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**Analysis of the possibility of, and challenges associated
with, the qualification for refugee status of victims of
human trafficking in South Africa**

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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CHAPTER 1

Introduction

Human rights discourse, when talking about trafficking, is the shorthand reminder that people, not only states, are harmed by this practice.¹

It is with this quote in mind that this thesis attempts to address the issue of human trafficking from a human rights perspective, and seeks redress for victims of trafficking beyond the realm of criminal law. The aim of the enquiry is to establish whether trafficking victims could find protection within a particular human rights framework – that of refugee law – and to assess any factors that may hinder qualification for such protection.

Although this thesis will spend a considerable amount of time looking at the definitions of ‘human trafficking’ and ‘refugee’, the aim is not to compare the two definitions or find similarities between them. This would be a futile task because the definitions use completely different terminology, are structured differently and were drafted to achieve different objectives. The definition of ‘human trafficking’ was drafted in order to establish elements and set parameters for prohibited conduct, while the definition of ‘refugee’ was drafted in order to set parameters for the bestowment of persons with a particular legal status. Thus, while ‘human trafficking’ serves to define a criminal *offence*, the definition for ‘refugee’ describes a particular type of *person*. The content dealt with by each definition is thus dissimilar and incapable of word for word comparison.

Instead, this thesis will endeavour to establish similarities between the people that are associated with each of the concepts. This will be done from the perspective of

¹ ‘Trafficking in hegemony’ in Catherine Dauvergne *Making people illegal: what globalization means for migration and law* (New York: Cambridge University Press, 2008) 69, hereafter referred to as ‘Dauvergne’ at 73.

the *victims* of human trafficking. In particular, what will be attempted is a demonstration that in South Africa the status enjoyed by persons who are categorised as ‘refugees’ can also be enjoyed by persons who are categorised as ‘victims of human trafficking’. In other words, it will be assessed whether the concept ‘victim of human trafficking’ can be included within the concept ‘refugee’. The two definitions linked to these concepts will play important, albeit different, roles in this analysis. The definition of ‘trafficking’ will be used to facilitate the task of recognising and describing the victims of trafficking. However, the conception of ‘trafficking’ also presents certain challenges to the qualification of trafficking victims for refugee status, and these will also be identified. Thereafter, the definition of ‘refugee’ will provide the criteria according to which it will be assessed whether or not trafficking victims can meet the requirements for refugee status in South Africa. Throughout, a victim-centred approach will be taken, as opposed to an approach that concentrates on the offenders of human trafficking.

The following chapter (Chapter 2) will attempt to establish links between trafficking victims and refugees, by looking at the necessity for and availability of protection to victims of trafficking in South Africa, in relation to refugees. Thereafter, the definition of trafficking, both internationally and in South Africa, will be discussed and analysed (Chapter 3). Chapter 4 then draws on the notion of trafficking, as contained in the definitions, to determine the nature of human trafficking as an offence, its likely perpetrators and its effects on victims. By using the deductions made in the previous chapter, Chapter 5 assesses whether a victim of trafficking fulfils the requirements for refugee status in South Africa. Finally, factors obstructing trafficking victims’ qualification for refugee status will be discussed. Some of these factors arise from the conception of ‘trafficking’ examined in Chapter 3, while others arise from limitations that ordinarily operate within refugee law.

CHAPTER 2

Establishing links between victims of human trafficking and refugees

1 AN INTRODUCTION TO HUMAN TRAFFICKING

Many authors refer to human trafficking as ‘modern-day slavery’² – a contemporary form of servitude which does not entail legal ownership of one person by another, but nonetheless results in a relationship of complete control over the former’s freedom and survival.³ Human beings are said to be treated as expendable objects by traffickers – used and sold repeatedly for profit until they are broken or no longer of any worth.⁴

Human trafficking takes on many exploitative forms. The most profitable form of trafficking is sexual exploitation of women and children, which often entails forced marriages, prostitution and pornography.⁵ Frequently, persons are trafficked to be used as labourers in domestic settings,⁶ brothels, construction sites, sweatshops, mines, plantations or farms; or persons are coerced into begging for the benefit of their traffickers.⁷ In these contexts employment conditions are usually sub-standard, dangerous and unhealthy, with little or no wage payments.⁸ Human trafficking can also occur in order to supply human organs for sale on the black market.⁹ Where traffickers are involved in drug smuggling, victims of human trafficking are sometimes used as drug mules to transport illegal drugs into other countries.¹⁰ Finally, human trafficking

² Rika Snyman ‘Victims of human trafficking’ in Linda Davis and Rika Snyman (eds) *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 280, hereafter referred to as ‘Snyman’, at 280; Jane N Sigmon ‘Combating modern-day slavery: issues in identifying and assisting victims of human trafficking worldwide’ (2008) 3 *Victims and Offenders* 245, hereafter referred to as ‘Sigmon’, at 246; Anna M Gallagher ‘Triply exploited: female victims of trafficking networks – strategies for pursuing protection and legal status in countries of destination’ (2004) 19 *Georgetown Immigration Law Journal* 99, hereafter referred to as ‘Gallagher’, at 101.

³ Snyman (n 2) at 282; Sigmon (n 2) at 246.

⁴ Sigmon (n 2) at 249; Gallagher (n 2) at 101.

⁵ Snyman (n 2) at 284.

⁶ Domestic servitude is a very difficult form of trafficking to identify because, *inter alia*, household labour is seldom regulated or inspected by governments – see Sigmon (n 2) at 248.

⁷ Snyman (n 2) at 284; Sigmon (n 2) at 246-7.

⁸ Snyman (n 2) at 284 and 287.

⁹ *Ibid* at 284. These organs are then used for traditional healing purposes or medically transplanted into other persons.

¹⁰ *Ibid*.

could serve as a means to illegally adopt children from foreign countries where strict administration rules complicate the adoption process.¹¹

The occurrence of human trafficking is rooted in the vulnerability of certain persons, who are sought out and exploited for profit.¹² Factors that contribute to the vulnerability of persons include poverty, unemployment, ignorance, illiteracy, HIV/Aids, conflict, natural disasters,¹³ discrimination and violence against women.¹⁴ The existence of these factors can also aggravate the situations of persons who are naturally more vulnerable, such as children or disabled persons.¹⁵ Other factors, such as strict immigration control, globalisation,¹⁶ cross-border criminal networks and deficient legal or political systems, also create an ideal environment for the trafficking of human beings.¹⁷ Furthermore, while modern developments in transport and technology make living simpler and more efficient for some humans, these developments also facilitate the methods used by traffickers for exploiting people.¹⁸

2 PROTECTION FOR VICTIMS

From the description of the different forms of trafficking given above, it is apparent that persons could experience a great deal of trauma during the process of being trafficked. Victims of trafficking are obviously susceptible to serious *physical* harm in the form of rape, forced abortions, violent abuse, harassment, starvation or infection

¹¹ Ibid. While there is no solid evidence indicating that trafficking occurs for this purpose, Snyman suspects that increased levels of foreign adoptions could be indicative of trafficking for adoption.

¹² Ibid at 282-3.

¹³ The disorder and instability caused by conflict or natural disasters, for example, is often exacerbated in developing nations (ibid at 283) – increasing the vulnerability of persons from those societies.

¹⁴ Ibid at 283 and 285. Persons affected by these factors will be at a high risk of victimisation, but other factors, such as the personality or lifestyle of a person could also make them vulnerable to victimisation – see Anna van der Hoven and Alice Maree ‘Victimisation risk factors, repeat victimisation and victim profiling’ in Linda Davis and Rika Snyman *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 55, hereafter referred to as ‘Van der Hoven and Maree’, at 56.

¹⁵ Snyman (n 2) at 283.

¹⁶ See Loring Jones at al ‘Globalization and human trafficking’ (2007) 34(2) *Journal of Sociology & Social Welfare* 107, hereafter referred to as ‘Jones et al’.

¹⁷ Snyman (n 2) at 283. Some authors also attribute the occurrence of human trafficking to the increasing demand for sex industry-related activities and sex tourism; and, as a result, they advocate for a decrease in this demand in order to prevent human trafficking – see Sigmon (n 2) at 251.

¹⁸ Sigmon (n 2) at 246.

with sexually transmitted diseases.¹⁹ However, victims are often also affected *emotionally* or *socially* by an inability to develop in a natural social environment.²⁰ Victims of human trafficking who are genuinely traumatised by their encounters are thus understandably in need of assistance and support - services which, until recently, have been lacking due to the absence of policy or legislation dealing with the issue of human trafficking.²¹

Although many early instruments deal with slavery and trafficking as it is traditionally understood, none encompass the existing forms of exploitation that are involved in human trafficking.²² At the international level, contemporary human trafficking was first addressed as a distinct issue in the *United Nations Convention against Transnational Organized Crime*²³ and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (hereafter, the ‘Palermo Protocol’ or ‘Protocol’),²⁴ both of which entered into force in 2003.²⁵

The Protocol is a crucial guide to addressing trafficking problems because it provides an internationally agreed upon definition of ‘human trafficking’ and also creates an obligatory framework for the national enforcement of trafficking laws.²⁶ It has been argued that the Protocol should also include mandatory provisions regarding victim services and protection, where currently states are only required to provide assistance if they deem it ‘appropriate’ to do so within their discretion.²⁷ The current

¹⁹ Snyman (n 2) at 287; Gallagher (n 2) at 101.

²⁰ Snyman (n 2) at 287.

²¹ Ibid at 280.

²² Ibid at 281. For a discussion of the historical development of trafficking legislation and instruments in South Africa and internationally, see Snyman (n 2) at 285-6 and Gallagher (n 2) at 101-2.

²³ United Nations General Assembly *United Nations Convention against Transnational Organized Crime* A/RES/55/25 (8 January 2001), available at:

<http://www.unhcr.org/refworld/docid/3b00f55b0.html> [accessed 28 September 2010].

²⁴ United Nations General Assembly *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000), available at:

<http://www2.ohchr.org/english/law/protocoltraffic.htm> [accessed 28 September 2010], hereafter referred to as ‘Palermo Protocol’ or ‘Protocol’.

²⁵ Sigmon (n 2) at 251.

²⁶ Snyman (n 2) at 287.

²⁷ Snyman (n 2) at 287; Sigmon (n 2) at 252-3; Gallagher (n 2) at 102; D Singh ‘Piercing the veil on trafficking in women’ (2004) 37(3) *The Comparative and International Law Journal of Southern Africa* 1, hereafter referred to as ‘Singh’, at 11-12. Gallagher (n 2) notes at 102 that the law enforcement provisions in the Protocol contain mandatory language, while the victim assistance and protection

wording of the Protocol signifies that South Africa, as a state party to the Protocol, would only need to provide protective services to victims of human trafficking if it was deemed appropriate.²⁸ Thus, on its own the Protocol is not sufficiently capable of providing trafficking victims with the protection and assistance that they need. It is thus essential that trafficking victims be able to source additional legal protection elsewhere, and it is submitted that refugee law has the potential to supply such protection.

However, it should be noted that trafficking victims may also be in need of assistance that refugee law cannot provide. For example, some trafficking victims may need reparation from their perpetrators in the form of compensation or an apology.²⁹ Victims may also require witness protection for themselves and their families in order to rebuild their lives and feel secure – especially if they are to testify against their perpetrators in a criminal trial.³⁰ While refugee status will allow victims to access the protection afforded to ordinary South African citizens who are victims or witnesses to crimes,³¹ it will not guarantee that they qualify for such protection – victims would still need to meet the procedural and substantive requirements set out in South African law.³² Similarly, while refugee status may serve to provide victims of human trafficking with additional *protection*, it cannot necessarily address issues regarding the prevention of human trafficking or the prosecution of traffickers.³³ ‘Protection’ is

provisions contain discretionary language. Sigmon (n 2) states at 253 that the victim protection provisions are rarely implemented in countries, and that non-governmental organisations usually take on the role of protecting and assisting victims.

²⁸ Granting blanket refugee status, in other words, *group* status determination, to all legitimate victims of human trafficking as a protective measure would therefore be within the discretion of the South African government. If the government chooses *not* to grant additional protection in this manner, as is the case at present in South Africa, each trafficking victim would be required to plead their case in an *individual* application for refugee status if they wish to gain legal protective status.

²⁹ Snyman (n 2) at 287.

³⁰ United Nations General Assembly *Report of the Special Rapporteur on trafficking in persons, especially women and children A/64/290* (12 August 2009), hereafter referred to as ‘Special Rapporteur Report 2009’, at paras 43–6. See also Snyman (n 2) at 287.

³¹ These protections include the creation of shelters or places of refuge for victims and the development of witness protection programmes – David Bruce ‘Challenges of the criminal justice system in addressing the needs of victims and witnesses’ in Linda Davis and Rika Snyman (eds) *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 100, hereafter referred to as ‘Bruce’, at 101–2.

³² See the Witness Protection Act 112 of 1998.

³³ Dauvergne (n 1) at 87–8. With regard to the prevention and prosecution of human trafficking, the state will need to take proactive steps. Thus, the state could take steps to reduce poverty and provide financial assistance, as was done in Ghana, so that parents (especially those whose children had already been

granted through policies, rights and services aimed at restoring victims' dignity and meeting their needs, while 'prevention' of trafficking is achieved by '[including] policies and practices that cut off modern slavery at the source' and 'prosecution' refers to the law enforcement mechanisms used to criminalise and punish trafficking conduct.³⁴ Providing victims of human trafficking with refugee status will therefore not be an absolute solution; other protective, preventative and prosecutorial mechanisms may also need to be put in place through the trafficking legislation.

3 HOW COULD REFUGEE STATUS BE RELEVANT?

The exploitation that underpins the crime of human trafficking has dreadful implications for the human rights of individuals.³⁵ Besides the obvious affronts to dignity and personal freedom, if trafficking is to be regarded as a form of slavery or servitude, then its occurrence would directly violate article 4 of the Universal Declaration of Human Rights³⁶ and article 8 of the International Covenant on Civil and Political Rights.³⁷ It is for this reason that human trafficking incidents need to be addressed not only through criminal justice, but within human rights frameworks as well – both nationally and internationally.³⁸ This framework could be provided by refugee law, which provides protective status to persons who have left their homes in fear of persecution and who are at risk of human rights violations. Trafficking victims may be able to meet the requirements for refugee status, and would then be able to access the legal protection available to refugees in South Africa.

trafficked) would not be tempted to sell their children into exploitation – see Snyman (n 2) at 287-8 for a discussion of the steps taken by the Ghanaian government to prevent and combat trafficking.

³⁴ United States Department of State *Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report* 10ed (2010), available at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm> [accessed 15 January 2011], hereafter referred to as 'Trafficking in Persons Report 2010', at 12–15.

³⁵ Snyman (n 2) at 280-81; Sigmon (n 2) at 246-7; Dauvergne (n 1) at 73; Jones et al (n 16) at 115.

³⁶ United Nations General Assembly *Universal Declaration of Human Rights* 217 A (III) (10 December 1948), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> [accessed 8 November 2010], hereafter referred to as 'UDHR'. At art 4 of the UDHR, it is stated that '[n]o one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms' (emphasis added).

³⁷ *International Covenant on Civil and Political Rights* 999 UNTS 171 (1966), hereafter referred to as 'ICCPR'. Article 8 of the ICCPR is worded similarly to art 4 of the UDHR.

³⁸ Gallagher (n 2) notes at 103 that a human rights perspective to trafficking has been lacking until recently.

3.1 Accessing protection in South Africa

3.1.1 *South Africa's anti-trafficking and victim assistance efforts from a global perspective*

Since 2001 the United States Secretary of State has submitted an annual report to the United States Congress, called the 'Trafficking in Persons Report',³⁹ that categorises countries into three tiers, according to certain minimum standards set by the United States of America, depending on their domestic efforts to combat human trafficking.⁴⁰ The reason for categorising states in this manner is purportedly to '[encourage] other countries to help fight all forms of modern slavery'⁴¹ by providing a forum within which to compare areas of strength or weakness. However, the threat of non-trade-related sanctions,⁴² along with the embarrassment that states are likely to suffer from the use of this 'naming and shaming' technique, appears to be aimed at *punishing* states with unsatisfactory records, rather than *encouraging* them.

In the 2010 report, South Africa was listed as a Tier 2 country, because although it does not fully comply with the minimum standards 'it is making significant efforts to do so'.⁴³ In order to become compliant, it was recommended that South Africa should increase funding for the combating of trafficking, enact and implement trafficking legislation, increase awareness, support anti-trafficking NGOs and develop procedures for the collection of reliable trafficking statistics.⁴⁴ In order to increase its status within the report, and prevent the imposition of sanctions,⁴⁵ South Africa needs

³⁹ The full title of the annual report is 'Victims of Trafficking and Violence Protection Act of 2000: Trafficking in Persons Report'. For a discussion of the annual report see Dauvergne (n 1) at 75–83.

⁴⁰ Trafficking in Persons Report 2010 (n 34) at 22. See also Snyman 9n 2) at 286; Sigmon (n 2) at 250-1. Tier 1 countries have advanced measures in place to combat human trafficking and meet the minimum standards; Tier 2 countries have made significant, albeit inadequate, efforts to combat trafficking; and Tier 3 countries are those that have made very little or no effort to address human trafficking. Tier 2 countries are further categorised into two groups: those 'ordinary' Tier 2 countries, and those on the Tier 2 Watch List, because, despite efforts to meet the minimum standards, circumstances (such as high victim numbers) jeopardise their progress.

⁴¹ This justification for the existence of the report was given by the U.S Department of State, and can be viewed at <http://www.state.gov/g/tip/rls/tiprpt/index.htm> [accessed 15 January 2011]. Links to the actual reports are also available at this webpage address.

⁴² Sigmon (n 2) at 250.

⁴³ Trafficking in Persons Report 2010 (n 34) at 297-9.

⁴⁴ Ibid at 298.

⁴⁵ The Trafficking in Persons Report 2010 (n 34) states at 25 that:

to increase the amount of protection it affords to victims of human trafficking – this can be achieved by providing victims with a legal status that entitles them to reside within the country for an indefinite period.

3.1.2 Who enjoys greater protection in South Africa? Comparing victims of trafficking with refugees

The South African Trafficking Bill⁴⁶ provides less residency protection to victims of trafficking than the Refugees Act provides to refugees, but many of the rights and privileges held by the two categories of persons overlap.

3.1.2.1 Residence

Certified victims of trafficking are only permitted to remain in South Africa for a 90-day ‘recovery and reflection period’,⁴⁷ regardless of whether they are willing to assist in the investigation and prosecution of the trafficking perpetrators.⁴⁸ However, this period could be shorter where the victim is unwilling to co-operate and it is safe for him or her to return to the country of origin.⁴⁹ Temporary residence in the form of a visitor’s permit can also be granted, provided that it is unsafe for the victim to return

... the U.S. government may withhold nonhumanitarian [sic], non-trade-related foreign assistance. Such assistance may be withdrawn from countries receiving it, and in addition, countries on Tier 3 may not receive funding for government employees’ participation in educational and cultural exchange programs.... governments subject to sanctions would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions such as the International Monetary Fund (IMF) and the World Bank.

⁴⁶ Prevention and Combating of Trafficking in Persons Bill [B7–2010], available at: <http://www.pmg.org.za/bill/20100129-prevention-and-combating-trafficking-persons-bill-b7-2010> [accessed July 2010]. Hereafter referred to as ‘Trafficking Bill’ or ‘Bill’.

⁴⁷ This fulfils art 7 of the Palermo Protocol, which requires that states consider adopting measures that allow trafficking victims to remain within their territory, either temporarily or permanently.

⁴⁸ Clauses 17(1) and 17(5)(a) of the Bill. This is in line with the Special Rapporteur Rapport 2009 (n 30), which stipulates at 14 that the provision of assistance must not be conditional on the trafficking victim’s co-operation in criminal justice proceedings.

⁴⁹ Clauses 17(2) and 17(3) of the Bill.

home or that the victim is in the process of assisting with bringing the perpetrators to justice.⁵⁰

In the case of refugees, the Refugees Act 130 of 1998⁵¹ provides that refugees can remain in South Africa without any time restrictions,⁵² but subject to *inter alia* the provisions concerning the cessation or withdrawal of refugee status.⁵³ Refugee status is thus a form of immediate ‘temporary residence’ which remains effective indefinitely until certain circumstances arise.⁵⁴ Where certified victims of human trafficking have to meet additional requirements in order to be allowed temporary residence, certified refugees automatically granted temporary residence.⁵⁵

3.1.2.2 Protection from refoulement

Both refugees and trafficking victims enjoy protection from *refoulement* (‘expulsion or return’)⁵⁶ in South Africa. Generally, *refoulement* consists of ‘the forced direct or indirect removal of an individual to a country or territory where he runs a risk of being subjected to human rights violations’.⁵⁷ The prohibition of *refoulement* aims to prevent violations of human rights and therefore involves a prospective assessment of risk.⁵⁸ In South Africa, *refoulement* is prohibited in terms of s 2 of the Refugees Act. The

⁵⁰ Clause 18 of the Bill. For a discussion about temporary visas issued to trafficking victims in foreign jurisdictions, see Gallagher (n 2) at 118–22.

⁵¹ Hereafter referred to as the ‘Act’ or ‘Refugees Act’.

⁵² Section 27(b) of the Refugees Act.

⁵³ Provisions concerning the cessation and withdrawal of refugee status are found at ss 5 and 36 of the Refugees Act respectively.

⁵⁴ Even prior to obtaining refugee status, applicants (called ‘asylum seekers’) are permitted to remain in the country without time restrictions, pending a decision about their application for refugee status.

⁵⁵ However, refugees and victims of trafficking have to meet similar requirements for permanent residence. Both require that the person has been resident in South Africa for a continuous period of five years. In the case of refugees, it must additionally be shown that the refugee will remain as such ‘indefinitely’, while a victim of trafficking must show that ‘he or she may be harmed, killed or trafficked again if he or she is returned’. See s 27(c) of the Refugees Act and clause 19 of the Bill. For a discussion of the political and social benefits of granting permanent residence to trafficking victims, see Dauvergne (n 1) at 85–6.

⁵⁶ See title of art 33 in the United Nations General Assembly *Convention relating to the status of refugees* 189 UNTS 137 (28 July 1951), available at: <http://www.unhcr.org/refworld/docid/3be01b964.html> [accessed 3 March 2010]. Hereafter referred to as the ‘UN Refugee Convention’.

⁵⁷ CW Wouters *International legal standards for the protection from refoulement* (Oxford: Intersentia, 2009), hereafter referred to as ‘Wouters’, at 25. See also James Hathaway and John Dent *Refugee rights: report on a comparative survey* (York Lanes Press, 1995) at 5–18.

