup>1353</sup> Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3, regulation 50(a)(i), cited in Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 912 .

<sup>1354</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Para. 18 <<http://www.refworld.org/docid/4721cb942.html>> 16 January 2015; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 912.

The third reason why the ICC might be considered a more capable organ for addressing TIP as a crime against humanity is that international courts may be more capable than domestic jurisdictions of applying justice and dealing with serious crimes effectively. Indeed, national jurisdictions' resources and powers may be overwhelmed by TIP.<sup>1355</sup> Additionally, national jurisdictions may be unable to tackle the crime of TIP, as this crime may be committed in more than one country. Therefore, prosecuting this crime may be subjected to certain legal difficulties such as the lack of evidence in relation to the commission of the crime of TIP. The prosecution of this crime may be hindered if it is not possible to obtain the evidence required for a conviction, and as a result of this an acquittal may be the result for the defendant. Accordingly, if the accused has been acquitted of the crime of TIP in one country, criminal proceedings will not be initiated for the same crime in another country according to the *non bis in idem* principle.<sup>1356</sup>

However, the view that the ICC is a more capable body than national criminal justice systems for addressing TIP as a crime against humanity could be challenged on the following bases: Firstly, the RSICC does not contain an accurate and precise definition of the crime of TIP, which may hinder the prosecution of this crime by the ICC.<sup>1357</sup> Furthermore, the failure to define TIP in the RSICC may create uncertainty. Does the scope of Article 7 of RSICC include all forms of TIP which are recognised by the TIPP, or it is limited to the more severe forms?<sup>1358</sup> Other problems may result from the failure to define TIP, as the definition of TIP is differentiated at the national and international levels. Hence, this may lead to an expansion or limitation of the scope of the RSICC.<sup>1359</sup>

Accordingly, it is suggested that the ICC adopt and incorporate the definition of TIP stated in the TIPP,<sup>1360</sup> because this definition is regarded as the most acceptable definition of TIP internationally.<sup>1361</sup> Such an adoption would be important because all forms of exploitation

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<sup>1355</sup> Wilt, op cit, Para. 43.

<sup>1356</sup> *ibid*, Para. 45.

<sup>1357</sup> Aston and Paranjape, op cit, 10-11.

<sup>1358</sup> Kim, op cit, 6.

<sup>1359</sup> *ibid*, 9.

<sup>1360</sup> *ibid*, 9, 14; Aston and Paranjape, op cit, 10.

<sup>1361</sup> United Nations Office on Drugs and Crime, 'Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (2004) UN Sales No. E.05.V.2, at 267; Winterdyk, Reichel, and Perrin, op cit, 236; Allum and Gilmour, op cit, 217; Mohamed Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law' (2010) UNOV/DM/CMS/EPLS/Electronic Publishing Unit 1, 7.

stated in the definition of TIP in the Protocol<sup>1362</sup> could be subjected to prosecution under the ICC jurisdiction.<sup>1363</sup>

Secondly, the issues of admissibility and limitations of the ICC jurisdiction could be obstacles to prosecuting the crime of TIP as a crime against humanity.<sup>1364</sup> It should be stressed that states have the primary right to exercise their criminal jurisdiction over the crime of TIP or other crimes against humanity due to state sovereignty. Therefore, the role of the ICC in prosecuting crimes is secondary and is subject to certain conditions.<sup>1365</sup> In this regard, it is noteworthy that if the crime of TIP has been prosecuted effectively under the national jurisdiction, prosecution will not proceed under the ICC jurisdiction.<sup>1366</sup>

Thirdly, the ICC relies on states to provide evidence and conduct investigations required for the prosecution. Therefore, if states do not support and cooperate with the ICC, it may not be able to function fully when support and cooperation are required.<sup>1367</sup> Furthermore, the ICC may have difficulty in accessing or obtaining evidence or conducting investigations, especially when crimes under its jurisdiction are committed far away and/or in unsafe areas.<sup>1368</sup> The ICC also relies on states to protect trafficked victims who participate in trafficking-in-persons prosecution cases. Therefore, the ICC and the states involved in TIP need to cooperate in providing protection, transportation, and accommodation during the trial procedures for trafficked victims who participate in such trials, as well as collecting evidence from them.<sup>1369</sup>

Accordingly, two main principles should be considered before deciding whether the ICC is a more capable body than national criminal justice systems for addressing TIP as a crime against humanity.

The first principle is that the ICC jurisdiction is complementary to national jurisdiction.<sup>1370</sup> In this regard, it has been stated that ‘[t]he principle of complementarity of the Court vis-a-vis national jurisdictions is based on the premise that the investigation and prosecution of the

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<sup>1362</sup> These forms, in accordance with art 3(a) of the Protocol, are ‘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>1363</sup> Aston and Paranjape, op cit, 10.

<sup>1364</sup> *ibid*, 11.

<sup>1365</sup> *ibid*, 12.

<sup>1366</sup> *ibid*.

<sup>1367</sup> *ibid*.

<sup>1368</sup> *ibid*, 13.

<sup>1369</sup> *ibid*.

<sup>1370</sup> The RSICC, at Preamble, Arts. 1, 17(1)

crimes provided for in the Statute lies primarily with national jurisdictions'.<sup>1371</sup> A point to note, however, is that complementarity means that national justice systems have priority in investigating and prosecuting the cases in question unless these cases have been referred to the ICC on reasonable grounds.<sup>1372</sup>

Interestingly, the principle of complementarity is designed to protect the states' sovereignty, where a good-faith basis for investigating and prosecuting cases is exercised by these states under their jurisdiction.<sup>1373</sup> Moreover, in accordance with this principle, the states parties' sovereignty in investigating and prosecuting crimes committed within their jurisdiction will not be encroached upon by the ICC when genuine investigations and prosecutions are conducted by these states.<sup>1374</sup> In this regard, it should be noted that the ICC complements national justice systems rather than having primacy over them.<sup>1375</sup> In other words, the principle of complementarity can be used by the ICC to help and cooperate with the national systems when the magnitude of the crimes committed exceeds the states' resources.<sup>1376</sup> Additionally, this principle might be exercised in the event of failings under the national justice systems in relation to investigation and persecution.<sup>1377</sup>

Accordingly, in applying the principle of complementarity over the crime of TIP as a crime against humanity falling under the ICC jurisdiction, it might be argued that states parties' failure to adopt adequate laws in relation to TIP could be considered a sign of the unwillingness or inability of these states to investigate and prosecute this crime. This is because it is necessary to adopt such laws to comply with international standards in addressing the crime of TIP.<sup>1378</sup>

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<sup>1371</sup> Prosecutor v. *Lubanga* (Decision on the Practices of Witness Familiarisation and Witness Proofing) ICC-01/04-01/06 (8 November 2006) Para. 34, cited in Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 50.

<sup>1372</sup> Triffterer and Ambos, op cit, 57.

<sup>1373</sup> Prosecutor v. *Katanga et al* (Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)) ICC-01/04-01/07 (16 June 2009) Para. 79. This Paragraph states that 'according to paragraph 6 of the Preamble, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"'. However, if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute'.

<sup>1374</sup> Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 336.

<sup>1375</sup> *ibid.*

<sup>1376</sup> *ibid.*, 52.

<sup>1377</sup> *ibid.*

<sup>1378</sup> Kim, op cit, 29.

The second principle is the gravity threshold.<sup>1379</sup> Consequently, it should be noted that the aforementioned reasons justify considering the ICC as a more capable organ than national criminal justice systems for addressing TIP as a crime against humanity. Furthermore, exercising jurisdiction over TIP as a crime against humanity requires the adoption of a number of legal mechanisms by the ICC to exercise its jurisdiction. These legal mechanisms will be addressed in the following section by shedding light on the ways in which the ICC might exercise its jurisdiction over TIP as a crime against humanity.

## **5.5 The Ways in which the ICC Could Exercise its Jurisdiction over Trafficking in Persons as a Crime against Humanity**

This section aims to explain three ways in which the ICC might exercise its jurisdiction. To be more precise, in accordance with the RSICC, the International Criminal Court could exercise its jurisdiction over any crime against humanity if the crime is referred to the prosecutor by a state party, or if the crime is referred to the prosecutor by the Security Council under Chapter VII of the Charter of the United Nations, or if the prosecutor has initiated an investigation in respect of this crime.<sup>1380</sup>

It is noteworthy that the United States has challenged the jurisdiction of the ICC on the basis that this jurisdiction is considered a violation of customary international law because, according to the RSICC, states parties are required to surrender their nationals to non-state parties.<sup>1381</sup> Furthermore, the ICC in accordance with the customary international law might exercise its jurisdiction against persons from non-state parties of the RSICC if the non-state parties allow the ICC to exercise its jurisdiction.<sup>1382</sup>

This jurisdiction has been justified according to the Report of the International Commission on Intervention and State Sovereignty (2001), which will be referred to hereinafter as the 'ICISS'. This report contains a number of moral rules and principles.<sup>1383</sup> To be more specific, this report includes a number of responsibilities of states. The first responsibility is to prevent

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<sup>1379</sup> The RSICC, Art. 17(1)(d); Kim, *op cit*, 30. This principle has been discussed in chapter five (5.2); this section will examine circumstances where the crime of trafficking in persons has sufficient gravity to raise it to the level of crimes against humanity.

<sup>1380</sup> The RSICC, Arts. 5, 13-14; Obokata, 'Trafficking of Human Beings as a Crime against Humanity', *op cit*, 454.

<sup>1381</sup> Steven C. Roach, 'Humanitarian Emergencies and the International Criminal Court (ICC): Toward a Cooperative Arrangement between the ICC and UN Security Council' (2005) 6(4) *International Studies Perspectives* 431, 435.

<sup>1382</sup> The RSICC, Art. 12(2); Roach, *op cit*, 435-436.

<sup>1383</sup> Roach, *op cit*, 437-438.



crises which could put their population at risk. The second responsibility is to react against any threat. The third responsibility is to rebuild the affected society. It is noteworthy that all of these responsibilities are considered part of the responsibility of states to protect.<sup>1384</sup> Furthermore, a harmonised response to humanitarian emergencies has been provided in this report. To be more precise, the ICC and the Security Council in the matter of humanitarian emergencies will cooperate through two kinds of assistance. The first kind is information gathering. The second kind is institutional re-engineering.<sup>1385</sup> More to the point, the duty of protecting populations at risk is also considered one of the principles contained in the ICISS. This duty starts on the state level. Therefore, should the state prove unable or unwilling to protect its civilians, the duty to protect populations at risk is transferred to the international level.<sup>1386</sup>

In other words, the duty to protect populations at risk lies with the state whose individuals are affected because it is regarded as best placed to understand, deal with, and take action to solve the problems that may arise. However, this could be challenged on the basis that the international community, represented by the wider community of states, becomes responsible for this duty ‘to protect communities from mass killing, women from systematic rape and children from starvation’ if the state in question is considered unable or unwilling to fulfil its responsibilities or is itself the perpetrator.<sup>1387</sup>

Moreover, the ICISS aims to make the concept of humanitarian intervention more acceptable. However, it could be said that it does not succeed in characterising the conditions in which humanitarian crises will reach the level of international responsibility.<sup>1388</sup> In addition, it is noteworthy that intervention on humanitarian grounds requires criteria and procedures for determining how and when to intervene when all other tactics have failed.<sup>1389</sup> Accordingly, it should be noted that giving the ICC jurisdiction over TIP as a crime against humanity may be hindered by state sovereignty and interests,<sup>1390</sup> because states may be reluctant to abandon their jurisdiction over their own citizens, which constitutes an obstacle to the effective

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<sup>1384</sup> The Report of the International Commission on Intervention and State Sovereignty (December, 2001) XI; Roach, *op cit*, 438.

<sup>1385</sup> Roach, *op cit*, 437-438, 340.

<sup>1386</sup> *ibid*, 437-438.

<sup>1387</sup> The Report of the International Commission on Intervention and State Sovereignty (December, 2001) Paras. 2.29-2.31; Roach, *op cit*, 438.

<sup>1388</sup> Roach, *op cit*, 438.

<sup>1389</sup> *ibid*, 439.

<sup>1390</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, *op cit*, 454.

application of international criminal law.<sup>1391</sup> However, it can certainly be argued that international law might impose limitations on state sovereignty. Therefore, it is possible to assert that there is no absolute sovereignty and no state is completely independent of others.<sup>1392</sup> In this regard, the following has been stated:

The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world.<sup>1393</sup>

Notably, the ICC might exercise its jurisdiction over TIP in any of the following ways:

### **5.5.1 The Referral of the Crime by a State Party to the Prosecutor**

The ICC might exercise its jurisdiction over TIP as a crime against humanity if the crime is referred by a state party to the prosecutor.<sup>1394</sup> However, it is noticeable that the state should be a state party to the RSICC if it is to exercise its right of complaint about a situation to the ICC.<sup>1395</sup> It is worth noting that, if the referral requires the consent of a state, this consent is considered unnecessary when the state is unwilling or unable to tackle TIP by enacting legislation to prohibit this crime or by giving traffickers immunity.<sup>1396</sup>

It is noteworthy that the unwillingness of a state might be determined according to a number of factors acknowledged by international law.<sup>1397</sup> The first factor is ‘shielding the persons’. According to this notion, the state receiving the letter from the ICC instructing it to carry on investigating and prosecuting the offenders (the traffickers) engaged in a crime may initiate fake procedures aimed at shielding the offenders from criminal responsibility. Notably, it is not easy to prove the intent of the state in doing so as the burden of proof lies with the prosecutor, who must prove this intent. The second factor is ‘unjustifiable delay’. This takes place when the state unjustifiably delays the procedures for bringing the offenders (the traffickers) to justice because the state’s intent is not consistent. The third factor is ‘lack of

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<sup>1391</sup> Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008) 15.

<sup>1392</sup> *ibid*, 16.

<sup>1393</sup> United Nations Secretary-General, ‘An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping’ (1992) A/47/277, Para. 17.

<sup>1394</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, *op cit*, 454-455.

<sup>1395</sup> Triffterer and Ambos, *op cit*, 579.

<sup>1396</sup> Obokata, ‘Trafficking of Human Beings as a Crime against Humanity’, *op cit*, 454-455.

<sup>1397</sup> Triffterer and Ambos, *op cit*, 622.

impartiality'. This means that the state's procedures are not being conducted impartially and independently against the offenders (the traffickers).<sup>1398</sup>

### **5.5.2 The Security Council Refers the Crime to the Prosecutor under Chapter VII of the Charter of the United Nations**

It has been argued that TIP could fall under Chapter VII of the Charter of the United Nations (UN) if this crime is considered a threat to international peace and security, which enables the Security Council to refer this crime to the ICC regardless of whether this crime was committed in a state or non-state party. This can be illustrated by cases where TIP is associated with terrorist activities and armed conflict.<sup>1399</sup> For instance, terrorists have bought children in Pakistan to use them as suicide bombers. Furthermore, rebels in Africa engage in trafficking in children for the purpose of obtaining child soldiers and funding conflicts.<sup>1400</sup>

Interestingly, the funding of a terrorist group, an insurgency or a guerrilla movement is one of the reasons why traffickers engage in TIP. For example, in Europe a terrorist in prison ran a network of Moldovan trafficked women working in prostitution in order to fund *Hezbollah*. In addition, Kurdish criminals ran a nightclub staffed by trafficked women in Turkey to help the Kurdistan Workers' Party, the 'PKK'.<sup>1401</sup> Furthermore, the link between TIP and terrorism is becoming a serious problem,<sup>1402</sup> and the demand for trafficked persons for the purpose of military engagement in war zones has increased.<sup>1403</sup>

However, this might be challenged on the basis that it is not easy to illustrate TIP as a crime that of itself might be elevated to the level of a threat to international peace and security in accordance with Chapter VII of the Charter of the UN.<sup>1404</sup>

To a certain extent, it is understood that giving the Security Council the power to refer a situation to the ICC according to the RSICC might be criticised on the basis that this power may politicise and affect the impartiality, legitimacy, credibility, and independence of the ICC.<sup>1405</sup> However, this might be challenged on the basis that, according to lawfully legitimate

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<sup>1398</sup> *ibid*, 623; Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, op cit, 345.

<sup>1399</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 454-455.

<sup>1400</sup> Louise I. Shelley, *Human Trafficking: a Global Perspective* (Cambridge University Press 2010) 87.

<sup>1401</sup> Maggy Lee (ed), *Human Trafficking* (Willan Publishing 2007) 120.

<sup>1402</sup> Anis H. Bajrektarević, 'Trafficking in and Smuggling of Human Beings-Linkages to Organized Crime-International Legal Measures' (2000) 8(1-2) *Kriminologija i socijalna integracija* 57, 59.

<sup>1403</sup> Opong, op cit, 40.

<sup>1404</sup> Obokata, 'Trafficking of Human Beings as a Crime against Humanity', op cit, 454-455.

<sup>1405</sup> Lawrence Moss, 'The UN Security Council and the International Criminal Court: Towards a More Principled Relationship' (2012) *International Policy Analysis* 1, 3-4.

standards, the referral of the crime to the prosecutor under Chapter VII of the Charter of the United Nations is not dictated by external actors, as the making of political choices by external entities will not be allowed by the prosecutor of the ICC.<sup>1406</sup> Furthermore, in accordance with the RSICC, an appropriate balance has been found between judicial independence and political concerns. In particular, the Security Council is no longer viewed as the gatekeeper to the ICC. However, the Security Council is still able to intervene in specific cases via resolutions.<sup>1407</sup> A point to note, however, is that it is not easy for the Security Council to determine which situations should be referred to the ICC.<sup>1408</sup>

### 5.5.3 The Prosecutor could Initiate an Investigation by His or Her Own Motion

According to Article 15 of the RSICC, an investigation might be initiated by the prosecutor's own motion according to information which proclaims that crimes under the jurisdiction of the ICC have been committed. Furthermore, it is evident that this Article aims to pave the way for the ICC to exercise its jurisdiction.<sup>1409</sup> However, it is noteworthy that the prosecutor's right to initiate an investigation is discretionary and unconditional. Nonetheless, the prosecutor needs authorisation from a Pre-Trial Chamber to launch a full investigation.<sup>1410</sup>

In addition to this, the prosecutor needs to examine information before carrying out an investigation. Accordingly, it can be stated that since information has arrived at the prosecutor's office and a decision has been made to initiate an investigation on the basis of this information, the source of this information is considered irrelevant. In this regard, it is understood that the right of the prosecutor to initiate an investigation *proprio motu* should not be arbitrary. This right should be limited to the most serious crimes internationally.<sup>1411</sup> However, there is a presumption that the prosecutor's decision as a result of the prosecutorial discretion doctrine is constitutionally valid.<sup>1412</sup> Accordingly, it can be said that close judicial scrutiny of the prosecutor's decisions could undermine the effectiveness of crime control.<sup>1413</sup>

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<sup>1406</sup> The RSICC, Art. 59; Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers 2008) 377.

<sup>1407</sup> William Schabas, 'United States Hostility to the International Criminal Court: It's all about the Security Council' (2004) 15(4) *European Journal of International Law* 701, 716.

<sup>1408</sup> Moss, *op cit*, 4.

<sup>1409</sup> The RSICC, Art. 15(1); Triffterer and Ambos, *op cit*, 585.

<sup>1410</sup> The RSICC, Art. 15(1).

<sup>1411</sup> Triffterer and Ambos, *op cit*, 585-586.

<sup>1412</sup> Robert Heller, 'Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion' (1997) 145(5) *University of Pennsylvania Law Review* 1309, 1314.

<sup>1413</sup> *ibid*, 1333.

It is obvious that if the states prosecute and investigate the offenders in good faith, the ICC may not intervene in these processes. However, it is possible to argue that the case may be admissible if states are unwilling or unable to take legal action against offenders. An example of this is the inactivity that ensues when the state's jurisdiction remains inactive against any case falling under this jurisdiction. Another situation of admissibility arises when the trial is not considered to be genuine. More to the point, if the state has decided that it will not prosecute the offender despite the fact that it has criminal jurisdiction over the offence, this situation is inadmissible. Furthermore, it is clear that if the case is not considered to be of sufficient gravity, the ICC will take no further action and will not intervene in the state jurisdiction.<sup>1414</sup>

Accordingly, the ICC has a number of legal mechanisms which enable it to exercise its jurisdiction over TIP as a crime against humanity.

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<sup>1414</sup> Triffterer and Ambos, *op cit*, 606, 615, 617, 619.

## 5.6 Conclusion

This chapter has examined, in four sections, whether or not the ICC is considered an effective organ for addressing TIP as a crime against humanity. The first section has investigated when TIP might be considered a crime against humanity falling under the ICC jurisdiction by taking an in-depth look at the relationship between TIP and enslavement. In this regard, it can be said that the importance of considering TIP as a practice falling under the notion of enslavement is that it gives the ICC jurisdiction over TIP as a crime against humanity.

The second section has highlighted the elements that must be present in the crime of TIP in order for it to be classified as a crime against humanity by analysing three elements. The first element is the exercising of the right of ownership over an individual or individuals. The second element is the meaning of the terms ‘attack’, ‘widespread’, ‘systematic’, and ‘civilian population’ as the main components raising the crime of TIP to the level of crimes against humanity. The third element is the criminal intent required in crimes against humanity.

The third section has dealt with the reason for considering the ICC a more capable organ than the national criminal justice systems for addressing TIP as a crime against humanity. This section has stated that the inferior capability of the national criminal justice systems compared with the ICC and the ways in which the ICC enables victims to play a role in trials are the main reasons for considering the ICC to be a more capable organ.

The fourth section has examined the ways in which the ICC might exercise its jurisdiction over TIP as a crime against humanity by addressing the following processes. The first is the referral of the crime to the prosecutor by a state party in the RSICC. The second is the referral of the crime to the prosecutor by the Security Council under Chapter VII of the Charter of the UN. The third is the initiation of an investigation by the prosecutor *proprio motu*.

This chapter concludes that the crime of TIP as a crime against humanity might be prosecuted under the ICC jurisdiction when this crime is committed via a widespread or systematic attack against trafficked persons with knowledge of the traffickers.<sup>1415</sup> Furthermore, the ICC might be considered an effective tool for addressing TIP as a crime against humanity when this crime is categorised under the heading of ‘the most serious crimes of international concern’.

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<sup>1415</sup> Aston and Paranjape, op cit, 9-10.

This chapter also concludes that although the ICC might be regarded as a more capable body for addressing TIP as a crime against humanity when it has jurisdiction over this crime, no prosecution of this crime as a crime against humanity has yet been successfully undertaken under the ICC jurisdiction.<sup>1416</sup>

This chapter argues that by focusing on the highest-ranked perpetrators, the ICC might strongly deter the commission of such crimes.<sup>1417</sup> In this regard, the following has been stated:

[O]nly by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court.<sup>1418</sup>

Therefore, if the ICC focuses on the senior and highest-ranked officials who may become involved in the commission of the crime of TIP in states parties, this may send a strong message to these states that legal consequences may be imposed by the ICC. Consequently, this might play a deterrent role in addressing the crime of TIP.

This chapter suggests limiting the ICC jurisdiction over the crime of TIP to the severest cases falling under the concept of crimes against humanity, when all the elements of enslavement as a crime against humanity are also present, leaving other cases of the crime of TIP to national jurisdictions.