⁵⁸ Wouters (n 57) at 25.

provision, which applies to all persons, not only those with refugee or asylum seeker status, reads as follows:

General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

2. Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

This is South Africa's version of art 33 of the UN Refugee Convention, which prohibits the *refoulement* of a refugee where his or her 'life or freedom would be threatened' on the basis of one of the listed grounds for persecution.⁵⁹ A similar form of the prohibition of *refoulement* has also been included in several clauses of the Trafficking Bill. For example, clause 18(4) provides that a temporary visitor's permit can be granted to a victim of trafficking 'taking into account the likelihood that the holder of that permit may be harmed, killed or trafficked again if he or she is returned'.⁶⁰

Protection from *refoulement* is particularly beneficial to trafficking victims because it staves off deportation where the victim no longer has a legal basis for

⁵⁹ Article 33(1) of the UN Refugee Convention. However, unlike the South African provision, art 33(2) restricts the application of the prohibition where the refugee poses a dangerous risk to the society in which he claimed asylum. For comprehensive accounts of the content and scope of the prohibition of *refoulement* in the UN Refugee Convention, see Wouters (n 57) at Chapter 2. See also Guy S Goodwin-Gill and Jane McAdam *The refugee in international law* 3ed (Oxford: Oxford University Press, 2007), hereafter referred to as 'Goodwin-Gill', at 201–84.

⁶⁰ Similar sentiments are expressed in clauses 19, 25, 30(1)(d) and 30(2)(a)(iii) of the Bill.

remaining in South Africa.⁶¹ According to the Immigration Act 13 of 2002, any ‘illegal immigrant’ is subject to removal from the territory of South Africa.⁶² While the removal process itself could be traumatic,⁶³ deportation may also be undesirable for victims of human trafficking because it puts victims in the same vulnerable position that exposed them to being trafficked in the first place and puts them at risk of prosecution for crimes committed during the trafficking process.⁶⁴ Victims may have also migrated to the trafficking destination themselves, without any prompting from traffickers, because they were seeking to improve their lives or escape from dangerous situations.⁶⁵ Deportation would return these victims to the circumstances that were originally detested by them – except now, they would be even more discontent due to their trafficking victimisation experience. A risk of deportation is thus a risk of further forms of victimisation.

3.1.2.3 Rights and support services

As far as rights are concerned, persons with refugee status are expressly entitled to enjoy all the rights contained within the South African Bill of Rights,⁶⁶ except those that are limited to South African citizens.⁶⁷ Foreign victims of human trafficking who are in South Africa will have the same entitlements as refugees in this regard.⁶⁸ Refugees are furthermore expressly allowed to receive the ‘same basic health services and basic primary education which the inhabitants of [South Africa] receive from time

⁶¹ Trafficking victims are commonly fearful of arrest and deportation – Sigmon (n 2) at 254.

⁶² See ss 32, 41 and 49 of the Immigration Act 13 of 2002.

⁶³ Deportees are often kept captive in holding facilities near the border or in prisons.

⁶⁴ Snyman (n 2) at 288; Sigmon (n 2) at 254.

⁶⁵ Sigmon (n 2) at 246.

⁶⁶ Section 27(b) of the Refugees Act. Since South Africa is a party to the UN Refugee Convention, refugees in South Africa will also be entitled to all the rights contained therein, although most of them overlap with the rights in the South African Bill of Rights. For a comprehensive discussion of all the rights enjoyed by refugees internationally, see James Hathaway *The rights of refugees under international law* (New York: Cambridge University Press, 2005).

⁶⁷ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [1999] JOL 5398 (C) at 76–7.

⁶⁸ Manifestations of the rights of trafficking victims to safety, adequate health care, sanitation, and privacy are also expressly recognised at clause 21 of the Bill, where it is stated that minimum norms and standards for these rights must be prescribed by the certain members of the Executive.

to time'.⁶⁹ Victims of trafficking are also entitled to the basic public health care that is available to South Africans,⁷⁰ and they will be able to access education in terms of s 29 of the Constitution of South Africa, 1996.

Refugees *do* enjoy certain additional rights that the Bill does not bestow on trafficking victims. Thus, refugees are entitled to an identity document and travel documents in addition to the written recognition of their refugee status – whereas trafficking victims are merely issued with a certificate of their victim status.⁷¹ Importantly, refugees are also permitted to 'seek employment' in South Africa⁷² – something that victims of trafficking are only able to do once they have obtained a visitor's permit in terms of clause 18 of the Bill.⁷³

On the other hand, the Bill establishes mechanisms for the accreditation of organisations that will provide certified trafficking victims with accommodation, counselling and assistance with reintegration into society.⁷⁴ This type of machinery does not exist in the Refugees Act. However, refugee status may prove useful for accessing other, perhaps more established and effective, South African organisations that care for abused women or victims of sexual violence, amongst others.⁷⁵ Many of these organisations require proof of South African citizenship or legal residency before they will administer treatment.⁷⁶ Being in possession of refugee status is thus likely to increase the possibility of accessing such additional treatment. In this way, refugee status could contribute to the healing of trafficking victims and help them to proceed forth with their lives.

Due to their status as victims of crime, trafficking victims are also entitled to compensation in certain instances – refugee status does not grant a right to

⁶⁹ Section 27(g) of the Refugees Act.

⁷⁰ Clause 15 of the Bill.

⁷¹ See s 27 of the Refugees Act at paragraphs (a), (d) and (e), and also ss 30 and 31.

⁷² Section 27(f) of the Refugees Act.

⁷³ See subsections (4) and (5).

⁷⁴ Clauses 20–23 of the Bill. These services are deemed essential for the effective protection and recovery of a trafficking victim – Special Rapporteur Report 2009 (n 30) at paras 52–6.

⁷⁵ Snyman (n 2) at 288. In other words, refugee status will provide access to organisations beyond those that are dedicated to assisting only victims of human trafficking.

⁷⁶ *Ibid.*

compensation.⁷⁷ However, qualification for refugee status will also not affect victims' ability to access this right, and should therefore not dissuade victims from applying for refugee status.

3.2 Why would a victim of trafficking want or need to apply for refugee status?

The Bill provides mechanisms at clause 30 for voluntary repatriation where victims of trafficking wish to return to their countries of origin.⁷⁸ However, victims could also wish to remain in South Africa.⁷⁹ This could be the case, for example, where victims feel that South Africa could provide protection that is unavailable in their countries of origin, where the standard of living is higher in South Africa, or where victims are fearful of harm upon return.⁸⁰ Obviously though, desiring to remain does not necessarily mean that they will be permitted to do so – all the relevant requirements will still have to be met.⁸¹

There are various bases upon which a foreign individual could remain in South Africa – qualification as a refugee is just one such basis.⁸² However, gaining refugee status will be the most valuable option for victims of human trafficking wishing to stay in South Africa particularly because of the residency benefits that flow from it.⁸³ This will enable a trafficking victim who wishes to remain in South Africa beyond the recovery and reflection period, and beyond a visitor's permit period, to properly

⁷⁷ See clauses 9(3) and 27 of the Bill. Compensation forms an important aspect of the victim's right to an effective remedy for the harm suffered by him or her – see Special Rapporteur Report 2009 (n 30) at para 63.

⁷⁸ Snyman (n 2) at 288. The Trafficking in Persons Report 2010 (n 34) indicates at 299 that in South Africa 'almost all foreign victims preferred to return home without pressing charges'. Where victims choose to repatriate, procedures should be put in place to ensure the proper reintegration of the victim into his or her community – see clause 31 of the Bill and para 66 of the Special Rapporteur Report 2009 (n 30).

⁷⁹ Article 14 of the Palermo Protocol stipulates that the rights of trafficking victims to apply for refugee status are not affected by any provisions in the Protocol – see also United Nations High Commissioner for Refugees *Guidelines on international protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked* HCR/GIP/06/07 (7 April 2006), hereafter 'UNHCR Guidelines', at para 12.

⁸⁰ Gallagher (n 2) at 100.

⁸¹ Thus, the UDHR includes a right to **apply**, not qualify, for 'asylum from persecution' at art 14.

⁸² See Immigration Act 13 of 2002.

⁸³ Dauvergne (n 1) at 88.

integrate into South African society, since refugees are not confined to camps or settlements in the way that victims of trafficking will be confined to the accredited organisations established by the Bill.

While it is true that the Bill provides victims with most of the protection granted to refugees, it is short-term and often subject to qualification or the discretion of an administrator or police official.⁸⁴ In contrast, refugee status provides the benefits automatically without further requirements. It is perhaps also noteworthy that the trafficking legislation establishes *new* protective mechanisms that still need to be implemented by the South African government. Those victims with refugee status will be able to access protection as though they were South African. Thus, they would be using existing machinery that officials are more familiar with and that, although not necessarily effective and efficient, has already been enhanced and developed over time.

This thesis seeks to ascertain whether persons who have been trafficked could qualify for refugee status within the South African legal framework and receive these benefits.⁸⁵ In order to qualify, trafficking victims would need to meet all the definitional requirements for refugee status in South Africa. However, before it can be assessed whether these requirements are met, it is necessary to identify clearly the group of persons that will be the subject of the definitional analysis, namely, victims of human trafficking. These victims can be identified and characterised in terms of the offence that was committed against them. Once the legal parameters of the human trafficking offence are defined, the victims of human trafficking will be those persons who have suffered the conduct that falls within those parameters. It is for this reason that the legal definition of the offence of human trafficking will be discussed in the following chapter.

⁸⁴ Trafficking in Persons Report 2010 (n 34) at 299; Gallagher (n 2) at 103. However, it is stipulated in the Special Rapporteur Rapport 2009 (n 30) at para 50 that the provision of assistance must not be conditional on the trafficking victim's co-operation in criminal justice proceedings. Conditional access to assistance is similarly prohibited in terms of clause 17(5)(a) of the Trafficking Bill.

⁸⁵ Persons who have never been trafficked before could also seek asylum in a foreign country due to a fear of being trafficked, but this thesis will only deal with persons who have already been trafficked (UNHCR Guidelines (n 79) at 13) – in other words, those that have already been victims of the offence.

CHAPTER 3

The definition of human trafficking

1 THE INTERNATIONAL LAW DEFINITION OF 'HUMAN TRAFFICKING'

Although human trafficking is 'a difficult concept to capture in a single definition',⁸⁶ the Palermo Protocol defines 'trafficking in persons' as follows at article 3(a):

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

Aimed at guiding national trafficking legislation, this is the first internationally agreed upon conception of human trafficking,⁸⁷ and is quite inclusive in its wording of the type of conduct that is to be considered as human trafficking.⁸⁸ Thus, exploitation taking place in unusual settings, for example, on farms, in factories or at home, could also fall within the ambit of the human trafficking definition.⁸⁹

⁸⁶ Snyman (n 2) at 281.

⁸⁷ Sigmon (n 2) at 251.

⁸⁸ Chandré Gould 'Cheap lives – Countering human trafficking: considerations and constraints' (June 2006) 16 *SA Crime Quarterly* 19, hereafter 'Gould', notes at 20 that the definition is purposefully broad so that states are provided with 'legal ammunition' to develop trafficking legislation capable of prosecuting all forms of trafficking conduct.

⁸⁹ Sigmon (n 2) at 252.

Three components or elements of trafficking in persons can be discerned from the definition: ‘the acts’, ‘the means used’ and ‘the purpose of the acts’.⁹⁰ All three of these components need to be present for human trafficking to have taken place. The first component, namely *the acts*, could be committed by recruiting, transporting, transferring, harbouring or receiving a person. Any ‘threat or use of force or other forms of coercion, of abduction, of fraud, [or] of deception’ against a person that accompanies the acts would constitute the second component of the definition – *the means used*. Similarly, any ‘abuse of power or of a position of vulnerability’ or ‘giving or receiving of payments or benefits to achieve the consent of a person having control over another person’ (like parents have control over children) would fulfil the second component of human trafficking. The final component of human trafficking, *the purpose of the acts*, is the exploitation of a person. The Protocol stipulates that ‘exploitation’ at the very least must be either ‘the exploitation of the prostitution of others’, ‘other forms of sexual exploitation’, ‘forced labour or services’, ‘slavery or practices similar to slavery’, ‘servitude’ or ‘the removal of organs’. Each component of the definition will be discussed in more detail in the following section.

1.1 The acts

This first element of human trafficking is described in the definition as ‘the recruitment, transportation, transfer, harbouring or receipt of persons’.⁹¹ Some of the acts that are listed in the definition, namely, ‘transportation’ and ‘transfer’, suggest that the person being trafficked needs to be moved from one place to another in order for it to constitute human trafficking.⁹² However, such movement is, strictly speaking, not necessary, as traffickers can recruit, harbour or receive persons, and then exploit them,

⁹⁰ Sigmon (n 2) at 251-2; Gallagher (n 2) at 102; UNHCR Guidelines (n 79) at para 9. A similar classification is made by T Leggett ‘Hidden agendas? The risks of human trafficking legislation’ (September 2004) 9 *SA Crime Quarterly* 1 at 1-6, as discussed in Snyman (n 2) at 281-2.

⁹¹ Article 3(a) of the Palermo Protocol.

⁹² Snyman (n 2) at 281. The notion of ‘trafficking’ as motion is attributable to the early 16th century origin of the verb ‘to traffic’, which denoted the ‘commercial transportation of merchandise or passengers’ – see C Soanes and A Stevenson (eds) *Oxford dictionary of English* 2ed (Oxford: Oxford University Press, 2005), hereafter referred to as ‘Soanes and Stevenson’, at 1870.

all at the same location.⁹³ The situation could also arise where victims themselves travel to the site of exploitation before any human trafficking process has actually begun.⁹⁴ It is then only upon arrival at their destination that the victim is recruited (or held captive) and exploited.

In those instances where trafficking victims *are* transported from place to place by their traffickers, most travel occurs by road, instead of by air or water. Traffickers also tend to use ordinary public modes of transportation, like trains or buses, in order to detract attention from the offence they are committing.⁹⁵

1.2 The means used

This second element of human trafficking is:

... 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[.]⁹⁶

The means used to commit the acts listed in the first element and achieve the end goal of exploitation can therefore either be direct, in the form of physical intimidation or capture, or indirect, in the form of enticement or manipulation.⁹⁷

The use of ‘abuse of power or of a position of vulnerability’ indicates ‘any situation in which the person involved has no real and acceptable alternative but to submit’.⁹⁸ This component of human trafficking is thus characterised by a significant

⁹³ Snyman (n 2) at 281. The modern linguistic meaning of the verb ‘to traffic’ similarly lacks any reference to motion and is described merely as the ‘deal or trade in something illegal’ – Soanes and Stevenson (n 92) at 1870.

⁹⁴ This could occur where, for example, the traffickers place bogus advertisements directing potential victims to meet them at a certain place in order to receive some benefit promised in the advertisement – usually employment (Trafficking in Persons Report 2010 (n 34) at 297). The trafficking victims could also be forced to migrate (to a location where they are later recruited and exploited) due to natural disaster or conflict (see Sigmon (n 2) at 246), in which case the traffickers would not at all be responsible for the initial movement which brought the victims to the location of exploitation.

⁹⁵ Snyman (n 2) at 285.

⁹⁶ Article 3(a) of the Palermo Protocol.

⁹⁷ Snyman (n 2) at 281-2.

⁹⁸ Gallagher (n 2) at 103.

disparity in the power relationship between the victim of human trafficking and his or her trafficker.⁹⁹ In other words, the definition assumes that the trafficking victim is powerless in relation to the trafficker, and therefore seems to undermine the autonomy and agency of the victim.¹⁰⁰ It could also be argued to the contrary that it is not the Protocol which undermines the autonomy of the victim, but rather that the trafficking incident itself undermines the victim's autonomy and that the Protocol's provisions are merely activated by such an undermining of autonomy.

While it is true that the agency of victims is often denied by the type of harm that trafficking exposes them to, the Protocol should have taken care to acknowledge the resilience of victims and also their potential to be imperfect. Power structures that operate in relation to gender, culture and socio-economic class,¹⁰¹ for example, may very well be relevant in these situations, but the ability of the victim to act against powerful forces should not be ignored.¹⁰² Sometimes, the trafficking situation even involves the consent of the trafficked person, and many choices are made by the trafficked person to lead them to the final point of exploitation. This is the case where, for example, the trafficking victim responds to an advertisement for work opportunities in a foreign country (or accepts help from an 'agent'), which is later revealed to be the means used by traffickers to recruit victims.¹⁰³

These two arguments seem to mirror a debate that was prominent amongst women's rights proponents during the drafting and negotiation stages of the Protocol.¹⁰⁴ With regard to exploitation in the form of prostitution, some women's rights proponents were of the view that prostitution is always exploitative – whether a

⁹⁹ Snyman (n 2) at 282.

¹⁰⁰ See Dauvergne (n 1), who strongly states at 74 that '[t]he discourse of victimization erases the possibility of women's agency The subject position of victim robs women of voice'.

¹⁰¹ In other words, structures such as patriarchy and capitalism.

¹⁰² See Sandra Walklate 'Appreciating the victim: conventional, realist or critical victimology?' in R Matthews and J Young (eds) *Issues in realist criminology* (London: Sage Publications, 1992) 102, hereafter referred to as 'Walklate', at 113–14. This is the theoretical approach of 'critical victimology', which analyses the relationship between agency and structure in victimisation contexts – see generally RI Mawby and S Walklate *Critical victimology: international perspectives* (London: Sage Publications, 1994); 'Victimology: theoretical approaches' in Basia Spalek *Crime victims: theory, policy and practice* (New York: Palgrave Macmillan, 2006) 33, at 44–5; and 'Theories of victimology' in L Wolhunter et al *Victimology: victimisation and victims' rights* (New York: 2009, Routledge-Cavendish) 13, at 26–8.

¹⁰³ Snyman (n 2) at 284-5. Another example is where a victim of trafficking consents to assistance with illegal transit into a country where he or she wishes to reside but cannot immigrate to.

¹⁰⁴ Dauvergne (n 1) at 73.

woman consented to being a prostitute or not.¹⁰⁵ Proponents of this view argue that prostitution and trafficking cannot be separated conceptually because prostitution can never be regarded as a legitimate form of labour undertaken freely by women.¹⁰⁶ Thus, prostitution will always be preceded by acts of recruitment, deceptive or coercive means and exploitative purposes, where the prostitution itself was the purpose. In contrast, other women's rights proponents argue that women are legitimately capable of choosing to become 'sex workers'.¹⁰⁷ In other words, sex workers are autonomous, and their decision to exercise such autonomy should not deter governments from providing them with protection from exploitation.¹⁰⁸ In this view, prostitution does not necessarily amount to exploitation and trafficking.

The Protocol definition clearly adopts the former approach to women's rights and thus perpetuates the stereotype of the weak, blameless and virtuous victim in opposition to a powerful and evil offender¹⁰⁹ – an approach which may affect the way in which Refugee Status Determination Officers (hereafter referred to as 'RSDOs') view certified victims of trafficking. Where RSDOs adopt the Protocol's idea that trafficking victims are vulnerable and helpless individuals, they are more likely to be sympathetic when exercising their discretion whether to grant refugee status to victims or not. On the other hand, RSDOs who adopt the Protocol's sentiment may be unsympathetic when presented with a certified victim of human trafficking who does not fit the stereotype of a weak, helpless 'victim'.¹¹⁰ A victim, even if certified as such, could thus be treated as eligible for refugee status depending on how he or she has

¹⁰⁵ Gould (n 88) at 21. The reasoning for this argument is that women's consent is merely apparent in situations such as prostitution – consent is not genuine because it is given as a result of male domination.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ This manner of stereotyping upholds what has been identified in the field of victimology as 'the false dichotomy between offenders and victims' – Ezzat Fattah 'The evolution of a young, promising discipline: sixty years of victimology, a retrospective and prospective look' in Shoham et al *International handbook of victimology* (London: CRC Press, 2010) 43, hereafter referred to as 'Fattah', at 57–8.

¹¹⁰ The RSDO may then, improperly, deem the applicant as 'undeserving' of refugee status – see United Nations High Commissioner for Refugees *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees* (January 1992), available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html> [accessed March 2010], hereafter referred to as 'UNHCR Handbook', at para 202. The principles contained in this Handbook have been adopted and applied by South African courts *inter alia* in *Fang v Refugee Appeal Board and Others* [2006] JOL 18635 (T), at 19–20.

reacted to the victimisation and whether he or she comes across as a stereotypical ‘victim’ or not. The meaning assigned to the concept of human trafficking, and its underlying connotations, is therefore important not only in determining *who* qualifies as a victim of trafficking, but also in moulding *attitudes* towards trafficking victims – including the attitudes of the administrators responsible for granting refugee status.

1.3 The purpose of the acts

The third and final element of human trafficking is:

... 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[.]¹¹¹

In order for the acts to constitute human trafficking, the purpose of committing the acts must be the exploitation of the person trafficked. Thus, a trafficking victim need not have actually been exploited for human trafficking to have taken place – it is merely required that the *acts* and *means used*, as described in the definition, have occurred, but *for the purpose of* exploitation. In this way the Protocol distinguishes between trafficking conduct and exploitative conduct that is the motivation for the trafficking conduct.¹¹²

The Protocol attempts to clarify what will constitute ‘exploitation’ in order to satisfy the third element of the ‘trafficking in persons’ definition. However, the drafting of this portion of the definition can lead to much confusion, due to the simultaneous use of the word ‘include’ and the phrase ‘at a minimum’.

On one hand, the words ‘[e]xploitation shall include, at a minimum...’ could be interpreted as meaning that *at its most basic level* ‘exploitation’ includes the listed practices, but that it is not limited to these practices, and further, that none of the listed practices *have* to be present in order for there to be ‘exploitation’. On the other hand,

¹¹¹ Article 3(a) of the Palermo Protocol.

¹¹² Snyman (n 2) at 282.

the words could be interpreted to mean that at the very least *one* of the listed forms of exploitation has to be present in order for there to be ‘exploitation’. Any exploitative conduct in addition to the listed forms could then also constitute ‘exploitation’, just as long as one listed form was present.