This chapter recommends adding TIP to the list of crimes against humanity under Article 7 and using the definition stated in the TIPP for this crime.

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<sup>1416</sup> Kim, *op cit*, 3; Aston and Paranjape, *op cit*, 10.

<sup>1417</sup> Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *op cit*, 348.

<sup>1418</sup> Situation in the Democratic Republic of Congo (Decision on The Prosecutor's Application for Warrants Of Arrest, Article 58) ICC-01/04-01/07 (10 February 2006) Para. 55.

## Chapter Six

### Addressing the Crime of Trafficking in Persons in Jordan

#### 6.1 Introduction

The aim of this chapter is to examine how the crime of trafficking in persons (TIP) has been addressed in Jordan. In doing so, this chapter will shed light on five main aspects of this.

The first aspect is Jordan's efforts in addressing the crime of TIP. This aspect will be dealt with in the first section by highlighting the importance of each effort. Furthermore, recommendations will be made in relation to these efforts by suggesting the adoption of similar approaches used in countries such as Syria<sup>1419</sup> and Egypt,<sup>1420</sup> which might be regarded as good practice for addressing the crime of TIP; these countries also have a similar legal system to that of Jordan. The second aspect is the role of Islamic Criminal Law in addressing the crime of TIP in Jordan. This aspect will be dealt with in the second section by analysing the Islamic approach in the fight against the crime of TIP. The chapter will look at the Saudi Arabia Law for Combating Crimes of Trafficking in Persons<sup>1421</sup> as Saudi Arabia is a country that follows Islamic law strictly. This is significant because Islam is regarded as a way of life in Jordan. Therefore, it will be useful to establish how Islamic Criminal Law addresses the crime of TIP and how Saudi Arabia deals with TIP, as this may be a good example to follow, as a comparative example between Islamic jurisdictions.

The third aspect examines challenges to address the crime of TIP in Jordan. In this regard, there are two types of challenges. The first type is the legal challenges. These challenges will be studied by shedding light on the vagueness of the definition of the crime of TIP and its forms in the Jordanian Anti-Trafficking in Persons Law (JATIPL).<sup>1422</sup> Then, a number of issues that have not been addressed in this Law will be examined, such as the issue of the attempt to commit the crime of TIP, the issue of the criminal participation in the commission of this crime, and the protection of vulnerable categories. After that, the incommensurateness between the punishments for the commission of the crime of TIP and the gravity of this crime

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<sup>1419</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons.

<sup>1420</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010).

<sup>1421</sup> The Saudi Arabian Law for Combating Crimes of Trafficking in Persons (Royal Decree No M/40 of 2009) *Um Al-Quaran*, dated 7 August 2009.

<sup>1422</sup> The Jordanian Anti-Trafficking in Persons Law (JATIPL) (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009.



in the JATIPL will be dealt with as another legal challenge. Subsequently, the overlap between the JATIPL and other legislation will be analysed.

The second type of challenges is practical. These challenges will be examined accordingly by shedding light on the following: sheltering, the filing of complaints by trafficked victims, failure to employ systematic procedures, the lack of formal procedures used to identify trafficked victims, insufficient awareness-raising, the weak implementation of the Jordanian National Strategy to Prevent Trafficking in Persons, language barriers, the difficulty of estimating the scale of the crime of TIP, the mass influx of refugees, the inadequacy of inter-ministerial cooperation, and the absence of national non-judiciary mechanisms to ensure the rights of trafficked victims. The analysis will seek to identify to what extent these challenges can be addressed by legal/legislative means.

The fourth aspect is the consistency between the JATIPL and the ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP),<sup>1423</sup> in the matter of trafficked persons’ rights. This aspect will be dealt with in the fourth section by examining whether or not the JATIPL provides trafficked victims with the rights stated in the Protocol, and what might happen in the event of a contradiction between the JATIPL and the TIPP.

The final aspect concerns state responsibility over TIP. This aspect will be dealt with by examining the question of whether or not compliance with international standards in addressing the crime of TIP might impose state responsibility.

This chapter concludes that Jordan have made notable efforts to address the crime of TIP and to comply with the international standards in the fight against this crime.

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<sup>1423</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

## 6.1 Jordan's Efforts to Address the Crime of Trafficking in Persons

This section will examine the efforts made in Jordan to address the crime of TIP by shedding light on the following efforts representing legislative and practical measures of implementation:

### 6.2.1 Enacting the Jordanian Anti-Trafficking in Persons Law (JATIPL)

In 2009, Jordan enacted the JATIPL.<sup>1424</sup> It is noteworthy that this is considered the most important effort made by Jordan to address the crime of TIP, since this Law criminalises the crime of TIP for the first time.<sup>1425</sup> In other words, after the introduction of this Law, TIP became a crime *per se*.<sup>1426</sup> Therefore, anyone committing this crime is subject to criminal legal liability.<sup>1427</sup> The JATIPL has a number of features. The first feature is omissions liability. In other words, this Law not only criminalises the commission of the crime of TIP but also criminalises the failure to take action when this crime is committed.<sup>1428</sup> More precisely, the JATIPL criminalises any person who, as a consequence of his/her position,<sup>1429</sup> is aware of a plan to commit the crime of TIP or that the crime of TIP has been committed and fails to report what has happened to the competent authorities. However, this requires the commission of the crime of TIP to be coupled with aggravating circumstances.<sup>1430</sup>

The second feature is the vicarious liability. In other words, the JATIPL punishes a legal person when it commits the crime of TIP through its representatives. This punishment extends not only to the legal person but also to his/her representative committing the crime of TIP. It should be stressed that the punishment for the legal person ranges from a fine to suspension from work, permanently or partially. Notably, if there is a recurrence of the commission of the crime of TIP by the legal person, the punishment could be deregistration or dissolution.<sup>1431</sup>

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<sup>1424</sup> A number of efforts had been made in relation to trafficking in persons before the enactment of the Jordanian Abolition of Slavery Law. These efforts were dealt with in chapter three (3.2).

<sup>1425</sup> The Jordanian Anti-Trafficking in Persons Law (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009; Zahra T. Salman, *Trafficking in Persons: Trafficking in Persons Protocol and Jordan's Obligations about it - A Comparative Study* (Arabic edn, Darwael 2012) 130.

<sup>1426</sup> The JATIPL, Art. 3.

<sup>1427</sup> *ibid*, Arts. 8-11.

<sup>1428</sup> Wijdan S. Irtemah, *General Provisions of Crimes of Human Trafficking: A Comparative Study* (Arabic edn, Daralthaqafa 2014) 238, 350-351.

<sup>1429</sup> In accordance with Article 9(b)(7) of the JATIPL, the position means here that the person who knows is a public officer or this person is assigned to a public duty.

<sup>1430</sup> The JATIPL, Art. 10(a).

<sup>1431</sup> *ibid*, Art. 11; Irtemah, *op cit*, 346-347.

The third feature is that this Law criminalises the possession, concealment, or disposition of the proceeds of the crime of TIP. Therefore, any person found guilty of committing any of the above acts will be sentenced to imprisonment, or a fine, or both sentences.<sup>1432</sup> It should be stressed that the JATIPL is limited in its scope to criminalising the possession, concealment, or disposition of the financial proceeds of the crime of TIP. In other words, this Law does not criminalise other acts such as hiding a person or persons who participate in the commission of the crime of TIP.<sup>1433</sup> It is noteworthy that such an act has been criminalised under the Egyptian Law on Combating Human Trafficking, which imposes imprisonment for concealing a perpetrator who has committed any of the crimes of TIP.<sup>1434</sup> Therefore, it is recommended that similar provision be adopted in the JATIPL in order to criminalise the concealment of traffickers, because there is no difference in substance between concealing proceeds and concealing the perpetrator in terms of seriousness of wrongdoing.

However, it should be stressed that the JATIPL does not deal with two important issues related to addressing the crime of TIP. The first issue is the liability for the attempt to commit this crime. The second issue is the criminal participation in the commission of the crime of TIP.<sup>1435</sup>

## **6.2.2 Adopting the Jordanian National Strategy to Prevent Trafficking in Persons**

Another significant effort made to address the crime of TIP in Jordan is the adoption of the Jordanian National Strategy to Prevent Trafficking in Persons. According to this strategy, a number of aims need to be achieved.<sup>1436</sup> The first aim is to prevent TIP.<sup>1437</sup> The second aim is to protect trafficked victims and those who are affected by the commission of this crime.<sup>1438</sup> The third aim is to harmonise legislation preventing TIP nationally and the other legislation preventing TIP internationally.<sup>1439</sup> The fourth aim is to adopt and implement programmes for awareness, education, and training to all groups involved in the prevention of the crime of TIP.<sup>1440</sup> The fifth aim is to activate and implement the JATIPL and enhance the efficiency of

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<sup>1432</sup> The JATIPL, Art. 10(b); Irtemah, op cit, 352.

<sup>1433</sup> Irtemah, op cit, 352.

<sup>1434</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 8.

<sup>1435</sup> These issues will be further discussed in chapter six (6.4.1).

<sup>1436</sup> The Jordanian Anti-Human Trafficking National Committee (JAHTNC), 'The Jordanian National Strategy to Prevent Trafficking in Persons and the Framework for 2010-2012' (Arabic edn) 3-4.

<sup>1437</sup> *ibid*, 3.

<sup>1438</sup> *ibid*.

<sup>1439</sup> *ibid*, 3-4.

<sup>1440</sup> *ibid*, 4.

investigation and prosecution bodies.<sup>1441</sup> The sixth aim is to rehabilitate and train all persons working to implement the JATIPL, including judges, and prosecutors.<sup>1442</sup> The seventh aim is to enhance regional and international cooperation in the prevention of TIP.<sup>1443</sup>

It should be stressed that the ‘three Ps approach’ in the fight against TIP has not been fully achieved by the aims of the Jordanian National Strategy to Prevent Trafficking in Persons. Precisely, this approach focuses on preventing TIP, protecting trafficked victims, and prosecuting traffickers equally. In reality, the aims of the Jordanian National Strategy to Prevent Trafficking in Persons have a greater focus on preventing TIP than protecting trafficked victims and prosecuting traffickers.

The Jordanian National Strategy to Prevent Trafficking in Persons contains four strategic axes.<sup>1444</sup> These four strategic axes will be described accordingly. The first strategic axis is prevention. This axis contains three strategic aims. The first strategic aim is to draw up comprehensive policies to prevent TIP. The second strategic aim is to raise awareness about TIP. The third strategic aim is to provide special training in the prevention of TIP to those concerned with this prevention.<sup>1445</sup> The second strategic axis is protection. This axis contains two strategic aims. The first strategic aim is to identify trafficked victims and those who are affected by the commission of the crime of TIP. The second strategic aim is to protect and support trafficked victims and those who are affected by the commission of the crime of TIP.<sup>1446</sup>

The third strategic axis is prosecution, which has two strategic aims. The first is to enhance the rule of law and find a competent judiciary.<sup>1447</sup> The second strategic aim is to create an executive body eligible for and specialised in combating TIP. This strategic aim might be achieved by setting up a framework on the work of the Jordanian Anti-Trafficking in Persons Unit and establishing a special database for the Unit.<sup>1448</sup> The fourth strategic axis is to build partnerships and cooperation locally, regionally, and internationally. This axis contains two

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<sup>1441</sup> *ibid.*

<sup>1442</sup> *ibid.*

<sup>1443</sup> *ibid.*

<sup>1444</sup> The JAHTNC, ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 1; The JAHTNC, ‘The Jordanian National Strategy to Prevent Trafficking in Persons and the Framework for 2010-2012’ (Arabic edn) 5-8; The Jordanian National Center for Human Rights, ‘Status Report of Human Rights in the Hashemite Kingdom of Jordan’ (2010) 213.

<sup>1445</sup> The JAHTNC, ‘The Jordanian National Strategy to Prevent Trafficking in Persons and the Framework for 2010-2012’ (Arabic edn) 5-6.

<sup>1446</sup> *ibid.*, 6-7.

<sup>1447</sup> *ibid.*, 7.

<sup>1448</sup> *ibid.*, 8.

strategic aims. The first is to enhance transparency and a participatory approach. The second strategic aim is to enhance regional and international cooperation.<sup>1449</sup>

It should be stressed that, despite the importance of the Jordanian National Strategy to Prevent Trafficking in Persons, there is no periodical review, evaluation, or monitoring of this strategy. Additionally, this strategy is limited to the years 2010-2012. Therefore, reviewing, evaluating, monitoring, and updating this strategy could be a significant step in order to achieve the strategy aims and its strategic axes.

### **6.2.3 Establishing the Jordanian Anti-Human Trafficking National Committee (JAHTNC)**

Establishing the JAHTNC is another effort to tackle the crime of TIP. This Committee has been established in accordance with the JATIPL.<sup>1450</sup> This Committee has a number of tasks. The first task is to draw up the anti-trafficking-in-persons general policy, set out the plans required to implement this policy, and oversee its application.<sup>1451</sup> The second task is to review legislation on preventing TIP and to submit suggestions and recommendations in this regard.<sup>1452</sup>

The third task is to coordinate the work of official and unofficial entities concerned with preventing TIP to facilitate the repatriation of trafficked victims and those who are affected by the commission of this crime to their home countries or any other chosen country that agrees to receive them.<sup>1453</sup> The fourth task is to issue a national guide including guidelines and educational materials relevant to the work of the JAHTNC.<sup>1454</sup> The fifth task is to raise awareness among employers, persons who recruit employees, and employees on the issues relevant to preventing TIP by holding conferences, workshops, training and educational programmes, and other activities.<sup>1455</sup>

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<sup>1449</sup> *ibid.*

<sup>1450</sup> The JATIPL, Art. 4; The Jordanian Public Security Directorate's Criminal Investigation Unit, 'Trafficking in Persons in accordance with the Jordanian Anti-Trafficking in Persons Law and the Rights and Duties of Migrant Workers in accordance with the Jordanian Laws of (Labour, Residence and Foreigners' Affairs, and Passports) and the Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status' (Arabic edn, 2011) 7-8; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32.

<sup>1451</sup> The JATIPL, Art. 5(a).

<sup>1452</sup> *ibid.*, Art. 5(b).

<sup>1453</sup> *ibid.*, Art. 5(c).

<sup>1454</sup> *ibid.*, Art. 5(d).

<sup>1455</sup> *ibid.*, Art. 5(e).

The sixth task is to study international, regional, and local anti-trafficking-in-persons reports, and take the required measures.<sup>1456</sup> An example is ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009-2013).<sup>1457</sup> The seventh task is to coordinate work by official and unofficial entities to implement physical, psychological, and social recovery programmes required for trafficked victims and those affected by the commission of this crime, and to oversee efforts to shelter them in places established or recognised as shelters.<sup>1458</sup> The eighth task is to form one or more subcommittees to assist the JAHTNC to perform its tasks, as well as to provide recommendations to the Committee.<sup>1459</sup>

Notably, however, the JAHTNC is significant because it includes all the national institutions and high-level representatives who are combating TIP.<sup>1460</sup> However, it could be argued that although the JATIPL requires that the JAHTNC meet quarterly,<sup>1461</sup> this Committee does not meet consistently.<sup>1462</sup> By way of illustration, this Committee has not met for a period of time exceeding one and a half years. Moreover, the Committee did not fulfil the requirement to meet quarterly.<sup>1463</sup> Therefore, this is considered a violation of the JATIPL and the Jordanian National Strategy to Prevent Trafficking in Persons; consequently, this affects Jordan’s obligations in addressing the crime of TIP.<sup>1464</sup> Finally, it is noteworthy that the Committee does not make legally binding decisions; it is merely a meeting point for relevant officials with the goal of coordinating.

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<sup>1456</sup> *ibid*, Art. 5(f).

<sup>1457</sup> This Report was issued in 2014 by the Jordanian Anti-Human Trafficking National Committee.

<sup>1458</sup> The JATIPL, Art. 5(g).

<sup>1459</sup> *ibid*, Art. 5(h).

<sup>1460</sup> *ibid*, Art. 4(a); The Jordanian Anti-Human Trafficking National Committee (JAHTNC), ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 1, 7. In this regard, it should be stressed that this ‘[c]ommittee is headed by the Minister of Justice with membership of: the Secretary General of the Ministry of Justice, Secretary General of the Ministry of the Interior, the Secretary General of the Ministry of Labor, the Commissioner-General of the National Center for Human Rights, a representative of the Ministry of Foreign Affairs, a representative of the Ministry of Social Development, a representative of the Ministry of Industry and Trade, a representative of the Ministry of Health, one of the senior officers of the Public Security Directorate, and the Secretary General of the National Council of Family Affairs’.

<sup>1461</sup> The JATIPL, Art. 6(a).

<sup>1462</sup> United States Department of State (USDS), ‘Trafficking in Persons Report (TIPR)’ (2011) 210, (2012) 203, (2013) 215.

<sup>1463</sup> USDS, ‘TIPR’ (2014) 225, (2015) 202. It should be stressed that during the reporting period (June 2013- June 2014) the JAHTNC just met three times and during the reporting period (July 2014- July 2015) it met two times.

<sup>1464</sup> The JATIPL, Art 6(a). This Articles requies that the JAHTNC must meet quarterly. The Jordanian National Center for Human Rights, ‘Status Report of Human Rights in the Hashemite Kingdom of Jordan’ (Arabic edn, 2011) 83.

#### 6.2.4 Establishing the Jordanian Anti-Trafficking-in-Persons Unit

The establishment of a specialised Anti-Trafficking-in-Persons Department, in 2008, in the Criminal Investigation Department in the Jordanian Public Security Directorate,<sup>1465</sup> is another particular measure taken against the crime of TIP in Jordan.<sup>1466</sup> This Department worked and cooperated with police to investigate cases of TIP or any suspicions relating to the commission of the crime of TIP. The Anti-Trafficking in Persons Department dealt with a number of cases related to TIP. The first type of case is related to the sale of human organs. The second type of case concerns advertisements for job opportunities with high salaries. These advertisements were aimed at the sexual exploitation of those who applied for these job opportunities. The third type of case involves housemaids who have been trafficked.<sup>1467</sup>

It should be stressed that, in 2012, as a result of the Memorandum of Understanding signed between the Public Security Directorate and the Ministry of Labour, this Department became a Unit.<sup>1468</sup> The significance of the establishment of this Unit is that this Unit first investigates cases of TIP and then refers these cases to the judiciary.<sup>1469</sup> Furthermore, this Unit is working to identify trafficked victims, facilitate the repatriation of possible trafficking victims, and refer cases of TIP for prosecution through its liaison officers. These liaison officers are working in cooperation with foreign embassies.<sup>1470</sup>

#### 6.2.5 Training

Another action that has been taken as part of the Jordanian efforts to address the crime of TIP is the provision of training. Labour inspectors and police officers have been trained to uncover cases of TIP, having received instruction on the various forms of TIP.<sup>1471</sup> Special

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<sup>1465</sup> 'Law enforcement services in Jordan are provided by the Public Security Directorate (PSD)'. This includes '[c]riminal investigations; Operations and training; Judicial police; Road safety and traffic; Administration and planning; [and] Human resources'. See <<http://www.interpol.int/Member-countries/Asia-South-Pacific/Jordan>> accessed 1 September 2015.

<sup>1466</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 8; Mohanad F. Al-Dweikat, *Criminal Investigation in Trafficking in Persons Cases* (Arabic edn, Lemon marketing 2012) 16; Salman, op cit, 136; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32.

<sup>1467</sup> Salman, op cit, 136.

<sup>1468</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 8; USDS, 'TIPR' (2014) 223, (2015) 202. This Unit is subsidiary to the Criminal Investigation Department in the Jordanian Public Security Directorate.

<sup>1469</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 8; USDS, 'TIPR' (2013) 214, (2014) 223-224.

<sup>1470</sup> USDS, 'TIPR' (2014) 224.

<sup>1471</sup> USDS, 'TIPR' (2009) 173, (2010) 192, (2011) 209; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32. These forms, in accordance with Article

training on TIP has been provided by the Jordanian Public Security Directorate to a large number of officers.<sup>1472</sup> Furthermore, training in anti-trafficking-in-persons techniques has been provided for police officers.<sup>1473</sup> Additionally, publications and brochures to identify trafficked victims have been distributed to police and border control officers.<sup>1474</sup>

Moreover, labour inspectors have been trained on several aspects of TIP by the Jordanian Ministry of Labour.<sup>1475</sup> It is worth noting that labour inspectors' training has played a significant role in protecting workers' rights in the Jordanian Qualified Industrial Zones (QIZs). In particular, because of this training, there is no illegal withholding of passports for most of the QIZs's workers. Moreover, there has been a decline in the severity and number of QIZs workers' rights violations.<sup>1476</sup>

Furthermore, 300 border control personnel have been trained by the Borders and Residency Department in the Jordanian Public Security Directorate to identify trafficked victims.<sup>1477</sup> This training was important because it aimed to train border guards to both interview and recognise trafficked victims.<sup>1478</sup> Additionally, technical equipment has been supplied to border control officers for the purpose of detecting forged travel documents.<sup>1479</sup>

In addition, recruitment agencies were trained in domestic workers' rights.<sup>1480</sup> Anti-trafficking training was also provided by Jordan's Peace Operations Training Center<sup>1481</sup> for peacekeepers deployed in international peacekeeping missions abroad. It is worth noting that this training is considered part of the standard training provided to the peacekeepers.<sup>1482</sup>

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3(b) of the JATIPL, are: 'forced labour or services, slavery, servitude, the removal of organs, prostitution, or any other form of sexual exploitation'.

<sup>1472</sup> USDS, 'TIPR' (2009) 173, (2012) 202.

<sup>1473</sup> USDS, 'TIPR' (2007) 126.

<sup>1474</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1475</sup> USDS, 'TIPR' (2008) 153, (2009) 173.

<sup>1476</sup> USDS, 'TIPR' (2008) 153.

<sup>1477</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1478</sup> USDS, 'TIPR' (2010) 191.

<sup>1479</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1480</sup> USDS, 'TIPR' (2008) 153.

<sup>1481</sup> Peace operation Training Center 'is an organic unit of the Directorate of Doctrine and Joint Training/Jordanian Armed Force, established in August 1996. This dedicated to training troops on UN Peace Operations' <<http://www.jaf.mil.jo/English/EducationAndTraining/centers/Pages/PeaceOperationTrainingCenter.aspx>> accessed 1 December 2014.

<sup>1482</sup> USDS, 'TIPR' (2010) 193, (2011) 210, (2012) 203.



However, this training later became optional for Jordanians deployed in peacekeeping operations abroad.<sup>1483</sup>

Accordingly, it should be stressed that the scope of this training was not sufficient to address the crime of TIP because such training did not include training for people involved in implementing the law.<sup>1484</sup> More precisely, as a result of the special nature of the crime of TIP, addressing this crime requires a holistic approach. This approach should include the provision of training to all people involved in the fight against this crime. Therefore, specialised training for bodies working against TIP is needed to combat this crime comprehensively as this crime has various patterns and types.<sup>1485</sup>

In this regard, training for specialised officials has been provided to ‘the judiciary, public prosecution, and specialised executive police body’. This specialised training has also been provided by the Jordanian Bar Association for lawyers interested in trafficking-in-persons cases or involved in the litigation of this crime. Furthermore, this specialised training has been provided to recruitment office owners, facility and factory owners, and press and media personnel.<sup>1486</sup>

Accordingly, it should be stressed that this specialised training is important because it has targeted a wide variety of officials. Furthermore, it has been provided in cooperation with a number of bodies. Additionally, this specialised training has included various types of courses such as ‘Advanced Course on Combating Human Trafficking’ and ‘Training of Investigators on Combating Trafficking in Persons’.<sup>1487</sup>

Finally, it is worth noting that there are two observations regarding the training. Firstly, it is difficult to assess the exact effect of the training overall due to the lack of standardised procedures for the evaluation of training. Secondly, the training indicates that enforcement priority is being given to TIP, as this does not typically occur in relation to other crimes.