It is submitted that the former interpretation could result in the scope of ‘exploitation’ being almost limitless, because no lower or upper constraints have been placed on the meaning of the concept – a few examples of practices that *do* constitute exploitation have merely been given. One could look to the ordinary linguistic meaning of ‘exploitation’,¹¹³ but the lack of minimum or maximum thresholds would only be aggravated by the subjective nature of the term – what is exploitation in the eyes of one may not be exploitation in the eyes of another, depending on cultural practices, religious views and personal inclinations.¹¹⁴ Where the meaning of ‘exploitation’ is so broad that almost any harmful practices could qualify as human trafficking (provided that the other two elements for human trafficking have been met), then the Protocol provisions defining and prohibiting ‘trafficking in persons’ would be rendered ineffective. This is because genuine trafficking cases would be completely indistinguishable from other instances where persons are recruited for harmful purposes.¹¹⁵ General principles of legal interpretation presume that no futile provisions are included within written laws.¹¹⁶ Thus, in order to prevent an overly inclusive or vague definition of ‘trafficking in persons’, ensure that the number of human trafficking complaints correlates with the seriousness of the offence, and preclude the futility of the Protocol’s provisions, an interpretation that limits the scope of ‘exploitation’ should be favoured. For these reasons, it is submitted that the latter interpretation of ‘exploitation’ should be adopted.

¹¹³ C Botha *Statutory interpretation: An introduction for students* 4ed (Lansdowne: Juta & Co, Ltd, 2005), hereafter referred to as ‘Botha’, at 86-7.

¹¹⁴ Snyman (n 2) at 282. Snyman notes at 282 that ‘certain practices, such as arranged marriages or organ donation’, which are conventional in some cultures or religions, could be deemed exploitative by persons who do not engage in those practices. However, Snyman seems to suggest that the test for exploitation should be based on principles of ‘the integrity and equality of a person’ instead of whether the practices are culturally accepted or not. This would be in compliance with the Constitution of South Africa, 1996, which protects the values of equality and human dignity at ss 9 and 10 respectively.

¹¹⁵ It is difficult to recognise genuine victims of human trafficking (as will be discussed in Chapter 6), even with a limited interpretation of the concept of ‘exploitation’.

¹¹⁶ Botha (n 113) at 73-4.

Thus, the Protocol is deemed to list the *minimum* requirements for forms of ‘exploitation’ that are sufficient to meet the definition of human trafficking.¹¹⁷ In order to constitute ‘exploitation’ in terms of the Protocol, at least one of the listed forms of harm (‘the exploitation of the prostitution of others’, ‘other forms of sexual exploitation’, ‘forced labour or services’, ‘slavery or practices similar to slavery’, ‘servitude’ or ‘the removal of organs’) must therefore be discernible in the abusive practices. Any harmful practices that are not listed can only amount to ‘exploitation’ where it is present *in addition to* one of the listed forms.¹¹⁸

It should be noted that although it is suspected that children are transported for the purpose of being adopted in foreign countries,¹¹⁹ adoption in itself does not constitute ‘exploitation’ in terms of the Protocol. In other words, the fraudulent or forced transit of children purely for the purpose of their adoption in another place does not amount to ‘human trafficking’. One of the definition’s listed forms of exploitation would need to be present in addition to the adoption in order to constitute ‘exploitation’ in respect of ‘human trafficking’.

1.4 Additional principles applicable to the trafficking of persons in the Protocol

Article 3(b) of the Protocol stipulates that a trafficking victim’s consent to future exploitation is irrelevant if any of the means listed in the second element of the trafficking definition are used by the traffickers. In other words, where the second element is met, consent will not negate, or affect in any manner, the presence of the trafficking offence. This principle applies specifically to adult victims of human trafficking, who consent to their exploitation.¹²⁰

¹¹⁷ Snyman (n 2) at 282.

¹¹⁸ It is submitted that the additional conduct would need to be harmful or abusive in some way in order to be considered exploitative. Furthermore, that the linguistic meaning of ‘exploitation’, as well as the listed forms of exploitation, could, although not conclusive, provide guidance as to what might be considered exploitative conduct in terms of the definition.

¹¹⁹ Snyman (n 2) at 284.

¹²⁰ Sigmon (n 2) at 252.

This principle seems to recognise that even where adults have consented to being exploited during or at the end of the trafficking process, if some form of manipulation or force was used by the traffickers during the trafficking process, such consent could never have been informed consent given freely by the victim. It is therefore not real consent, and cannot be legally recognised as a defence to the offence committed by the traffickers.¹²¹ While this principle may be appropriate in some cases, it may also be inappropriate in others – the presence of forms of coercion or deception does not necessarily result in consent, especially where the person desires beforehand to engage in conduct that is considered exploitative by the Protocol. Thus, the Protocol again seems to undermine the autonomy of victims by denying that they have the ability to make their own choices, specifically where those choices may be considered bad.

Furthermore, where a child, defined as ‘any person under eighteen years of age’,¹²² is the trafficking victim concerned, article 3(c) specifies that:

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘‘trafficking in persons’’ even if this does not involve any of the means set forth in subparagraph (a) of this article [.]

Thus, where the relevant victim is a child, the second element of the offence, namely, the means used, is *not* a requirement or necessary element for the offence of human trafficking to have occurred.¹²³ A child is therefore a victim of ‘trafficking in persons’ simply provided that one of the listed acts was committed against him or her for the purpose of exploitation.¹²⁴

This principle seems to be based on the rationale that children, due to their vulnerability and dependency, can be the victims of human trafficking without

¹²¹ Where the second element of human trafficking is *not* present, consent to exploitation on the part of the victim *could* be a defence to the offence as it would, arguably, be free and informed consent; however, it would be unnecessary to raise any defence in that case because the definitional requirements for the offence would not have been met in the first place.

¹²² Article 3(d) of the Palermo Protocol.

¹²³ Sigmon (n 2) at 252.

¹²⁴ Note that despite this principle, committing one of the listed acts (in the absence of coercion or deception) for the sole purpose of adopting a child can still not constitute ‘trafficking’ because ‘adoption’ does not amount to ‘exploitation’ in terms of the Protocol.

traffickers needing to force or manipulate them into being recruited for the purpose of exploitation.

Although this latter principle is important to note because of the different requirements that apply to child victims of human trafficking, this thesis will focus primarily on adult victims of human trafficking. Thus, the Protocol definition of ‘trafficking in persons’ will henceforth be dealt with as though all three elements are required for human trafficking to have occurred.

2 THE SOUTH AFRICAN LEGAL DEFINITION OF ‘TRAFFICKING’

As a party to the Palermo Protocol, South Africa has committed itself to the Protocol’s provisions – including art 5, which dictates that measures dealing with and criminalising all forms of human trafficking must be implemented.¹²⁵ However, any principles of an international agreement can only become binding law in South Africa by the inclusion of those principles in national legislation.¹²⁶ Thus, the discussion of the possibility of trafficking legislation for South Africa has been ongoing since December 2003¹²⁷ – before then, no specific framework for the restriction of human trafficking existed in the country.¹²⁸ There was much debate about whether new laws were actually necessary, as some argued that legislation existing before the Bill could be used separately to prosecute the different acts that are involved in human trafficking.¹²⁹ Others argued that specific trafficking legislation was necessary because the concepts

¹²⁵ Article 5 of the Palermo Protocol. See also Snyman (n 2) at 285; Sigmon (n 2) at 251. Note that at a regional level, the African Union *Ouagadougou action plan to combat trafficking in human beings, especially women and children* (November 2006), available at: www.africa-union.org [accessed 30 August 2010], would be relevant to South Africa.

¹²⁶ Section 231(4) of the Constitution of South Africa, 1996.

¹²⁷ Nolwandle Qaba ‘Trafficking in persons: a South African response’ (2004) 1(5) *Sexual Offences Bulletin* 42, hereafter ‘Qaba’, at 43–5. For a comprehensive record of the legislative process, that is, the meetings, hearings and discussions held by various bodies concerning the drafting of trafficking legislation, see www.pmg.org.za/search/apachesolr_search/trafficking%20persons [accessed August 2010].

¹²⁸ Snyman (n 2) at 285.

¹²⁹ Ibid at 285-6. Thus, it was argued by Bronwyn Pithey ‘Do new crimes need new laws? Legal provisions available for prosecuting human trafficking’ (September 2004) 9 *SA Crime Quarterly* 7, at 7-10 that legislation such as the Prevention of Organised Crime Act 121 of 1998, the Child Care Act 74 of 1983 and the Criminal Law (Sexual Offences) Amendment Bill B2 of 2003 (now the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007) could be used to prosecute or control human trafficking, especially that which involves sexual exploitation, in South Africa.

used in existing legislation were not always compatible with the contemporary trafficking process.¹³⁰ In light of this latter argument, Parliament has proceeded with the drafting of a trafficking bill that aims to give effect to the Protocol. At present, the Prevention and Combating of Trafficking in Persons Bill [B7–2010] is before Parliament for comment and approval.¹³¹

Formulating a definition for the concept of human trafficking is an immensely difficult task to overcome during the drafting of trafficking legislation.¹³² It is however vital that the task be performed well because a poorly drafted definition of the offence could result in confusion about the criminal elements that need to be proven by prosecutors.¹³³ The Bill includes a comprehensive definition for ‘trafficking’, which significantly adds to the basic components of the Protocol definition of ‘trafficking in persons’. Until the Bill or similar trafficking legislation comes into effect, the offence of trafficking will be dealt with in terms of transitional provisions contained in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.¹³⁴ This Act also contains a definition for ‘trafficking’ at s 70(2)(b) that is similar to the Bill’s definition, although not as extensive.¹³⁵ However, this definition will not be

¹³⁰ Snyman (n 2) at 286; Qaba (n 127) at 42.

¹³¹ As at 21 January 2011, the Bill was before the Committees of the National Assembly – see www.pmg.org.za/billsstatus/ [accessed 28 January 2011].

¹³² Snyman (n 2) at 285-6.

¹³³ Ibid at 286.

¹³⁴ See ss 70 and 71 of Act 32 of 2007.

¹³⁵ The definition at s 70(2)(b) of Act 32 of 2007 is as follows:

‘trafficking’ includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of—

- (i) a threat of harm;
- (ii) the threat or use of force, intimidation or other forms of coercion;
- (iii) abduction;
- (iv) fraud;
- (v) deception or false pretences;
- (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
- (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage,

for the purpose of any form or manner of exploitation, grooming or abuse of a sexual nature of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic, and **‘trafficks’** and **‘trafficked’** have a corresponding meaning.

discussed in any more detail in this thesis.¹³⁶ This is due to the transitional nature of the provisions and their primary concern with trafficking for *sexual* purposes.¹³⁷ Therefore, the definition of ‘trafficking’ as contained in the Bill, and not in the transitional provisions, will now be analysed.

2.1 The definition of ‘trafficking’ in the Bill

Clause 1 of the Bill contains the following definition for ‘trafficking’:¹³⁸

‘**trafficking**’ includes the delivery, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, exchange, lease, disposal or receiving of a person, or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic, of a person trafficked or an immediate family member of the person trafficked, by means of—

- (a) a threat of harm;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) the abuse of vulnerability;
- (d) fraud;
- (e) deception or false pretences;
- (f) debt bondage;

¹³⁶ For a more comprehensive discussion of these provisions see Dee Smythe ‘Sections 70–71: Transitional provisions relating to trafficking in persons for sexual purposes’ in Dee Smythe et al (eds) *Commentary on the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007* (Cape Town: Juta, in press 2011), Chapter 31.

¹³⁷ Section 71 of Act 32 of 2007 creates the offence of ‘trafficking in persons for sexual purposes’ at subsection (1), while ‘involvement in trafficking in persons for sexual purposes’ is criminalised at subsection (2).

¹³⁸ Although the definition term is not as specific as that in the Protocol, namely, ‘trafficking in *persons*’ [emphasis added], it is clear from the wording of the definition that, for the purposes of the Bill, ‘trafficking’ applies to *human* trafficking, and not to the trafficking of drugs or weaponry, for example. The Bill definition also does not specify that root or derivative words such as ‘traffic’, ‘trafficks’, ‘trafficker’ or ‘trafficked’, as used in other provisions of the Bill, have meanings corresponding to that assigned to ‘trafficking’ in the Bill – although one can assume that must be the case. Such an application of corresponding meanings has explicitly been included in other definitions for ‘trafficking’ in, for example: s 70(2)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and clause 1 of the 2009 draft Prevention and Combating of Trafficking in Persons Bill [B – 2009], available at <http://www.pmg.org.za/bill/20090508-prevention-and-combating-trafficking-persons-bill> [accessed July 2010]. This draft Bill even included a definition for ‘victim of trafficking’, namely ‘any person who is a victim of the offence of trafficking in persons’.

- (g) abduction;
- (h) kidnapping;
- (i) the abuse of power;
- (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (k) the giving or receiving of payments, compensation, rewards, benefits or any other advantage,

for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic[.]

The same three elements for human trafficking can be discerned from this definition as those which are discernible from the Protocol definition of ‘trafficking in persons’. Thus, the definition is also divided into *the acts*, *the means used*, and *the purpose of the acts* that together constitute trafficking. The content of each element, as contained within the Bill, will be discussed in turn.

2.1.1 The acts

The acts that constitute the first element of human trafficking are described as follows:

... includes the delivery, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, exchange, lease, disposal or receiving of a person, or the adoption of a child facilitated or secured through legal or illegal means, within or across the borders of the Republic, of a person trafficked or an immediate family member of the person trafficked[.]¹³⁹

Similarly to the Protocol, this portion of the definition of ‘trafficking’ acknowledges that movement of the victim can take place, but that it is not inherent in the trafficking process. It is also clear that trafficking does not necessarily have a transnational

¹³⁹ Clause 1 of the Bill at ‘trafficking’.

component to it.¹⁴⁰ This is evident by the use of the words ‘within or across the borders of the Republic’.¹⁴¹ Apart from this similarity though, the content of this element in the Bill is vastly different to that contained in the Protocol. The most noticeable difference is that while the Protocol only lists five acts, the Bill lists 14 acts (including all five that are listed in the Protocol) that could satisfy the first element of the ‘trafficking’ definition. This widens the types of conduct that are thought to initiate the trafficking process considerably.

Furthermore, unlike the Protocol, the Bill expressly recognises that in human trafficking processes, human beings are often treated as commercial objects, in terms of which illegal contracts of sale, exchange or lease are undertaken by traffickers. The Bill definition also addresses the suspected role played by adoption in human trafficking. Although this was discussed above in the context of children being trafficked *for the purpose of adopting* them, the Bill treats *adoption as an act* which is committed for the purpose of exploiting, sexually grooming or abusing children.¹⁴² In other words, while contemplating the trafficking definition in the Protocol, it was contemplated that children are trafficked so that they can be adopted. However, in terms of the Bill, children are adopted so that they can be exploited. Thus, adoption can be viewed from two different causal perspectives.¹⁴³

Finally, the Bill specifies that the listed trafficking acts can be committed against the person who is actually being trafficked, or against an immediate family member of the person who was trafficked. Besides the circular nature of this portion of the definition (the term ‘trafficked’ is used in an explanation of the term ‘trafficking’), it was unnecessary to include the words ‘or an immediate family member of the person

¹⁴⁰ Qaba (n 127) at 42; UNHCR Guidelines (n 79) at para 10. An example of trafficking conduct that takes place *within* South Africa is the traditional practice of *ukuthwala* – a form of forced marriage where women and girls are kidnapped by prospective husbands (see Trafficking in Persons Report 2010 (n 34) at 297).

¹⁴¹ Note that while technically any victims of trafficking who come to South Africa could apply for refugee status, this thesis will concentrate on those victims who have been trafficked to, from or within South Africa – not on those victims who have been trafficked elsewhere, and then subsequently come to South Africa to seek asylum.

¹⁴² At clause 1 the Bill defines ‘child’ as ‘a person under the age of 18 years’.

¹⁴³ While the Bill has followed the Protocol by not adopting the perspective that adoption can be included as part of the *purpose of the acts* element of human trafficking, the Bill has departed from the Protocol in adopting the perspective that adoption, whether effected by legal or illegal means, can constitute one of the *acts* of human trafficking.

trafficked’ in the definition because, where those acts, together with the requisite means and purpose, were committed against him or her, the family member would him- or herself be ‘the person trafficked’ spoken of in the definition. Alternatively, where the listed acts have been committed against a family member of a victim, unaccompanied by the requisite means and purpose, not all of the definition’s elements would have been met. If the legislature was implying that immediate family members could also be complainants in a criminal case involving their trafficked relative, as might be the case, then it should have indicated this in more precise terms.

It is important to note that the Bill makes use of the term ‘includes’ before listing the acts, which could mean that the list of acts given by the legislature is not a closed list and that other non-listed acts that fall within the ordinary meaning of ‘trafficking’ could also meet the first element of the definition. If this is the correct interpretation of the word ‘includes’, then the definition’s scope could become even broader, which would make it increasingly difficult to ascertain whether conduct constitutes trafficking or not.

The word ‘includes’, as used in legislation to introduce a list of items, has been interpreted by South African courts. Recently, an interpretation was undertaken by the Constitutional Court in the case of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others*,¹⁴⁴ in regard to the definition of ‘child pornography’ in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Following precedent in *R v Ah Tong*¹⁴⁵ and *R v Debele*,¹⁴⁶ the court enumerated three possible interpretations for the word ‘includes’:

The correct sense of ‘includes’ in a statute must be ascertained from the context in which it is used. *Debele* provides useful guidelines for this determination. If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by ‘includes’ go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that ‘includes’ is non-exhaustive. If, as in this case, the primary meaning already

¹⁴⁴ 2003 (2) SACR 445 (CC); 2003 (12) BCLR 1333 (CC). Hereafter referred to as ‘*De Reuck*’.

¹⁴⁵ 1919 AD 186 at 189–90.

¹⁴⁶ 1956 (4) SA 570 (A).

encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case “includes” is used exhaustively. Between these two situations there is a third, where the drafters have for convenience grouped together several things in the definition of one term, whose primary meaning – if it is a word in ordinary, non-legal usage – fits some of them better than others. Such a list may also be intended as exhaustive, if only to avoid what was referred to in *Debele (supra)* as ‘n moeras van onsekerheid’ (a quagmire of uncertainty) in the application of the term.¹⁴⁷

The use of ‘includes’ in describing the ‘acts’ element of trafficking, seems to fall into the third situation enumerated by *De Reuck* as some of the listed items fit the ordinary meaning of the act of trafficking better than others. Linguistically, the verb ‘to traffic’ usually refers to the action of dealing or trading (in something that is illegal).¹⁴⁸

However, only some of the listed acts, such as ‘transfer’, ‘sale’, ‘exchange’ and ‘lease’, match this ordinary meaning properly. Thus, although the term ‘includes’ is used, the list must be deemed to be exhaustive. In order to avoid unnecessary uncertainty, only the listed items can constitute ‘acts’ in satisfaction of the first element of ‘trafficking’.

In *De Reuck*, the Court expressed the opinion that the legislature could have decreased the potential for confusion and uncertainty by using the word ‘means’ instead of ‘includes’.¹⁴⁹ It is submitted that the same adjustment could be made in the Bill to ensure that the list of acts is regarded as a closed list and that the definition of trafficking is more limited in its scope. As mentioned above, the number of items listed within this element alone is already considerable. Leaving the element open to even more interpretation could cause the definition to be uncertain, incapable of interpretation, and, as a result, unenforceable.

¹⁴⁷ *De Reuck* (n 144) at para 18. Original footnotes omitted.

¹⁴⁸ Soanes and Stevenson (n 92) at 1870.

¹⁴⁹ *De Reuck* (note 144) at para 19.

2.1.2 *The means used*

The definition lists 11 means by which traffickers would have had to commit the acts discussed above in order for the second element of ‘trafficking’ to have been met:

... by means of—

- (a) a threat of harm;
- (b) the threat or use of force, intimidation or other forms of coercion;
- (c) the abuse of vulnerability;
- (d) fraud;
- (e) deception or false pretences;
- (f) debt bondage;
- (g) abduction;
- (h) kidnapping;
- (i) the abuse of power;
- (j) the giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
- (k) the giving or receiving of payments, compensation, rewards, benefits or any other advantage,¹⁵⁰

This is a closed list of possible means. Thus, unlike the first element, this second element is more explicitly limited in its potential interpretative scope. However, the inclusion of ‘or’ indicates that any *one* of the listed means can be present in order to fulfil this part of the definition, and each listed item has some scope for further interpretation. The legislature has therefore precluded the possibility of incorrect interpretation by law enforcement and the courts by including additional definitions for two of the listed items: ‘abuse of vulnerability’ and ‘debt bondage’.

The first of these listed means, ‘abuse of vulnerability’,¹⁵¹ acknowledges that often the root of human trafficking is the vulnerability of potential victims,¹⁵² which

¹⁵⁰ Clause 1 of the Bill at ‘trafficking’.

¹⁵¹ Defined at clause 1 of the Bill as:

‘**abuse of vulnerability**’, for purposes of the definition of trafficking, means any physical or psychological abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes, but is not limited to, taking advantage of the vulnerabilities of that person resulting from—

makes them susceptible to deceit and coercion. The definition recognises the inherent vulnerability of illegal migrants, pregnant women, disabled persons, addicts, children and the poor,¹⁵³ and the ability of traffickers to take advantage of their vulnerabilities. Abuse of vulnerability is also contained within the Protocol definition of ‘trafficking in persons’ as a listed means.

The second listed means that is defined by the Bill, ‘debt bondage’,¹⁵⁴ is not explicitly included in the Protocol definition, although it could be interpreted as falling within some of the other listed Protocol means (such as ‘other forms of coercion’, ‘deception’ or ‘fraud’). By expressly including debt bondage, or, the pledging of services in order to ‘pay off’ a loan (either real or contrived), as a means used in committing the acts of human trafficking, the Bill seems to be highlighting the prevalence of this method in trafficking processes. In this respect, the Bill goes so far as to criminalise the intentional causing of a person’s entrance into ‘debt bondage’ as a separate offence at clause 5.

Other means listed by the Bill that are not listed by the Protocol are: ‘a threat of harm’,¹⁵⁵ ‘intimidation’,¹⁵⁶ ‘false pretences’,¹⁵⁷ ‘kidnapping’,¹⁵⁸ and ‘the giving or

-
- (a) the person having entered or remained in the Republic illegally or without proper documentation;
 - (b) pregnancy;
 - (c) any disability of the person;
 - (d) addiction to the use of any dependence-producing substance;
 - (e) being a child; and
 - (f) socio-economic circumstances;

¹⁵² Snyman (n 2) at 282–3.

¹⁵³ Although, it is specified in the definition of ‘abuse of vulnerability’ that the reasons for vulnerability are not limited to those listed in the clause and mentioned here.

¹⁵⁴ Defined at clause 1 of the Bill as:

‘**debt bondage**’ means the status or condition that arises from a pledge by a person of—

- (a) his or her personal services; or
- (b) the personal services of another person under his or her control, as security for a debt owed, or claimed to be owed, including any debt incurred or claimed to be incurred after the pledge is given, by that person if the—
 - (i) debt owed or claimed to be owed, as reasonably assessed, is manifestly excessive;
 - (ii) length and nature of those services are not respectively limited and defined; or
 - (iii) value of those services as reasonably assessed is not applied towards the liquidation of the debt or purported debt;

¹⁵⁵ Clause 1 of the Bill at ‘trafficking’, para (a).