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<sup>1483</sup> USDS, ‘TIPR’ (2013) 216, (2014) 225, (2015) 202.

<sup>1484</sup> The Jordanian National Center for Human Rights, ‘Status Report of Human Rights in the Hashemite Kingdom of Jordan’ (2010) 119; The Jordanian National Center for Human Rights, ‘Status Report of Human Rights in the Hashemite Kingdom of Jordan’ (Arabic edn, 2012) 125.

<sup>1485</sup> The JAHTNC, ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 11.

<sup>1486</sup> *ibid.*

<sup>1487</sup> *ibid* 11, 13.

## 6.2.6 Being a State Party to a Number of International Conventions Dealing with Trafficking in Persons Directly or Indirectly

Another effort made in Jordan to address the crime of TIP is its accession as a state party to a number of international conventions that deal with TIP directly or indirectly.<sup>1488</sup> To begin with, in 1931, Trans-Jordan acceded to ‘the 1921 International Convention for the Suppression of the Traffic in Women and Children’.<sup>1489</sup> Then, in 1957, Jordan acceded to ‘the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery’.<sup>1490</sup> Afterwards, in 1959, Jordan acceded to ‘the Convention to Suppress the Slave Trade and Slavery’.<sup>1491</sup> In 1966, Jordan ratified ‘the Forced Labour Convention, 1930 (No. 29)’.<sup>1492</sup> Subsequently, Jordan ratified ‘the International Covenant on Civil and Political Rights’ in 1975.<sup>1493</sup> Next, in 1976, Jordan acceded to ‘the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others’.<sup>1494</sup> Then, ‘the Convention on the Rights of the Child’ was ratified by Jordan in 1991.<sup>1495</sup> After that, in 1992, Jordan ratified ‘the Convention on the Elimination of

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<sup>1488</sup> *ibid*, 1; Mohamed Olwan, ‘Trafficking in Persons in Jordan’ (2011) CRIMES AS 2011/42, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole (FI): European University Institute 1, 6.

<sup>1489</sup> International Convention for the Suppression of the Traffic in Women and Children (entered into force 15 June 1922) 9 LNTS 415. Trans-Jordan accessed this Convention on 2 November 1931 <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VII-3&chapter=7&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VII-3&chapter=7&lang=en)> accessed 1 September 2015.

<sup>1490</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (entered into force 30 April 1957) 226 UNTS 3. Jordan accessed this Convention on 27 September 1957 <[https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en)> accessed 1 June 2015.

<sup>1491</sup> Convention to Suppress the Slave Trade and Slavery (signed at Geneva on 25 September 1926, entered into force 9 March 1927) 60 LNTS. 253. Jordan accessed this Convention as amended on 5 May 1959 <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-2&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-2&chapter=18&lang=en)> accessed 1 September 2015.

<sup>1492</sup> Forced Labour Convention, 1930 (No. 29) (entered into force 1 May 1932) adopted on 28 June 1930 by the General Conference of the International Labour Organisation at its fourteenth session. Jordan ratified this Convention in 6 June 1966 <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103201](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103201)> accessed 1 September 2015. This Convention was published on the Official Gazette (No 1809) dated 2 December 1964.

<sup>1493</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171. Jordan ratified this Convention in 28 May 1975 <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-4&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en)> accessed 1 September 2015. This Covenant was published on the page 2227 of the Official Gazette (No 4764) dated 15 June 2006.

<sup>1494</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (entered into force 25 July 1951) 96 UNTS 271. Jordan accessed this Convention on 13 April 1976 <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-4&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&lang=en)> accessed 1 September 2015.

<sup>1495</sup> Convention on the Rights of the Child (entered into force 2 September 1990) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989). Jordan ratified this Convention in 24 May 1991 <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)>

all forms of Discrimination against Women'.<sup>1496</sup> Subsequently, in 2000, Jordan ratified 'the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour'.<sup>1497</sup> In 2002, Jordan ratified 'the Rome Statute of the International Criminal Court'.<sup>1498</sup> In this Statute, TIP has been recognised as a practice falling under the notion of enslavement.<sup>1499</sup> It is noteworthy that Jordan is one of the few Arab countries not only to have become a state party to the RSICC but also to have embarked on implementing the RSICC's provisions in its legal system.<sup>1500</sup> In this regard, Jordan ratified the RSICC on 11 April 2002.<sup>1501</sup> After that, Jordan published the RSICC in the Official Gazette.<sup>1502</sup> It should be stressed that the implementation of any international convention in Jordan requires such convention to be ratified and published in the Jordanian Official Gazette in order for it to be integrated in the Jordanian legal system.<sup>1503</sup>

Next, 'the United Nations Convention against Transnational Organized Crime' was ratified by Jordan in 2009.<sup>1504</sup> In the same year, Jordan accepted the 'Protocol to Prevent, Suppress

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accessed 1 September 2015. This Convention was published on page 3993 of the Official Gazette (No 4787) dated 16 October 2006.

<sup>1496</sup> Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13. Jordan ratified this Convention in 1 July 1992 <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-8&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&lang=en)> accessed 1 September 2015. This Convention was published on page 4943 of the Official Gazette (No 4839) dated 1 August 2007.

<sup>1497</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, C182 (entered into force 19 November 2000) ILO No. 182, 2133 UNTS161. Jordan ratified this Convention in 20 April 2000 <<http://www.refworld.org/docid/3ddb6e0c4.html>> accessed 1 September 2015. This Convention was published on page 5209 of the Official Gazette (No 4623) dated 1 October 2003.

<sup>1498</sup> Rome Statute of the International Criminal Court (last amended 2010) adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (entered into force 1 July 2002) ISBN No. 92-9227-227-6.

<sup>1499</sup> Mohamed Y. Mattar, 'The International Criminal Court (ICC) Becomes a Reality: When Will the Court Prosecute The First Trafficking in Persons Case?' (2002) *The Protection Project* 1, 3.

<sup>1500</sup> Lutz Oette (ed), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ashgate Publishing 2013) 184, 191. It is noteworthy that there is no much literature on Jordan's relationship with the ICC and its attitude to it due the fact that this area has not been dealt with comprehensively.

<sup>1501</sup> For more information see <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103201](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103201)> accessed 1 September 2015.

<sup>1502</sup> The Official Gazette (No 4539) dated 16 April 2002.

<sup>1503</sup> The Jordanian Constitution (1952) page 3 of the Official Gazette (No 1093) dated 8 January 1952, Art. 33(2); Zahra T. Salman, *Trafficking in Persons: Trafficking in Persons Protocol and Jordan's Obligations about it - A Comparative Study* (Arabic edn, Darwael 2012) 21; Mohammed Al-Moosa, 'The Application of International Conventions for Human Rights in the Jordanian Judiciary: The reality and Ways Available' Tamkeen for Legal Aid and Human Rights (Arabic edn) 36-37. The issue of the integration of conventions into the Jordanian legal system will be discussed in chapter six (6.2.6).

<sup>1504</sup> United Nations Convention against Transnational Organized Crime (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001). Jordan ratified this Convention in 22 May 2009 <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en)> accessed 1 September 2015. This Convention was published in the Official Gazette (No 4960) dated 30 April 2009.

and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime'.<sup>1505</sup>

Accordingly, it should be stressed that Jordan has ratified, acceded to, or accepted<sup>1506</sup> a wide range of international conventions that deal with TIP either directly or indirectly. Therefore, this indicates that the political will exists in Jordan to comply with international standards in addressing TIP.<sup>1507</sup> However, this might be challenged on the grounds that being a state party to an international Convention does not reflect serious obligations in the matter of compliance. More precisely, the applicability of some Conventions, which are not subjected to the self-executing rule, may require internal legal processes to incorporate them within the legal system in Jordan to create an effect domestically.<sup>1508</sup> Notably, '[t]he term 'self-executing' may be used to state a principle of the particular system of national law that certain rules of international law do not need incorporation in order to have internal effect'.<sup>1509</sup>

Accordingly, it should be stressed that the Jordanian Constitution does not address the issue of precedence if there is a contradiction between Conventions to which Jordan is a state party and Jordanian legislation. What is certain, however, is that courts in Jordan have consistently given precedence to the application of Conventions over national legislation.<sup>1510</sup> This might be justified on the grounds that national courts seek to avoid conflict with international obligations generally as national governments would be embarrassed by the conflict.<sup>1511</sup> Furthermore, states have an obligation to comply with the rules of international law; otherwise they will be responsible for any breach for these rules.<sup>1512</sup> In this regard, the

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<sup>1505</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001). Jordan accepted this Protocol in 11 June 2009 <[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12-a&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en)> accessed 1 September 2015. This Protocol was published on page 2049 of the Official Gazette (No 4960) dated 30 April 2009.

<sup>1506</sup> Article 2(b) of the Vienna Convention on the Law of Treaties states that "ratification", "acceptance", "approval" and "accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.

<sup>1507</sup> Olwan, op cit, 6.

<sup>1508</sup> Olwan, op cit, 6.

<sup>1509</sup> Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 48.

<sup>1510</sup> Olwan, op cit, 6.

<sup>1511</sup> Malcolm Evans, *International Law* (4th edn, Oxford University Press 2014) 432-433.

<sup>1512</sup> Malcolm N. Shaw, *International Law* (6th edn, Cambridge University Press 2008) 131.

Vienna Convention on the Law of Treaties states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.<sup>1513</sup>

One question that should be asked here is the following: What is the relationship between international law and national law? To answer this question, it is important to note that the application or enforcement of international law at the national level is not prescribed in international law. Therefore, giving effect to the application or enforcement of international law is subject to national constitutions.<sup>1514</sup> In particular, an examination of the relationship between international law and national law starts with states' constitutions, which determine how international law is integrated with their legal systems.<sup>1515</sup>

Moreover, the relationship between international law and national law has been explained mainly in two theories. The first theory is the *monist* theory. In accordance with this theory, the transformation of international obligations into national law rules is unnecessary<sup>1516</sup> because international law and national law are 'part of the same system of norms receiving their validity and consents by an intellectual operation from a basic norm'.<sup>1517</sup> Additionally, this theory supports the idea of 'a unitary view of law as a whole'.<sup>1518</sup> Furthermore, where there is a conflict between international law and national law, the international law prevails because it supersedes national legal norms.<sup>1519</sup>

The second theory is the *dualist* theory. Transformation of international rules into national law rules is necessary according to this theory<sup>1520</sup> because international law and national law differ in the sense that the subject matters regulated by these laws are different.<sup>1521</sup> Furthermore, international law and national law exist separately.<sup>1522</sup> In particular, sovereign states are the subject of international law, and the relationship between the citizens themselves or between them and the executive within a state is the subject of national law.<sup>1523</sup> Additionally, where there is a conflict between international law and national law, the

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<sup>1513</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art. 27.

<sup>1514</sup> Evans, op cit, 412.

<sup>1515</sup> *ibid*, 417.

<sup>1516</sup> Evans, op cit, 418.

<sup>1517</sup> Brownlie, op cit, 32.

<sup>1518</sup> Shaw, op cit, 131.

<sup>1519</sup> Evans, op cit, 418; Ilias Bantekas and Efthymios Papastavridis, *International Law Concentrate: Law Revision and Study Guide* (Oxford University Press 2015) 49.

<sup>1520</sup> *ibid*, 418.

<sup>1521</sup> Shaw, op cit, 131.

<sup>1522</sup> *ibid*; Bantekas and Papastavridis, op cit, 49.

<sup>1523</sup> Brownlie, op cit, 31-32; Shaw, op cit, 130.

national court will apply the national law<sup>1524</sup> because international law does not supersede national law, as states are considered to be equally sovereign under international law.<sup>1525</sup>

Another question that should be asked here is the following: What are the legal mechanisms for integrating Conventions into the Jordanian legal system? The answer to this question requires an examination of two legal mechanisms for this integration.

The first legal mechanism for integrating Conventions into the Jordanian legal system is the 'self-executing' mechanism.<sup>1526</sup> The Jordanian Constitution does not contain any provision organising the relationship between international Conventions and national legislation.<sup>1527</sup> However, it could be argued that when the Jordanian Constitution states that '[t]reaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the Parliament', this could be understood as an exception to the general situation, which does not require the approval of the parliament for international treaties and agreements to be implemented. Therefore, it can be said that, in accordance with the previous provision, any Convention that does not involve financial commitments to the treasury or does not affect the public or private rights of Jordanians could be implemented automatically after it is ratified and published in the Jordanian Official Gazette.<sup>1528</sup>

Accordingly, it should be noted that most international Conventions dealing with TIP directly or indirectly have been published in the Jordanian Official Gazette. This means that these Conventions are regarded as part of the legal system in Jordan. Therefore, the Jordanian courts should enforce them, and where there is a conflict between them and Jordanian legislation, these Conventions will take precedence.<sup>1529</sup>

The second legal mechanism for integrating Conventions into the Jordanian legal system is the referral mechanism.<sup>1530</sup> In accordance with this mechanism, the national judge could apply the recognised rights in Conventions as these rights are considered international

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<sup>1524</sup> Brownlie, *op cit*, 32.

<sup>1525</sup> Shaw, *op cit*, 129; Evans, *op cit*, 418.

<sup>1526</sup> Salman, *op cit*, 19; Mohammed Al-Moosa, 'The Application of International Conventions for Human Rights in the Jordanian Judiciary: The reality and Ways Available' *Tamkeen for Legal Aid and Human Rights* (Arabic edn) 43.

<sup>1527</sup> Salman, *op cit*, 20; Al-Moosa, *op cit* 36-37.

<sup>1528</sup> The Jordanian Constitution (1952) page 3 of the Official Gazette (No 1093) dated 8 January 1952, Art. 33(2); Salman, *op cit*, 21; Al-Moosa, *op cit* 36-37.

<sup>1529</sup> Abu-Karaki, Faqir and Marashdah, *op cit*, 186.

<sup>1530</sup> Salman, *op cit*, 15-16; Al-Moosa, *op cit* 40-42.

rights.<sup>1531</sup> In this regard, the Jordanian Constitution states that '[e]xtradition of criminals shall be regulated by international agreements and laws'. This provision refers to international agreements and laws to determine the extradition of criminals.<sup>1532</sup> Furthermore, the referral mechanism can be found in the Jordanian Penal Code. In particular, the Jordanian Penal Code excludes its applicability 'to crimes committed by foreign service officials and consuls enjoying immunity conferred on them by public international law'.<sup>1533</sup>

### **6.2.7 Notable Efforts Made under the Jordanian Labour Law**

Notable efforts have been made under the Jordanian Labour Law in regard to addressing the crime of TIP. By way of illustration, trafficking-in-persons-related offences have been investigated.<sup>1534</sup> Moreover, the Jordanian Labour Law aims to protect workers from being trafficked in any form of TIP such as slavery, servitude, or forced labour.<sup>1535</sup> Furthermore, the Jordanian Labour Law has been amended to include domestic workers, be they national or foreign workers.<sup>1536</sup> It should be stressed that this amendment is significant because domestic and agricultural workers become protected categories subject to the Jordanian Labour Law's application.<sup>1537</sup> Furthermore, this amendment gives domestic workers labour protection.<sup>1538</sup> Accordingly, it can be said that these efforts are important because they provide further protection to people vulnerable to conditions that may amount to the level of TIP.

### **6.2.8 Adopting Regulations Protecting the Workers' Rights**

The adoption of a number of regulations that protect the rights of workers is another important effort made in Jordan to address the crime of TIP. In particular, the issuing of the Jordanian Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status is regarded as a proactive measure to help these categories of workers avoid being subjected to the condition of TIP.<sup>1539</sup> This Regulation is significant because it regulates a number of issues to protect workers' rights and it organises the relationship between workers

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<sup>1531</sup> Al-Moosa, op cit 43.

<sup>1532</sup> The Jordanian Constitution (1952) Art. 21(2); Salman, op cit, 23; Al-Moosa, op cit 43.

<sup>1533</sup> The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Art. 11; Salman, op cit, 23; Al-Moosa, op cit 43.

<sup>1534</sup> USDS, 'TIPR' (2007) 126.

<sup>1535</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 5.

<sup>1536</sup> Olwan, op cit, 9.

<sup>1537</sup> USDS, 'TIPR' (2009) 172.

<sup>1538</sup> Olwan, op cit, 9.

<sup>1539</sup> The Jordanian Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status (No 90 of 2009) page 5348 of the Official Gazette (No 4989) dated 1 October 2009.

and their employers. The first issue is that a contract between the worker and the employer should be written in two languages: Arabic and another language understood by the worker. Additionally, four copies of this contract should be issued and distributed to the worker, the employer, the Ministry of Labour, and the recruitment agency that employed the worker.<sup>1540</sup> The second issue is that this Regulation contains a number of rights and duties for workers and employers.<sup>1541</sup> The third issue is that this Regulation organises the working hours and breaks.<sup>1542</sup> The fourth issue is that this Regulation addresses the role of the Ministry of Labour in organising the relationship between workers and their employers.<sup>1543</sup> However, it is evident that the Jordanian Regulation of Domestic Workers, Cooks, and Gardeners and Persons of Similar Status does not address the issues of maximum working hours, freedom of movement, payment for overtime, and the right to privacy.<sup>1544</sup>

Another example of the regulations protecting workers' rights in Jordan is the Jordanian Regulation of Organizing the Private Offices Working in Recruiting and Using Non-Jordanians Workers in Houses.<sup>1545</sup> This Regulation is important because it deals with issues regarding the recruitment of non-Jordanian workers by private offices for the purpose of using them for work in houses.<sup>1546</sup> In particular, this Regulation organises a number of issues. The first issue is how to license these offices.<sup>1547</sup> The second issue is the rights and duties of these offices.<sup>1548</sup> The third issue is the relationship between these offices and the Ministry of Labour.<sup>1549</sup> The fourth issue is the punishments that might be imposed upon these offices in the event of violations of this Regulation.<sup>1550</sup>

Accordingly, it can be stated that the adoption of these regulations is significant because they widen the scope of protection and provide proactive measures for categories of workers vulnerable to being subjected to trafficking-in-persons conditions. A point to note, however, is that the implementation of these regulations is partially hindered by two factors.<sup>1551</sup> The

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<sup>1540</sup> *ibid*, Art. 3.

<sup>1541</sup> *ibid*, Arts. 4, 5, 8.

<sup>1542</sup> *ibid*, Arts. 6,7.

<sup>1543</sup> *ibid*, Arts. 9-11.

<sup>1544</sup> *ibid*; Olwan, *op cit*, 10.

<sup>1545</sup> The Jordanian Regulation of Organising the Private Offices Working in Recruiting and Using Non-Jordanians Workers in Houses (No 89 of 2009) page 5342 of the Official Gazette (No 4989) dated 1 October 2009.

<sup>1546</sup> *ibid*.

<sup>1547</sup> *ibid*, Arts. 3-5.

<sup>1548</sup> *ibid*, Arts. 6, 7, 9, 11(a),14.

<sup>1549</sup> *ibid*, Arts. 8(a), 9.

<sup>1550</sup> *ibid*, Arts. 10, 11, 12, 13.

<sup>1551</sup> USDS, 'TIPR' (2011) 210.



first factor is that the nature of these regulations is unclear.<sup>1552</sup> The second factor is that labour inspectors are unable to monitor the workplaces of domestic servants effectively.<sup>1553</sup>

Notably, in Jordan, the main reason why migrant workers are vulnerable to TIP is the lack of visas and special work permits that might be given to trafficked victims allowing them to stay in Jordan legally.<sup>1554</sup> However, this might be challenged on the basis that, in accordance with the Action Plan to Prevent Trafficking in Persons, which was launched in 2010 by the JAHTNC, provisions have been included to grant specific visas for trafficked victims. In particular, work and residency permits have been provided to trafficked victims during their pursuit of legal actions related to TIP.<sup>1555</sup>

### 6.2.9 Building Partnerships

Building partnerships is one of the aspects of the Jordanian holistic approach in addressing the crime of TIP. In particular, in accordance with the building-partnerships aspect, Jordan responds to the crime of TIP in two ways. The first is to promote cooperation nationally, regionally, and internationally. The second is to activate channels of communication and exchange experiences and information by cooperating with regional and international bodies through seminars and workshops.<sup>1556</sup>

As an example of building partnerships, the Amman Center for Human Rights Studies<sup>1557</sup> and *Tamkeen* for Human Rights<sup>1558</sup> have held discussion sessions on issues related to TIP. This was important because in these discussion sessions the JATIPL and migrant workers' conditions in Jordan were reviewed.<sup>1559</sup> Another example is the developing cooperation between the Jordanian government and diplomatic missions both in Jordan and abroad. This

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<sup>1552</sup> *ibid.*

<sup>1553</sup> *ibid.*

<sup>1554</sup> USDS, 'TIPR' (2010) 192, (2011) 209.

<sup>1555</sup> USDS, 'TIPR' (2010) 192-193.

<sup>1556</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 10.

<sup>1557</sup> Amman Center for Human Rights Studies (ACHRS) is an independent, regional, scientific, advocacy center for studies, research and training on issues of human rights and democracy' <<http://www.achrs.org/english/>> accessed 1 September 2015.

<sup>1558</sup> 'Tamkeen seeks to enhance social protection for marginalized groups and victims of human rights violations, regardless of social origin, race, color, sex, language, religion or other status. Tamkeen aims to combat all forms of discrimination, trafficking in persons, torture and ill-treatment' <<http://www.tamkeen-jo.org/index.htm>> accessed 1 September 2015.

<sup>1559</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 10.

aims to prevent TIP by disseminating information. Additionally, this cooperation aims to increase awareness of TIP.<sup>1560</sup>

#### **6.2.10 Raising Awareness about Trafficking in Persons**

Raising awareness is regarded as another effort made in Jordan to address the crime of TIP. A point to note, however, is that there are a number of aims of programmes for raising awareness in Jordan. The first aim is to target all kinds of jobs and sectors. This means not limiting the scope of these programmes to a specific group of people or a particular sector.<sup>1561</sup>

The second aim is for these awareness programmes to focus on children and youth. The third aim is for the awareness programmes to focus on prevalent religious, cultural heritage, and moral values in order to achieve their objectives.<sup>1562</sup>

Additionally, these awareness programmes have been provided in cooperation with a number of bodies such as the International Organization for Migration, the US Embassy in Jordan, the American Bar Association, Government bodies, and *Tamkeen* for Legal Aid and Human Rights.<sup>1563</sup> Moreover, these awareness programmes have used different types of tools to reach people. An example of these tools is the use of awareness materials such as booklets, brochures, stickers, and posters. Another example of these tools is the use of media such as newspapers and magazines, radio, T.V, websites, and mobile phones.<sup>1564</sup> By way of illustration, a media campaign was launched targeting foreign domestic workers to increase their awareness of TIP. This campaign was the outcome of cooperation between the Jordanian Ministry of Labour, the United Nations Development Fund for Women, and the *Adaleh* Center for Human Rights.<sup>1565</sup> In addition, to achieve their targets, these awareness programmes have used awareness sessions on TIP. In these sessions, ways of approaching and identifying trafficked victims were discussed. Furthermore, the available legal ways to protect trafficked victims' rights were discussed in these awareness sessions.<sup>1566</sup>

It should be noted that these awareness sessions could play an important role in raising awareness on TIP because they were provided by different bodies with different approaches,

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<sup>1560</sup> *ibid.* The principle exists but there is a problem with the implementation.

<sup>1561</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 15-17.

<sup>1562</sup> *ibid.*, 15.

<sup>1563</sup> *ibid.*, 15-17.

<sup>1564</sup> *ibid.*, 15-17.

<sup>1565</sup> USDS, 'TIPR' (2007) 126.

<sup>1566</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 17.

such as<sup>1567</sup> the Sisterhood Is Global Institute-Jordan,<sup>1568</sup> the Arab Women's Legal Network, the American Bar Association, the Jordanian Anti-Trafficking in Persons Unit, the National Center for Human Rights, and the *Mizan* Law Group for Human Rights.<sup>1569</sup> Equally importantly, these awareness sessions targeted a vast range of people including judges and prosecutors, lawyers representing victims, civil society representatives, domestic workers, industrial production workers, construction workers, agricultural production workers, university and school students, participants from the education, health, agricultural, and industrial sectors, media and press participants, local communities and trade unions participants, and housewives.<sup>1570</sup>

Additionally, in order to raise awareness about TIP, workshops targeting clerics, domestic worker recruitment agency owners, and industrial cluster employers were held.<sup>1571</sup> Moreover, the Jordanian government worked with the United Nations Development Fund for Women to raise awareness about foreign workers' rights among employers and employees by producing a pamphlet for that purpose.<sup>1572</sup> Furthermore, the Jordanian government distributed booklets on foreign domestic workers' rights through the Jordanian Ministry of Labour. These booklets were distributed among the Ministry of Labour offices and recruitment agencies. The significance of this measure was that the recruitment agencies were required to provide foreign domestic workers with these booklets as soon as they arrived. Moreover, these booklets had to be provided in foreign domestic workers' languages.<sup>1573</sup>

### **6.2.11 Establishing the National Screening Team**

A National Screening Team was formed from members of the JAHTNC, representatives of the Jordanian police, the Jordanian Ministry of Justice, the Jordanian Ministry of the Interior, and the Jordanian Ministry of Labour in cooperation with the International Organization for Migration. Interestingly, it was part of the Team's role to interview 30 girls from Indonesia

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<sup>1567</sup> *ibid.*

<sup>1568</sup> 'The Sisterhood Is Global Institute (SIGI), an international nonprofit NGO with consultative status to the United Nations, has for almost three decades functioned as the world's first feminist think-tank. SIGI has also developed a global communications network through which an umbrella of NGO interest, advice, contacts, and support can collectively be mobilized for greater, more cost-effective impact in connecting and empowering the global women's movement' <<http://sigi.org/>> accessed 1 September 2015.

<sup>1569</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 17.

<sup>1570</sup> *ibid.*

<sup>1571</sup> *ibid.*, 18.

<sup>1572</sup> USDS, 'TIPR' (2005) 234.

<sup>1573</sup> USDS, 'TIPR' (2007) 127. These booklets are mainly available in the relevant ministries, departments, units, country borders, and other bodies.

who were sheltering in their countries' embassies in Jordan. The aim of the interviews was to determine whether these girls were trafficked victims or not.<sup>1574</sup> Notably, these interviews led to a number of official recommendations being provided to the Jordanian government by the International Organization for Migration. These official recommendations were about procedures to protect, help, and identify trafficked victims. Moreover, these recommendations were concerned with creating a National Evaluation Team.<sup>1575</sup> A point to note, however, is that the National Screening Team was not active subsequently, and potential trafficked victims were not interviewed by the Team.<sup>1576</sup> Later, however, the Team became more successful in identifying trafficking victims, discovering 27 cases of TIP. Additionally, a formal checklist has been established by the Team. This checklist is to be used by officials in order to identify trafficked victims proactively.<sup>1577</sup>

### **6.2.12 Adopting Various Measures to Protect Foreign Workers**

Foreign workers can be regarded as a vulnerable category in the context of TIP. Therefore, the Jordanian government has adopted various measures to protect them. By way of illustration, a number of employers were prosecuted because they abused foreign domestic workers. Furthermore, a number of recruiting agencies were closed down for the same reason. Additionally, a number of trafficked victims were provided with diverse forms of help. Moreover, in response to violations of workers' rights, warnings were issued to a number of recruitment agencies.<sup>1578</sup> In this regard, it should be noted that the government responded to violations of foreign domestic workers' rights mainly by issuing administrative punishments rather than imposing criminal penalties.<sup>1579</sup>

Another measure taken in Jordan to protect foreign workers is the requirement for the sponsors of transit workers to accompany them while they are in transit in Jordan. Otherwise, these workers will not be allowed to enter Jordan. This is an important step to eliminate TIP by preventing the flow of trafficked victims through the country.<sup>1580</sup> A possible counter-argument is that the Jordanian sponsorship system, in other ways, does not benefit foreign

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<sup>1574</sup> USDS, 'TIPR' (2012) 202.

<sup>1575</sup> *ibid.*

<sup>1576</sup> USDS, 'TIPR' (2013) 215.

<sup>1577</sup> USDS, 'TIPR' (2014) 224.

<sup>1578</sup> USDS, 'TIPR' (2005) 234, (2006) 152, (2007) 126, (2008) 153, (2009) 173, (2010) 191-193, (2011) 209-210, (2012) 202-203, (2013) 215.

<sup>1579</sup> USDS, 'TIPR' (2007) 126, (2008) 153, (2009) 173, (2010) 192, (2011) 208, (2012) 202, (2013) 214, (2014) 223.

<sup>1580</sup> USDS, 'TIPR' (2006) 151.

workers. In particular, in accordance with the Jordanian sponsorship system, foreign workers are bound by their designated employers. Therefore, when these workers face abuse they do not have sufficient access to legal recourse. Furthermore, foreign workers are unable to change their employers. This gives recruitment agencies and employers more power over these workers.<sup>1581</sup> Additionally, under the measures taken in Jordan to protect foreign workers, a Directorate for Foreign Domestic Workers has been established in the Ministry of Labour. Moreover, an anti-trafficking-in-persons coordinator has been appointed in the Ministry of Foreign Affairs.<sup>1582</sup>

### **6.2.13 Signing a Number of Memoranda of Understanding**

A number of memoranda of understanding were signed including between Jordan and Indonesia, Sri Lanka, and the Philippines. These memoranda of understanding have guaranteed the workers' rights and set out how the workers might be employed in Jordan.<sup>1583</sup> For example, in 2009 a memorandum of understanding between the Jordanian government and the Indonesian government was signed. In accordance with this memorandum, the oversight and regulation of the domestic workers' process of recruitment were strengthened, and protection responsibilities were clearly delineated.<sup>1584</sup> The signing of these memoranda of understanding is important because, by organising the process of employment and guaranteeing the workers' rights, it is possible to eliminate the possibility of these workers being vulnerable to trafficking-in-persons conditions.

### **6.2.14 Issuing the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan**

In 2014, as part of Jordan's efforts to address the crime of TIP, the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan was issued by the Jordanian Anti-Human Trafficking National Committee (JAHTNC). This report is an important tool for addressing the crime of TIP in Jordan for a number of reasons. The first reason is that this report deals with the steps taken to criminalise the crime of TIP in Jordan.<sup>1585</sup> The second reason is that it includes a holistic approach in the matter of addressing the crime of TIP. This approach includes 'legislative and legal frameworks,

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<sup>1581</sup> USDS, 'TIPR' (2011) 207.

<sup>1582</sup> USDS, 'TIPR' (2007) 126.

<sup>1583</sup> USDS, 'TIPR' (2006) 151.

<sup>1584</sup> USDS, 'TIPR' (2010) 193.

<sup>1585</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 1. See further <<http://www.ahtnc.org.jo/en/national-committee>> accessed 1 September 2015.

national capacity-building, awareness, and providing protection to victims of human trafficking'.<sup>1586</sup>

The third reason is that this report indicates future challenges to efforts to address the crime of TIP nationally in accordance with the National Committee's vision.<sup>1587</sup> The first future challenge is to change the stereotypes, societal behaviours and beliefs about forced labour and the legitimacy of forcing workers to work in lawful and unlawful professions against their will. The second future challenge is to provide continuous training for law and judicial enforcement personnel to identify the crime of TIP and the elements of this crime. The third future challenge is to complete national capacity- building and training plans, as well as to provide financial resources to establish shelters for trafficked victims. The fourth future challenge is to confront the increasing number of human trafficking crimes as a result of the huge number of refugees coming to Jordan. The fifth future challenge is to review legislation periodically on TIP and to ensure that these laws are applied harmoniously.<sup>1588</sup> However, it should be stressed that the report does not address how these challenges might be overcome or dealt with.

The fourth reason is that this is the first national periodic report aiming to notify interested parties and the public about efforts to address the crime of TIP nationally. In this regard, it can be said that the periodic reports play a significant role in reviewing and evaluating institutional developments to address the crime of TIP.<sup>1589</sup>

#### **6.2.15 Other Efforts**

A number of other efforts have been made in Jordan to address the crime of TIP. The first effort is the issuing of 'standardized contracts for domestic workers' in cooperation with the United Nations Development Fund for Women.<sup>1590</sup> These contracts are important because they delineate the rights of domestic workers and the enforceability of these rights in Jordan.<sup>1591</sup>

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<sup>1586</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 1.

<sup>1587</sup> *ibid.*

<sup>1588</sup> *ibid.*, 21.

<sup>1589</sup> *ibid.*, 1.

<sup>1590</sup> 'UN Women is the UN organization dedicated to gender equality and the empowerment of women' <<http://www.unwomen.org/en/about-us>> accessed 1 September 2015.

<sup>1591</sup> USDS, 'TIPR' (2007) 126-127.

The second effort is to offer hotline numbers, operated by the Jordanian Ministry of Labour, which workers can call to report abuse.<sup>1592</sup> These hotline numbers are important because they can be used to report cases of TIP.<sup>1593</sup> The trafficking hotline is significant because it has helped to identify six potential cases of TIP, two cases of sexual exploitation and four cases of forced labour.<sup>1594</sup> However, the operation of the hotline numbers is limited to daytime hours,<sup>1595</sup> and there has been a lack of translation services for languages of the workers' home countries.<sup>1596</sup>

The third effort is the provision of non-financial support by the Jordanian government to international organisations operating anti-trafficking-in-persons programmes. These organisations include the International Organization for Migration and the United Nations Development Fund for Women.<sup>1597</sup>

The fourth effort is the authorisation of the establishment of a Committee of Judges. This establishment was authorised by the Jordanian Judiciary Council. The authorisation of this establishment is significant because this Committee is in charge of overseeing judicial activities in relation to TIP. In particular, under this role, cases related to TIP will be analysed, training materials will be amended, and judicial training will be provided.<sup>1598</sup>

The fifth effort is to rectify the legal status of trafficked victims and those affected by the commission of the crime of TIP, and to provide them with the necessary identification documents. This has been done by issuing temporary residence permits for them, or exempting them from fines, thus enabling them to return voluntarily to their home countries or any other chosen countries which agree to receive them.<sup>1599</sup> For example, nine trafficked victims were provided with temporary residence permits by the Jordanian police. However, in accordance with these permits, they were not allowed to seek employment.<sup>1600</sup>

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<sup>1592</sup> USDS, 'TIPR' (2008) 153, (2009) 173, (2010) 193, (2011) 210, (2012) 203.

<sup>1593</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1594</sup> USDS, 'TIPR' (2014) 225.

<sup>1595</sup> USDS, 'TIPR' (2012) 203, (2013) 216.

<sup>1596</sup> USDS, 'TIPR' (2012) 203.

<sup>1597</sup> USDS, 'TIPR' (2008) 153. It should be stressed that there is no more information provided in the report regarding the non-financial support provided by the Jordanian government to these organisations.

<sup>1598</sup> USDS, 'TIPR' (2013) 215, (2014) 224.

<sup>1599</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 20.

<sup>1600</sup> USDS, 'TIPR' (2012) 202. In this regard, it should be stressed that providing financial resources to shelter trafficked victims is one of the future challenges to efforts to address the crime of trafficking in persons.

### 6.3 The Role of Islamic Criminal Law in Addressing the Crime of Trafficking in Persons in Jordan

Interestingly, Islamic Criminal Law<sup>1601</sup> has the potential to play a significant role in addressing the crime of TIP in Jordan. It is noteworthy that although Jordanian legislation is based on European Laws,<sup>1602</sup> Islam is a way of life for Jordanian people. Jordan is a Muslim country,<sup>1603</sup> and Islam is the dominant national religion.<sup>1604</sup> Consequently, examining TIP from an Islamic law perspective may reflect the general thinking of Jordanian society. Notably, in many Muslim states the legal systems and traditions rely primarily on Islamic Law. Consequently, it is important to understand the position of Islam on the crime of TIP by studying provisions and related traditions linked to TIP. In other words, understanding this position could play a significant role in developing a comprehensive approach to addressing the crime of TIP.<sup>1605</sup>

Accordingly, the following should be stressed:

Islamic law is no longer religious in the traditional Shari'a sense that each and every detail of conduct is explicitly regulated by the divine will. Islamic government and society, however, continue to be based on the Qur'anic injunction to "obey Allah, his Prophet and those at the head of your affairs." Thus, every existing Islamic legal system is, by definition, a system of law based on religion.<sup>1606</sup>

It is noteworthy that Islamic Criminal Law applies the principle of individual criminal responsibility.<sup>1607</sup> Furthermore, there are three categories of crimes under Islamic Criminal

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<sup>1601</sup> The body of law dealing with wrongs that are punishable by the state with the object of deterrence is known as criminal law. Islamic criminal law recognizes three categories of these wrongs. The first is the *hudūd* ... . The second, *ta'zīr* .... The third category, *qiṣāṣ*' <<http://www.oxfordislamicstudies.com/article/opr/t236/e0170>> accessed 1 September 2015; Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 43.

<sup>1602</sup> Mohamed Al-Jabour, *Alwaseet in the Penal Law: General Section* (Arabic edn, Darwael 2012) 38-39.

<sup>1603</sup> The Jordanian Constitution (1952) Art. 2. This Article states that '[i]slam is the religion of the State'.

<sup>1604</sup> United States Department of State, 'Report on International Religious Freedom – Jordan' (2013) <<http://www.refworld.org/docid/53d9075e14.html>> accessed 1 September 2015.

<sup>1605</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 1.

<sup>1606</sup> Noel J. Coulson, 'Law and Religion in Contemporary Islam' (1978) Vol. 29 *The Hastings Law Journal* 1447, 1457, cited in Gad Barzilai, *Law and Religion* (Ashgate 2007) 159.

<sup>1607</sup> Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge University Press 2006) 20.



Law. The first category is *Hudud* crimes. *Hudud* means fixed.<sup>1608</sup> Therefore, the commission of *Hudud* crimes is subject to fixed punishments;<sup>1609</sup> these punishments have been stated in the *Quran*<sup>1610</sup> or in the *Sunnah*.<sup>1611</sup> The determination of *Hudud* crimes is subject to the text.<sup>1612</sup> Additionally, *Hudud* crimes are regarded as offences against God.<sup>1613</sup> An example of *Hudud* crimes is theft.<sup>1614</sup> The second category is *Qisas* crimes. *Qisas* means equality.<sup>1615</sup> Interestingly, *Qisas* crimes are regarded as crimes against persons.<sup>1616</sup> Thus, they are subject to the principle of *lex talionis*, which means ‘the same injury which the defendant inflicted on the victim can be inflicted on the defendant in retaliation’.<sup>1617</sup> This principle has been affirmed in the *Quran*.<sup>1618</sup> An example of *Qisas* crimes is murder.<sup>1619</sup> The third category is *Tazir* crimes. *Tazir* means discretionary.<sup>1620</sup> These crimes are regarded as acts that endanger state security or public order. The punishment for *Tazir* crimes is discretionary. In particular, the punishment for these crimes is subject to the ruler’s discretion<sup>1621</sup> because the punishments for *Tazir* crimes are not set forth in the *Quran* or in the *Sunnah*.<sup>1622</sup> Moreover, the punishments applicable for *Tazir* crimes could apply for *Hudud* and *Qisas* crimes when

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<sup>1608</sup> Jonathan G. Burns, *Introduction to Islamic Law: Principles of Civil, Criminal, and International Law under the Shari’a* (TellerBooks 2014) 111.

<sup>1609</sup> *ibid*, 111.

<sup>1610</sup> ‘For Muslims, the Qur’an is the eternal and indisputable word of God. The oldest and most sacred text of Islam, it is the cornerstone of every believer’s faith and morality’ <<http://www.oxfordislamicstudies.com/article/opr/t243/e275>> accessed 1 September 2015.

<sup>1611</sup> ‘[T]he actions and sayings of the Prophet Muhammad. Inspired by God to act wisely and in accordance with his will’ <<http://www.oxfordislamicstudies.com/article/opr/t243/e332>> accessed 1 September 2015.

<sup>1612</sup> Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 43.

<sup>1613</sup> Steven E. Barkan and George J. Bryjak, *Fundamentals of Criminal Justice: A Sociological View* (2nd edn, Jones & Bartlett Publishers 2011) 342; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 43.

<sup>1614</sup> Abdelwahab Bouhdiba and Muḥammad M. Dawālībī, *The Individual and Society in Islam* (UNESCO 1998) 309; Cliff Roberson and Dilip K. Das, *An Introduction to Comparative Legal Models of Criminal Justice* (CRC Press 2008) 145.

<sup>1615</sup> Burns, *op cit*, 110.

<sup>1616</sup> Barkan and Bryjak, *op cit*, 342; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 43-44.

<sup>1617</sup> Burns, *op cit*, 110.

<sup>1618</sup> The Holy *Quran*, ‘The Noble Qur’an: English Translation of the Meanings and Commentary’ (King Fahd Complex for the Printing of the Holy Qur’an) 5(45) <[pages.uoregon.edu/msa/qurans/quranenglish.pdf](http://pages.uoregon.edu/msa/qurans/quranenglish.pdf)> accessed 1 September 2015. It should be stressed that Jordanian laws do not allow individuals to retaliate themselves.

<sup>1619</sup> Bouhdiba and Dawālībī, *op cit*, 314.

<sup>1620</sup> Burns, *op cit*, 121.

<sup>1621</sup> *ibid*, 121; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 43-44.

<sup>1622</sup> Barkan and Bryjak, *op cit*, 342; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 44-45.

the punishment for committing *Hudud* and *Qisas* crimes cannot be imposed for procedural reasons.<sup>1623</sup> An example of *Tazir* crimes is fraud.<sup>1624</sup>

It is noteworthy that Islamic Criminal Law imposes severe punishments for committing crimes for two reasons. The first reason is that Islamic Criminal Law aims to deter the commission of crimes based on the idea of individual responsibility. The second reason is to protect the public.<sup>1625</sup> However, it should be noted that the rights of the accused are protected under Islamic Criminal Law. Procedural safeguards are provided for the accused by Islamic Criminal Law, such as the right of the accused to appeal, to conduct cross-examination, and to have access to legal counsel. Moreover, the accused is considered innocent until proven guilty. Additionally, the accused should not be subjected to forced confessions.<sup>1626</sup>

A key question should be raised here: Where does the crime of TIP stand under Islamic Criminal Law? The crime of TIP could fall under the category of *Tazir* crimes as this crime is not set forth in the *Quran* or in the *Sunnah*.<sup>1627</sup> Furthermore, the crime of TIP is considered a violation of the right to personal security. This is one of the rights that might be threatened by the commission of *Tazir* crimes.<sup>1628</sup> Therefore, any state applying Islamic Criminal Law could impose discretionary punishments for the commission of this crime, as the crime of TIP is regarded as a *Tazir* crime to be subject to these punishments.<sup>1629</sup>

Accordingly, it should be noted that Islam could play an important role in addressing the crime of TIP in view of how Islam addresses various forms of exploitation, as exploitation is regarded as the main element in the definition of the crime of TIP. In other words, Islamic law addresses a number of practices falling under the list of exploitative purposes stated in the TIPP.

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<sup>1623</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 44-45.

<sup>1624</sup> Richard J. Terrill, *World Criminal Justice Systems: A Comparative Survey* (Routledge 2010) 634.

<sup>1625</sup> The Holy *Quran*, op cit, 2(179); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 44.

<sup>1626</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 44. These procedural safeguards have been stated under Jordanian legislation, firstly, in the Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Arts. 147(1), 172(2), 208(1), 256-269 and, secondly, in the Jordanian Bar Association Law (No 11 of 1972) page 666 of the Official Gazette (No 2357) dated 1 January 1972, Art. 100(7).

<sup>1627</sup> *ibid*, 45; Myada O. El-Sawi, 'Beyond the "tiers" of Human Trafficking Victims: Islamic Law's Ability to Push the Muslim World to the Top of the United States Trafficking Tier Placements and into Compliance with International Law' (2011) 39(2) Georgia Journal of International and Comparative Law 391, 407.

<sup>1628</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 44-45; El-Sawi, op cit, 407-408.

<sup>1629</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 45; El-Sawi, op cit, 407.

The first practice addressed in Islam is the exploitation of labour. More precisely, Islam prohibits the exploitation of labour.<sup>1630</sup> This prohibition can be illustrated by emphasising that a number of obligations toward labourers must be fulfilled. The first obligation is to fulfil the conditions stated in the contract between the employer and the worker.<sup>1631</sup> The second obligation is to pay the wages agreed in the contract.<sup>1632</sup> The third obligation is to ensure that the compensation due to the worker for his/her efforts is specified in the contract between the employer and the employee.<sup>1633</sup> Additionally, no one should be subjected to hard labour as this practice is prohibited under Islam. It is noteworthy that this practice falls under the Islamic condemnation of the infliction of hardship and harm.<sup>1634</sup> Accordingly, forced labour or services are prohibited under Islam as they result in harm to workers.<sup>1635</sup>

The second practice addressed in Islam is sexual exploitation, which is prohibited in Islam. Furthermore, prostitution *per se* is considered a forbidden act and is regarded as a form of sexual exploitation in Islam. Moreover, Islam forbids forced prostitution and the earning of money from prostitution.<sup>1636</sup>

The third practice addressed in Islam is slavery. It should be noted that, at the outset of Islam, slavery, which was a common practice before Islam, was not abolished. Moreover, it has been argued that slavery was authorised and institutionalised by Islam.<sup>1637</sup> However, this has been challenged on the basis that although slavery existed and was allowed at the outset of Islam, Islam has encouraged the freeing of slaves to make up for shortcomings and wrongdoings.<sup>1638</sup> Additionally, creating a new slave is not allowed in the *Quran*.<sup>1639</sup>

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<sup>1630</sup> The Holy *Quran*, op cit, 7(85); Talal Al-Sharfat, *Human Trafficking Crimes: A Comparative Study* (Arabic edn, Darwael 2012) 134; Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 22; El-Sawi, op cit, 403.