¹⁵⁶ *Ibid*, para (b).

¹⁵⁷ *Ibid*, para (e).

¹⁵⁸ *Ibid*, para (h).

receiving of payments, compensation, rewards, benefits or any other advantage'.¹⁵⁹

The inclusion of the last of these listed means recognises that benefits are not only promised to parents so that they will consent to the trafficking of their children – benefits are also promised to adults so that they will agree to their *own* trafficking and exploitation.

2.1.3 *The purpose of the acts*

As per the other two elements of human trafficking, the Bill adds considerably to the third element of the definition. The third element is stated thus:

... for the purpose of any form or manner of exploitation, sexual grooming or abuse of such person, including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic;¹⁶⁰

While the Protocol names only one purpose that will meet the requirement for human trafficking, 'exploitation', the Bill mentions three possible purposes, namely 'exploitation, sexual grooming or abuse of such person'. Like the Protocol, the Bill includes an explicit definition for 'exploitation' – although no separate definition is offered for 'sexual grooming' or 'abuse'. Exploitation is thus defined at clause 1 of the Bill as follows:

“exploitation” includes, but is not limited to—

- (a) all forms of slavery or practices similar to slavery;
- (b) forced marriage;
- (c) sexual exploitation;
- (d) servitude;
- (e) debt bondage;
- (f) forced labour;
- (g) child labour as defined in section 1 of the Children's Act;

¹⁵⁹ Ibid, para (k).

¹⁶⁰ Clause 1 of the Bill at 'trafficking'.

- (h) the removal of body parts; and
- (i) the impregnation of a female person against her will for the purpose of selling her child when the child is born[.]

It can be seen from the outset that the Bill includes a few forms of exploitation that are not included in the Protocol, namely: 'forced marriage', 'debt bondage', 'child labour as defined in section 1 of the Children's Act', and 'the impregnation of a female person against her will for the purpose of selling her child when the child is born'.

Furthermore, the definition stipulates that exploitation 'includes, but is not limited to' the listed forms of exploitation, whereas the Protocol requires that 'at a minimum' exploitation 'includes' one of the listed forms. As discussed earlier, the words 'includes at a minimum' in the Protocol definition allow for two possible interpretations, but, in order to limit the already extensive scope of the human trafficking offence, they should be interpreted to mean that *at least one* of the listed forms *has* to be intended for the third element to have been met. The Bill's wording however stipulates that while the listed forms will constitute 'exploitation', other types of harm could, without requiring the additional presence of a listed form, also qualify as 'exploitation'. Thus, due to the use of the words 'but is not limited to' in the Bill, it is clear that the term 'includes' introduces a non-exhaustive list of exploitation forms, and that these forms may go beyond the ordinary meaning of the term 'exploitation'.¹⁶¹ To avert the danger associated with a limitless list of potential exploitation forms, it is submitted that any additional forms should only be considered as 'exploitation' where they fall within the ordinary meaning of exploitation or where they are similar in kind to the items listed in the definition.¹⁶²

Some of the listed forms of exploitation are defined further in the Bill, and can be subjected to additional interpretation.¹⁶³ Presumably, those listed forms of exploitation without definitions are to be interpreted in accordance with their ordinary

¹⁶¹ This is a converse application of the reasoning in *De Reuck* (n 144) at para 18.

¹⁶² *De Reuck* (n 144) at para 19.

¹⁶³ For example, 'forced marriage' is defined at clause 1 of the Bill as 'a marriage concluded against the will and without the valid consent of both parties to the marriage'. See also definitions for 'debt bondage', 'forced labour', 'removal of body parts', 'servitude', 'sexual exploitation' and 'slavery' at clause 1.

meanings. The scope of ‘exploitation’, and the type of intended conduct which will qualify as exploitation, is thus broadened significantly in the Bill.

Furthermore, although the Protocol did include ‘the removal of organs’ as a form of exploitation,¹⁶⁴ the Bill has slightly altered the wording of this form to ‘the removal of body parts’.¹⁶⁵ This is important because where ‘organs’ refer only to those parts of the human body that are ‘self-contained and [have] a specific vital function’,¹⁶⁶ ‘body parts’ could refer to any portions of the human body, whether they are classified as organs or not. The Bill’s broader meaning of this form of exploitation is made apparent from its definition:

“**removal of body parts**” means the removal of or trade in *any organ or other body part* from a living person who has been trafficked or the body of a deceased person who has been trafficked and killed for the sole purpose of removing the organ or other body part in contravention of the National Health Act, 2003 (Act No. 61 of 2003);¹⁶⁷

Thus, traffickers can intend to remove the victim’s body parts while the victim is still alive or when the victim is already deceased – both would qualify as purposes that satisfy the third element of the definition.

Finally, ‘debt bondage’¹⁶⁸ is oddly included both as a form of exploitation, in other words as a purpose for which trafficking acts are committed, and as a means used to commit trafficking acts. It is fathomable that debt bondage could be used as a device to recruit and capture a victim for trafficking. It is also fathomable that someone could be trafficked with the intention that they would become party to a debt bondage situation. However, it seems illogical that debt bondage can be a *means used* and a *purpose* simultaneously. In other words, how can traffickers use debt bondage as a means to recruit or transport someone for the purposes of debt bondage? As will be discussed in the next Chapter, the Protocol definition tries to separate actual exploitation from the intention to exploit, and only includes the latter of these in the

¹⁶⁴ Article 3(a) of the Protocol.

¹⁶⁵ Clause 1 of the Bill at ‘exploitation’, para (h).

¹⁶⁶ Soanes and Stevenson (n 92) at 1240.

¹⁶⁷ Clause 1 of the Bill. Emphasis added.

¹⁶⁸ Defined at clause 1 of the Bill and discussed above at 2.1.2.

definition of ‘trafficking in persons’.¹⁶⁹ By including debt bondage as both a *means used* and a *purpose* in the ‘trafficking’ definition, the Bill recognises that victims are often exploited *during* the trafficking process as well.¹⁷⁰

As far as the purposes of ‘sexual grooming’ and ‘abuse’ is concerned, no explicit definitions are included in the Bill. Presumably, ‘sexual grooming’ refers to the offences enumerated in ss 18 and 24 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. However, this is a confusing association to make because the offences at ss 18 and 24, respectively concern complainants who are children and those who are mentally disabled persons, whereas the Bill makes no such limitations on the potential victim. It is therefore unclear what the Bill means by ‘sexual grooming’. Furthermore, s 18 contains two offences, namely ‘promoting the sexual grooming of a child’ and the actual ‘sexual grooming of a child’, and s 24 contains similar offences. Thus, it is difficult to discern whether the third element of ‘trafficking’ only refers to the purpose of *actual* sexual grooming or whether a purpose to *promote* the sexual grooming of the trafficking victim will also suffice.

The ‘trafficking’ definition describes ‘abuse’ as:

... including the commission of any sexual offence or any offence of a sexual nature in any other law against such person or performing any sexual act with such person, whether committed in or outside the borders of the Republic;¹⁷¹

The inclusion of this description of ‘abuse’ was unnecessary because much of the conduct described already forms a part of another purpose – exploitation. This is owing to the fact that ‘exploitation’ encompasses the concept of ‘sexual exploitation’,¹⁷² which is defined at clause 1 of the Bill as follows:

¹⁶⁹ Snyman (n 2) at 282.

¹⁷⁰ Ibid at 282 and 284. It is however unclear whether it was the legislature’s intention to do so or whether poor drafting happened to be advantageous in this instance.

¹⁷¹ Clause 1 of the Bill. Although the third element of the trafficking definition could be interpreted to mean that all three purposes *together* could include within their meaning ‘the commission of any sexual offence ... borders of the Republic’, it is more likely that only the last-mentioned purpose, namely ‘abuse’, includes those types of conduct, since ‘exploitation’ is given its own specific definition in the Bill.

¹⁷² See clause 1 of the Bill at ‘exploitation’, para (c).

“sexual exploitation” means the commission of any sexual offence in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act or any offence of a sexual nature in any other law against a victim of trafficking, and includes forcing a victim of trafficking to participate in the production of pornographic material or to perform any act of a sexual nature in, but not limited to, a strip club, massage parlour, brothel or escort agency;

The only conduct that is included in the ‘abuse’ description but not in the definition of ‘sexual exploitation’ is the ‘[performance] of any sexual act with such a person’.¹⁷³ Furthermore, unlike ‘sexual exploitation’, the ‘abuse’ description indicates that it does not matter whether the abusive acts are intended to (or do) take place in South Africa or elsewhere. Since the Bill lacks a distinctive description for ‘abuse’ and the term is often used as a blanket term for most kinds of sustained harm, the scope of the definition for ‘trafficking’ is expanded considerably by the inclusion of the ‘abuse’ as a purpose. This is demonstrative of bad drafting and a failure to consider the implications of including such an ambiguous concept within the definition of ‘trafficking’.

2.2 Concerns about the Bill’s definition of ‘trafficking’

As mentioned above, the Protocol’s definition is greatly inclusive with regard to the type of conduct that will fall within the ambit of ‘trafficking in persons’. However, the definition of ‘trafficking’ in the Bill goes even further to broaden significantly the scope of what will be considered as human trafficking. Therefore, the conduct that is prohibited in terms of Chapter 3 of the Bill will be much more extensive. Chapter 3 creates offences for ‘trafficking in persons’,¹⁷⁴ ‘involvement of trafficking in

¹⁷³ Clause 1 of the Bill at ‘trafficking’. In terms of the description there is no requirement that the sexual acts be performed without consent. The inclusion of this as a form of intended ‘abuse’ could be problematic because, for example, a man could be convicted of ‘trafficking’ where he convinces a woman to travel home with him (commits an act of transportation) so that he can perform consensual sexual acts with her like kissing or intercourse (with the purpose of abuse), by untruthfully declaring his love for her (by means of deceit). The serious criminalisation of this sort of behaviour is wholly undesirable.

¹⁷⁴ Clause 4(1) of the Bill.

persons',¹⁷⁵ '[p]ossession, destruction, confiscation, concealment of or tampering with documents' to '[facilitate] or [promote] trafficking in persons',¹⁷⁶ '[u]sing services of victims of trafficking',¹⁷⁷ 'conduct facilitating trafficking in persons'¹⁷⁸ and '[l]iability of carriers' who transport 'victim[s] of trafficking'.¹⁷⁹ A broader definition for 'trafficking' is therefore relevant in the application and enforcement of all these offences, thereby increasing the (already wide-ranging) scope of criminalisation in the Bill significantly.

While the South African legislature is obviously trying to account for the varying forms and modes of human trafficking, there is a danger of over-criminalisation and legislative uncertainty to the point where law enforcement officials classify almost any behaviour as human trafficking, or where officials cannot distinguish trafficking conduct from other types of criminal conduct. Uncertainty in the definition of 'trafficking' could also render the Bill's provisions unenforceable.¹⁸⁰ Due to the presumption that legislation does not contain futile provisions,¹⁸¹ uncertainty in the definition should be avoided by limiting the interpretation and scope of 'trafficking' in the Bill.

The Bill's definition is made convoluted by the inclusion of further definitions for 'the abuse of vulnerability', 'debt bondage' and 'exploitation', the latter of which contains yet more terms that are defined by the Bill. For legal scholars and prosecutors, mastering the definition of 'trafficking' as currently contained in the Bill will therefore be fairly challenging. One can only imagine then how law enforcement officials, or Refugee Status Determination Officers wishing to ascertain whether someone qualifies as a victim of 'trafficking', will grapple with identifying trafficking

¹⁷⁵ Ibid at clause 4(2).

¹⁷⁶ Ibid at clause 6.

¹⁷⁷ Ibid at clause 7.

¹⁷⁸ Ibid at clause 8(1). Furthermore, clause 8(2) and (3) of the Bill constitute an offence for '[c]onduct facilitating trafficking in persons' that is committed specifically by internet service providers.

¹⁷⁹ Ibid at clause 9.

¹⁸⁰ Gould (n 88) at 22. See also Gould at 19:

... it is vital for law enforcement agencies to have a clear understanding of what practices constitute trafficking, in order to successfully identify, investigate and prosecute such cases. Without a clear definition and understanding of what needs to be prevented and controlled, an effective response is impossible.

¹⁸¹ Botha (n 113) at 73.

conduct. Trafficking identification will not only require ample training and expertise – a great amount of time and resources will also be required. The definition, while comprehensive in the type of conduct that it tries to cover, is thus impracticable for South Africa’s criminal justice system.

An important result of this overly broad and convoluted definition is that the concept ‘victim of human trafficking’ becomes significantly more fluid and imprecise. In terms of the Bill, once an incident of human trafficking is reported, an assessment must be conducted on the persons concerned to assess whether they are victims of trafficking.¹⁸² If the assessment is affirmative, a certificate will be issued to certify that the person is indeed a ‘victim of trafficking’.¹⁸³ Therefore, the Bill has the effect of formalising and concretising a concept that is vague and open to much interpretation by the assessors concerned. Only persons in possession of the certificate can then be considered genuine trafficking victims – for all legal purposes, including refugee status determination. This could have adverse consequences for legitimate trafficking victims who wish to qualify for refugee status in South Africa, but who have not been certified.

In the spite of all these concerns, there is hope for South Africa’s trafficking legislation. While the Bill is at the final stages of the legislative process, it has not yet achieved the status of an Act and can therefore still be modified and improved.¹⁸⁴ The Bill is admirable for taking a victim-centred and human rights approach to the issue of human trafficking. However, in order to provide effective assistance to victims, the Bill needs to be revised – particularly in regard to the definition of ‘trafficking’.

CHAPTER 4

The nature of the offence and its effect on victims

¹⁸² Clause 13(5)(b) of the Bill.

¹⁸³ Ibid at clause 13(7)(a).

¹⁸⁴ Once it is an Act, however, any alterations to the wording of provisions will have to be made via a formal amendment - see Botha (n 113) at 37–8. The national legislative process is enumerated at ss 73–82 of the Constitution of South Africa, 1996.

1 PROTRACTED NATURE OF THE OFFENCE

It can be concluded from both the international and South African definitions discussed above that the offence of human trafficking is a process consisting of a number of different acts committed sequentially over a period of time.¹⁸⁵ Three geographical phases could be discernible from the trafficking process: the recruitment phase, transit phase and exploitation phase.¹⁸⁶ Where the phases take place across national borders, the state of recruitment is called the ‘country of origin’, an intermediate state used for transit is called the ‘country of transit’, and the state in which the exploitation occurs is called the ‘country of destination’.¹⁸⁷ Therefore, human trafficking does not occur as a single event but as a continuous process ending in exploitation.

The conduct that collectively constitutes the crime is often difficult to recognise or distinguish, and this impedes the work of both researchers and prosecutors.¹⁸⁸ Additional criminal activities, such as kidnapping, assault, money laundering, forgery, corruption and prostitution, frequently accompany the trafficking process.¹⁸⁹ For example, travel and identification documents are often forged, falsified or obtained from corrupt administrators to ease the transit of the trafficking victim; while the trafficking victim’s real documents are confiscated and kept by the traffickers.¹⁹⁰ The presence of these other activities makes prosecution more complex and further obscures the detection of human trafficking.

As stated previously, the Protocol attempts to distinguish the acts involved in trafficking, which are undertaken for the purposes of exploitation, from the actual

¹⁸⁵ Snyman (n 2) at 281; UNHCR Guidelines (n 79) at para 10.

¹⁸⁶ Snyman (n 2) at 281. As discussed in Chapter 3, human trafficking as defined in the Protocol does not necessarily involve the geographical movement of a victim, but where such movement does take place, these three geographical phases are recognisable.

¹⁸⁷ Snyman (n 2) at 281. Similar labels are assigned to ‘areas’ where trafficking takes place within one state or within a local district. Similar labels are also used in refugee law to describe the countries moved through during flight, except that the final destination is called the ‘country of asylum’ instead of the ‘country of destination’. It is sad to note that in the context of human trafficking South Africa is simultaneously a country of origin, transit and destination – see Snyman (n 2) at 286-7; Trafficking in Persons Report 2010 (n 34) at 297; Qaba (n 127) at 42.

¹⁸⁸ Snyman (n 2) at 281, Pithey (n 129) at 7-10.

¹⁸⁹ Sigmon (n 2) at 249.

¹⁹⁰ Snyman (n 2) at 284; Sigmon (n 2) at 249.

exploitation.¹⁹¹ In other words, a person need not have actually been exploited in order to have been ‘trafficked’ in terms of the Protocol – that the trafficking occurred for the *purpose of* exploitation is sufficient. These concepts are however not always easy to differentiate because exploitation can also occur at the recruitment stage or while the trafficked person is in transit.¹⁹² Furthermore, where victims are manipulated or coerced during the trafficking process, those acts can in themselves be exploitative in that they undermine the dignity and human rights of the trafficking victims.¹⁹³ Thus, although those acts do not constitute ‘exploitation’ in terms of the Protocol, they form part of a protracted period of abuse and mistreatment which makes up the trafficking process.

2 THE PERPETRATORS OF HUMAN TRAFFICKING

Due to the protracted nature of the offence, a number of persons are usually involved in a single human trafficking process.¹⁹⁴ Perpetrators often operate within sophisticated criminal networks that traverse vast global regions and profit considerably from the exploitation of trafficking victims.¹⁹⁵ These networks develop advanced methods for changing their modes of operation, varying their transit routes and concealing their identities in order to remain undetected and evade capture.¹⁹⁶ However, the perpetrators of human trafficking could also be smaller informal groups or individuals who attempt to benefit from trafficking activity on a smaller scale.¹⁹⁷ The trafficking victim may even know someone involved in the process – relatives, community

¹⁹¹ Snyman (n 2) at 282.

¹⁹² Ibid. Thus, Snyman (n 2) states at 282 and 284 that trafficked persons are sometimes overpowered or raped into submission by their traffickers during a so-called ‘seasoning process’.

¹⁹³ Ibid at 282.

¹⁹⁴ Ibid at 283-4. The persons involved in the process will act in different capacities and have different roles depending on the phase of the trafficking process and the circumstances of each trafficking incident – see Snyman (n 2) at 284.

¹⁹⁵ Snyman (n 2) at 283; Sigmon (n 2) at 249. In addition to human trafficking, these large organised networks often partake in other transnational criminal activity, such as the trafficking of drugs or weaponry – Sigmon at 249.

¹⁹⁶ Sigmon at 249.

¹⁹⁷ Ibid.

members or persons with authority over the victim sometimes facilitate initial contact between the traffickers and the victim.¹⁹⁸

3 NATURE OF THE VICTIMISATION

The effects of trafficking victimisation could be physical, psychological, social or financial.¹⁹⁹ Physical effects could be as a result of assault, abuse or torture endured by the victim during the trafficking process, and can include aches, bruising, loss of appetite, exhaustion and insomnia.²⁰⁰ In respect of psychological effects, some trafficking victims will suffer from post-traumatic stress disorder (PTSD), but most will have lesser emotional reactions in the form of shock, panic, nightmares, angry outbursts, exaggerated fear, disorientation, or being easily startled.²⁰¹ Long-term psychological effects include depression, paranoia, withdrawal and some victims may commit acts of self-harm.²⁰² Some victims could develop addictions because of coerced substance abuse during the trafficking process.²⁰³ These psychological effects could seriously impact on the victim's ability to interact in society and may put strain on the victim's relationships. This could be particularly relevant where traffickers threaten the victim's family members or friends.²⁰⁴ The victim's employment situation and prospects may also be adversely affected, particularly since the victim will have been away from work for a period of time. For the victim to overcome these effects,

¹⁹⁸ Snyman (n 2) at 283; Trafficking in Persons Report 2010 (n 34) at 297. This is the case where, for example, desperate parents consent to the trafficking of their child because the traffickers promise a better life for the child in the country of destination – Snyman (n 2) at 283–4.

¹⁹⁹ Zuzelle Pretorius and Barbara Louw 'Victim empowerment and support in South Africa' in Linda Davis and Rika Snyman *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 74, hereafter referred to as 'Pretorius and Louw', at 75.

²⁰⁰ Diana Tudorache 'General Considerations on the Psychological Aspects of the Trafficking Phenomenon' in Guglielmo Schinina (ed) *Psychosocial support to groups of victims of human trafficking in transit situations* Vol 4 (International Organisation for Migration, February 2004) 19, at 22. Hereafter referred to as 'Tudorache'.

²⁰¹ Tudorache (n 200) at 21–3; Pretorius and Louw (n 199) at 75; Sigmon (n 2) at 253–4. See also AA Jones 'Post-traumatic stress disorder and victims of human sex trafficking: a perpetuation of chronic indignity' (2009) 4 *Intercultural Human Rights Law Review* 317, particularly at 327–8.

²⁰² Pretorius and Louw (n 199) at 75; Tudorache (n 200) at 23–4.

²⁰³ Trafficking in Persons Report 2010 (n 34) at 297.

²⁰⁴ Sigmon (n 2) at 254.

intervention in the form of victim support, health care and counselling is required.²⁰⁵ Where these are not provided to the victim by the state, the victim may also incur great expenses in order to recover from the ordeal.

Furthermore, a number of fundamental rights that are protected in the South African Constitution²⁰⁶ could be adversely affected by the process of trafficking, as defined in the Protocol and Bill. Where a trafficking victim endures physical abuse by traffickers or exploiters the rights to life and freedom and security of the person, including the right to bodily integrity,²⁰⁷ would be implicated. Where a trafficking victim is held captive, he or she is denied the right to freedom of movement and protection from arbitrary arrest.²⁰⁸ Where women are trafficked because men perceive them as objects to take advantage of, the right to protection from gender discrimination and other women's rights would be affected.²⁰⁹ Where conditions are unfavourable, the rights to privacy, fair labour practices and a clean and safe environment could be relevant.²¹⁰ Where trafficking victims are separated from their families for long periods of time, or where children are trafficked, rights concerning the family unit and a number of children's rights could be violated.²¹¹ Finally, and arguably most importantly, throughout the process the right to human dignity of the victim will be undermined. These are serious human rights violations and can therefore have long-lasting effects in the lives of trafficking victims.

As mentioned in Chapter 2, the successful trafficking of human persons is rooted in the vulnerability of potential victims. This is highlighted in the title of the Protocol, as it recognises that two of society's most vulnerable groups, women and

²⁰⁵ Victims may also require translation services and legal assistance in the country of destination – Special Rapporteur Report 2009 (n 30) at paras 59–62.

²⁰⁶ Most of these rights are also protected in terms of the UDHR (n 36), the ICCPR (n 37) and the *International Covenant on Economic, Social, and Cultural Rights* 993 UNTS 3 (16 December 1966), hereafter the 'ICESCR'.

²⁰⁷ See ss 11 and 12 of the Constitution of South Africa, 1996, respectively.

²⁰⁸ Sections 21 and 12(1) of the Constitution of South Africa, 1996, respectively.

²⁰⁹ *Ibid* at s 9.

²¹⁰ *Ibid* at ss 14, 23 and 24 respectively.

²¹¹ Children's rights are protected in terms of s 28 of the Constitution, while the right to family unity has been recognised as forming part of the right to dignity (s 10 of the Constitution) by the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC).

children, are most often the victims of human trafficking.²¹² A genuine experience of human trafficking victimisation could magnify the vulnerability of each victim, to a point where urgent remedial assistance may become necessary. It should be reiterated here that while the Protocol correctly recognises that victims act (or fail to act) within the constraints of power structures such as patriarchy, the ability of victims to be resilient in the face of their vulnerability should also be acknowledged.²¹³ Thus, victimisation experiences may also strengthen some victims by demonstrating to them that they are capable of surviving their vulnerabilities.

It is important to note however victims of human trafficking will subjectively perceive, define and live their victimisation experiences differently, depending on their personal characters and backgrounds.²¹⁴ Thus, the needs of trafficking victims will differ from person to person. As an offence, human trafficking also has different effects on victims in comparison to other offences. However, while trafficking victims may experience the specific effects of trafficking victimisation, they will also experience the generic effects of being a victim of crime, some of which will overlap with the effects of trafficking.²¹⁵ Furthermore, where other offences are also committed against the victim during the trafficking process, the victimisation experiences will all be compounded. This labyrinth of victimisation experiences requires that policies designed to assist human trafficking victims be comprehensive and nuanced enough to address all the possible needs of victims and provide them with adequate protective rights.

²¹² Although this is true, men have also been the victims of human trafficking – Snyman (n 2) at 284.

²¹³ Walklate (n 102) at 113–14.

²¹⁴ Fattah (n 109) at 50.

²¹⁵ Sigmon (n 2) at 250.

CHAPTER 5

Definitional requirements for refugee status

1 WHO IS A 'REFUGEE' IN SOUTH AFRICA?²¹⁶

1.1 Section 3 of the Refugees Act – the definition of 'refugee'

The definitional requirements for refugee status in themselves present an immense challenge to victims of human trafficking who wish to remain in South Africa.

According to s 3 of the Refugees Act 130 of 1998 ('Act' or 'Refugees Act'), a person qualifies for refugee status in South Africa only if he or she:

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- (c) is a dependant of a person contemplated in paragraph (a) or (b).

From the provision it is clear that refugee status may be obtained in three different circumstances. The first circumstance, contained in paragraph (a), is where a person has fled his or her country of origin because of a fear of persecution. The need for protection stems from a person's fear that he or she may be a specific target for

²¹⁶ While this thesis only considers the South African construction of the 'refugee' concept, there are varying international opinions about who a refugee is. See, for example AE Shacknove 'Who is a refugee?' (January 1985) 6 *Ethics* 274. Hereafter referred to as 'Shacknove'.

persecution in the country of origin, because of a particular characteristic that he or she displays. The first circumstance is thus highly individualistic and based primarily on the sentiment of the refugee concerned and the refugee's personal experience within the context of the country or origin.

Paragraph (a) of the definition is taken from art 1A(2) of the United Nations Convention Relating to the Status of Refugees,²¹⁷ adopted in 1951, as amended by art I of the 1967 Protocol Relating to the Status of Refugees.²¹⁸ Taking its cue from the Refugee Protocol, the South African provision does not limit the scope of refugee-producing events to a certain time period, as was done in the UN Refugee Convention.²¹⁹ Furthermore, the South African definition adds an item to the list of

²¹⁷ See note 56. Article 1A(2) of the UN Refugee Convention states:

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

...

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

²¹⁸ United Nations General Assembly *Protocol relating to the status of refugees* 606 UNTS 267 (31 January 1967), hereafter referred to as the 'Refugee Protocol'. Article 1 of the Refugee Protocol, states:

...

2. For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words 'As a result of events occurring before 1 January 1951 and...' and the words '...as a result of such events', in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article IB(I) (a) of the Convention, shall, unless extended under article IB(2) thereof, apply also under the present Protocol.

²¹⁹ UNHCR Handbook (n 110) at paras 35–6 and 108–10. Before its amendment by the Refugee Protocol, the UN Refugee Convention limited persecution, at art 1A(2), to that '[a]s a result of events occurring before 1 January 1951' because many countries did not want to assume responsibility for future events that they could not foresee. This was not only a temporal limitation; it was a geographic limitation too, because most large refugee-producing events before 1951 occurred in Europe during the first and second world wars. States also had the option of expressly limiting the application of the refugee definition to events occurring only in Europe. Thus, art 1B of the UN Refugee Convention read as follows:

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

(a) 'events occurring in Europe before 1 January 1951'; or

(b) 'events occurring in Europe or elsewhere before 1 January 1951'; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

grounds for persecution that is not contained within the UN Refugee Convention or its Refugee Protocol – tribe. This seems fitting in a country where most of the population find their historical origins within a traditional African tribe.

Only paragraph (a) will be the focus of this thesis. Given that it is the instrument from which paragraph (a) originates, the UN Refugee Convention and its accompanying Refugee Protocol will be used as interpretive tools when applying the South African definition to victims of human trafficking. The Refugees Act itself acknowledges the need to consider these two instruments when applying and interpreting its provisions at s 6(1)(a) and (b).

The second circumstance, contained in paragraph (b), pertains to situations of war or hostility in the whole or a part of a person's country of origin, which causes an individual to flee. In this circumstance, the reason for flight is not based on the fear of being a particular object of pursuit. Rather, flight is deemed necessary because of unrest and instability in the country of origin, which endangers the survival of the general population. Paragraph (b) of the definition finds its origins in art 1(2) of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.²²⁰ Recognising the existence of widespread conflict in Africa, caused by states themselves and also by rebel forces, the OAU Convention made special provision for those persons who are forced to flee their homes due to conditions of danger and instability, rather than individualised persecution.²²¹ It is noteworthy that this paragraph permits qualification for refugee status even where only a portion of the country is in a state of conflict, provided that the person concerned

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

²²⁰ Organization of African Unity *Convention Governing the Specific Aspects of Refugee Problems in Africa* 1001 UNTS 45 (10 September 1969), hereafter referred to as the 'OAU Convention'. Article 1(2) of the OAU Convention reads as follows:

2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

²²¹ Shacknove (n 216) at 275.

would be affected by it and he or she could not reasonably have been expected to seek refuge in another portion of the same country.²²²

The third circumstance, contained in paragraph (c), exists where an individual is a dependent of someone who qualifies for refugee status under either paragraph (a) or (b). In this third circumstance, refugee status is granted because of the relationship that exists between an individual and a refugee, and is thus a derivative status. This derivative status was included in the definition in fulfilment of Recommendation B of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.²²³ This resolution, made at the same conference that adopted the UN Refugee Convention, recommends that ‘the unity of the refugee's family [be] maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country’.²²⁴ Paragraph (c) is thus South Africa’s attempt to ensure that the right to family unity is enjoyed by recognised refugees.

A Bill to amend the Refugees Act was introduced in 2010 for consideration by the National Assembly. The Refugees Amendment Bill²²⁵ does not however propose any amendments to s 3 of the Act. Thus, the requirements for refugee status that are currently found in the Act will be dealt with as is in the discussions that follow.

1.2 The application process

The process for the application and granting of refugee status is enumerated in the Refugees Act. Claimants for refugee status must personally go to a Refugee Reception Office²²⁶ to make an application with a Refugee Reception Officer (RRO).²²⁷ The RRO has a duty to accept the application, assist the claimant with completing the

²²² Although the UN Refugee Convention does not include this principle within its definition of a ‘refugee’, the principle was recognised in 1992 by the UNHCR Handbook (n 110) at para 91.

²²³ *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 1951 UNdoc. A/CONF.2/108/Rev.1 (26 Nov. 1952).

²²⁴ *Ibid* at B(1).

²²⁵ B30–2010, available at: <http://www.pmg.org.za/bill/20100820-refugees-amendment-bill-b30-2010> [accessed 27 January 2011]. Hereafter referred to as the ‘Refugees Amendment Bill’.

²²⁶ Established in terms of s 8 of the Refugees Act.

²²⁷ Section 21(1) of the Refugees Act.

application, and submit the completed application to a Refugee Status Determination Officer (RSDO) at the Refugee Reception Office.²²⁸ It is then the duty of the RSDO to determine the outcome of the application. Pending the RSDO's decision, the RRO must issue an 'asylum seeker permit' to the claimant in terms of s 22(1) of the Act. As a recognised asylum seeker, the claimant will, subject to conditions, be allowed to remain in South Africa (temporarily, dependant on the outcome of the application) and also study and/or work while in the country.²²⁹ Thus, merely applying for refugee status could bestow victims of human trafficking with more rights than they would have under the trafficking Bill.

Finally, in making a decision and considering all relevant information, the RSDO 'must have due regard' for the claimant's right to administrative justice contained in s 33 of the Constitution,²³⁰ since status determination is an administrative, not judicial, procedure. The RSDO can then grant refugee status, reject the application either as 'manifestly unfounded, abusive or fraudulent' or as 'unfounded', or refer a question of law to a Standing Committee for Refugee Affairs established in s 9 of the Act.²³¹ Where decisions are unfavourable, claimants have the ability to appeal or submit them for review in terms of ss 25 and 26 of the Act.

Here, it is worth mentioning that the Refugees Amendment Bill replaces the Act's 'Refugee Status Determination Officer' with a 'Status Determination Committee'. A Status Determination Committee is to be 'established by the Director-General [of the Department of Home Affairs] in the prescribed manner to consider and deal with applications for asylum in accordance with section 24'.²³² The Bill however does not include any reference to the composition of the Committee – it merely

²²⁸ Section 21(2) of the Refugees Act. Section 21(2)(c) permits the Refugee Reception Officer to 'conduct such enquiry as he or she deems necessary in order to verify the information furnished by the application' but the enquiry cannot result in the Officer's refusal of the application.

²²⁹ Section 22(1) of the Refugees Act. In the case of *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA); [2004] 1 All SA 21(SCA) it was decided that, based on the right to dignity of persons present in South Africa, the lack of alternative means of support and the lengthy period that applicant's have to wait for the outcome of their status applications, asylum seekers should be permitted to work in South Africa.

²³⁰ Section 24(2) of the Refugees Act. The RSDO will also have to bear in mind the provisions of the Promotion of Administrative Justice Act 3 of 2000.

²³¹ Section 24(3) of the Refugees Act.

²³² See clause 3(a) of the Refugees Amendment Bill.

specifies that the ‘prescribed manner’ for its establishment is to be set out in regulations.²³³ It is therefore unclear what a Status Determination Committee will look like and how it will affect status determinations in practice. What is clear is that where previously a single administrator determined the fate of a refugee, there will now be a committee of administrators. This could decrease the likelihood of partial determinations, increase administrator accountability and allow for a larger and more diverse pool of expertise in each status determination.

1.3 Burdens and standards of proof in refugee applications

In accordance with general principles of evidence, the burden of proof in claims for refugee status rests on the refugee applicant.²³⁴ Therefore, the claimant must furnish evidence and establish the truth and accuracy of the facts that underlie his or her claim.²³⁵ However, because refugees often flee without being able to gather relevant documents and have limited access to resources in the country of asylum, adjudicators responsible for determining the status of refugees are expected to *share* with refugee applicants the burden of ascertaining and evaluating evidence.²³⁶ This is primarily achieved by gathering relevant information about the country of origin in order to verify facts alleged by the claimant.²³⁷

The standard of proof in refugee status determinations is less robust than the standards for criminal proceedings (proof beyond a reasonable doubt) or civil proceedings (proof on a balance of probabilities). Thus, the facts alleged in a refugee claim do not need to be proven so that the adjudicator is completely convinced of their

²³³ Section 1 of the Refugees Act stipulates that ‘prescribed’ denotes ‘prescribed by regulation’ in the Act. Presumably this would also be the case in the Refugees Amendment Bill, which contains clauses that eventually become are to become a part of the Act.

²³⁴ Office of the United Nations High Commissioner for Refugees *Note on Burden and Standard of Proof in Refugee Claims* (16 December 1998), available at:

<http://www.unhcr.org/refworld/docid/3ae6b3338.html> [accessed April 2010], at para 6. Hereafter referred to as ‘Note on Burden and Standard of Proof’. See also UNHCR Handbook (n 110) at paras 195–6.

²³⁵ Note on Burden and Standard of Proof (n 234) at paras 5–6; Gina Clayton *Textbook on immigration and asylum law* 2ed (New York: Oxford University Press, 2006), hereafter referred to as ‘Clayton’, at 429.

²³⁶ Note on Burden and Standard of Proof (n 234) at para 6; UNHCR Handbook (n 110) at para 196.

²³⁷ Note on Burden and Standard of Proof (n 234) at para 6.

truth (beyond a reasonable doubt), nor do the facts alleged have to be proven as more probable than other facts (balance of probabilities).²³⁸ The adjudicator need merely establish that the claimant's allegations are likely to be *credible*, based on the supporting evidence and the coherence and plausibility of the claimant's testimony.²³⁹

1.4 Section 3 and victims of human trafficking

A victim of human trafficking *may* qualify for refugee status based on conditions of unrest in his or her country of origin or because he or she is a dependant of a recognised refugee, but these two circumstances will not form part of the subject matter of this thesis. Instead, the concern will be whether trafficking victims, based on their *individual* experiences of being trafficked, could meet the criteria for refugee status contained in paragraph (a). Obviously, the personal experiences of persons who are trafficked may vary. It would thus be impossible to say conclusively that all victims of human trafficking would equally meet the criteria set out in paragraph (a). However, in Chapters 3 and 4, the nature of the *offence* of human trafficking was analysed in terms of its international and South African legal definitions, in order to determine the likely characteristics of a *victim* of human trafficking. From here onwards, it will thus be assumed that a comprehensive account has been given of the common experiences and attributes of trafficking victims. The question then develops into whether a trafficked person, *as defined and understood in the definitions discussed previously*, meets the criteria for refugee status in paragraph (a).

2 APPLYING THE ELEMENTS FOR INDIVIDUAL REFUGEE STATUS TO VICTIMS OF HUMAN TRAFFICKING

Individuals who rely on paragraph (a) for refugee status would need to fulfil the following five elements:

²³⁸ Ibid at paras 7–8.

²³⁹ Note on Burden and Standard of Proof (n 234) at paras 8–12. In other words, where facts cannot be ascertained but the claimant seems credible, he or she 'should, unless there are good reasons to the contrary, be given the benefit of the doubt' – UNHCR Handbook (n 110) at para 196 (see also paras 197–205).

- (i) have a **well-founded fear**
- (ii) of **persecution**
- (iii) persecution must be upon the **grounds** of race, tribe, religion, nationality, political opinion or membership of a particular social group
- (iv) **alienage** (being foreign to the country of asylum)
- (v) **lack of protection** by the country of origin because he or she is unable or unwilling to avail him- or herself thereof.

It is important to note that an individual is a ‘refugee’ *as soon as* these elements have been fulfilled, regardless of whether he or she has been granted formal refugee status or not.²⁴⁰ Thus, the refugee status referred to in s 3 does not turn persons into refugees; it merely *declares* that they are refugees.²⁴¹ Therefore, if victims of human trafficking meet the requirements, they will be refugees from the time that the requirements are met, not only from the time that the South African government grants them refugee status.

Each of the elements will now be discussed in turn, in so far as they are relevant to victims of trafficking. At the same time it will be assessed whether a victim of human trafficking could meet the requirements for each element based solely on the circumstances surrounding the trafficking event.

2.1 Well-founded fear

This element consists of both a subjective and objective requirement.²⁴² A person applying for refugee status needs to show a subjective fear of persecution that is also objectively grounded in fact.²⁴³ The subjective requirement is acknowledged because ‘fear’ is essentially a personal reaction or state of mind, experienced differently by

²⁴⁰ UNHCR Handbook (n 110) at para 28.

²⁴¹ *Ibid.*

²⁴² UNHCR Handbook (n 110) at paras 37–50; Clayton (n 235) at 428.

²⁴³ *Fang v Refugee Appeal Board and Others* [2006] JOL 18635 (T) at 8.

different individuals.²⁴⁴ However, the subjective nature of the ‘fear’ requirement is qualified by a necessity that the fear be objectively ‘well-founded’.²⁴⁵

Thus, while a determination of refugee status will be focussed on subjective statements by the asylum seeker concerned, and *not* on facts about existing conditions in the country of origin, these facts must also be taken into account by the administrator responsible for the determination.²⁴⁶ As will be discussed below, both the subjective and objective aspects of the ‘well-founded fear’ element could be fulfilled by a victim of human trafficking in South Africa.

2.1.1 *Subjective fear*

In the context of refugee status, the use of the ‘*fear of persecution*’ requirement means that persons need not have actually suffered persecution in order to qualify – ‘those who wish to avoid a situation entailing the risk of persecution’ can also qualify.²⁴⁷

When determining whether a subjective element of fear exists, the personality, emotions and opinions of the applicant will have to be assessed, particularly because the psychological effects of persecution can vary between individuals.²⁴⁸ It is an assessment of whether *that person* ‘believes or anticipates that he/she will be subject to that persecution’.²⁴⁹ The Office of the United Nations High Commissioner for Refugees has stated that ‘[f]ear must be reasonable’.²⁵⁰ However, ‘exaggerated fear’, or fear that is irrational, can meet the requirements for refugee status if ‘such a state of mind can be regarded as justified’ in light of the surrounding circumstances.²⁵¹

²⁴⁴ UNHCR Handbook (n 110) at para 37.

²⁴⁵ Ibid at para 38. Although it is not explicitly stated as such in the ‘refugee’ definition, this is essentially an assessment of whether the claimant’s fear is reasonable in light of the facts surrounding his or her case.

²⁴⁶ Ibid at paras 37–8. It is noted at para 39 of the UNHCR Handbook (n 110) that ‘all the circumstances need to be taken into account for a proper understanding of the applicant’s case’.

²⁴⁷ UNHCR Handbook (n 110) at para 45; Clayton (n 235) at 429. Here, the use of ‘persecution’ refers to the narrow meaning of that concept in terms of international refugee law – see below at 2.2.

²⁴⁸ UNHCR Handbook (n 110) at paras 40 and 52; Clayton (n 235) at 429.

²⁴⁹ Note on Burden and Standard of Proof (n 234) at para 14.

²⁵⁰ UNHCR Handbook (n 110) at para 41.

²⁵¹ Ibid.

Thus, in the case of a person who has been trafficked, it will need to be assessed in each individual case whether that person was indeed fearful of persecution and whether his or her expressions of fear can be explained with reference to his or her personality and particular trafficking experience. In this regard, the credibility of the trafficking victim will be considered, along with all relevant circumstances, to assess whether there was a genuine motivation of fear.²⁵²

Although it may not be true for all victims of human trafficking, it is certainly possible, and likely, that a trafficked person would meet the requirement of subjective fear. Apart from fear that is experienced directly during the trafficking process, trafficked persons could also fear impending exploitation in the country of destination. Victims could also have a genuine fear of being trafficked again in the future.

2.1.2 Objectively well-founded

The objective assessment consists of an evaluation of the trafficked person's testimony and background, in the context of the situation existing in the country of origin, both at the time that the person left and at the time of the assessment.²⁵³

In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.²⁵⁴

Data about the incidence and nature of human trafficking that occurs from the trafficking victim's country of origin, if available and reliable, may also provide valuable objective information against which to evaluate the subjective fear of the trafficked person. An analysis of the country of origin's inability to protect the claimant from persecution could also indicate that the claimant's fear is well-founded.²⁵⁵ Thus, based on an assessment of the country of origin, it could well be demonstrated that because it was possible for the person to be trafficked in the first

²⁵² UNHCR Handbook (n 110) at para 41.

²⁵³ Ibid at para 42.

²⁵⁴ Ibid.

²⁵⁵ *Canada (Attorney General) v Ward* [1993] 2 S.C.R. 689 at 39. Hereafter referred to as 'Ward'.

place, and perhaps he or she was not the first victim of the offence, conditions in the country of origin were ‘intolerable’ at the time of departure. It could likewise be shown that, due to the prevalence of trafficking or the lack of protection and support for victims, it is ‘intolerable’ at the time of status determination for a victim of trafficking to return to the country from which he or she was trafficked.

The subjective fear of the trafficked person could also be deemed well-founded because of what has happened to others who have been in a similar position to him or her.²⁵⁶ In other words, justification for the fear may be perceived from the experiences of others also – not just from the experience of the trafficking victim him- or herself.²⁵⁷ Again, each trafficked person’s case will have to be assessed based on its own merits. Nevertheless, there are certainly situations in which the fear of trafficked persons would be objectively justifiable where there is reliable knowledge of these fears being realised in the case of other trafficked persons. For example, a trafficking victim’s fear of being exploited by his or her traffickers could be objectively justified by evidence that other trafficking victims, in similar positions to the victim under assessment, were exploited during or after their trafficking experiences.

2.1.3 The standard of proof for establishing that a fear is objectively well-founded

Although the standard of proof for refugee claims generally is based on the likelihood of the facts alleged, a specific standard applies to establishing the well-foundedness of a claim. There have been a series of international cases debating the standard of proof that should apply regarding a well-founded fear.²⁵⁸ However, it now appears to be

²⁵⁶ In *Chaudri v Canada (Minister of Employment and Immigration)* [1986] 69 N.R. 114, the Canadian Federal Court accepted an applicant’s testimony about the persecution suffered by persons who were in a similar position to him – at paras 7 and 12 of the judgment.

²⁵⁷ UNHCR Handbook (n 110) at para 43.