<sup>1631</sup> The Holy *Quran*, op cit, 5(1); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 23; El-Sawi, op cit, 403.

<sup>1632</sup> The Holy *Quran*, op cit, 28(25); *ibid*, 34(47); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 23; El-Sawi, op cit, 403.

<sup>1633</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 23; El-Sawi, op cit, 403.

<sup>1634</sup> The Holy *Quran*, op cit, 28(27); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 23; El-Sawi, op cit, 403.

<sup>1635</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 22-23.

<sup>1636</sup> The Holy *Quran*, op cit, 17(32); *ibid*, 24(33); Al-Sharfat, op cit, 88; Mohamed Y. Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: the scope of the problem and the appropriate legislative responses (A Look at the Middle East: Challenges and Legal Perspectives)' (2003) 26(3) *Fordham International Law Journal* 721, 735-736; Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 25; El-Sawi, op cit, 403.

<sup>1637</sup> *Irtemah*, op cit, 56-57; Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 18; El-Sawi, op cit, 400.

<sup>1638</sup> The Holy *Quran*, op cit, 4(92); *ibid*, 5(89); *ibid*, 58(3); *ibid*, 90(12-13); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 19; El-Sawi, op cit, 400.

Moreover, Islam praises owners who release their slaves.<sup>1640</sup> Furthermore, the *Quran* encourages an owner and his/her slave to enter into a contract in which the slave might earn his/her freedom.<sup>1641</sup>

Consequently, Islam has followed the gradual elimination approach in addressing the issue of slavery rather than outright abolition. This gradual elimination is harmonised with the Islamic approach, which focuses on gradual social change. In particular, slavery was a common practice when Islam appeared. Therefore, the economic and social foundations of the community would have been upset by the immediate abolition of slavery.<sup>1642</sup>

The fourth practice addressed in Islam is practices similar to slavery. Specifically, forced marriage as a practice similar to slavery, which is regarded as a form of TIP, has been condemned under Islam. In this regard, it should be stressed that Islam freed women from being regarded as property subject to inheritance and transfer, practices that had been exercised pre-Islam.<sup>1643</sup> Additionally, illegal adoption as a practice similar to slavery, which is considered a form of TIP, does not exist in Muslim countries, as adoption is not recognised under Islam.<sup>1644</sup> Therefore, the adoption of children is not demanded.<sup>1645</sup>

The fifth practice addressed in Islam is the selling or buying of human organs. To be more precise, under Islam selling another human being's organs is prohibited because human beings are not owned by other human beings - they are owned solely by God.<sup>1646</sup>

Accordingly, it can be stated that TIP could occur for any of the aforementioned purposes. Therefore, a knowledge of how Islam has addressed these purposes or any other purposes by extension could play a significant role in addressing the crime of TIP by adopting the Islamic approach in the fight against this crime.<sup>1647</sup> Moreover, complying with the Islamic approach to addressing the crime of TIP could enhance Muslim countries' compliance with

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<sup>1639</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 19.

<sup>1640</sup> *ibid.*

<sup>1641</sup> The Holy *Quran*, op cit, 24(33); Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 19.

<sup>1642</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 20; El-Sawi, op cit, 400-401.

<sup>1643</sup> Al-Sharfah, op cit, 149; Irtemah, op cit, 341; Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East', op cit, 730-731.

<sup>1644</sup> The Holy *Quran*, op cit, 33(4-5); Al-Sharfah, op cit, 150; Irtemah, op cit, 341; Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East', op cit, 727-729.

<sup>1645</sup> Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East', op cit, 727-729.

<sup>1646</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 26.

<sup>1647</sup> *ibid.*, 20.

international standards on TIP, as Islamic law complies with international law regarding trafficking- in-persons issues.<sup>1648</sup> Additionally, it can be said that TIP cannot legitimately exist in a truly Islamic society.<sup>1649</sup> Furthermore, the realisation that TIP is condemned in the international community, as well as in Muslim countries, may play a significant role in addressing the crime of TIP in these countries. More precisely, it is important to highlight that the Islamic position is against TIP, as this may bring an ideological aspect to the fight against TIP by making Muslim countries more productive in combating this crime.<sup>1650</sup> Consequently, it can be said that the position of Islamic Criminal Law in addressing the crime of TIP is consistent with the internal law position in this regard. Notably, both positions are, to a certain extent, in line with international standards in addressing this crime.

An example of a Muslim country that applies Islamic law and takes significant actions to address TIP is Saudi Arabia. Saudi Arabia follows Islamic law strictly.<sup>1651</sup> In this regard, it should be stressed that the Saudi Arabian Law for Combating Crimes of Trafficking in Persons<sup>1652</sup> tries to comply with international standards in addressing TIP.<sup>1653</sup> This Law defines TIP,<sup>1654</sup> prohibits all form of TIP,<sup>1655</sup> prescribes punishments for the commission of the crime of TIP<sup>1656</sup> addresses the situations in which the crime of TIP is committed through a legal person,<sup>1657</sup> and deals with the issues of exemption from punishments and the consent of the trafficked victim.<sup>1658</sup> Finally, this Law states certain procedures that should be followed during the investigation or prosecution of the crime of TIP.<sup>1659</sup> Therefore, Saudi Arabia might be regarded as a good example of the Islamic approach in the fight against TIP, and its example might be followed by other countries applying Islamic law, as the religious approach in these countries has an influence on people. Consequently, addressing TIP might be seen as a religious obligation.<sup>1660</sup>

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<sup>1648</sup> El-Sawi, op cit, 394.

<sup>1649</sup> ibid, 404.

<sup>1650</sup> ibid, 411.

<sup>1651</sup> ibid, 414, 416-417.

<sup>1652</sup> The Saudi Arabian Law for Combating Crimes of Trafficking in Persons (Royal Decree No M/40 of 2009) *Um Al-Quaran*, dated 7 August 2009.

<sup>1653</sup> El-Sawi, op cit, 414, 416-417.

<sup>1654</sup> The Saudi Arabian Law for Combating Crimes of Trafficking in Persons, Art. 1(1).

<sup>1655</sup> ibid, Art. 2.

<sup>1656</sup> ibid, Arts. 3-4, 6-11, 14.

<sup>1657</sup> ibid, Art. 13.

<sup>1658</sup> ibid, Art. 5.

<sup>1659</sup> ibid, Arts. 15-16.

<sup>1660</sup> El-Sawi, op cit, 414, 416-417.

## **6.4 Challenges Facing Efforts to Address the Crime of Trafficking in Persons in Jordan**

There are two main kinds of challenges affecting the application of the JATIPL. The first kind of challenge is the legal challenges. The second kind of challenge is the practical challenges.

### **6.4.1 Legal Challenges Facing Efforts to Address the Crime of Trafficking in Persons in Jordan**

There are a number of legal challenges facing efforts to address the crime of TIP in Jordan. The first legal challenge is the legislative aspect of efforts to address the crime of TIP. In particular, the definition of the crime of TIP and the components of its elements in the JATIPL, to a certain extent, are unclear, inaccurate, and generic; this makes the application of this Law a difficult task for judges as the general drafting of the provisions of this Law does not clarify the components of the elements of the crime of TIP.<sup>1661</sup> In this regard, it should be noted that it is difficult for judges, when they are applying the JATIPL, to correctly interpret the meaning of certain phrases used in the definition of the crime of TIP, because when the JATIPL defines the crime of TIP, it adopts the definition of TIP used in the TIPP. In doing so, this Law uses a number of phrases that have been taken literally from the TIPP. These phrases, which have been used in the Protocol, have their own definitions under international law but they have not been defined under national legislation. An example of this is slavery. Therefore, this may make it difficult for judges to understand the meanings of these phrases as they are not known under Jordanian legislation.<sup>1662</sup> Accordingly, it might be argued that the vagueness of the definition of the crime of TIP and the components of its elements in the JATIPL could lead to uncertainty in this Law, thus violating the principle of legality.<sup>1663</sup>

Furthermore, the vagueness of the definition of the crime of TIP and the components of its elements in the JATIPL could also lead to the crime of TIP being prosecuted under other crimes, because these crimes are clearer and contain procedural safeguards for their application.<sup>1664</sup> In other words, some acts in the definition of the crime of TIP, such as

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<sup>1661</sup> Irtemah, op cit, 23-24; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32.

<sup>1662</sup> The TIPP, Art. 3(a); The JATIPL, Arts. 3(a)(1), 3(b); Salman, op cit, 83.

<sup>1663</sup> See chapter three (3.3.1).

<sup>1664</sup> *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32.

abduction, fraud, and sexual exploitation, are considered crimes *per se* in accordance with the Jordanian Penal Code. Therefore, judges might prosecute the crime of TIP under other crimes.<sup>1665</sup>

The second legal challenge is the fact that the JATIPL does not address the issue of the attempt to commit the crime of TIP.<sup>1666</sup> Consequently, this issue is subject to the general rules of the Jordanian Penal Code.<sup>1667</sup> These rules state that '[a]n attempt to commit a misdemeanor is not punishable unless in the instances explicitly stipulated by the law'.<sup>1668</sup> Accordingly, the attempt to commit the crime of TIP is not punishable when this crime is regarded as a misdemeanour.<sup>1669</sup> Notably, the crime of TIP will be considered a misdemeanour, when the commission of this crime is not coupled with aggravating circumstances.<sup>1670</sup> However, if the crime of TIP is regarded as a felony, the attempt to commit this crime is punishable.<sup>1671</sup> The crime of TIP will be regarded as a felony when its commission is coupled with aggravating circumstances. Therefore, the attempted to commit the crime of TIP, when the commission of this crime is coupled with aggravating circumstances, would be punishable under Jordanian legislation.<sup>1672</sup> In this regard, it should be stressed that the Syrian Legislative Decree on the Crimes of Trafficking in Persons addresses the issue of the attempt to commit the crime of TIP under its provisions.<sup>1673</sup> Therefore, it is recommended that a similar approach be adopted to address this issue under the JATIPL.

The third legal challenge is the fact that the JATIPL does not address the issue of criminal participation in the commission of the crime of TIP.<sup>1674</sup> Therefore, these rules are also subject to the general rules of the Jordanian Penal Code.<sup>1675</sup> In this regard, it should be stressed that

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<sup>1665</sup> Salman, *op cit*, 83-84.

<sup>1666</sup> Irtemah, *op cit*, 255; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32. For more information see chapter six entitled (6.2.1).

<sup>1667</sup> The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Arts. 68-71; Al-Sharfah, *op cit*, 21; Irtemah, *op cit*, 249, 251-253.

<sup>1668</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 71(1).

<sup>1669</sup> Irtemah, *op cit*, 249.

<sup>1670</sup> The JATIPL, Arts. 8,10.

<sup>1671</sup> Irtemah, *op cit*, 253.

<sup>1672</sup> The JATIPL, Arts. 9.

<sup>1673</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, Art. 12(2). In accordance with this article, the attempt to commit the crime of trafficking in persons and the commission of this crime are considered the same in the matter of punishment.

<sup>1674</sup> Irtemah, *op cit*, 255; *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32. For more information see chapter six entitled (6.2.1).

<sup>1675</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 75-84 (These rules deal with the criminal liability of the perpetrators, inciters, and accomplices); Irtemah, *op cit*, 255.

the crime of TIP often requires the participation of more than one person, as this crime contains various elements such as recruiting, deceiving, and exploiting victims.<sup>1676</sup> Consequently, it is better to address the criminal participation in the commission of the crime of TIP specifically in the JATIPL rather than subjecting this criminal participation to the general rules in the Jordanian Penal Code. This is because the JATIPL is more relevant to addressing the crime of TIP, it is *lex specialis*, and it is better to include provisions regarding criminal participation in this Law as part of its comprehensive approach to addressing the crime of TIP. It should be noted that the issue of the criminal participation in the commission of the crime of TIP has been dealt with in the Syrian Legislative Decree on the Crimes of Trafficking in Persons by prescribing the same punishment for the offender, the accomplice, the instigator, and the intervenor involved in the commission of the crime of TIP.<sup>1677</sup> Therefore, it is suggested that a similar provision dealing with the criminal participation in the commission of the crime of TIP be adopted in the JATIPL.

The fourth legal challenge is the fact that the punishment for the commission of the crime of TIP, in the JATIPL, is not commensurate with the gravity of this crime,<sup>1678</sup> which means that this Law is not consistent with the criminal justice system and international standards, as there should be proportionality between the severity of the punishment and the gravity of crime.<sup>1679</sup> In other words, the punishments prescribed for the commission of the crime of TIP in accordance with the JATIPL are considered insufficiently stringent and they are not commensurate with the seriousness of the crime of TIP.<sup>1680</sup> In particular, if the crime of TIP is not coupled with aggravating circumstances, the person convicted of committing this crime will be ‘sentenced to imprisonment for a period of not less than six months or to a fine of an amount not less than 1000 Jordan *Dinar* and not more than 5000 Jordan *Dinar* or to both penalties’.<sup>1681</sup>

It may be necessary to ask whether the punishment for the commission of the crime of TIP in accordance with the JATIPL is consistent with the TIPP. It should be stressed that although the TIPP does not specify the punishment for the crime of TIP, it states that criminal offences

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<sup>1676</sup> Irtemah, op cit, 257.

<sup>1677</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, Art. 12(1).

<sup>1678</sup> *Tamkeen* for Legal Aid and Human Rights, ‘The Report of the Conditions of Migrant Workers in Jordan’ (Arabic edn, 2009) 32; Olwan, op cit, 3.

<sup>1679</sup> *Tamkeen* for Legal Aid and Human Rights, ‘The Report of the Conditions of Migrant Workers in Jordan’ (Arabic edn, 2009) 32.

<sup>1680</sup> USDS, ‘TIPR’ (2009) 173, (2010) 191-192, (2011) 208, (2012) 202, (2013) 214, (2014) 223.

<sup>1681</sup> The JATIPL, Art. 8.



should be established for the commission of this crime in the states parties when the crime of TIP is committed intentionally.<sup>1682</sup> However, it is noteworthy that ‘the United Nations Convention against Transnational Organized Crime’ (UNCTOC) states that serious crime is ‘punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’.<sup>1683</sup>

It is noteworthy that the seriousness of the crime of TIP requires the imposition of stringent penalties to deter the commission of this crime.<sup>1684</sup> However, administrative penalties<sup>1685</sup> were imposed for labour violations committed against workers from Jordan or abroad in accordance with Jordanian Labour Law as part of the fight against TIP. In this regard, it can be said that the administrative penalties imposed were insufficient to deter the commission of the crime of TIP.<sup>1686</sup>

The fifth legal challenge to efforts to address the crime of TIP in Jordan concerns the overlap between the JATIPL and other legislation. In particular, the JATIPL overlaps with the Jordanian Penal Code in the matter of criminal groups. In this respect, it should be noted that the JATIPL requires that the criminal group contain three persons or more. This contrasts with the Jordanian Penal Code, which requires two or more persons to engage in the criminal agreement in order to be criminalised.<sup>1687</sup>

Furthermore, the JATIPL overlaps with the Jordanian Residence and Foreigners’ Affairs Law. More precisely, the right of repatriation, which has been set out in the JATIPL, could be hindered by the application of the Jordanian Residence and Foreigners’ Affairs Law. In particular, if trafficked persons are foreigners who are ordered to pay fines as a result of violating the Jordanian Residence and Foreigners’ Affairs Law, these trafficked persons will not be able to exercise their right of repatriation, set out in the JATIPL and the TIPP, unless

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<sup>1682</sup> The TIPP, Art. 5.

<sup>1683</sup> The UNCTOC, Art. 2(b).

<sup>1684</sup> Mattar, ‘Trafficking in Persons, Especially Women and Children, in Countries of the Middle East’, op cit, 745.

<sup>1685</sup> Administrative penalties could include fines, licence revocations, and closures. See Carl E. Bruch, Elizabeth Mrema, and United Nations Environment Programme, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (UNEP/Earthprint 2006) 348.

<sup>1686</sup> USDS, ‘TIPR’ (2009) 173, (2010) 192, (2011) 208, (2012) 202, (2013) 214, (2014) 223, (2015) 201.

<sup>1687</sup> The JATIPL, Art. 2; The Jordanian Penal Code, as amended (No 16 of 1960) Art. 157(1). For more information about the overlap between the JATIPL and the Jordanian Penal Code in the matter of criminal group see chapter three (3.3.2.1.1).

they pay off the fines imposed. Notably, denial of the right of repatriation is considered a violation of the JATIPL and the TIPP.<sup>1688</sup>

However, this might be challenged on the grounds that the application of the Jordanian Residence and Foreigners' Affairs Law's provisions might be overlooked, in some situations, if 'persons [are] exempted by the Minister of Internal Affairs on account of special considerations connected with international or humanitarian courtesy or of the right to political asylum or yet in application of the principle of reciprocity'.<sup>1689</sup> Furthermore, the Minister of Internal Affairs might exempt foreigners from paying fines.<sup>1690</sup> Therefore, it can be stated that the previous provisions could be used to help trafficked persons exercise their rights of repatriation.<sup>1691</sup> By way of illustration, in 2008, 'over-stay fines for 185 runaway Filipina domestic workers' were waived by the Jordanian Ministry of Interior.<sup>1692</sup> It should be noted that the aim of waiving over-stay fines was to enable these domestic workers to exercise their rights of repatriation.<sup>1693</sup>

Furthermore, in 2011, a 50 per cent reduction in accumulated over-stay fines for foreign domestic workers was granted by the Jordanian cabinet. Moreover, a grace period of two months was also provided by the Jordanian cabinet. It is noteworthy that the aim of this grace period was to enable foreign domestic workers to pay their accumulated over-stay fines.<sup>1694</sup> Additionally, from April to mid-June 2011, an amnesty for domestic workers from Indonesia, Sri Lanka, and the Philippines was announced by the Jordanian cabinet. This amnesty applied for 'a new work permit' and 'a waiver of the entirety of their accumulated overstay fines'.<sup>1695</sup>

Moreover, in 2012, a one-time amnesty was granted by the Jordanian government for domestic workers from Indonesia, Sri Lanka, and the Philippines who were out of status. In accordance with this amnesty, over-stay fines were waived and exit permits to leave Jordan were granted.<sup>1696</sup> Along with this, NGOs were helped by the Jordanian Public Security

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<sup>1688</sup> The TIPP, Art. 8; The Jordanian Residence and Foreigners, Affairs Law (No 24 of 1973) page 1112 of the Official Gazette (No 2426) dated 16 June 1973, Art. 34(a); The JATIPL, Art. 5(c); Salman, op cit, 123.

<sup>1689</sup> The Jordanian Residence and Foreigners, Affairs Law (No 24 of 1973) Art. 29(h).

<sup>1690</sup> *ibid*, Art. 34(b).

<sup>1691</sup> Salman, op cit, 124-125.

<sup>1692</sup> USDS, 'TIPR' (2008) 152.

<sup>1693</sup> USDS, 'TIPR' (2008) 152, (2009) 173, (2010) 192, (2011) 208-209.

<sup>1694</sup> USDS, 'TIPR' (2011) 209.

<sup>1695</sup> USDS, 'TIPR' (2011) 210, (2012) 202.

<sup>1696</sup> USDS, 'TIPR' (2013) 215.

Directorate's (PSD) Anti-Trafficking Unit to repatriate trafficked victims from Egypt and Morocco.<sup>1697</sup>

The sixth legal challenge is the fact that the JATIPL does not address the issue of the protection of vulnerable categories. For example, this Law does not protect trafficked persons from deportation. Additionally, this Law does not protect the right of foreign trafficked persons to stay in Jordan if they are in danger of being re-trafficked should they return to their home countries.<sup>1698</sup>

#### **6.4.2 Practical Challenges Facing Efforts to Address the Crime of Trafficking in Persons in Jordan**

There are a number of practical challenges facing efforts to address the crime of TIP in Jordan. The first practical challenge concerns sheltering. More precisely, the sheltering of trafficked persons or those who are affected by the commission of the crime of TIP has experienced two problems. The first problem is the delay in establishing a shelter.<sup>1699</sup> In this regard, it should be stressed that, in accordance with the JATIPL, a shelter or shelters for trafficked victims or those affected by the commission of the crime of TIP may be established.<sup>1700</sup> To this end, in 2012 the Jordanian Regulation of Shelters for Trafficked Victims and Those Who are Affected by the Commission of the Crime of Trafficking in Persons was issued in accordance with Article 7 of the JATIPL.<sup>1701</sup> This regulation is significant because it fulfils the requirements to establish a shelter or shelters, as stated in the JATIPL. These requirements are as follows: determining the basis for physical, psychological, and social recovery programmes required for trafficked victims and those who are affected by the commission of the crime of TIP; determining the way in which such shelters are managed; and determining the conditions required for employees in such shelters.<sup>1702</sup>

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<sup>1697</sup> USDS, 'TIPR' (2013) 215, (2014) 224.

<sup>1698</sup> Olwan, *op cit*, 4. In this regard, it should be stressed that the JATIPL contains the right to facilitate the repatriation of trafficked victims without requiring such repatriation to be coupled with the safety of these victims. This issue will be further discussed in chapter six (6.5).

<sup>1699</sup> USDS, 'TIPR' (2014) 224. This shelter was designated officially by the Jordanian government in February 2014.

<sup>1700</sup> The JATIPL, Art. 7.

<sup>1701</sup> The Jordanian Regulation of Shelters for Trafficked Victims or Those Who are Affected by the Commission of the Crime of Trafficking in Persons (No 30 of 2012) page 1623 of the Official Gazette (No 5153) dated 16 April 2012.

<sup>1702</sup> The JATIPL, Art. 7.

However, it should be stressed that there was no shelter in Jordan for trafficked persons or those affected by the commission of the crime of TIP until the Jordanian government officially designated a shelter in February 2014.<sup>1703</sup> Therefore, as a result of the delay in establishing a shelter, a number of trafficked persons have been sheltered by the Jordanian Women's Union.<sup>1704</sup> More precisely, in 2012 the Jordanian Women's Union sheltered 16 trafficked female victims. In 2013, it sheltered 36 trafficked female victims in a shelter intended for women victims. Notably, in 2013, the Jordanian Women's Union also sheltered six trafficked male victims in a hotel.<sup>1705</sup> These trafficked victims were of various nationalities such as Egyptian, Syrian, Sri Lankan, Bangladeshi, Indonesian, Filipino, and Indian.<sup>1706</sup> Furthermore, trafficked victims who were foreign domestic workers 'were sheltered at their respective embassies'.<sup>1707</sup> Additionally, 'potential female trafficking victims' were referred to a local shelter, operated by a local NGO, by the Jordanian police.<sup>1708</sup> Furthermore, identified trafficked victims were referred to shelter services which were regarded as 'donor-funded shelters'.<sup>1709</sup> Moreover, a number of trafficked foreign women were sheltered in the Jordanian Ministry of Social Development's shelter, which is intended for abused women. It should be noted that services and capacity specified for trafficked victims are considered insufficient in this shelter.<sup>1710</sup>

A point to note, however, is that the sheltering of trafficked victims by the Jordanian Women's Union or by their respective embassies or by other bodies does not meet the requirements needed to protect trafficked victims as these shelters are not designated for all trafficked victims. For example, the shelter provided by the Jordanian Women's Union is intended for women victims. Furthermore, no shelter was designated for trafficked male victims. Therefore, these victims were placed in a hotel.

The second problem, in relation to sheltering as the first practical challenge, is the insufficient protection provided for trafficked persons or those affected by the commission of the crime of

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<sup>1703</sup> USDS, 'TIPR' (2014) 224, (2015) 201.

<sup>1704</sup> 'The Jordanian Women's Union (JWU), ... is a non-governmental, democratically elected organization that is committed to improving the status of women' <<http://jwu.org.jo/Home.aspx?lng=1>> accessed 1 September 2015.

<sup>1705</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19; USDS, 'TIPR' (2014) 224.

<sup>1706</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1707</sup> USDS, 'TIPR' (2005) 234, (2009) 172, (2010) 191, (2011) 207, (2012) 202, (2013) 215, (2014) 224, (2015) 202.

<sup>1708</sup> USDS, 'TIPR' (2012) 202, (2013) 215, (2014) 224.

<sup>1709</sup> USDS, 'TIPR' (2013) 215, (2014) 224.

<sup>1710</sup> USDS, 'TIPR' (2011) 209.

TIP using this shelter.<sup>1711</sup> In this regard, it should be stressed that there were a number of reasons for the insufficient protection in the shelter. The first reason is that the government failed to provide or fund sufficient shelter services.<sup>1712</sup> The second reason is that this shelter is a gender-based shelter. Therefore, it is limited to female trafficked victims.<sup>1713</sup> The third reason is that this shelter has a limited capacity, as it can accommodate no more than 50 female trafficked victims.<sup>1714</sup> The fourth reason is that it is necessary to file a criminal case in order to receive shelter services.<sup>1715</sup>

The second practical challenge is the fact that trafficked victims hesitate to file complaints about their situation because they fear deportation and retaliation or do not trust the authorities.<sup>1716</sup> However, in this regard, it can be stated that, in accordance with the Jordanian Code of Criminal Procedures, a number of means could be used to protect trafficked persons. More precisely, the right to file a complaint is a guaranteed right according to the Jordanian legislation.<sup>1717</sup> Therefore, if a complaint related to the commission of the crime of TIP has been filed, this complaint should be addressed regardless of who filed it.<sup>1718</sup> Interestingly, the procedures for filing complaints for cases of TIP have been eased. More specifically, telephone hotlines have been established in Jordan for the purpose of reporting criminal activities. This includes reporting the commission of the crime of TIP.<sup>1719</sup>

The third practical challenge is the fact that systematic procedures were not employed by law enforcement authorities in Jordan to refer or identify trafficked victims proactively.<sup>1720</sup> Additionally, the identification of labour trafficked victims and labour trafficking crimes was inadequate<sup>1721</sup> because the number of labour inspectors in the Jordanian Ministry of Labour

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<sup>1711</sup> USDS, 'TIPR' (2014) 224.

<sup>1712</sup> USDS, 'TIPR' (2014) 223-224. It should be stressed that over the majority of the reporting period (June 2013- June 2014) these services were not provided or funded by the government.

<sup>1713</sup> USDS, 'TIPR' (2014) 224, (2015) 202.

<sup>1714</sup> USDS, 'TIPR' (2014) 224, (2015) 202.

<sup>1715</sup> The Jordanian Regulation of Shelters for Trafficked Victims or Those Who are Affected by the Commission of the Crime of Trafficking in Persons (No 30 of 2012). In accordance with Article 4 of this Regulation, shelter services include protecting and sheltering trafficked victims and those who are affected by the commission of the crime of TIP, as well as providing them with physical, psychological, legal, cultural and social recovery programmes.

<sup>1716</sup> Al-Dweikat, op cit, 35; Salman, op cit, 84-85.

<sup>1717</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19. It should be stressed that the right to file a complaint has been ensured in the Jordanian Code of Criminal Procedures in the following Articles: 2(1), 27(1), 52, 54.

<sup>1718</sup> The JAHTNC, 'The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan' (2009 - 2013) 19.

<sup>1719</sup> *ibid.*

<sup>1720</sup> USDS, 'TIPR' (2009) 173, (2010) 192, (2011) 209, (2013) 215, (2014) 223, 225.

<sup>1721</sup> USDS, 'TIPR' (2009) 173.

was insufficient. By way of illustration,<sup>1722</sup> there were just 120 labour inspectors for the whole country.<sup>1723</sup> This number has increased to 160 labour inspectors.<sup>1724</sup> However, the Ministry of Labour and the Ministry of the Interior, through their units, aim to address the crime of TIP by using control measures such as the labour inspection system. Nevertheless, it should be stressed that the crime of TIP is often committed in secrecy. Therefore, addressing this crime requires the adoption of special procedures; otherwise, it will not be prosecuted.<sup>1725</sup> An example of these special procedures is the activation of the surveillance role of inspectors and the inspection system in the Ministry of Labour. This involves creating a suitable mechanism for periodic follow-up for domestic workers.<sup>1726</sup>

A point to note, however, is that the Jordanian Public Security Directorate identified some trafficking victims and referred them to NGOs to assist them.<sup>1727</sup> Furthermore, 3,000 identified trafficked victims, who were working in the QIZs, were moved by the government to places with improved working conditions. Notably, psychological and/or medical assistance have not been provided to these trafficked victims.<sup>1728</sup> However, it should be stressed that, as a result of the failure to identify trafficked victims, a number of those victims were kept in administrative detention awaiting deportation.<sup>1729</sup> Additionally, as a result of the lack of formal procedures for identifying trafficked victims, these victims were being punished for committing acts resulting from the trafficking they had experienced, such as becoming involved in prostitution or immigration violations.<sup>1730</sup> In this regard, it is to be noted that the Egyptian Law on Combating Human Trafficking assures the importance of identifying trafficked victims in all stages of the crime of TIP, be it in the stage of collecting evidence, investigation, or trial, in order to remove these victims from the perpetrators' control.<sup>1731</sup> Therefore, it could be suggested that a similar provision be adopted in the JATIPL. This is significant because, if a trafficked person is identified as a victim, this victim

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<sup>1722</sup> As of September 2015, Jordan population is approximately 6,835,000 <<http://countrymeters.info/en/Jordan>> accessed 1 September 2015.

<sup>1723</sup> USDS, 'TIPR' (2013) 215, (2014) 225.

<sup>1724</sup> USDS, 'TIPR' (2015) 202. This happens during the reporting period (July 2014- July 2015).

<sup>1725</sup> *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 32. The Jordanian Labour Law addresses issues related to the labour inspection system through dealing with the 'role of the Jordanian Ministry of Labour undertaken in relation to the inspection duties', 'qualifications, duties, powers and remunerations of the labour inspectors', and 'the obligations of the employers towards labour inspectors'. These issues have been addressed in Arts 5-9.

<sup>1726</sup> *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 34.

<sup>1727</sup> USDS, 'TIPR' (2010) 192.

<sup>1728</sup> USDS, 'TIPR' (2007) 126.

<sup>1729</sup> USDS, 'TIPR' (2011) 209.

<sup>1730</sup> USDS, 'TIPR' (2008) 152, (2009) 172, (2010) 192, (2011) 209, (2012) 202, (2013) 215, (2014) 223.

<sup>1731</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 23.

might not be subjected to prosecution as a result of committing, participating, or being involved in the commission of the crime of TIP, or inciting others to commit this crime, in accordance with Article 12 of the JATIPL.

The fourth practical challenge is the failure to raise sufficient awareness of the crime of TIP. It is worth noting that the NGOs play the most prominent role in raising this awareness in Jordan. However, it could be said that their efforts are limited, insufficient, and do not reach all the victims.<sup>1732</sup> Other problems related to this practical challenge are the lack of public awareness about the existence of the JATIPL and the absence of cooperation among media agencies to raise awareness about the danger of TIP and the importance of applying the JATIPL.<sup>1733</sup> However, it should be stressed that notable efforts were made to raise awareness of TIP.<sup>1734</sup>

The fifth practical challenge is the weak implementation of the Jordanian National Strategy to Prevent Trafficking in Persons.<sup>1735</sup> The sixth practical challenge is language barriers. In this regard, it should be noted that most trafficked victims are foreigners who do not understand the Arabic language very well, and the translation services provided are insufficient.

The seventh practical challenge is that the estimation of the scale of the crime of TIP is difficult because of the clandestine nature of this crime. Additionally, accurate information about the crime of TIP is inadequate in the matter of the prosecution of this crime, the investigations into this crime, the complaints against the occurrence of this crime, and the convictions of offenders committing this crime.<sup>1736</sup> Moreover, proving the occurrence of the abuse of domestic workers is difficult as this takes place in recruitment agencies or private houses.<sup>1737</sup> Furthermore, some trafficked victims do not cooperate with the authorities in providing full information about their experience under trafficking.<sup>1738</sup>

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<sup>1732</sup> *Tamkeen* for Legal Aid and Human Rights, 'The Report of the Conditions of Migrant Workers in Jordan' (Arabic edn, 2009) 33.

<sup>1733</sup> The Jordanian National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (Arabic edn, 2011) 84; The Jordanian National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (Arabic edn, 2012) 126.

<sup>1734</sup> For more information, please see chapter six (6.2.5) and (6.2.10).

<sup>1735</sup> The Jordanian National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (Arabic edn, 2011) 83; The Jordanian National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (Arabic edn, 2012) 125; The Jordanian National Center for Human Rights, 'Status Report of Human Rights in the Hashemite Kingdom of Jordan' (Arabic edn, 2013) 99.

<sup>1736</sup> Olwan, op cit, 11.

<sup>1737</sup> ibid, 12.

<sup>1738</sup> Al-Dweikat, op cit, 35; Salman, op cit, 84-85.

The eighth practical challenge is that Jordan faces a mass influx of refugees, which could increase the occurrence of the crime of TIP.<sup>1739</sup> For example, as a result of the unrest in Syria, thousands of people fled from Syria to Jordan. Some of them were subjected to trafficking-in-persons situation such as TIP for the purpose of forced labour or forced prostitution.<sup>1740</sup>

The ninth practical challenge is the fact that trafficked victims were not encouraged by the Jordanian government to pursue prosecution or investigation of the crimes of TIP committed against them.<sup>1741</sup> The tenth practical challenge is that the shortage of inter-ministerial cooperation affects the creation of a solid anti-trafficking-in-persons strategic and legal framework.<sup>1742</sup> The eleventh practical challenge is the absence of national non-judiciary mechanisms to ensure the rights of trafficked victims.<sup>1743</sup>

## **6.5 The Consistency between the JATIPL and the TIPP in the Matter of Trafficked Persons Rights**

It is noteworthy that the JATIPL contains a number of rights for trafficked victims. These rights are similar to the rights stated in the TIPP. To begin with, this Law contains the right to facilitate the repatriation of trafficked victims to their home countries or any other chosen country that agrees to receive them. In this regard, it could be said that the JATIPL complies with the TIPP.<sup>1744</sup> However, it could be argued that this does not make it fully compliant with the Protocol. In particular, unlike the TIPP, the JATIPL does not indicate that the repatriation of trafficked persons should be coupled with the safety of these victims. Moreover, it does not necessarily require this repatriation to be voluntary. Additionally, in accordance with the JATIPL, trafficked persons might choose to return to their home countries or any other chosen country that agrees to receive them.<sup>1745</sup> This contrasts with the TIPP, which states that trafficked persons might return to a ‘state party of which that person is a national or in which he or she had the right of permanent residence’.<sup>1746</sup> More precisely, the JATIPL does not limit the return of trafficked victims to their home countries or require

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<sup>1739</sup> The JAHTNC, ‘The First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ (2009 - 2013) 21.

<sup>1740</sup> USDS, ‘TIPR’ (2012) 201, (2013) 214, (2014) 223, (2015) 201.

<sup>1741</sup> USDS, ‘TIPR’ (2010) 192, (2011) 209, (2012) 202, (2013) 215, (2014) 224.

<sup>1742</sup> USDS, ‘TIPR’ (2011) 208, (2012) 201.

<sup>1743</sup> *Tamkeen* for Legal Aid and Human Rights, ‘The Report of the Conditions of Migrant Workers in Jordan’ (Arabic edn, 2009) 33. There is no further clarification of these national non-judiciary mechanisms in the source.

<sup>1744</sup> The TIPP, Art. 8; The JATIPL, Art. 5(c); Salman, *op cit*, 116.

<sup>1745</sup> The JATIPL, Art. 5(c).

<sup>1746</sup> The TIPP, Art. 8.



victims to have the right of permanent residence in the countries to which they wish to return. Additionally, this Law does not require the countries of which trafficked persons are nationals or the countries chosen by trafficked persons as preferred destinations to be states parties to the TIPP.<sup>1747</sup>

Another right afforded to trafficked victims, as stated in the JATIPL, is the provision of physical, psychological, and social recovery programmes for these victims; they should also be sheltered through the establishment of one or more shelters for that purpose.<sup>1748</sup> What is certain, however, is that the TIPP requires states parties to provide trafficked victims with these rights.<sup>1749</sup> Nevertheless, it should be noted that, in Jordan, there was a delay in establishing such shelters,<sup>1750</sup> and in these shelters the protection for trafficked persons or those affected by the commission of the crime of TIP is insufficient.<sup>1751</sup> Therefore, it can be said that this delay and insufficient protection may contradict Jordan's claim of compliance with the TIPP, which requires each state party to provide trafficked victims with appropriate housing.<sup>1752</sup> In other words, it can be said that this problem is at the level of application rather than at the level of norms.

Furthermore, in the matter of determining the identity of trafficked victims and maintaining the confidentiality of this identity, it might be argued that the protection of trafficked persons' rights under the JATIPL does not fully meet the protection provided in the TIPP.<sup>1753</sup> In particular, unlike the TIPP, the JATIPL does not contain any provision for determining the identity of trafficked victims and maintaining the confidentiality of this identity, where required, especially the identity of trafficked children.<sup>1754</sup>

However, it should be stressed that the Jordanian Juvenile Law contains provisions for the protection of juveniles.<sup>1755</sup> For example, in accordance with the Jordanian Juvenile Law, trials of juveniles are confidential, and no one is allowed to attend the trial except the probation officers, the juvenile's parents, the juvenile's guardian, the juvenile's lawyer, and any other

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<sup>1747</sup> The JATIPL, Art. 5(c).

<sup>1748</sup> *ibid*, Arts. 5(g), 7.

<sup>1749</sup> The TIPP, Art. 6(3).

<sup>1750</sup> The delay in establishing a shelter has been dealt with in chapter six (6.4.2).

<sup>1751</sup> The insufficient protection has been dealt with in in chapter six (6.4.2).

<sup>1752</sup> The TIPP, Art. 6(3)(a).

<sup>1753</sup> Salman, *op cit*, 117.

<sup>1754</sup> *ibid*, 118.

<sup>1755</sup> The Jordanian Juvenile Law (No 24 of 1968) page 555 of the Official Gazette (No 2089) dated 16 April 1968, Arts. 10, 12; Salman, *op cit*, 118.

person directly connected to the case in question.<sup>1756</sup> Another example of this protection is the fact that the Jordanian Juvenile Law prohibits the publishing of the name and photograph of the juvenile on trial. Moreover, this Law prohibits the publishing of the proceedings or the summary of the juvenile's trial.<sup>1757</sup> Therefore, it is suggested that similar provisions be adopted in the JATIPL to protect the identity of trafficked victims.

Additionally, the JATIPL does not contain any provision enabling trafficked victims to participate in judicial procedures and view these procedures.<sup>1758</sup> In this regard, it can be stated that the JATIPL does not comply with the TIPP. More specifically, the Protocol requires a state party to help trafficked victims to present their views and concerns against offenders in the criminal proceedings in a manner that does not contradict the rights of the defence.<sup>1759</sup> Therefore, in dealing with this right, it might be suggested that the Egyptian approach be adopted in the JATIPL. In this respect, the Egyptian Law on Combating Human Trafficking addresses this right under its protection for trafficked persons, when it guarantees the right of a trafficked person 'to be heard and to have his views and interests considered during all stages of criminal proceeding without prejudice to the rights of the defense'.<sup>1760</sup> Accordingly, this participation is very important because it benefits trafficked victims from criminal justice and human rights perspectives by allowing them to provide evidence and testimony, to make their voices heard, and to come to terms with their trauma and anger.<sup>1761</sup>

Moreover, unlike the TIPP,<sup>1762</sup> there is no provision in the JATIPL addressing the right of trafficked victims to counselling. In this regard, it is worth noting that the Egyptian Law on Combating Human Trafficking guarantees the right of trafficked victim to receive counselling during the stages of investigation and trial under the right of legal assistance for trafficked victims.<sup>1763</sup> Therefore, it might be suggested that the JATIPL adopt a provision giving trafficked victims the right to counselling.

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<sup>1756</sup> The Jordanian Juvenile Law (No 24 of 1968) Art. 10.

<sup>1757</sup> *ibid*, Art. 12.

<sup>1758</sup> Salman, *op cit*, 118. The issue of victims' participation in and observation of judicial procedures is also somewhat unclear under the Jordanian Code of Criminal Procedures. In this regard, this Law deals with complaints in Articles 52-67, specifying the previous issue.

<sup>1759</sup> The TIPP, Art. 6(2)(b).

<sup>1760</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 23(d).

<sup>1761</sup> Obokata, *Trafficking of Human Beings from a Human Rights Perspective*, *op cit*, 158.

<sup>1762</sup> The TIPP, Art. 6(3)(b).

<sup>1763</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 23(e).

Additionally, unlike the TIPP,<sup>1764</sup> the JATIPL does not address the right of trafficked victims to stay in the country temporarily or permanently. However, the enforcement policies in Jordan encourage foreign trafficked victims to return to their home countries rather than remain in Jordan to take legal action against the perpetrators of the crime of TIP.<sup>1765</sup> In other words, one factor that may deter foreign trafficked victims from staying in Jordan to take legal action against their traffickers is the prospect of incurring fines as they may be regarded as being out of status if they do not have valid residency documents.<sup>1766</sup> In this respect, it should be noted that the Saudi Arabian Law for Combating Crimes of Trafficking in Persons addresses the possibility of allowing foreign trafficked victims, when necessary, to stay or work in Saudi Arabia. This stay is subject to the discretion of the public prosecutor or the competent court.<sup>1767</sup> Therefore, it might be suggested that a similar provision be adopted in the JATIPL.

Furthermore, unlike the TIPP, the JATIPL does not contain any provision about the right of trafficked victims to compensation.<sup>1768</sup> Therefore, their right to compensation for damages is subject to the general rules on compensation provided in the Jordanian Penal Code,<sup>1769</sup> the Jordanian Code of Criminal Procedures,<sup>1770</sup> and the Jordanian Civil Code.<sup>1771</sup> In particular, the Jordanian Penal Code addresses the right to compensation for damages under the subject of civil obligations. These obligations are as follows:<sup>1772</sup> restitution,<sup>1773</sup> reparation of damages,<sup>1774</sup> forfeiture,<sup>1775</sup> and expenses.<sup>1776</sup> Therefore, anyone who finds him/herself affected by the commission of the crime can ask the court dealing with the crime in question to apply the aforementioned civil obligations.

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<sup>1764</sup> The TIPP, Art. 7.

<sup>1765</sup> Olwan, op cit, 4.

<sup>1766</sup> USDS, 'TIPR' (2011) 209.

<sup>1767</sup> The Saudi Arabian Law for Combating Crimes of Trafficking in Persons (Royal Decree No M/40 of 2009) *Um Al-Quaran*, dated 7 August 2009, Art. 15(7).

<sup>1768</sup> The TIPP, Art. 6(6); Salman, op cit, 119; Olwan, op cit, 4.

<sup>1769</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 42, 43(1), 43(3), 44, 45.

<sup>1770</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) page 311 of the Official Gazette (No 1539) dated 16 March 1961, Art. 52; Salman, op cit, 119.

<sup>1771</sup> The Jordanian Civil Code (No 43 of 1976) the Official Gazette (No 2645) dated 1 August 1976, Art. 256; Olwan, op cit, 4.

<sup>1772</sup> The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Art. 42.

<sup>1773</sup> See Article 43(1) of the Jordanian Penal Code, which defines restitution as follows: 'the reverting back of the conditions that were present before committing the crime'.

<sup>1774</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 43(3).

<sup>1775</sup> *ibid*, Art. 44.

<sup>1776</sup> *ibid*, Art. 45.

Moreover, according to the Jordanian Code of Criminal Procedures, any person who deems himself/herself affected as a result of a felony or misdemeanour may lodge a complaint in which he/she shall hold the capacity of personal claimant to the public prosecutor or the competent court.<sup>1777</sup> Additionally, the right to compensation for damages for trafficked victims might be based on the right to compensation as stated in the Jordanian Civil Code. More precisely, in accordance with the Jordanian Civil Code, any damage caused by others renders them liable for insuring the damage.<sup>1778</sup> Therefore, it can be stated that, according to the general provisions of injurious acts in the Jordanian Civil Code, trafficked victims might ask for compensation as a result of the damage caused to them by traffickers.<sup>1779</sup>

Accordingly, it should be noted that although the JATIPL does not contain any provision about the right of trafficked victims to compensation, it gives the court, which has jurisdiction over the crime of TIP, the power to seize any assets acquired or earned as a result of the commission of the crime of TIP.<sup>1780</sup> In this regard, it should be stressed that forfeiture could be a supplementary penalty. For example, it may involve forfeiting ‘all items generated as a result of a felony or intentional misdemeanor, or items used or prepared for use in committing previous acts’.<sup>1781</sup> Additionally, forfeiture could be a civil penalty when it is regarded as compensation for damages caused. In this case, the ownership of the forfeited items is transferred to the person who deems himself/herself affected by the damages caused, according to a personal claim by this person.<sup>1782</sup> Moreover, seizure could be a precautionary measure. For instance, ‘[i]llegally manufactured, sold or acquired items shall be confiscated even if not belonging to the accused or if the legal action taken does not result in a conviction’.<sup>1783</sup>

Consequently, in light of the right to compensation, it could be suggested that Egypt’s approach be adopted in the JATIPL. This approach deals with the right of trafficked victims to compensation. More specifically, in accordance with this approach, a state fund will be

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<sup>1777</sup> The Jordanian Code of Criminal Procedures, as amended (No 9 of 1961) Art. 52.

<sup>1778</sup> The Jordanian Civil Code (No 43 of 1976) Art. 256; Olwan, op cit, 4.

<sup>1779</sup> The Jordanian Civil Code (No 43 of 1976) Art. 256; Olwan, op cit, 4.

<sup>1780</sup> The JATIPL, Art. 14; The Jordanian Public Security Directorate’s Criminal Investigation Unit, op cit, 10.

<sup>1781</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 30; Kamel Al-Saeed, *Explanation of the General Provisions in the Penal Code: A Comparative Study* (Arabic edn, 3rd edn, Daralthaqafa 2011) 555-558.

<sup>1782</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 43(3); Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 553-554.