²⁵⁸ See, for example: *INS v Stevic* 467 U.S. 407 (1984) (‘reasonable possibility’ test); *INS v Cardoza-Fonseca* 480 U.S. 421 (1987) (‘reasonable possibility’ test); *Fernandez v Government of Singapore* 1971 WL 37421 (HL); [1971] 2 All ER 691 (‘reasonable chance’ or ‘serious possibility’ test); *R v Secretary of State for the Home Department ex parte Sivakuraman* (1988) 1 All ER 193 (HL) (‘reasonable degree of likelihood’ test); *Chan Yee Kin v The Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 (‘real chance’ test); *Joseph Adjei v Minister of Employment and Immigration* 1976 R.S.C. 52 (‘reasonable chance’ test); and *Salibian v Canada (Minister of Employment and Immigration)* A-479-89 (24 May 1990) (‘reasonable possibility’ test). See descriptions of these cases in the Annex to Note on Burden and Standard of Proof (n 234).

established by international jurisprudence that a fear of persecution will be deemed ‘well-founded’ if persecution is proven to be ‘reasonably possible’.²⁵⁹ This is also the standard that has been adopted in South Africa.²⁶⁰ A victim of human trafficking would therefore only be required to show that there is a reasonable possibility that he or she will be persecuted in order to establish that his or her fear is well-founded. This will be discussed further below.

2.2 Persecution

In order to qualify for refugee status under s 3(a), ‘a well-founded fear of persecution’ (emphasis added) must have been the motive for departing from the country of origin or the reason for not wanting to return to the country of origin.²⁶¹ Fleeing solely for fear of famine, economic hardship or natural disaster, for example, does not qualify one for refugee status.²⁶²

2.2.1 What is ‘persecution’?

Although the precise meaning of ‘persecution’ is not agreed upon,²⁶³ it is accepted that any threat to a person’s life or freedom, where that threat is based on one of the listed grounds of persecution, would constitute persecution.²⁶⁴ Related to this, it is widely accepted that where the human rights of an individual are to be seriously violated, also based on one of the listed grounds, such violation would amount to ‘persecution’.²⁶⁵ In this respect, both commissions and omissions should be able to constitute ‘persecution’

²⁵⁹ Note on Burden and Standard of Proof (n 234) at 17; Clayton (n 235) at 430–2.

²⁶⁰ *Fang v Refugee Appeal Board and Others* [2006] JOL 18635 (T), at 8.

²⁶¹ UNHCR Handbook (n 110) at para 39.

²⁶² UNHCR Handbook (n 110) at paras 39 and 62–4; James Hathaway *The law of refugee status* (Ontario: Butterworths, 1991), hereafter referred to as ‘Hathaway’, at 117–19. See also Shacknove (n 216) at 278–9, who argues for a more inclusive notion of refugees that deems ‘persecution’ as ‘a sufficient, but not a necessary’ basis for refugee status. Shacknove argues further at 279 that ‘other threats to physical security’ also qualify as valid bases for being a refugee.

²⁶³ Hathaway (n 262) at 102; Goodwin-Gill (n 59) at 90–2; Clayton (n 235) at 435–6. Hathaway (n 262) defines ‘persecution’ at 104–5 as ‘the sustained or systemic violation of basic human rights demonstrative of a failure of state protection’ [footnotes omitted].

²⁶⁴ UNHCR Handbook (n 110) at para 51; Hathaway (n 262) at 106–8; Goodwin-Gill (n 59) at 92; Gallagher (n 2) at 109.

²⁶⁵ UNHCR Handbook (n 110) at para 51. See also Hathaway (n 262) at 106–8.

since human rights could be violated by action or inaction.²⁶⁶ Other than these two clear examples of persecution, an individual assessment of the existence or threat of ‘persecution’ will have to be made based on the circumstances of each case.²⁶⁷

2.2.1.1 Human rights violations as ‘persecution’

With regard to human rights violations that are serious enough to constitute persecution, Hathaway points to those fundamental rights ‘which all states are bound to respect as a minimum condition of legitimacy’.²⁶⁸ Referring to the rights contained in the UDHR, ICCPR and ICESCR, Hathaway categorises rights into four categories – only some of which will constitute persecution.²⁶⁹ The first category permits no derogation by states, even in emergencies, and includes *inter alia* the right to life, prohibition against torture, freedom from slavery and freedom of religion.²⁷⁰ South Africa also regards the right to dignity at s 10 of the Constitution as an entirely non-derogable right, even during states of emergency.²⁷¹ Any violation of the rights in this category constitutes ‘persecution’ for the purposes of refugee status because it is indicative of the state’s failure to ensure the protection of these non-derogable rights.²⁷² The second category consists of rights such as the right to equality, the right to privacy, fair trial rights, freedom of movement and freedom of expression.²⁷³ These are rights that are internationally recognised but that can be derogated from in the case of state emergencies, and a violation of these rights will therefore constitute persecution only where the derogation was not the result of a state emergency.²⁷⁴ The third category consists of socio-economic and cultural rights, but the violation of these can only

²⁶⁶ For example, the right to privacy could be violated where a person’s home is searched (commission), while the right to health care could be violated where the state fails to take reasonable steps to provide basic health care services (omission).

²⁶⁷ UNHCR Handbook (n 110) at para 52.

²⁶⁸ Hathaway (n 262) at 106. At 92–3, Goodwin-Gill (n 59) refers similarly to ‘obligations *erga omnes*’ and mentions most of those rights also included by Hathaway.

²⁶⁹ Hathaway (n 262) at 108–112. Hathaway’s categorisation is also discussed in Clayton (n 235) at 436–7.

²⁷⁰ Hathaway (n 262) at 108–9.

²⁷¹ See table at s 37 of the Constitution of South Africa, 1996.

²⁷² Hathaway (n 262) at 109.

²⁷³ *Ibid.*

²⁷⁴ *Ibid* at 109–110.

constitute persecution where rights in the first two categories are adversely affected, or where the third category rights are denied on a discriminatory basis.²⁷⁵ The final category comprises those rights which, while in the UDHR, are not in the Covenants.²⁷⁶ According to Hathaway, a violation of one of these rights alone can never amount to persecution as states are not obliged to ensure their protection in the first place.²⁷⁷

As has been discussed in Chapter 4, the offence of human trafficking poses potential threats to several human rights. These include rights to: life, dignity, security of the person, bodily integrity, privacy, protection from slavery, freedom of movement, family unity, fair labour conditions, and a safe environment. Of these, only the right to life and protection against slavery seem to fall within Hathaway's first category of rights. In the South African context, the right of trafficking victims to dignity would also fall within this category. Thus, where a trafficking victim's right to life dignity or protection from slavery is at risk of violation, such violation would amount to persecution. If trafficking is to be considered as 'modern-day slavery'²⁷⁸ then it is further arguable that the trafficking process in its entirety will always be persecutory on account of the country of origin's failure to ensure that victims are not trafficked and subjected to slavery or related forms of servitude. Even if one cannot make the assumption that all trafficking is persecution, several category two rights are affected by the trafficking incident. Thus, where the country of origin is not in a state of emergency and fails to protect the trafficking victim's rights to privacy, bodily integrity, security of the person, or freedom of movement, the violations of these rights would constitute persecution. Employment and family rights of trafficking victims fall into the third category of rights and can therefore only constitute persecution on their own where they are violated discriminatorily, or where there are sufficient resources to protect them. Finally, the right to a safe environment, although included within the South African Bill of Rights at s 24,²⁷⁹ is not included in the UDHR and would

²⁷⁵ Ibid at 110–111. Furthermore, where the failure to ensure these rights is based on lack of resources, it will not constitute persecution – Hathaway (n 262) at 112 and 116–24.

²⁷⁶ Ibid at 111.

²⁷⁷ Ibid.

²⁷⁸ See Chapter 2.

²⁷⁹ Constitution of South Africa, 1996.

therefore not fall into any one of Hathaway's four categories. The violation of this right during the trafficking process is therefore unlikely to constitute persecution.

2.2.1.2 *Exploitation as 'persecution'*

Another aspect of human trafficking may be considered as 'persecution' for the purposes of refugee status: exploitation. However, it is important to note that victims of human trafficking may or may not have been exploited during or after the trafficking process. As discussed in Chapter 4, the definition of 'trafficking' separates actual exploitation from trafficking conduct which is undertaken for the purpose of exploitation. Thus, in order to be a victim of trafficking, no exploitation need actually have taken place after the trafficking process. However, exploitation can occur as *part* of the trafficking process also. It is thus possible that someone who qualifies as a victim of trafficking has actually already been exploited – whether such exploitation occurred during or after the trafficking process. Where 'exploitation' is synonymous with 'persecution' this could mean that the trafficking victim has either already been persecuted during or after the trafficking process, or that it was intended that he or she be exploited and that persecution is thus a future possibility. In the either case, where a fear of such (past or future) persecution exists, the trafficking victim could qualify for refugee status.

Thus, is 'exploitation' in the context of human trafficking synonymous with 'persecution'? Despite ambiguities in the definition of 'exploitation' within the Palermo Protocol and South African Bill, if one considers the harms that are included within the scope of 'exploitation',²⁸⁰ the potential for a number of human rights violations is evident. Exploitation could mean the violation of rights to freedom of security and bodily integrity, freedom from slavery, and the rights to life, privacy, fair labour conditions and a safe environment. At the very least, exploitation would violate the victim's dignity – whether such dignity is protected as a fundamental human right (as is the case in South Africa)²⁸¹ or whether dignity is merely the value that underlies

²⁸⁰ See Chapter 3.

²⁸¹ See s 10 of the Constitution of South Africa, 1996.

the other international human rights. If one follows Hathaway's reasoning above, then 'exploitation', as described in the trafficking instruments, would in the correct circumstances certainly constitute 'persecution' in terms of all violated rights, except those relating to the environment. Thus, 'exploitation' is not synonymous with 'persecution' in terms of the trafficking legislation, but it usually amounts to 'persecution' in individual cases because of the human rights violations that it involves. In those cases, fear of exploitation could therefore constitute fear of persecution and the definitional element for refugee status could be met.

2.2.1.3 Sufficiency of state protection

It was held by the House of Lords in *Horvath* that where the state is not the persecutor, lack of state protection must be shown at both the 'unable or unwilling' stage of the status determination and also when considering whether there was a well-founded fear of *persecution*.²⁸² Thus, where there is sufficient state protection, in other words, where the state can and will offer protection, it could be held that there is well-founded fear of violence or harm, rather than of persecution.²⁸³ It was furthermore held that protection could be deemed 'sufficient' even where the state could not guarantee that all dangers had been eradicated – a practical standard had to be applied based on the reasonableness of the state's fulfilment of the duty to protect its nationals.²⁸⁴ The sufficiency of state protection in relation to trafficking victims will therefore have to be assessed in each case, and the presence of a fear of persecution may be negated as a result. State protection could be deemed sufficient where reasonable anti-trafficking laws and policies have been put in place, for example.

²⁸² *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489; [2000] 3 WLR 379, hereafter '*Horvath*'. For a comprehensive analysis of the decision in *Horvath*, see H el ene Lambert 'The conceptualisation of "persecution" by the House of Lords: *Horvath v. Secretary of State for the Home Department*' (2001) 13 *IJRL* 16.

²⁸³ See *Horvath* (n 282). This supports Hathaway's (n 262) definition at 104–5 of 'persecution', which maintains that persecution consists of 'the ... violation of basic human rights *demonstrative of a failure of state protection*' [emphasis added].

²⁸⁴ See *Horvath* (n 282).

2.2.2 *A subjective assessment*

As in the context of ‘fear’, ‘persecution’ includes a subjective component. This is because what one person views as ‘persecution’ might not constitute ‘persecution’ in the view of another.²⁸⁵ Persons could qualify for refugee status because they subjectively believe that they might be persecuted, even where an objective assessment of their situation does not perceive any risk of persecution. It is therefore necessary to take into account the personal nature of the applicant for refugee status when assessing whether any actual or threatened harm committed against him or her amounts to ‘persecution’.²⁸⁶ However, unlike the element of ‘fear’, the subjective nature of persecution is not qualified by an objective assessment of facts or an objective notion of what would constitute ‘persecution’. Thus, if the acts or threats would have been interpreted as ‘persecution’ by the particular asylum seeker concerned, even where they do not meet the usual criteria for ‘persecution’, those acts or threats could amount to ‘persecution’ for the purpose of the refugee status. Obviously, a credibility assessment of the claimant becomes very important in a scenario such as this – in terms of each claimant it will have to be ascertained whether there is a genuine perception of past or future ‘persecution’.

In the case of trafficking victims, this would mean that the outcome of individual cases may depend on the perceptions and personality of the victim concerned. In other words, where a victim genuinely considers what has happened to him or her, or what is being threatened against him or her, to be ‘persecution’, then the definitional requirements for persecution could be met, even where no human rights violations are present or imminent. This could be problematic in the context of trafficking victims because victims of crime react differently to their victimisation and use different methods to cope with it.²⁸⁷ Thus, victims may specifically reject the notion of ‘persecution’ in order to make light of the ordeal that they have endured, in the same way that victims may want to call themselves ‘survivors’ instead of ‘victims’

²⁸⁵ UNHCR Handbook (n 110) at para 52.

²⁸⁶ *Ibid.*

²⁸⁷ Fattah (n 109) at 50–1.

to avert the weakness and vulnerability that is associated with victimisation.²⁸⁸ In a case where the victim does not want to subjectively accept the extent or magnitude of his or her suffering, the RSDO may deem the persecution requirement unfulfilled where what is feared by the victim actually does amount to ‘persecution’. However, it is submitted that in those cases the RSDO’s determination would have to be based on the severity of the human rights violations that have occurred or that are likely to occur if refugee status is not granted.²⁸⁹

The subjective nature of the requirement presents a further difficulty in the context of trafficking victims: they are put at risk of secondary victimisation by the need for credibility assessments. The term ‘secondary victimisation’ refers to ‘insensitive or other disrespectful or harsh treatment by criminal justice officials [that serves] as a source of additional distress for victims’.²⁹⁰ As victims of crime, trafficking victims are therefore ordinarily at risk of secondary victimisation by police officials, prosecutors or judges. Furthermore, the administrative procedure for refugee status determination could be daunting for any applicant, but the experience will be worsened by credibility assessments, especially where these are conducted harshly or insensitively by administrators. For trafficking victims, this could amount to further victimisation, which they experience in addition to the secondary victimisation associated with the criminal justice system.

2.2.3 Persecution, discrimination and punishment

Persecution may consist of a single act or threat (where serious enough)²⁹¹ or the sustained repetition of the same act or threat, or a number of different acts or threats

²⁸⁸ Gould (n 88) notes at 21–2 that victims of trafficking are often reluctant to identify themselves as victims.

²⁸⁹ As discussed previously, a person who has been trafficked would most likely meet the threshold for ‘persecution’ because of all the human rights violations associated with the trafficking process.

²⁹⁰ Bruce (n 31) at 102.

²⁹¹ Despite Hathaway’s (n 262) assertion at 102 that ‘persecution’ must be ‘sustained or systemic... rather than just an isolated incident of harm’, Goodwin-Gill (n 59) does not include these concepts within his description of ‘persecution’ at 131–2. It is the view of this thesis that a single event can amount to persecution, because one devastating event could be sufficiently harmful so as to amount to persecution in the mind of the person that had to endure it. This is also the conclusion reached by Clayton (n 235) at

considered collectively. Thus, where an individual act that does not on its own amount to persecution is committed against the claimant, *together with* another act that is harmful but does not amount to persecution, or *in the presence of* another adverse circumstance, it could constitute ‘persecution’ if the acts and circumstances are considered jointly.²⁹² Here, one could consider the example of a person who is verbally affronted by a government official or a member of the public for wearing a religious garment or icon. While this act may amount to religious *discrimination*, it cannot on its own constitute ‘persecution’.²⁹³ However, if that same person experiences a similar discriminatory affront on various other occasions,²⁹⁴ or the single affront is made within a tense climate of religious intolerance, the seemingly immaterial act could very well be perceived as ‘persecution’ by the person concerned. This perception is especially likely where the continued discrimination or surrounding factors ‘produce, in the mind of the person concerned, a feeling of apprehension and insecurity’.²⁹⁵ In that case, the applicant’s claim would be based on ‘cumulative grounds’ of persecution.²⁹⁶

Generally speaking, the acts and means and purposes involved in human trafficking are not discriminatory and can therefore not amount to persecution on that basis. However, one could argue that the trafficking of *women* necessarily involves acts of gender discrimination as human trafficking is just another manifestation of gender-based violence and abuse. A variety of acts, like female genital mutilation, sexual violence and forced prostitution, committed during the trafficking process are gender-specific so that the trafficking process itself, as well as the exploitation associated with it, can constitute persecution in the form of gender discrimination.²⁹⁷ The discriminatory nature of human trafficking is accentuated by the harsh reality that

438–9, who states at 439 that a human rights approach to persecution supports the notion that ‘a single instance of sufficiently severe ill-treatment may amount to persecution’.

²⁹² UNHCR Handbook (n 110) at paras 53 and 201; Clayton (n 235) at 444–7.

²⁹³ Discrimination can only amount to persecution where ‘measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned’, where for example, there are serious limitations on the exercise of his or her rights – UNHCR Handbook (n 110) at para 54.

²⁹⁴ UNHCR Handbook (n 110) at para 55.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid* at paras 53 and 55. An assessment of whether ‘cumulative grounds’ exist will need to be based on the circumstances of each case and the ‘particular geographical, historical and ethnological context’ will therefore need to be considered – UNHCR Handbook (n 110) at para 53.

²⁹⁷ Gallagher (n 2) at 107–8.

most victims of human trafficking are women, rather than men.²⁹⁸ If one accepts this approach, then most, if not all, female victims of human trafficking would meet the ‘persecution’ requirement because the trafficking endured by them constitutes a process of sustained discrimination or various discriminatory events, which, when considered together, amount to persecution.

A claimant may also fear persecution in the form of *punishment* for acts allegedly committed by him or her in the country of origin. This is particularly relevant for victims of human trafficking because, despite the Bill’s stipulation that trafficking victims are not to be treated as offenders or criminal participants,²⁹⁹ victims could be prosecuted and punished for illegal acts committed in the country of origin or elsewhere, such as the unlawful departure from that country,³⁰⁰ that they were involved in during the trafficking process. This is especially pertinent where it is unclear that they are actually trafficking victims, or where the country in which they face prosecution is not a member to the Palermo Protocol.

However, in the context of refugee law, ‘punishment’ (or ‘prosecution’) and ‘persecution’ are ordinarily distinguished so that fugitives from the law do not qualify for refugee status.³⁰¹ Exceptions are however made where the punishment likely to be endured by the claimant is excessively harsh, so that the severity of the punishment renders it persecutory.³⁰² Punishment may also amount to persecution where the punishment concerned is discriminatory on one of the listed grounds – for example, where prosecution will be commenced against a person particularly because he or she has a so-called ‘unlawful’ political opinion or religious view.³⁰³ In order to prove persecution in these cases, the relevant prevailing legal rules and their implementation by the government in the country of origin concerned will have to be considered as evidence.³⁰⁴ Obviously, where the person has a fear of prosecution and punishment,

²⁹⁸ Snyman (n 2) at 284.

²⁹⁹ See clause 16 of the Bill, titled ‘Criminal prosecution against victim of trafficking prohibited’.

³⁰⁰ UNHCR Handbook (n 110) at para 61.

³⁰¹ Ibid at para 56.

³⁰² Ibid at para 57; Clayton (n 235) at 443–4.

³⁰³ UNHCR Handbook (n 110) at para 57.

³⁰⁴ Ibid at para 59. The laws of the country of origin can be considered by comparing it to the domestic laws of the country in which asylum is being sought, and also by comparing it to international human rights standards and norms – UNHCR Handbook (n 110) at para 60.

but *also* has a well-founded fear of persecution, that person will qualify for refugee status – provided that the seriousness of the offence for which he or she faces prosecution does not exclude his or her claim for refugee status.³⁰⁵

In the case of trafficking victims, the prosecution that they could face in a country of origin or transit may amount to persecution for the purposes of qualifying for refugee status in South Africa. However, there is no way of determining whether all trafficking victims in general could meet the ‘persecution’ requirement on this basis as the penal laws to be applied to the claimant will have to be assessed in each individual case.

2.2.4 The forward-looking nature of the test

An important aspect of the ‘persecution’ element is the requirement that the relevant administrator’s assessment be forward-looking – an evaluation of the *risk* of persecution based on the claimant’s personal circumstances and also the prevailing circumstances of the country of origin.³⁰⁶ In other words, in order to qualify for refugee status, the claimant must, at the time of the application, have a well-founded fear of persecution, in respect of future persecution that may take place should he or she return to the country of origin. This principle ensures that where circumstances have changed for the better in the country of origin, the claimant will no longer seek the protection of a foreign country. The rationale is that where the authorities of the country of origin are the agents of persecution, a sufficient change in circumstances would render continued protection unnecessary, or, where another entity is the agent of the persecution, that the country of origin will now provide the protection required by the refugee claimant. As mentioned previously, in relation to a fear of present or future persecution, the RSDO will have to assess the *reasonable possibility*, at the time that

³⁰⁵ Ibid at para 58. Note that a claimant can be excluded from qualifying for refugee status, which he or she would otherwise have qualified for, in terms of arts 1D, 1E and 1F of the UN Refugee Convention and s 4 of South Africa’s Refugees Act. The exclusion of victims of human trafficking from qualifying for refugee status will be discussed in Chapter 6.

³⁰⁶ Note on Burden and Standard of Proof (n 234) at para 18–9; Clayton (235) at 430. For a comprehensive discussion of the prospective nature of the assessment, see Hathaway (n 262) at 66–75.

the assessment is made, of such persecution actually taking place, in order to determine whether the claimant's fear is deserving of protection in the form of refugee status.

In the context of victims of trafficking, this means that any past exploitation or harm that is experienced during or after trafficking, but which amounts to persecution, will not be considered as a basis for refugee status. The trafficking victim will have to show that he or she still fears present or future persecution *at the time of status determination*. This requirement could be met in a number of situations: where victims fear that upon return they will be re-victimised or re-trafficked;³⁰⁷ where victims fear retribution from their traffickers, either against themselves or family members, for escaping capture, aiding in the prosecution of the traffickers or failing to pay off bondage debts; where victims fear being ostracised by family members or communities upon return; or where victims fear punishment from the authorities in the country of origin.³⁰⁸

Although not conclusive, past persecution will be a strong indication of the possibility of future persecution.³⁰⁹ However, where a reasonable possibility of future persecution is found to be absent, the existence of past persecution could also be sufficient for refugee status, in certain circumstances. Thus, it has been held in the *Matter of Chen* decision that where past persecution is severe enough to make the claimant genuinely fear return to the country of origin, then proof of past persecution, not the likelihood of future persecution, is sufficient for refugee status.³¹⁰ Thus, refugee status was granted in that case for humanitarian reasons despite the lack of possible present or future persecution.³¹¹ It was similarly held in the South African case of *Mayongo v Refugee Appeal Board and Others*³¹² that a man who was

³⁰⁷ It was stated in *Streanga v Canada (Minister of Citizenship and Immigration)* 2008 FC 231; 70 Imm. L.R. (3d) 236 that '[t]he evidence is that persons of this kind endeavour to recapture their former victims and seek to traffic them again or to punish them' (para 5). In that case a woman feared to return to Romania because the men who had trafficked her to work as an exotic dancer and prostitute in Hungary had been released from prison and were thus free to recapture her. Van der Hoven and Maree (n 14) also indicate at 67 that persons who have already been victims of crime are generally more susceptible to future victimisation.