<sup>1783</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Art. 31; Al-Saeed, *Explanation of the General Provisions in the Penal Code*, op cit, 558.

established in order to assist trafficked victims financially.<sup>1784</sup> It is noteworthy that there are three sources for this fund. The first source is the fines imposed on those committing the crime of TIP.<sup>1785</sup> The second source is ‘the properties, objects, and means of transportation forfeited’.<sup>1786</sup> The third source is the accepted ‘contributions, grants, and donations from national and foreign entities’.<sup>1787</sup> With regard to the third source, it should be stressed that receiving financing or donations from foreign entities is subject to a number of conditions in Jordan. The first condition is that the source of financing or donations must be legitimate and must not contradict public order or morals.<sup>1788</sup> The second condition is that the conditions determined by the financing or donations body relating to the financing or donation offered should not contradict the Jordanian Law on Societies.<sup>1789</sup> The third condition is that the financing or donation should be spent or used in accordance with the purpose for which this financing or donation has been offered.<sup>1790</sup> The fourth condition is that the Jordanian Council of Ministers should be notified about the willingness to receive this financing or donation from foreign entities.<sup>1791</sup> Accordingly, it can be said that the complexity of these conditions may hinder this source of funding.

Additionally, unlike the TIPP, which pays particular attention to children, the JATIPL does not deal with the rights of trafficked children comprehensively.<sup>1792</sup> However, this view might be challenged on the basis that this Law pays particular attention to children in two situations at least. Firstly, in accordance with this Law, the means element is not required for the criminalisation of the commission of the crime of TIP where the victim is a child.<sup>1793</sup> Secondly, according to this Law, trafficking in children is considered an aggravating circumstance coupled with the commission of the crime of TIP.<sup>1794</sup>

Another right for trafficked victims in the JATIPL is the provision for the public prosecutor to refrain from prosecuting trafficked victims if they have committed, participated in, or been

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<sup>1784</sup> The Egyptian Law on Compacting Human Trafficking (No 64 of 2010) Art. 27; Mohamed Y. Mattar, ‘Human Rights Legislation in the Arab World: The Case of Human Trafficking (Successes and Failures in International Human Trafficking Law)’ (2011) 33(1) Michigan Journal of International Law 101, 125.

<sup>1785</sup> The Egyptian Law on Compacting Human Trafficking (No 64 of 2010) Art. 27.

<sup>1786</sup> *ibid*, Art. 27.

<sup>1787</sup> *ibid*, Art. 27.

<sup>1788</sup> The Jordanian Law on Societies (No 51 of 2008) page 4219 of the Official Gazette (No 4928) dated 16 September 2008, Art. 17(b)(1).

<sup>1789</sup> *ibid*, Art. 17(b)(2).

<sup>1790</sup> *ibid*, Art. 17(b)(3).

<sup>1791</sup> *ibid*, Art. 17(c).

<sup>1792</sup> Salman, *op cit*, 119.

<sup>1793</sup> The JATIPL, Art. 3(a)(2).

<sup>1794</sup> *ibid*, Art. 9(a).

involved in the commission of the crime of TIP, or if they incite others to commit this crime.<sup>1795</sup> However, it should be stressed that the decision not to prosecute is subject to a number of conditions. The first condition is that only the public prosecutor has the right to decide not to prosecute. The second condition is that the decision not to prosecute is applied only to trafficked victims who were also offenders and not to the offenders who committed the crime of TIP. The third condition is that the decision not to prosecute is subject to the approval of a panel consisting of the Director of Public Prosecutions, as the chairman, and two judges from the Jordanian Cassation Court nominated by the Director of the Jordanian Judiciary Council.<sup>1796</sup> Accordingly, it should be stressed that the right not to prosecute is a discretionary right, and there is no guidance in the JATIPL on how this right might be exercised by the public prosecutor.<sup>1797</sup> Therefore, this right will be exercised on a case-by-case basis. What is certain, however, is that unlike the JATIPL, the TIPP does not address the issue of how to halt the prosecution of trafficked victims in certain circumstances.

Additionally, unlike the TIPP, which deals with the attempt to commit the crime of TIP and criminal participation in the commission of this crime<sup>1798</sup> and the protection of trafficked persons from deportation,<sup>1799</sup> the JATIPL does not deal with these issues, leaving them to the general rules in the Jordanian Penal Code.<sup>1800</sup>

A key question should be raised here: What might happen in the event of a contradiction between the JATIPL and the TIPP in the matter of addressing the crime of TIP? To answer this question it should be stressed that the application of this Protocol requires that the crime of TIP be ‘transnational in nature and involve an organized criminal group’.<sup>1801</sup> Therefore, there will be no contradiction between the JATIPL and the TIPP when the crime of TIP is committed nationally, as this crime will be subject to the JATIPL and not to the TIPP.<sup>1802</sup> Although the TIPP requires the crime of TIP to be ‘transnational in nature and involve an organized criminal group’,<sup>1803</sup> establishing this crime in national laws does not require this

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<sup>1795</sup> *ibid*, Art. 12.

<sup>1796</sup> *ibid*; Salman, *op cit*, 114-115.

<sup>1797</sup> Mattar, ‘Human Rights Legislation in the Arab World’, *op cit*, 119.

<sup>1798</sup> The TIPP, Art. 5(2)(b).

<sup>1799</sup> *ibid*, Art. 8.

<sup>1800</sup> The Jordanian Penal Code, as amended (No 16 of 1960) Arts. 68-71, 75-84; Al-Sharfat, *op cit*, 21; Irtemah, *op cit*, 249, 251-253, 255.

<sup>1801</sup> The TIPP, Art. 4; Irtemah, *op cit*, 166.

<sup>1802</sup> Irtemah, *op cit*, 166.

<sup>1803</sup> The TIPP, Art. 4; Mattar, ‘Combating Trafficking in Persons in accordance with the Principles of Islamic Law’, *op cit*, 9.

nature and involvement.<sup>1804</sup> This has been affirmed in the Transnational Organized Crime Convention.<sup>1805</sup>

Additionally, although the issue of superiority between Conventions and Jordanian legislation has not been addressed in the Jordanian Constitution, there is evidence to support the superiority of Conventions over Jordanian laws.<sup>1806</sup> Firstly, the Jordanian Civil Code affirms the supremacy of international Conventions over its provisions.<sup>1807</sup> Secondly, the superiority of international Conventions over Jordanian laws has been affirmed in Jordanian Cassation Court rulings.<sup>1808</sup> Therefore, it is clear from the above that where there is a contradiction between the TIP and the JATIPL, the Protocol will take precedence.<sup>1809</sup>

## 6.6 State Responsibility over Trafficking in Persons

The question that needs to be raised here is whether or not compliance with international standards in addressing the crime of TIP might impose state responsibility. In this regard, it should be stressed that state responsibility arises as a result of a state's internationally wrongful act under international law.<sup>1810</sup> Moreover, although, under international law, states are considered entities with full legal capacity, they cannot act without their representatives and agents.<sup>1811</sup> Therefore, representatives' and agents' acts and omissions might bring state responsibility under international law, regardless of whether they act with or without their authorities, or even when their acts do not violate their internal law.<sup>1812</sup> Accordingly, in applying state responsibility for TIP, it can be said that this responsibility might be imposed

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<sup>1804</sup> Mattar, 'Combating Trafficking in Persons in accordance with the Principles of Islamic Law', op cit, 9.

<sup>1805</sup> The UNCTOC, Art. 34(2).

<sup>1806</sup> Irtemah, op cit, 169.

<sup>1807</sup> The Jordanian Civil Code (No 43 of 1976) Art. 24; Irtemah, op cit, 169.

<sup>1808</sup> The Jordanian Cassation Court Decision (No 3569/2000) dated 20 March 2001, (No 818/2003) dated 9 June 2003 (No 4309/2003) dated 22 April 2004, (No 4211/2004) dated 15 May 2005, (No 2294/2006) dated 31 March 2007, (No 1477/2005) dated 7 September 2009; Irtemah, op cit, 169. See also 'the Report Submitted to the UN Committee against Torture for its consideration of the 2nd Periodic Report of JORDAN (CAT/C/JOR/2) during the Committee's 44th session (26 April – 14 May 2010)', it states that '[t]he status of international law in Jordan has also been affirmed by the Court of Cassation of Jordan, which has ruled that international law has supremacy over national law and that the former should be applied in case of a conflict between the two'.

<sup>1809</sup> For more information about the legal mechanisms to integrate international law in the Jordanian legal system, and the relationship between the Jordanian legislation and international law see chapter six (6.2.6).

<sup>1810</sup> International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at Art. 1(1), 1(5), cited in Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010) 219-220.

<sup>1811</sup> International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at Art. 2(5), cited in Gallagher, op cit, 223.

<sup>1812</sup> *Velásquez Rodríguez v. Honduras* case, Inter-American Court of Human Rights (1988), Series C, No. 4, at Para. 170.

in a number of situations. The first situation is when an act or omission relating to the crime of TIP is attributed to a state.<sup>1813</sup> For example, state officials may become involved in TIP; if border control officers become involved in TIP, these actions are attributed to the state because they are committed by state officials abusing their official positions. Hence, this may impose state responsibility.<sup>1814</sup>

The second situation is where an international obligation is breached by an act or omission attributed to a state.<sup>1815</sup> In this regard, it should be stressed that Jordan is a state party to the TIP.<sup>1816</sup> Therefore, it has an international obligation to prevent TIP, protect trafficked victims, and prosecute traffickers.<sup>1817</sup> Consequently, any act or omission attributed to Jordan with regard to breaching any of the aforementioned obligations (prevention, protection, or prosecution) constitutes ‘an internationally wrongful act of a State’, which could bring state responsibility as a result of non-compliance with international standards in addressing the crime of TIP.<sup>1818</sup>

The third situation is when a state fails to prevent private parties’ conduct. This situation may bring state responsibility as a result of the state’s failure to take necessary measures for this prevention.<sup>1819</sup> Accordingly, in applying this situation to TIP it can be said that failure to take the necessary measures could lead to state responsibility even when the TIP was not caused by the state.<sup>1820</sup> In this respect, it should be noted that this is regarded as an obligation for states under international human rights law. In accordance with this obligation, it is not enough for states simply to refrain from committing violations.<sup>1821</sup> Moreover, states, in accordance with due diligence standards, are obligated to take a measure of care to respond to and prevent violation or abusive acts perpetrated by private individuals or entities, which interfere with established rights. Otherwise, the state may be held responsible for these

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<sup>1813</sup> Gallagher, op cit, 273.

<sup>1814</sup> *ibid.*, 226.

<sup>1815</sup> *ibid.*

<sup>1816</sup> Jordan accepted this Protocol on 11 June 2009

<[https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12-a&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en)> accessed 1 September 2015.

<sup>1817</sup> The TIP, Arts. 5, 9; Gallagher, op cit, 233.

<sup>1818</sup> International Law Commission, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) Report of the International Law Commission on the Work of Its Fifty-third Session , UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at Art. 2(7), cited in Gallagher, op cit, 233-234.

<sup>1819</sup> International Law Commission, ‘Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries’ (2001) Report of the International Law Commission on the Work of Its Fifty-third Session , UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at Chap II (4), cited in Gallagher, op cit, 237.

<sup>1820</sup> Gallagher, op cit, 237.

<sup>1821</sup> *ibid.*



acts.<sup>1822</sup> It should be stressed that the due diligence standard in the course of TIP has been affirmed in *Rantsev v. Cyprus and Russia*, when a number of state obligations have been identified by the European Court of Human Rights, such as the obligation to respond to and prevent TIP, the obligation to protect trafficked victims, the obligation to investigate TIP cases, and the obligation to participate in cross-border cooperation effectively.<sup>1823</sup>

It is noteworthy that state responsibility for TIP might be rejected by a state on the grounds that the crime of TIP has been committed by private entities, such as organised criminal groups, or on the grounds that the state is unable to exercise its control over these groups effectively. These grounds may not be justified unless the state shows that it has used the means available in order to prevent TIP, and that there was no possible appropriate way of achieving this prevention. However, it should be stressed that a state is unlikely to evade responsibility when there is an alternative outcome that the state can establish.<sup>1824</sup>

Accordingly, it is important to examine the result of establishing state responsibility for TIP. This is important because any state that is considered responsible for TIP may be in breach of its international obligations. This could lead to the imposition of two obligations on the breached state.<sup>1825</sup> The first obligation is to cease the act or omission constituting an international wrong, which brings state responsibility.<sup>1826</sup> The second obligation is to make reparations for the injury caused by the internationally wrongful act or omission.<sup>1827</sup> A point to note, however, is that when an international obligation is breached, countermeasures from one state to another are often used in response to such a breach in order to fulfil the responsible States' obligations.<sup>1828</sup> However, it should be stressed that there is a complexity in implementing state responsibility over TIP. This is because of the involvement of non-state parties in the commission of the crime of TIP.<sup>1829</sup>

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<sup>1822</sup> *ibid*, 241.

<sup>1823</sup> *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, Paras. 286–289.

<sup>1824</sup> Gallagher, *op cit*, 249.

<sup>1825</sup> *ibid*, 251.

<sup>1826</sup> *ibid*, 252.

<sup>1827</sup> *ibid*.

<sup>1828</sup> International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10, at General commentary 3(h).

<sup>1829</sup> Gallagher, *op cit*, 272.

## 6.7 Conclusion

This chapter examined the Jordanian efforts to address the crime of TIP in five sections. The first section analysed the efforts made in Jordan to address this crime. In doing so, this section took an in-depth look at these efforts. This is important because the analysis of these efforts will clarify how this crime has been addressed by highlighting what did or did not work in relation to addressing this crime. Furthermore, in this section, the Jordanian holistic approach in the fight against the crime of TIP was studied. This is significant because, by studying the efforts made, it becomes easier to determine what has been done, how it has been done, and how it might be done better in the future. Additionally, in this section recommendations were made. These are important because they might be adopted, where possible, as good practice in creating a holistic approach to addressing the crime of TIP.

The second section highlighted the role of Islamic Criminal Law in addressing the crime of TIP in Jordan. This is important because this Law may enhance the Jordanian holistic approach in the fight against the crime of TIP by following the Islamic approach in such a fight.

The third section investigated challenges facing efforts to address the crime of TIP in Jordan, be they legal or practical challenges. In this regard, a number of challenges were analysed. It should be stressed that the analysis of these challenges is significant because their identification makes it easier to address them. In other words, by pointing out these challenges, solutions, suggestions, and recommendations might be made in order to face and overcome them.

The fourth section examined the extent to which the JATIPL is in line with the TIPP in providing trafficked victims with the stated rights in the Protocol and dealing with other issues related to the crime of TIP. In doing so, a number of rights and issues were investigated, such as the right to facilitate the repatriation of trafficked victims, the right to provide trafficked victims with physical, psychological, and social recovery programmes, and shelter, the right to determine the identity of trafficked victims and maintain the confidentiality of this identity, the right to enable trafficked victims to participate in judicial procedures and view these procedures, the right of trafficked victims to counselling, the right of trafficked victims to stay in the destination country temporarily or permanently, and the right of trafficked victims to compensation. Furthermore, in this section other issues related to TIP were also investigated, such as paying particular attention to children, refraining from prosecuting trafficked victims, mitigating the punishment for the commission of the crime of

TIP, the attempt to commit the crime of TIP and, the criminal participation in the commission of this crime, and protecting trafficked persons from deportation. Subsequently, this section dealt with the relationship between the JATIPL and the TIPP where there are contradictions between them. The fifth section investigated Jordan's state responsibility where there is a breach of international obligations in relation to TIP.

To sum up, Jordan's general attitude to international law can be described as very open, as mentioned earlier in this chapter (6.2.6). This is illustrated by Jordan's ratification and acceptance of or accession to various international conventions concerning TIP. Therefore, it can be said that the Jordanian government policy is in line with international standards in the combating of the crime of TIP.

It is also noteworthy that Islamic principles forbid all forms of TIP; hence, Islamic principles comply with international law on TIP. Therefore, it might be argued that Islamic principles and international law on TIP seek to achieve the same objectives.

Finally, recommendations in relation to addressing the crime of TIP in Jordan will be dealt with under the recommendation section in the next chapter.

# Chapter Seven

## Conclusion

This chapter summarises the research findings and provides recommendations in this regard.

### 7.1 Chapters Summary

This research has analysed the crime of trafficking in persons under international law, with a special focus on Jordanian legislation, in seven chapters.

Chapter one presented the introduction of this research. It highlighted the background of this research. It then discussed the research questions and aims. After that, it analysed the research methodology. Subsequently, it addressed the significance of this research and its contribution to knowledge. Finally, it dealt with the research structure.

Chapter two examined trafficking in persons (TIP) as a crime under international law by dealing with two main issues. The first main issue concerns the identification of TIP. First, the chapter analysed definitions of TIP. It is noteworthy that some of these definitions have narrow aspects, limited scopes, and/or vague meanings while. On the other hand, others have broad aspects, inclusive scopes, and/or clear meanings. Consequently, by analysing these definitions, this chapter argued that the definition of TIP stated in ‘the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime’, hereinafter referred to as the Trafficking in Persons Protocol (TIPP)<sup>1830</sup> can be regarded as the best of these definitions because it gives a unified meaning for TIP, provides a list of exploitative purposes for the commission of the crime of TIP, treats TIP as a crime that might target all categories of people, and deals with the main elements of TIP. Second, the main elements of TIP (the action, the means, and the purpose) were examined. These elements answer three questions about TIP: what is done during TIP, how it is done, and why it is done. It is worth noting that the presence of these elements is necessary to establish that TIP has occurred, unless the victim of TIP is a child. In this case, there is no need for the means element. Third, this chapter highlighted the similarities and differences between TIP and the smuggling of

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<sup>1830</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001).

migrants in order to distinguish between them by looking at a number of elements such as the definition, the consent, the crossing of borders, the relationship between the parties to crimes, the way of obtaining the illicit profit from these crimes, and the legal status of trafficked persons and smuggled persons, since they overlap to a certain extent. Therefore, it is necessary to draw lines between them. Fourth, the forms of TIP were analysed with reference to international treaties. This was done because this chapter argued that, on the one hand, these forms have a treaty basis. On the other hand, the TIPP simply mentions them without explaining or defining them. Fifth, the typologies of TIP were investigated. In doing so, this chapter highlighted three issues. The first issue is the fact that TIP might be regarded as an international, transnational, or national crime. The second issue concerns the legal basis for addressing TIP and whether it is on a treaty, customary, or soft law basis. In this regard, it might be argued that TIP should be addressed on a treaty basis because the TIPP is a treaty. The third issue is whether the scope of the TIPP is limited to certain categories of people or includes all categories. In this respect, it can be said that TIP includes all categories of people: children, men and women.

The second main issue examined in chapter two is the historical background of TIP. The chapter examined the international legal instruments dealing with TIP by shedding light on three stages of combating TIP. The first stage is the initial efforts to combat TIP (the prohibition of slavery). The second stage is the effort to address TIP more effectively (the prohibition of prostitution, sexual exploitation, forced labour, slavery, practices similar to slavery, and the removal of organs), a process which began after the inception of the League of Nations. The third stage is the attempt to address TIP more comprehensively as a result of the adoption of the TIPP and other instruments such as the SAARC and the CoE. Finally, this chapter argued that knowledge of how the roots of TIP have been dealt with in various international legal instruments may play a significant role in helping the relevant authorities to understand this crime and address it more effectively.

Chapter three examined the crime of TIP under Jordanian legislation by dealing with three main issues. The first main issue is TIP in Jordan. It is noteworthy that, with regard to this issue, this chapter investigated the initial efforts made to deal with trafficking-in-persons-related issues in the form of the Jordanian Abolition of Slavery Law. This chapter then analysed reports about TIP. With reference to these reports, the Jordanian efforts were evaluated. For example, this chapter analysed trafficking-in-persons reports conducted by the United States Department of State, which classified Jordan as a destination, transit, and origin country for a number of forms of TIP. Furthermore, this chapter analysed reports conducted

by the Jordanian National Center for Human Rights on issues related to the crime of TIP in Jordan. Additionally, ‘the First Report on Combating Human Trafficking in the Hashemite Kingdom of Jordan’ conducted by the Jordanian Anti-Human Trafficking National Committee was analysed. It is noteworthy that such reports were, to a certain extent, the main sources from which to draw a picture about the situation of TIP in Jordan. Additionally, these reports have been used to fill the gap regarding the lack of statistics on TIP in Jordan.

The second main issue examined in chapter three is the identification of the crime of TIP in Jordan, which was achieved by dealing with two matters. The first matter is the definition of TIP under the Jordanian Anti-Trafficking in Persons Law (JATIPL).<sup>1831</sup> In this regard, this chapter argued that although the definition of the crime of TIP under this Law is comparatively consistent with the TIPP definition of TIP, there are two gaps in the Jordanian definition. The first gap is the fact that the JATIPL requires the crime of TIP to be committed against more than one person, a requirement influenced by the Protocol definition. This is justifiable under the Protocol as this Protocol applies to transnational TIP, but it is not justifiable for the JATIPL as this Law is a national Law. The second gap is the use of a limited list of exploitative acts under the ‘purpose’ element in the definition of the crime of TIP, as this may result in other exploitative acts that may occur not being subject to punishment as a result of the principle of legality ‘*nullum crimen, nulla poena sine lege*’. The second matter is the elements of the crime of TIP. This matter was examined by shedding light on the components of the three elements required in the crime of TIP. These elements are the action element, the means element, and the purpose element. The third main issue examined in chapter three is the criminal investigation and prosecution of the crime of TIP in Jordan. In doing so, this chapter examined the Jordanian criminal justice system, criminal investigation of the crime of TIP in Jordan, and the prosecution of the crime of TIP in Jordan. In conclusion, it can be stated that Jordan has made notable efforts under its legislation to comply with international standards in identifying TIP.

Chapter four examined TIP as a transnational organised crime by dealing with five main issues. The first issue is the concept of transnational organised crime. This issue was dealt with by clarifying the meaning of transnational organised crime and highlighting what makes this crime distinctive from other crimes such as disorganised, random, national, and international crimes. After that, this chapter analysed the concept of transnational organised crime under the ‘the United Nations Convention against Transnational Organized Crime’

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<sup>1831</sup> The Jordanian Anti-Trafficking in Persons Law (JATIPL) (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009.

(UNCTOC).<sup>1832</sup> In this analysis, the chapter argued that although the concept of transnational organised crime is regarded as an ambiguous concept, organised crime with complex natures may be categorised under this concept because of its broad meaning. There is also a global acceptance of this concept. The second main issue examined in chapter four is the transnational nature of TIP. In this regard, this chapter argued that the application of the UNCTOC and the TIPP to the crime of TIP requires this crime to be committed transnationally. This chapter then dealt with the situations in which the crimes in question might be regarded as transnational in nature. After that, this chapter highlighted how the transnational nature of TIP could be found in the process of TIP, the wide range of trafficking-in-persons operations, and the variety of networks involved in TIP. The third main issue examined in chapter four is jurisdiction over TIP as a transnational organised crime. In this respect, this chapter argued that territorial jurisdiction and flag principle jurisdiction are the main jurisdictions used over TIP. However, as a result of the transnational nature of TIP, other types of jurisdictions may be needed in order to tackle the crime of TIP, such as passive personality principle jurisdiction, active personality principle jurisdiction, and effects-based jurisdiction. Additionally, this chapter raised the possibility of exercising universal jurisdiction over TIP as a transnational organised crime. In doing so, it argued that the UNCTOC neither denies nor excludes the possibility of exercising universal jurisdiction. Moreover, this chapter argued that TIP as a transnational organised crime may not be subject to the principle of individual criminal responsibility.