³⁰⁸ Gallagher (n 2) at 108–9; Dauvergne (n 1) at 87.

³⁰⁹ Note on Burden and Standard of Proof (n 234) at para 19.

³¹⁰ *Matter of Chen* Interim Decision 3104 (1989) US.

³¹¹ *Ibid* at 4–6.

³¹² [2007] JOL 19645 (T). Hereafter referred to as '*Mayongo*'.

still suffering the effects of past persecution could qualify for refugee status, because his medical condition ‘constituted a compelling reason to refuse to avail himself of the [country of origin’s] protection’.³¹³ This was because he suffered from post traumatic stress syndrome and severe depression – psychological conditions which would only worsen if he was to return to the source of his persecution.³¹⁴

As far as trafficking victims are concerned, this would mean that if it could be shown that the exploitation or harm suffered in the past was sufficiently serious to warrant the claimant’s desire to remain within South Africa’s protective jurisdiction, then proof of the past persecution will be enough to qualify the claimant for refugee status. It is certainly possible that the circumstances of some trafficking situations will have been so severe that trafficking victims would fear returning to the country of origin despite persecution being only a fact of the past and not a possibility of the present or future. It is also possible that the effects of the trafficking victimisation, such as post traumatic stress, depression or paranoia³¹⁵ are of the nature that the victim’s condition would deteriorate upon return to the country of origin. It is therefore submitted that some trafficking victims would indeed meet the requirements for past persecution (and its continuing effects) where a fear of present or future persecution cannot be proven as an element of refugee status.

2.2.5 The agents of persecution

Although persecution is ordinarily associated with the government or leadership of the country of origin, other persons or entities can also be the agents of persecutory acts or threats.³¹⁶ In other words, despite laws and government policy prohibiting such conduct, members of the public or other group entities may undertake to persecute an individual based on one of the grounds listed in s 3(a) of the definition. In order to constitute ‘persecution’ in these cases where the government itself is not the agent of

³¹³ *Mayongo* (n 312) at para [9].

³¹⁴ *Ibid* at para [3].

³¹⁵ Discussed in Chapter 4.

³¹⁶ UNHCR Handbook (n 110) at 65; Goodwin-Gill (n 59) at 98; Clayton (n 235) at 447–51. See also the decision in *Ward* (n 255) at 37 and 39–45.

persecution, the acts or threats must either be ‘knowingly tolerated by the authorities, or [the authorities must] refuse, or prove unable, to offer effective protection’.³¹⁷

In the context of human trafficking, the agents of persecution are primarily the perpetrators of the trafficking offence. The offence of human trafficking can have one single perpetrator, but usually there are a number of persons involved in the trafficking process.³¹⁸ These persons are most frequently private persons or groupings, sometimes even known or related to the victim, and would qualify as appropriate agents of persecution in order to meet the refugee ‘definition’. However, there are also cases where state officials or administrators assist in the trafficking process by corruptly accepting bribes to ignore trafficking conduct or falsifying documents to ease the transit of trafficking victims, for example. In these cases, it is arguable that because the person was acting in his or her official capacity while facilitating the trafficking, he or she is also an agent of the trafficking persecution despite the fact that such conduct is *ultra vires* the official’s position.³¹⁹ Where an employee of the state is an agent of persecution while acting in his or her official capacity, the state itself may then also be responsible as an agent of persecution – no matter how removed the official’s act was from state control.³²⁰ Obviously, corrupt officials can be found in countries of origin, transit and/or destination. Thus, a scenario may arise where the country within which asylum is being sought is actually partially to blame as agents of the persecution.

The agents of persecution will not only be those persons involved in the trafficking process. As discussed earlier, actual exploitation endured by or threatened against the victim of trafficking could also constitute persecution. Thus, the persons responsible for, or those who would be responsible for, the victim’s exploitation will also be agents of persecution. These persons may be different to the persons who were involved in the process of trafficking victim. For example, exploiters in the country of

³¹⁷ UNHCR Handbook (n 110) at para 65.

³¹⁸ As discussed in Chapter 4.

³¹⁹ See Hathaway (n 262) at 126–7. The officials and administrators would be deemed perpetrators of trafficking-related offences in terms of clauses 4, 6 or 8 of the Bill.

³²⁰ See International Law Commission *Draft articles on Responsibility of States for internationally wrongful acts* (November 2001), available at: <http://www.ilsa.org/jessup/jessup06/basicmats2/DASR.pdf> [accessed 7 February 2011], at Chapter II (Attribution of conduct to a State).

destination may pay other persons to traffic victims to them from the country of origin so that they can be exploited by them in the country of destination.

Finally, where the relevant persecution is in the form of discrimination, the agent of persecution will be the group or person who has performed the discriminatory acts. Where the trafficking victim has a fear of persecution upon return to his or her country of origin in the form of prosecution and punishment, the agents of persecution will be the authorities or state bodies responsible for criminal justice in the country of origin.

2.3 Grounds

In order to meet the definitional requirements for refugee status, a person has to have a well-founded fear of persecution that is based on one or more, sometimes overlapping, grounds: race, tribe, religion, nationality, political opinion, or membership of a particular social group.³²¹ In other words, the persecution that is feared must be threatened or committed *because* the person being persecuted is of a particular race, tribe, religion, or nationality, holds a particular political opinion, or is a member of a particular social group.³²² This element therefore includes a requirement that there be a nexus, or causative link, between the feared persecution and one of the listed grounds.

Several possible reasons exist for the targeting of a particular social group by persecutors. For example, where the agent of persecution is the government of the country of origin, the social group may be targeted because they obstruct governmental power or have dissident political views.³²³ Or, where the agent of persecution is some other entity, the persecution may be directed at a particular group because of intolerance, revenge or financial profit. Unless it is warranted sufficient by the severity of the circumstances, merely belonging to the social group may not be enough to

³²¹ UNHCR Handbook (n 110) at para 66–7. Where a claimant him- or herself does not know the reason for his or her feared persecution, it is the duty of the relevant status determination administrator to ascertain the possible basis for persecution and to decide whether there is a valid claim for refugee status – UNHCR Handbook (n 110) at para 66–7.

³²² Clayton (n 235) at 458–60.

³²³ UNHCR Handbook (n 110) at para 77–8. In this example, the ground ‘membership of a particular social group’ would obviously overlap with the ‘political opinion’ ground.

qualify for refugee status – the claimant may need to show that the persecutors were aware or would become aware of his or her membership in the group.³²⁴

It is difficult to determine a basis upon which victims of trafficking could claim a fear of persecution. In individual cases, it may well be that the persecution feared by victims is to be directed at them because they are of a particular race, tribe, religion, nationality, or have a certain political opinion.³²⁵ However, these reasons for persecution could never be applied to all trafficking victims equally. The issue then is whether trafficking victims *generally* can claim that they are persecuted or face persecution because they belong to a particular social group? If so, what ‘social group’ could they be said to belong to?³²⁶

In the context of refugee law, a ‘social group’ has been described as consisting of ‘persons of similar background, habits or social status’.³²⁷ However this type of broad conception of a ‘social group’ poses the danger that several groups will be brought within the scope of refugee status that were never intended, by the drafters of the UN Refugee Convention, to receive protection.³²⁸ Similarly broad is the interpretation that ‘membership of a particular social group’ is a ‘safety net’ ground – encompassing all persecution that is based on something other than race, religion, nationality or political opinion.³²⁹ However, other interpretations have asserted that determinations about the content of ‘membership of a particular social group’ should be

³²⁴ UNHCR Handbook (n 110) at para 79.

³²⁵ UNHCR Guidelines (n 79) at paras 33–6. For example, evidence has shown that many children trafficked out of Romania are chosen as victims because they belong to the Roma race of people – *Dragomir v Canada (Minister of Citizenship and Immigration)* 2008 FC 1241; 76 Imm. L.R. (3d) 302. For a general discussion of all these grounds, see the UNHCR Handbook (n 110) at paras 68–76 and paras 80–86; Hathaway (n 262) at 141–57; Goodwin-Gill (n 59) at 70–73 and 86–90; Clayton (n 235) at 460–2 and 474–80.

³²⁶ Many claims for asylum by victims of trafficking seem to fail because they fail to show that they belonged to a *particular social group* that was a target of persecution – see Gallagher (n 2) at 111–15.

³²⁷ UNHCR Handbook (n 110) at para 77; Gallagher (n 2) at 109. Thus, for example, a specific family of persons was held to constitute a ‘particular social group’ for the purposes of refugee status in the case of *Alberto R Gonzales, Attorney General v Michelle Thomas et al* 547 U.S. (2006). See also Hathaway (n 262) at 164–6 and Clayton (n 235) at 471–3 for a discussion of the social group ‘family’ in the context of refugee claims.

³²⁸ Hathaway (n 262) at 158–60.

³²⁹ *Ward* (n 255) at 63–9. See also Hathaway (n 262) at 158–60, who argues against ‘membership of a particular social group’ being a residual ground for refugee status.

guided by the concept of discrimination.³³⁰ This is because the other listed grounds of persecution, like race, religion and nationality, are also recognised grounds of discrimination, which find their origin in fundamental human rights instruments like the UDHR and ICCPR.³³¹

A narrower interpretation of the concept ‘social group’, which does not link the ground to discrimination, was enumerated in the *Matter of Acosta*³³² decision.³³³ The meaning of ‘social group’ was interpreted, by the United States Board of Immigration Appeals, in relation to the other listed grounds as follows:

We find the well-established doctrine of *ejusdem generis*, meaning literally, ‘of the same kind,’ to be most helpful in construing the phrase ‘membership in a particular social group.’ That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words.... The other grounds of persecution ... listed in association with ‘membership in a particular social group’ are persecution on account of ‘race,’ ‘religion,’ ‘nationality,’ and ‘political opinion.’ Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.....

Applying the doctrine of *ejusdem generis*, we interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic

³³⁰ *Ward* (n 255) at 71. See also Goodwin-Gill (n 59) at 70. Thus, sexual orientation, a recognised ground of discrimination, represents the shared characteristic of the group ‘homosexual persons’, with the result that the group is recognised as a ‘social group’ in the context of refugee status.

³³¹ *Ward* (n 255) at 69–72.

³³² 19 I. & N. Dec. 211; Interim Decision 2986; 1985 WL 56042 (BIA), hereafter referred to as ‘*Matter of Acosta*’.

³³³ At 161, Hathaway (n 262) seems to agree with the interpretation in *Acosta* and states that the ‘social group’ test established there is ‘sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claim to international protection’ [footnotes omitted].

might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.³³⁴

Therefore, where persons can dissociate from a group or where a group defines itself by characteristics that can be changed, that group will not be deemed a ‘social group’.³³⁵

2.3.1 *Female victims of human trafficking*

It is accepted that gender is an immutable characteristic for the purpose of the ‘refugee’ definition,³³⁶ and gender is also an established ground for discrimination.³³⁷ Gender groups can therefore constitute particular ‘social groups’.³³⁸ Therefore, a fear of *gender-based* persecution can qualify a claimant for refugee status.³³⁹ In the context of victims of human trafficking, this means that a large number of victims can be included as a social group. As discussed previously, trafficking itself is a gendered crime that includes gender-specific violence and is directed predominantly at female victims. Women are easy targets for traffickers because of their vulnerability. Female victims of trafficking could therefore argue that they are being, or at risk of being, persecuted

³³⁴ *Matter of Acosta* (n 332) at 233.

³³⁵ Hathaway (n 262) at 161. A ‘social perception approach’ to the meaning of ‘social group’ similarly maintains that where persons share a common characteristic that sets them apart from society, as perceived by society, they can constitute a social group in refugee law – Gallagher (n 2) at 109–10.

³³⁶ Hathaway (n 262) at 162–3; Goodwin-Gill (n 59) at 81–4; Gallagher (n 2) at 105.

³³⁷ See, for example: UDHR at art 2; the ICCPR at arts 2 and 3; Constitution of South Africa, 1996 at s 9.

³³⁸ United Nations High Commissioner for Refugees *Guidelines on international protection: gender related persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees* HRC/GIP/02/01 (7 May 2002).

³³⁹ Gallagher (n 2) at 105. Gallagher notes at 106 that acts of gender-based persecution generally include:

... acts of sexual violence, family or domestic violence, coerced family planning, female genital mutilation, forced marriages, dowry murders, punishment for failure to obey social norms, honor killings, discrimination against homosexuals and forced prostitution.’

See also Jenna Shearer Demir ‘Trafficking of women for sexual exploitation: a gender-based well-founded fear?’ (UNHCR, Working Paper No 80, 2003), available at <http://www.jha.ac/articles/a115.pdf> [accessed 19 January 2011].

by traffickers because they are women.³⁴⁰ Thus, the social group relevant to a large proportion of trafficking victims is that of ‘women’.

2.3.2 Victims of human trafficking as a social group?

For those victims of human trafficking that do not fall into the social group ‘women’, it is possible that they could constitute a social group in and of themselves due to the fact that they are all persons who have been victims of the offence of human trafficking.³⁴¹ Thus, while being a victim of human trafficking is not an ‘innate’ characteristic, it is a ‘shared past experience’ between all victims.³⁴²

However, it is arguable that ‘victims of human trafficking’ cannot constitute a social group because persons react differently to victimisation and the effects of being a victim will vary between individuals.³⁴³ The broad definition of the trafficking offence also means that the victimisation experience could differ vastly from victim to victim – for one victim, the trafficking experience could include constant harm and abuse, while, for another, the experience could consist of simply being held captive. It is submitted here that although the particularities of the victimisation experience will differ, certain physical and psychological effects will be prevalent in most victims, as discussed in Chapter 4, although possibly to varying degrees. Furthermore, victims may choose not to embrace a victim identity³⁴⁴ – adopting instead a label like ‘survivor of human trafficking’ instead. It therefore seems possible that victims of the offence of trafficking have the ability to dissociate from the group. Over time, the effects of trafficking victimisation could also be treated by medication or therapy. Thus, the effects of the victimisation experience that binds trafficking victims together could be changed or diminished. Alternatively, it is arguable that once a person becomes a victim of such a devastating crime, the experiences and effects of victimisation will incorporate into the person’s identity and influence all future behaviour and decisions –

³⁴⁰ UNHCR Guidelines (n 79) at para 38. This has been successfully argued in the United Kingdom, Unites States and Canada – see Gallagher (n 2) at 111–15.

³⁴¹ UNHCR Guidelines (n 79) at para 39.

³⁴² This is an application of the principles enumerated in *Matter of Acosta* (n 332) at 233.

³⁴³ Fattah (n 109) at 50–1.

³⁴⁴ Gould (n 88) at 21–2.

whether that victim chooses to label him- or herself as such or not. The trafficking victim should then not be required to change the ‘victim’ aspect of his or her identity, even if it is possible and beneficial to do so.

Thus, if one bears in mind the typical victimisation effects of human trafficking and the impact of those effects on the victim’s identity, then it is possible for ‘victims of human trafficking’ to constitute a social group because of their shared experiences. It is therefore submitted that ‘victims of human trafficking’ can constitute a ‘social group’ for the purposes of the ‘refugee’ definition.

It must be borne in mind that ‘victims of human trafficking’ can only be the relevant social group in certain contexts. This is because it is illogical that victims can be persecuted on the basis that they are ‘victims of human trafficking’ where the persecution being referred to is the initial trafficking process itself.³⁴⁵ Thus, the social group cannot apply where persons have not yet been trafficked.³⁴⁶ The social group *would* be relevant where, for example, a victim fears re-victimisation by his or her traffickers upon return to the country of origin because they know that he or she has already been trafficked before, and is therefore a vulnerable and easy target. The social group would likewise apply where the claimant fears persecution in the form of prosecution upon return to the country of origin. In that case it is arguable that the authorities, knowing that a person has been a victim of trafficking, will specifically target the victim for prosecution because of the likelihood that he or she will have committed illegal acts during the trafficking process. These two examples would seem to indicate that membership of the social group ‘victims of human trafficking’ could only constitute a ground upon which refugee status is to be based in terms of future persecution, not in terms of persecution that has already happened in the past.

Still, where the relevant persecution is exploitation that has already taken place, it is possible to argue that such persecution was executed because of the victim’s membership of a social group. The reasoning for this is that, in terms of the trafficking definitions, exploitation is the end-goal of human trafficking. In other words, if

³⁴⁵ In other words, it does not make sense that persons would be trafficked *because* they were victims of trafficking, where they had never actually been trafficked before.

³⁴⁶ UNHCR Guidelines (n 79) at para 39.

persons are exploited at the *end* of the trafficking process, it is because they have reached that point by being trafficked. But for the trafficking, they would not have been exploited by the persecutors in the way that they were, and the fact that they have been trafficked makes them vulnerable to further persecution in the form of exploitation. Thus, they are exploited because they have been the victims of human trafficking. Where a victim is exploited *during* the trafficking process, the same argument cannot be made because the victim would not yet be a victim of ‘trafficking’ if the ‘trafficking’ process is incomplete. The victim would therefore not yet belong to the social group of ‘victims of human trafficking’.

2.4 Alienage

2.4.1 *Being outside the country of origin*

In order to apply for refugee status in a certain country, the claimant must, at the time of application, be within the country from which he or she seeks asylum. Furthermore, the refugee definition specifies that, in order to qualify for refugee status, a person must also be *outside* the country of his or her nationality or habitual residence (the country of origin).³⁴⁷ In other words, he or she must be foreign, or alien, to the country within which he or she claims refugee status. In order to meet this requirement, it will be necessary to establish what the nationality of the claimant is.³⁴⁸ In this regard, the possession of a national passport serves as *prima facie* evidence of nationality, although such evidence can be refuted.³⁴⁹ Both the international and South African definitions of a ‘refugee’ allow refugee status to persons who are citizens of a country

³⁴⁷ UNHCR Handbook (n 110) at para 88.

³⁴⁸ *Ibid* at para 89. Where a claim has dual or multiple nationalities, art 1A(2) provides that:

A. ...

...

(2) ...

In the case of a person who has more than one nationality, the term ‘the country of his nationality’ shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

For a discussion of this paragraph see UNHCR Handbook (n 110) at paras 106–7.

³⁴⁹ UNHCR Handbook (n 110) at para 93.

of origin, that is, those who have a nationality,³⁵⁰ and also to those who are citizens of no country and have no nationality (stateless persons). In the case of stateless persons, or where there is uncertainty about the nationality of a claimant, they must be outside their country of ‘habitual residence’ in order to qualify for refugee status.³⁵¹

Sometimes the situation arises where persons leave their homes or cannot return home due to a fear of persecution, but where they remain *within* their country of origin.³⁵² In many cases these persons would otherwise meet the ‘refugee’ definition but for the fact that they did not cross the border of their country of origin.³⁵³ However, alienage is a strict requirement for refugee status – with no exceptions.³⁵⁴ Any person who is still within the territorial jurisdiction of his or her country of origin cannot qualify for the protection of refugee status.³⁵⁵ Thus, any persons who fear persecution but are still within the territory of their country of origin are classified as ‘internally displaced persons’, (IDPs) instead of as ‘refugees’, due to the absence of the alienage requirement.³⁵⁶ Accordingly, South Africa would not be able to intervene with regards to any trafficking victims who have left their homes but are still within their country of origin – those victims would be deemed as IDPs and would therefore not enjoy the benefits of the protective status that is granted to refugees.

States are reluctant to intervene where IDPs are concerned because entering to provide aid and protection to nationals who are still within the territory of their country of nationality would be an affront on the state sovereignty of the country concerned³⁵⁷ – unless the country specifically invites or condones the foreign aid to IDPs. As a result,

³⁵⁰ The term ‘nationality’ is taken to mean ‘citizenship’, and most refugees remain citizens in their countries of origin despite having asylum in another state – see UNHCR Handbook (n 110) at para 87.

³⁵¹ UNHCR Handbook (n 110) at para 89. For a discussion of the particular application of the refugee definition to these persons, see UNHCR Handbook at paras 101–5.

³⁵² Amnesty International *Refugees: human rights have no borders* (London: Amnesty International Publications, 1997), hereafter referred to as ‘Amnesty International’, at 42.

³⁵³ Amnesty International (n 352) at 42.

³⁵⁴ UNHCR Handbook (n 110) at para 88.

³⁵⁵ *Ibid.*

³⁵⁶ Amnesty International (n 352) at 42. However, see Shacknove (n 216), at 282, who argues that persons can be ‘refugees’ where they have not crossed the frontiers of their country of origin, provided that they are ‘within reach of the international community’ for the purposes of assistance. For a general account of internally displaced persons, see Amnesty International (n 352) at 42–5. For more comprehensive information about internally displaced persons, see Inter-Agency Standing Committee *Handbook for the Protection of Internally Displaced Persons*, June 2010, available at <http://www.unhcr.org/refworld/docid/4790cbc02.html> [accessed 31 January 2011].

³⁵⁷ Amnesty International (n 352) at 42.

these people seldom receive the protection and assistance that they need.³⁵⁸ This makes IDPs vulnerable to further victimisation – particularly in IDP-designated camps or settlements, where human rights violations frequently take place.³⁵⁹

As observed previously in Chapter 3, the South African definition for ‘trafficking’ encompasses trafficking acts committed ‘*within* or across the borders of the Republic’.³⁶⁰ Where victims are trafficked within South Africa, their situation could be analogous to persons who are internally displaced within their country of nationality. Thus, although nationals of South Africa who are trafficked within the country’s borders could qualify as victims of human trafficking, they could not qualify as refugees, both in South Africa and elsewhere, and will instead be classified as IDPs. It must therefore be concluded that trafficking victims who have not crossed a border to get to South Africa before, during or after the trafficking process, are not eligible for refugee status – with no exceptions. The result of this is that only foreign victims of human trafficking would be able to apply for refugee status in South Africa.

From the above, it is clear that not all persons who meet the South African requirements for a victim of human trafficking will automatically also be able to meet the requirements for refugee status. Therefore, those trafficking victims who fear persecution but remain within their countries of origin and also those trafficking victims who are South African nationals will be ineligible for refugee status in South Africa.