The fourth main issue examined in chapter four is the notion of addressing TIP as a transnational organised crime. The chapter dealt with this issue by arguing that there is a need to adopt a comprehensive approach in order to achieve this objective. This strategy should include a number of approaches. First, the international approach was examined in light of the key international legal instruments for addressing TIP as a transnational organised crime. Second, the regional approach was discussed with reference to the efforts made by the European Union and the Arab world to combat the crime of TIP as a transnational organised crime. Third, the national approach was explored with reference to several obligations imposed upon states in relation to addressing TIP as a transnational organised crime. The final approach involves international organisations addressing TIP as a transnational organised crime, and the roles played by the UNODC, the IOM, the ILO, INTERPOL, and

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<sup>1832</sup> United Nations Convention against Transnational Organized Crime (UNCTOC) (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001).

the UNIAP in pursuit of this objective were discussed. The fifth main issue examined in this chapter is the key legal challenges to efforts to address TIP as a transnational organised crime. In this regard, this chapter argued that, because of the complex nature of the crime of TIP, there are a number of legal challenges to attempts to tackle this crime; for example, immunity could be granted to some offenders who committed the crime of TIP, the crime of TIP could be treated with leniency contrary to other transnational organised crimes, and some states may tolerate the commission of the crime of TIP. Arguably, however, these challenges might be addressed by applying the three 'Ps' approach (prevention, protection, and prosecution).

Chapter five examined TIP as a crime against humanity by dealing with four main issues. The first issue concerns occasions when TIP might fall under the jurisdiction of the International Criminal Court (ICC) as a crime against humanity. This chapter investigated when TIP might be regarded as a crime against humanity categorised under the notion of enslavement. Interestingly, this chapter argued that the Rome Statute of the International Criminal Court (RSICC) has explicitly recognised TIP under the concept of enslavement. Therefore, if all the elements required for enslavement to be classified as a crime against humanity have been met in the crime of TIP, this crime will be treated as a crime against humanity. The second main issue examined in chapter five is the three elements required in TIP in order for it to be regarded as a crime against humanity. In this regard, this chapter argued that the first element does not require the exercising of any or all of the powers attaching to the right of ownership because TIP is based on control, not ownership. Additionally, under the second element, this chapter analysed how a widespread or systematic attack against a civilian population might make TIP a crime against humanity. Furthermore, the third element requires that the perpetrator knows about the conduct. Accordingly, this chapter argued that it is possible to prove that the perpetrator has knowledge about such conduct, as the perpetrator knows that an act of TIP will be the result of his/her participation in trafficking-in-persons operations. TIP should be regarded as a serious crime due to its extensive effects on humanity and the approach adopted in carrying out the crime, which elevate it, by any reasonable standards, to the level of a crime against humanity.

Chapter five also argued that there are a number of reasons why the ICC might be a more capable organ than national jurisdictions for addressing TIP as a crime against humanity. The first reason is that the ICC as an international organ may be stronger than national criminal justice systems in withstanding the pressure exerted by traffickers, including corruption,



retaliation, intimidation, and bribery, in order to achieve their goals. The second reason is that, under the ICC, victims will be able to participate in the trial following their allegations. They will also be able to make representations and receive compensation. The third reason is that tackling serious crimes and achieving justice effectively require an organ such as the ICC, which has the necessary powers and resources. However, this chapter argued that the failure to define TIP properly under the RSICC, the complementary jurisdiction of the ICC, and the ICC's reliance on states parties can be regarded as bases on which to challenge the ICC's ability to address TIP as a crime against humanity. The final main issue examined in chapter five is the existence of three mechanisms that might be used by the ICC to exercise jurisdiction over TIP as a crime against humanity. In accordance with the first mechanism, a referral to the ICC's prosecutor by an RSICC state party of the crime of TIP as a crime against humanity is required. The second mechanism requires that TIP be considered a crime falling under Chapter VII of the Charter of the United Nations. This might occur when the crime of TIP is regarded as a threat to international peace and security. Therefore, a referral by the Security Council could be made to the ICC. Finally, the third mechanism requires that an investigation into TIP be initiated by the prosecutor's own motion. Consequently, the normal jurisdictional principles of the ICC could be applied in the context of TIP.

Chapter six examined efforts to address the crime of TIP in Jordan by dealing with five main issues. The first issue is the efforts that have been made in Jordan to address the crime of TIP. The chapter highlighted the significance of these efforts as they represent the Jordanian holistic approach to addressing this crime; by analysing these efforts, progress in combating this crime becomes clearer as it is possible to determine what worked and what did not work in this regard. Furthermore, this chapter dealt with the gaps in these efforts, recommending solutions to fill these gaps by adopting suitable approaches and good practices used to address this crime in other countries with similar legal systems to Jordan, such as Syria and Egypt. Additionally, in accordance with the second issue to be examined, this chapter argued that in Jordan Islamic Criminal Law might play an important role in the fight against the crime of TIP by highlighting how this crime has been addressed under this Law. Moreover, in this respect, the chapter also argued that, by applying the Islamic approach in this fight, Jordan may achieve greater compliance with the international standards in relation to addressing the crime of TIP. The third main issue examined in chapter six is the legal and practical challenges to efforts to address the crime of TIP in Jordan. Accordingly, this chapter firstly analysed the legal challenges. It then analysed the practical challenges. Such analysis

is important because it highlights the gaps in efforts to address such challenges in order to provide recommendations and solutions to fill these gaps.

The fourth main issue examined in chapter six is the consistency between the JATIPL and the TIPP in the matter of trafficked persons' rights. This chapter dealt with this issue by examining a number of rights. The first right is the right to facilitate the repatriation of trafficked victims. The second right is the right to provide trafficked victims with physical, psychological and social recovery programmes, and to provide them with shelter. The third right is the right to determine the trafficked victims' identities and to maintain the confidentiality of such identities. The fourth right is the right to enable trafficked victims to participate in judicial procedures and view these procedures. The fifth right is the right of trafficked victims to counselling. The sixth right is the right of trafficked victims to stay in the country temporarily or permanently. The seventh right is the right of trafficked victims to receive compensation. This chapter then dealt with the question of which legal instrument will take precedence if the JATIPL contradicts the TIPP? In answering this question, this chapter analysed the issue of superiority between legal instruments under Jordanian legislation and concluded that the Protocol will supersede the Jordanian Law.

The fifth main issue examined in chapter six concerns whether Jordan will be legally responsible if it does not comply with international standards in addressing the crime of TIP? In answering this question, this chapter analysed the rules of state responsibility and concluded that Jordan might be subjected to state responsibility for any act or omission attributed to it with regard to breaching its obligations in relation to TIP.

## **7.2 Recommendations**

As the earlier section of this chapter concluded and summarised the findings of the research, a number of recommendations for reform emerged in relation to addressing the crime of TIP. These recommendations will be discussed further in this section.

### **Recommendations on Trafficking in Persons under International Law**

Any definition of TIP should include all categories of human beings (adults, children, men, and women) who might be subjected to TIP, and it should not be limited to a certain category or categories.<sup>1833</sup> Additionally, the components of the elements of TIP should not be limited to certain lists of actions, means, or purposes. These lists should be open to any new actions, means, or purposes that may be encompassed by the concept of TIP.

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<sup>1833</sup> See chapter two (2.2.1).

TIP should be dealt with as a historical issue rather than just a modern problem because it is deeply rooted in history. These roots, represented by slavery, forced labour, and prostitution, have been addressed in various international legal instruments. Therefore, an examination of how these instruments have treated these roots and interacted with them may produce a better understanding of TIP, thereby influencing how this problem might be addressed.

### **Recommendations on Trafficking in Persons as a Transnational Organised Crime**

When the UNCTOC defines ‘organised criminal groups’,<sup>1834</sup> it does not specify whether there are any differences between these groups in matters related to transnational organised crime. Consequently, it is recommended that the commission of transnational organised crime by more sophisticated and structured organised criminal groups be considered an aggravating circumstance coupled with the commission of this crime.

As TIP can be regarded as a business,<sup>1835</sup> the cost-benefit perspective might be used to address TIP as a transnational organised crime. This might be done by reducing the profits generated by the crime of TIP by confiscating the assets and the profits of this crime and using these assets and profits to compensate trafficked victims. Interestingly, the cost-benefit perspective may find its legal basis in the UNCTOC as this Convention deals with confiscation and seizure of the proceeds of crimes covered by the scope of this Convention, as well as dealing with compensation of victims of such crimes.<sup>1836</sup> It is noteworthy that such a perspective is applicable in Jordan through forfeiture any assets earned or acquired because of the commission of the crime of TIP.

Notably, as a result of its failure to accommodate the differences among the UNCTOC’s states parties, the intent of this Convention and its focuses in the fight against transnational organised crime have not been fully achieved. Consequently, it is proposed that four strategies be adopted to achieve the intent and the focus of this Convention.<sup>1837</sup> In accordance with the first strategy, legislative and administrative measures aimed at addressing transnational organised crime should be adopted. These measures should be consistent with states parties’ domestic laws. Moreover, the first strategy requires the fulfilment of states

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<sup>1834</sup> United Nations Convention against Transnational Organized Crime (entered into force 29 September 2003) G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001) Art. 2(a).

<sup>1835</sup> Felia Allum and Stan Gilmour (eds), *Routledge Handbook of Transnational Organized Crime* (Routledge 2012) 229.

<sup>1836</sup> The UNCTOC, Arts. 12, 14(2), 25(2).

<sup>1837</sup> Jennifer L. Enck, ‘The United Nations Convention Against Transnational Organized Crime: Is it all that it is Cracked up to be? Problems Posed by the Russian Mafia in the Trafficking of Humans’ (2003) 30(2) *Syracuse Journal of International Law and Commerce* 369, 370-371.

parties' obligations by legislating and then enforcing laws.<sup>1838</sup> The second strategy is to adopt a system of punishment under the UNCTOC. In this regard, a number of issues should be considered under such a system, such as the commensuration between the gravity of the crime and the severity of the punishment, the efficiency of law enforcement, and the deterrent effect of punishments imposed for the commission of these crimes.<sup>1839</sup> The third strategy requires the provision of better protection for trafficked victims by the UNCTOC rather than relying on the efforts of individual states parties as there are various differences among them.<sup>1840</sup> The fourth strategy is to encourage states to support the UNCTOC and implement its provisions in order to achieve its intent and focus.<sup>1841</sup>

### **Recommendations on Trafficking in Persons as a Crime against Humanity**

There is no clear definition of the crime of TIP under the RSICC.<sup>1842</sup> This omission may hinder the ICC's prosecution of this crime, creating uncertainty in the law and widening the gap between the definitions of the crime of TIP at national and international levels.<sup>1843</sup> Therefore, the definition of the crime of TIP under the TIPP<sup>1844</sup> might be adopted as this definition has achieved a worldwide consensus and is regarded as the most comprehensive definition of TIP. It is also recommended that TIP as a crime against humanity be added to the list of crimes under Article 7 of the RSICC, although, as argued in this thesis, TIP may already constitute such a crime in some if not all cases. In other words, the ICC should, at the earliest opportunity, amend its statute to upgrade or encompass TIP as a substantive crime within its jurisdiction with a privileged position of at least being able to reduce the incidence of the crime in the first instance within the states parties.

TIP is a crime, and for the first time the ICC is representing the whole world as the only permanent international criminal court, which means there is now a suitable organ for combating international crimes. Consequently, TIP as an international crime should be addressed with the best organ or institution, which is the ICC. However, the ICC has yet to achieve a successful prosecution for TIP as a crime against humanity. Accordingly, it is

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<sup>1838</sup> The UNCTOC, Art. 34(1); Enck, *op cit*, 390.

<sup>1839</sup> The UNCTOC, Art. 11; Enck, *op cit*, 391.

<sup>1840</sup> Enck, *op cit*, 392.

<sup>1841</sup> *ibid*, 393.

<sup>1842</sup> Rome Statute of the International Criminal Court (last amended 2010) adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (entered into force 1 July 2002) ISBN No. 92-9227-227-6.

<sup>1843</sup> See chapter five (5.4).

<sup>1844</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (entered into force 25 December 2003) G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001) Art. 3(a).

suggested that the ICC be encouraged to prosecute senior officials who may become involved in the commission of the most severe cases of the crime of TIP as a crime against humanity. This will have a deterrent effect and send a strong message that the ICC is capable of imposing legal consequences when needed.

### **Recommendations on the Definition of the Crime of Trafficking in Persons and its Elements under the Jordanian Anti-Trafficking in Persons Law (JATIPL)**

The JATIPL<sup>1845</sup> limits the scope of the crime of TIP, as it uses the plural form when it defines this crime by requiring that the crime of TIP be committed against ‘persons’.<sup>1846</sup> Therefore, it is recommended that the definition of this crime stated in this Law be amended to criminalise the commission of the crime of TIP regardless of whether it is committed against one person or more.

The JATIPL, when it defines the crime of TIP, does not clarify the components of the trafficking-in-persons elements. This could lead to uncertainty in the law and breach the general principles of criminalisation as these principles require the criminal provisions to be clear.<sup>1847</sup> Consequently, it is suggested that a guideline be included to clarify the concept of these components annexed to this Law, taking into consideration how these components have been defined under international legal instruments.

The JATIPL, in its definition of the crime of TIP, limits the lists of actions and means used in TIP, as well as limiting its purposes.<sup>1848</sup> Hence, it is proposed that flexible phrases be used in order to enable these lists to include other actions, means, or purposes when necessary, similar to the TIPP,<sup>1849</sup> as this Protocol uses the expression ‘at a minimum’ to avoid limiting the list of exploitive acts because new or unnamed exploitive acts may appear.

The JATIPL, in its definition of the crime of TIP, uses the expression ‘polarization’ rather than the expression ‘recruitment’ used in the TIPP.<sup>1850</sup> Therefore, it is recommended that the expression ‘recruitment’ be used as this expression has a wider meaning, including seducing and luring victims.<sup>1851</sup> Additionally, by using the expression ‘recruitment’, the JATIPL will be more consistent with the TIPP definition of TIP.

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<sup>1845</sup> The Jordanian Anti-Trafficking in Persons Law (JATIPL) (No 9 of 2009) page 920 of the Official Gazette (No 4952) dated 1 March 2009.

<sup>1846</sup> See chapter three (3.3.1).

<sup>1847</sup> *ibid.*

<sup>1848</sup> See chapter three (3.3.2).

<sup>1849</sup> The TIPP, Art. 3(a).

<sup>1850</sup> *ibid.*; The JATIPL, Art. 3(a)(1).

<sup>1851</sup> Talal Al-Sharfat, *Human Trafficking Crimes: A Comparative Study* (Arabic edn, Darwael 2012) 20-21.

The means of TIP stated in the definition of the crime of TIP under the JATIPL are regarded as illegal means. Consequently, they may overlap with other crimes stated in the Jordanian Penal Code. In other words, these means might be considered means of TIP under the JATIPL or crimes under the Jordanian Penal Code. Therefore, it is important to distinguish between them, as TIP is the more suitable designation more accurately capturing the wrongdoing. In this regard, it should be stressed that the norms that might be used to distinguish between these means involve examining the purpose and the result of these means. Interestingly, the reason for this distinction is to determine which law will be applied to the crime committed. Furthermore, it is recommended that the list of means not be limited to just illegal means; rather, this list should be an open list capable of including any means that could be used to commit the crime of TIP. Nevertheless, illegal means might be treated as aggravating circumstances if they are used in the commission of the crime of TIP. Actually, this approach has been adopted under the Syrian Legislative Decree on the Crimes of Trafficking in Persons.<sup>1852</sup> Thus, it is suggested that a similar approach be adopted in the JATIPL.

Under the JATIPL, use of the services of trafficked victims has not been criminalised. This use has been criminalised under the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>1853</sup> Additionally, the Syrian Legislative Decree on the Crimes of Trafficking in Persons criminalises such use.<sup>1854</sup> This criminalisation is significant because it may help discourage the demand for such services. Accordingly, it is proposed that a similar approach be adopted in the JATIPL and that the use of the services of trafficked victims be regarded as one of the purposes of TIP on the list of exploitative acts.

Practices similar to slavery have not been regarded as a component of the purpose element in the definition of the crime of TIP in the JATIPL. Therefore, it is suggested that these practices be included in the list of exploitive acts, especially in light of the historical connection between slavery and trafficking and the common element of coercion.

### **Recommendations on Addressing the Crime of Trafficking in Persons as a Crime under Jordanian Legislation**

Islam has an influence on people and where traditions and the legal system depend on Islam. Therefore, it is suggested that the Islamic approach be adopted in addressing TIP in such

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<sup>1852</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, Art. 4.

<sup>1853</sup> Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 1 February 2008) ETS 197, 16.V.2005, Art. 19.

<sup>1854</sup> The Syrian Legislative Decree (No 3 of 2010) on the Crimes of Trafficking in Persons, Art. 9(2).

places<sup>1855</sup> for the following reasons. Firstly, such an adoption might be regarded as a part of the holistic approach that could be applied to address the problem. Secondly, this adoption may encourage the compliance with international standards in relation to addressing the crime of TIP, as the Islamic approach is in line with such standards. Thirdly Muslims will follow this approach as a part of their religious obligations.

Two important issues have not been addressed under the JATIPL; these issues are the attempt to commit the crime of TIP and the criminal participation of committing this crime.<sup>1856</sup> Consequently, these issues are subject to the Jordanian Penal Code's general rules,<sup>1857</sup> which may not be suitable to the particularity of the crime of TIP. Therefore, it is proposed that provisions dealing with the attempt and the criminal participation be included under the JATIPL as this will make the Law more comprehensive in addressing the crime of TIP.

There are few formal procedures for identifying trafficked victims.<sup>1858</sup> Accordingly, it is recommended that these formal procedures be increased for more effective identification of trafficked victims not only in the trial stage but also during the stages of collecting evidence and investigation. Such an approach has been used in the Egyptian Law on Combating Human Trafficking.<sup>1859</sup> Therefore, by adopting a similar approach in the JATIPL, identified trafficked victims may not be prosecuted as a result of their engagement in illegal activities while they were being trafficked.

The JATIPL does not include counselling among the rights of trafficking victims.<sup>1860</sup> Therefore, it is recommended that such a right be included under the JATIPL, be it at the investigation or the trial stage. Interestingly, a similar approach is used in the Egyptian Law on Combating Human Trafficking.<sup>1861</sup>

The right of trafficked persons to remain, temporarily or permanently, in Jordan has not been addressed under the JATIPL.<sup>1862</sup> This could lead to trafficked victims being vulnerable to TIP. Consequently, it is suggested that provisions be included in this Law granting special work permits and/or visas to trafficked victims, enabling them to stay in Jordan legally.

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<sup>1855</sup> Jordan is one of these places.

<sup>1856</sup> See chapter six (6.4.1).

<sup>1857</sup> The Jordanian Penal Code, as amended (No 16 of 1960) page 374 of the Official Gazette (No 1487) dated 11 May 1960, Arts. 68-71, 75-84.

<sup>1858</sup> See chapter six (6.4.2).

<sup>1859</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 23.

<sup>1860</sup> See chapter six (6.5).

<sup>1861</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 23(e).

<sup>1862</sup> See chapter six (6.5).

Trafficked victims' right to compensation has not been dealt with under the JATIPL.<sup>1863</sup> Accordingly, it is proposed that this right be addressed in this Law. In this regard, this Law would give the court trying the crime of TIP the right to seize any assets resulting from the commission of this crime. Hence, such assets could be used to compensate trafficked victims. Additionally, in order to compensate these victims, the JATIPL might adopt the approach used in the Egyptian Law on Combating Human Trafficking, which stipulates the establishing of a state fund for this purpose.<sup>1864</sup>

Adopting the Jordanian National Strategy to Prevent Trafficking in Persons is one of the significant efforts made by Jordan to address the crime of TIP.<sup>1865</sup> However, this strategy was used for the period between 2010 and 2012. Consequently, it is recommended that this strategy be reviewed, evaluated, monitored, and updated in order to help this strategy achieve its strategic aims.

The JATIPL has been influenced by the TIPP. However, unlike the Protocol, which pays particular attention to women and children, this Law does not pay such attention to these categories. Therefore, it is suggested that provisions be included under this Law to deal with the rights of women and children more comprehensively.

Training on several aspects of the crime of TIP is one of the main implements used in the Jordanian holistic approach to the fight against this crime.<sup>1866</sup> However, because of the special nature of this crime, such training should be more structured and comprehensive. Accordingly, it is proposed that specialised training be provided to those engaged in the fight against TIP. This includes, but is not limited to, public officials, judges, prosecutors, lawyers, personnel working on implementing the law, media and press personnel, recruitment office owners, and factory owners.

The raising of awareness has a significant influence on combating the crime of TIP.<sup>1867</sup> However, the raising of awareness in Jordan is insufficient and is predominantly carried out by NGOs. Therefore, it is recommended that the Jordanian government engage more in raising awareness by adopting a comprehensive approach to target foreign migrant workers, the general public, and any personnel dealing with trafficking-in-persons situations.

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<sup>1863</sup> See chapter six (6.5).

<sup>1864</sup> The Egyptian Law on Combating Human Trafficking (No 64 of 2010) Art. 27.

<sup>1865</sup> See chapter six (6.1.2).

<sup>1866</sup> See chapter six (6.1.5).

<sup>1867</sup> See chapter six (6.1.10).



There is a lack of data on TIP in Jordan.<sup>1868</sup> Therefore, it is recommended that a national system of data collection be established. This system should include data collected from all bodies concerned with issues relating to TIP in order to reveal the magnitude and the extent of the crime of TIP. Such a system would be significant because national reports and strategies could be conducted according to the data collected. Thus, solutions and recommendations could be made in order to tackle the crime of TIP in Jordan.

The prosecution of the commission of the crime of TIP could play an important role in addressing this crime.<sup>1869</sup> Therefore, it is proposed that the number of such prosecutions be increased. Furthermore, the investigation of trafficking-in-persons allegations should be treated more seriously.<sup>1870</sup> Additionally, the monitoring of factories in which foreign workers are employed and the investigation of involuntary servitude allegations in these factories should be improved.

In conclusion, it should be stressed that the state of international law with regard to TIP reflects the importance of addressing the crime of TIP by applying the three ‘Ps’ approach in the fight against this crime: preventing TIP, protecting trafficked victims, and prosecuting traffickers. Interestingly, notable efforts have been made under Jordanian legislation to comply with the international law in this regard. However, the transnational nature of the crime of TIP should be taken into consideration by legislators in Jordan. Furthermore, the following issues, which arise under both the international system and national legislation, should be given considerable attention: the under-prosecution of the crime of TIP; the absence of a unified international punishment mechanism; and the difficulty in identifying trafficked victims and the potential trafficked victims. Moreover, the hidden, complex and clandestine nature of the crime of TIP and the high number of unreported TIP cases also deserve careful consideration. Finally, attention should be paid to the low priority given to the fight against the crime of TIP in contrast with other international crimes such as terrorism.

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<sup>1868</sup> See chapter three (3.1).

<sup>1869</sup> See chapter three (3.4.3).

<sup>1870</sup> See chapter three (3.4.2).

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