2.4.2 *Linking persecution to the country of origin*

The alienage element furthermore requires that ‘an applicant’s well-founded fear of persecution must be in relation to the country of his nationality’.³⁶¹ For example, a foreign national who resides in South Africa and is trafficked within the borders of

³⁵⁸ Ibid. Despite much international disagreement about whether to protect IDPs and how such protection should appropriately be provided, there has been an increasing awareness of the plight of IDPs in recent years – although the international response is seemingly not yet sufficient – Amnesty International (n 352) at 42–3.

³⁵⁹ Amnesty International (n 352) at 42–3 and 45.

³⁶⁰ Emphasis added.

³⁶¹ UNHCR Handbook (n 110) at para 90.

South Africa, would not qualify for refugee status in South Africa because his fear of persecution is not related to his country of origin in any manner.³⁶² The rationale behind this requirement is that if the claimant is not fearful regarding the country of origin, then he or she should seek protection from that country of origin.³⁶³ This requirement could have harsh implications for individuals who fear persecution from forces that are external to their country of origin (during military invasion, for example), but where the country of origin is unwilling or unable to provide such protection. Fortunately, s 3(b) of the Act should provide for refugee protection in those types of situations.³⁶⁴ Even where s 3(b) does not apply, it is arguable that the lack of protection *by* or the occurrence of the persecutory threat *within* the country of origin is sufficient to establish a link between the feared persecution and the country of origin. This aspect of alienage is therefore not equivalent to a requirement that the claimant's country of origin be the agent of the persecution.

In the context of victims of human trafficking, it is arguable that the fear of persecution *will* in some way be related to the country of origin of the victim because in most cases the victim would have been trafficked *from* the country of origin. Furthermore, the victim may fear returning *to* the country of origin because of the potential of being harmed or re-trafficked there. The country of origin's inability to protect the victim from trafficking in the first place may also establish a link between the country of origin and the victim's persecution.

However, there may be cases where a person is trafficked from a place other than his or her country of origin.³⁶⁵ In those cases where there is no relation between the country of origin and the persecution, the trafficking victim would have to seek protection and assistance from his or her country of origin first as he or she would not be eligible for refugee status in a foreign country. Thereafter, if the country of origin fails to provide protection from further persecution to the victim, there may be a claim

³⁶² Although in reality it is unlikely that the foreign national would want to remain in South Africa anyway, since it was the location of his trafficking victimisation.

³⁶³ UNHCR Handbook (n 110) at para 90.

³⁶⁴ Thus, the claimant could argue that he or she was 'compelled to leave' because of the state's inability or unwillingness to protect him or her from 'external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order'.

³⁶⁵ Where, for example, a person is trafficked while vacationing or doing business in a foreign country.

for refugee status based on the victim's continued fear of persecution. South Africa would therefore only be able to grant refugee status to a trafficking victim who was trafficked *from* his or her country of origin. Where the victim was trafficked from elsewhere, South Africa could only grant refugee status after the victim has sought assistance from the country of origin and protection has been found to be lacking.

As discussed previously, persecution occurs throughout the trafficking process, and also sometimes after the trafficking process in the form of exploitation. The protracted nature of the trafficking offence sometimes makes it difficult to establish a link between this persecution and the victim's country of origin. This is because persecution may occur in one, some or all of the countries of origin, transit and destination. Therefore, fear of persecution in the country of destination, in other words, the country in which refugee status is being claimed, could also be a relevant factor, especially where persecution is in the form of exploitation at the end of the trafficking process. If persecution is linked to the country of destination, it is unlikely that the trafficking victim will want to claim refugee status from the country of destination at all, but where the country of origin is unable to provide the victim with assistance and protection, this may be the only available option (unless status is applied for in a transit country). Where all the elements are met, a link between the country of destination and the victim's fear of persecution should not hinder a claim for refugee status. However, the complexity of the situation could cause difficulties in the status determination process, so that RSDOs become reluctant to positively consider trafficking victims' applications for refugee status.

2.4.3 Refugees 'sur place' ('on site')

An important aspect to consider in relation to alienage is whether the claimant for refugee status fled his or her country of origin *because of* the fear of persecution. In the case of victims of human trafficking, this is unlikely to be the case because the flight of a trafficked person is usually involuntary or part of the trafficking process. In other words, trafficking victims do not *flee* their country of origin, unless they are trafficked within the borders of their country of origin and flee subsequently to seek asylum.

Sometimes, trafficking victims *themselves* depart from countries of origin to places where they are eventually trafficked and exploited, but for reasons not necessarily associated with persecution. Thus, a victim may be seeking new work or study opportunities, or may be misled into travelling to a foreign country by the false promises of clandestine traffickers.

Fortunately for victims of trafficking, the alienage element does *not* require that refugees depart the country of origin *because* of the fear of persecution; nor does it require that refugees depart using illegal methods.³⁶⁶ Instead, the forward-looking nature of the assessment requires that a refugee must be unwilling to *return* to the country because of a fear of persecution.³⁶⁷ This means that a person could depart the country of origin using valid travel methods and documents, for a reason that is completely unrelated to a fear of persecution, and still qualify for refugee status in the country of destination. Thus, refugee law recognises the existence of a refugee ‘*sur place*’, that is, ‘[a] person who was not a refugee when he left his country, but who becomes a refugee at a later date’.³⁶⁸ Persons usually become refugees at a later date either because circumstances have changed in countries of origin since departure, resulting in a fear of persecution,³⁶⁹ or because of actions undertaken by or committed against them while they are away.³⁷⁰

Thus, a person might become a refugee after leaving the country of origin where the trafficking process has commenced only subsequent to such departure. A victim of trafficking may also commit certain acts while in the country of destination

³⁶⁶ UNHCR Handbook (n 110) at para 94.

³⁶⁷ Clayton (n 235) at 433.

³⁶⁸ UNHCR Handbook (n 110) at para 94; Clayton (n 235) at 433–4.

³⁶⁹ See the case of *Chaudri v Canada (Minister of Employment and Immigration)* [1986] 69 N.R. 114, where Chaudri, a Pakistani man, migrated to Canada in order to further his studies (para 2). While he was in Canada, there was a violent military coup in Pakistan, which overthrew the ruling political party that he had been an active member of (paras 2–3). He had even received a summons to appear in martial court so that he could be prosecuted for his membership (paras 4–6). Circumstances had thus drastically changed in his country of origin, so that he presently feared persecution (para 10), despite a lack of fear at the time of departure. In these circumstances, the court held that he could qualify for refugee status (at para 12).

³⁷⁰ UNHCR Handbook (n 110) at paras 95–6. See, for example, the South African case of *Fang v Refugee Appeal Board and Others* [2006] JOL 18635 (T), particularly at 9–10, where a Chinese national fathered four children while in South Africa, in breach of China’s one-child policy.

that put him or her at risk of future persecution.³⁷¹ Similarly, conditions may become unfavourable to trafficking victims in the country of origin after departure – where a country would ordinarily be able to protect its nationals, factors may emerge that jeopardise the safe return of trafficking victims. Thus, where the political system collapses while the victim is in the country of destination or the incidence of human trafficking cases increases significantly so that the country of origin cannot provide adequate protection, the victim of trafficking may qualify as a *sur place* refugee.

2.5 Lack of protection

The refugee definition specifies that there must be a lack of protection by the claimant's country of origin. First, protection will be deemed lacking where the person is *unable* to 'avail himself' of that protection.³⁷² This will be the case where a claimant is physically unable to acquire state protection,³⁷³ where an effective government is absent,³⁷⁴ where the government refuses to give protection to claimant,³⁷⁵ or where the government does not have the resources to provide sufficient protection. Essentially, these are all circumstances that cannot be controlled or mitigated by the refugee.³⁷⁶

Second, protection could be lacking because the person is *unwilling* to 'avail himself' of state protection. It is important to note that in this context, it is not impossible to obtain protection from the country of origin – it is the claimant him- or herself who chooses not to make use of such protection.³⁷⁷ A person may be unwilling to seek protection from the country of origin because he or she does not trust the authorities or because the government is the agent of the persecution, for example. The UN Refugee Convention definition qualifies this second part of the lack of protection element by requiring that the claimant be unwilling to seek protection from the country

³⁷¹ For example, a victim could assist police in the country of destination in the investigation and capture of the perpetrators responsible for the trafficking.

³⁷² See s 3(a) of the Refugees Act.

³⁷³ See *Ward* (n 255) at 45.

³⁷⁴ During periods of conflict or political transition, for example.

³⁷⁵ This is especially relevant if the government itself is the persecutor. See UNHCR Handbook (n 110) at para 98; Hathaway (n 262) at 132. See also *Ward* (n 255) at 48.

³⁷⁶ UNHCR Handbook (n 110) at para 98. The UNHCR Handbook's interpretation of 'unable' was accepted in the Canadian case of *Ward* (n 255) at 47–8.

³⁷⁷ See *Ward* (n 255) at 45–6 and 51.

of origin ‘owing to’ his or her fear of persecution.³⁷⁸ In other words, fear must be the claimant’s motivation for not seeking the assistance of his or her own government. However, the South African definition at s 3(a) uses the qualification ‘owing to such fear’ in relation to stateless persons, but not in relation to those with nationalities. This is clearly a drafting oversight, because it results in persons with nationalities qualifying for refugee status where they were unwilling to seek state protection due to mere laziness, dislike or spite. This contradicts the inherent rationale of refugee status – the protection of persons in need when their own governments cannot or will not provide it.³⁷⁹ Thus, the qualification should apply equally to stateless persons and those with nationalities.

These two manifestations of a lack of protection by the country of origin must be considered holistically in terms of each claimant’s particular circumstances.³⁸⁰ In *Rajudeen*,³⁸¹ four contexts were specified in which state protection could be found lacking: where the state itself is the agent of persecution, where the state condones the persecution, where the state tolerates the persecution, and where persecution is present because the state refuses or is unable to protect against it (despite not condoning or tolerating the persecution).³⁸²

Trafficking victims may be unable to avail themselves of the protection of their countries of origin where those countries do not have legislation or policies in place to combat human trafficking and assist the victims thereof.³⁸³ Similarly, the country of origin may lack the resources and infrastructure necessary to effectively prevent and prosecute cases of human trafficking and to protect nationals from the effects of trafficking.³⁸⁴ Thus, as was the case in *Mayongo (supra)*, the country of origin may not be able to provide the trafficking victim with the medication and psychological

³⁷⁸ UNHCR Handbook (n 110) at para 100.

³⁷⁹ *Ward* (n 255) at 45.

³⁸⁰ Hathaway (n 262) at 129.

³⁸¹ *Zahirdeen Rajudeen v Minister of Employment and Immigration* (1985) 55 N.R. 129 (F.C.A.).

³⁸² These contexts take into account both ‘unwilling’ and ‘unable’ factors. See also Hathaway (n 262) at 129.

³⁸³ Gallagher (n 2) at 117; although Dauvergne (n 1) notes at 87 that where the country of origin manages even some success in the protection of trafficking victims upon their return, the claim for refugee status could be weak.

³⁸⁴ Sigmon (n 2) at 255–6.

treatment necessary to deal with the continuing effects of past persecution suffered, where such treatment is available to the victim in South Africa.³⁸⁵ In some cases, the country of origin may even refuse to acknowledge that the victim is need of protection and assistance at all, especially where it is not a party to the Palermo Protocol.

Alternatively, trafficking victims may be unwilling to avail themselves of state protection where they perceive that the state is complicit in persecution feared by them, particularly where corrupt officials' are involved in trafficking processes. Victims may also be distrustful of or disillusioned with authorities in the country of origin because they did not prevent or stop the original trafficking victimisation.³⁸⁶ As a result, victims may be unwilling to seek protection from authorities because they fear that they will simply be trafficked again. Finally, victims' unwillingness could stem from a fear of persecution in the form of prosecution or punishment. Thus, victims may be unwilling to seek assistance from a country of origin because they fear that doing so might expose them to prosecution by the country's authorities.

2.6 Summary of conclusions

It is therefore possible for a foreign trafficking victim to meet every element for refugee status in South Africa. Most past trafficking experiences will involve persecution of the victim in the form of human rights violations or discrimination. Where the effects of past victimisation are continuing or it is unsafe for the victim to return home, a risk future persecution can also be proven. Where the victim's subjective fear of persecution is supported by evidence that the country of origin does not provide adequate protection, a well-founded fear of persecution will be established. Many trafficking victims will fall within the social group of 'women' who suffer gender-based persecution, while another social group 'victims of human trafficking' could also be a basis for future persecution in respect of persons who have already been

³⁸⁵ *Mayongo* (n 312) at para [9]. Note that the continuing effect of past persecution is relevant in determining a current well-founded fear of persecution. Thus, although here the state's lack of protection relates to the *effects* of past persecution, and not actual persecution, those effects could form the basis for an applicant's fear of further future persecution.

³⁸⁶ Distrust of those in power or authority is a common effect of trafficking victimisation – Sigmon (n 2) at 254.

trafficked. Finally, it can be shown that trafficking victims are unable to access state protection where adequate protection is unavailable to them or that victims are unwilling to do so because they fear future persecution by traffickers or the authorities.

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CHAPTER 6

Factors obstructing the granting of refugee status

1 PARTICIPANTS IN CRIMINAL OFFENCES

Trafficking victims could be faced with a serious obstacle when applying for refugee status due to their involvement in a number of criminal acts committed during the trafficking process, and for which they would be subject to prosecution or arrest.³⁸⁷

Criminal offences that are usually linked to trafficking include prostitution, the falsification of documents, illegal migration, and the illegal entry into a country. Some victims may even become involved in the trafficking of other victims during or after the trafficking process, thereby becoming perpetrators themselves. However, criminal acts committed by the victim should not interfere with qualification for refugee status.

Victims of trafficking are exempted from criminal prosecution in respect of illegal entry or stay in South Africa, assisting another person to illegally enter or stay in the country, or possessing false documents.³⁸⁸ In line with the Protocol, South Africa has adopted a ‘victim-centred approach’ to the prosecution of the offence of human trafficking.³⁸⁹ This ensures that certified victims of human trafficking are not treated as criminals by the South African legal system.³⁹⁰ Persons functioning within the justice system, and administrators responsible for assessing refugee claims, should take care to do the same.³⁹¹

³⁸⁷ Snyman (n 2) at 287.

³⁸⁸ Clause 16(1) at paras (a), (b) and (c) of the Trafficking Bill.

³⁸⁹ Sigmon (n 2) at 250. This is also the approach adopted by the United States of America in its *Trafficking Victims Protection Act of 2000*. Like South Africa, the US allows trafficking victims to remain in the country while they are assisting the police in the investigation and capture of their perpetrators – Sigmon (n 110) at 250.

³⁹⁰ However, the Trafficking in Persons Report 2010 (n 34) indicates at 299 that some trafficking victims are still arrested in South Africa, and that in one case the victim was even detained in the same cell as his or her alleged trafficker.

³⁹¹ In this regard, persons like police officers, prosecutors and RSDOs should refer to the Department of Justice and Constitutional Development *Minimum standards on services for victims of crime*, available at http://www.justice.gov.za/VC/docs/vcms/2007%20MIN%20STAND%20ENG_V2.pdf [accessed 2 September 2010], and the United Nations General Assembly *Declaration of basic principles of justice for victims of crime and abuse of power* A/RES/40/34 (29 November 1985), available at: <http://www.unhcr.org/refworld/docid/3b00f2275b.html> [accessed 2 September 2010].

Furthermore, in terms of s 21(4) of the Refugees Act, ‘no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic’ where that person already has refugee status or has applied for asylum. The UN Refugee Convention goes further to state that no penalties can be imposed for a refugee’s illegal entry into or presence in a country where three requirements are met: the refugee must come directly from a country where there was a threat to his or her life or freedom; the refugee must present him- or herself to the authorities without delay; and ‘show good cause’ for the illegal behaviour.³⁹²

However, provided the requirements are met, these provisions could only exempt trafficking victims in so far as they have illegally migrated or entered to South Africa, via false documents or other means. Other criminal offences committed by trafficking victims, may therefore result in their exclusion from qualification for refugee status in terms of s 4(1) of the Refugees Act. Section 4(1)(a) of the Act excludes claimants from refugee status where they have committed ‘a crime against the peace, a war crime or a crime against humanity’.³⁹³ In the unlikely event that a trafficking victim has committed one of these international crimes, he or she will be excluded from refugee status. However, it is more likely for a trafficking victim to be excluded in terms of s 4(2) of the Act, on the basis that he or she ‘has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment’.³⁹⁴ Both prostitution and offences relating to

³⁹² Article 31 of the UN Refugee Convention. This article was interpreted in the case of *R v Uxbridge Magistrates’ Court ex parte Adimi* [2001] Q.B. 667. With regard to the first requirement, it was held in *Adimi* that ‘coming directly’ did not preclude the refugee from stopping over in intermediate countries and, to an extent, choosing where to claim refugee status (at 678). Circumstances such as the length and reasons for delay in an intermediate country would have to be considered (at 678). The second requirement, ‘without delay’, was interpreted as not meaning ‘as soon as he arrives’, and it was maintained that no time restriction could be imposed (at 679). The third requirement, ‘good cause’ was held to ‘be satisfied by a genuine refugee showing that he was reasonably traveling on false papers’ (at 679). Similar interpretations were made at a roundtable of experts co-hosted by the United Nations High Commissioner for Refugees – see *Summary conclusions: Article 31 of the 1951 Convention* (Cambridge University Press, June 2003), available at <http://www.unhcr.org/refworld/docid/470a33b20.html> [accessed April 2010].

³⁹³ This circumstance of exclusion is also included in art 1F(a) of the UN Refugee Convention.

³⁹⁴ This is based on the circumstance of inclusion contained in art 1F(b) of the UN Refugee Convention. The South African provision uses the threshold of ‘punishable by imprisonment’ where the UN Refugee Convention requires that the crime be ‘serious’ in order to exclude the possibility for refugee status. The South African threshold is less ambiguous, as sentencing practices in relation to most crimes will be

trafficking cannot be said to be political in nature and could result in a sentence of imprisonment in South Africa.³⁹⁵

It is important to note that a trafficking victim cannot be liable for any illegal act that he or she has been compelled to commit in the course of the trafficking process.³⁹⁶ Thus, RSDOs should also remain mindful of the fact that victims are often coerced or threatened into criminal behaviour in trafficking situations and that they may be ignorant of the fact that they are committing a crime.³⁹⁷ Thus, criminal acts committed during the trafficking process should not hinder the granting of refugee status to trafficking victims unless the act was serious enough to exclude refugee status and not committed under conditions of compulsion.

2 SAFE THIRD COUNTRY REQUIREMENTS AND INTERNAL FLIGHT ALTERNATIVE

Some countries apply a 'safe third country' principle before assessing the merits of claims for refugee status.³⁹⁸ This procedural principle maintains that where a refugee claimant could have obtained effective protection from persecution elsewhere, then he or she should apply for refugee status in that other 'safe third country' instead.³⁹⁹ Thus, many European countries decline to consider applications for refugee status where a claimant has had to transit through other countries and, as a result, had an opportunity to apply there.⁴⁰⁰ States also devise lists of countries considered to be 'safe', which fail to take into account the possibility of individual persecutory circumstances.⁴⁰¹

ascertainable from statutes and case law; whereas, the notion of 'serious' will require a value judgment on the part of the person assessing the asylum seeker's claim.

³⁹⁵ See clauses 4–8 of the Trafficking Bill, for example.

³⁹⁶ Clause 16(1)(d) of the Trafficking Bill.

³⁹⁷ Snyman (n 2) at 287. Ignorance could be due to linguistic and cultural barriers or a lack of knowledge about the relevant foreign legal system.

³⁹⁸ Goodwin-Gill (n 59) at 392.

³⁹⁹ Ibid.

⁴⁰⁰ Goodwin-Gill (n 59) states at 392 that the rationale for this application of the principle is that genuine refugees would seek asylum in the first country in which they could – any further movement is therefore merely for migration purposes and not for protection from persecution.

⁴⁰¹ Goodwin-Gill (n 59) at 392.

The application of this principle to refugees is deemed incorrect by Goodwin-Gill for three reasons: a ‘safe’ third country is not necessarily safe for all persons, especially where minority groups are concerned; international law does not impose any duty on asylum seekers to claim protection in the first country in which they can effectively do so; and international law does recognise a right, albeit limited, to choose a place of asylum, especially where other family members are already present there.⁴⁰²

The application of this principle can be particularly problematic for trafficking victims because they may have transited through a number of states where there were opportunities to access effective protective during the trafficking process. Fortunately, the South African Refugees Act does not seem to contain a safe third country principle. Trafficking victims will only be excluded from applying for refugee status if they already enjoy the protection of and reside within another country⁴⁰³ – not where they merely had the *opportunity* to enjoy protection there.

On the other hand, the concept of internal flight alternative (‘IFA’)⁴⁰⁴ refers to the ability of potential refugees to seek effective protection from persecution in another part of the country of origin – in other words, to flee within the country of origin, without crossing an international border.⁴⁰⁵ Sometimes, application for refugee status is denied after it has been determined that there is a well-founded fear of persecution on the basis that there was an internal flight alternative for the potential refugee and that he or she ‘could reasonably [have been] expected to relocate there’.⁴⁰⁶

The IFA concept is not especially relevant to trafficking victims wishing to apply for refugee status because victims are often not capable of controlling their transit during the trafficking process. Thus, it could not be reasonably expected that trafficking victims would have sought protection elsewhere within their countries of origin, even if effective protection was available there. IFA assessments could only be

⁴⁰² Ibid.

⁴⁰³ Section 4(1)(d) of the Refugees Act.

⁴⁰⁴ This is also sometimes referred to as ‘internal protection alternative’, or ‘IPA’.

⁴⁰⁵ Goodwin-Gill (n 59) at 123–4; Clayton (n 235) at 452–8.

⁴⁰⁶ Goodwin-Gill (n 59) at 125. University of Michigan Law School *International refugee law: the Michigan Guidelines on the Internal Protection Alternative* (11 April 1999), available at: <http://www.unhcr.org/refworld/docid/3dca73274.html> [accessed 7 February 2011], stipulates the international requirements and principles applicable in IFA assessments. See also Amnesty International (n 352) at 78.

relevant in situations where, for example, trafficking victims were trafficked within their countries of origin and subsequently fled to seek protection in South Africa.

3 DIFFICULTY WITH THE CONCEPTION OF HUMAN TRAFFICKING

Human trafficking is often confused with the smuggling of persons or illegal immigration because the methods used by perpetrators of these crimes are often similar.⁴⁰⁷ The perpetrators of all three crimes often enter and depart countries unlawfully, by bribing border administrators or forging documents.⁴⁰⁸ However, human trafficking is distinguishable from the other two crimes by the fact that it ends in the exploitation of the person trafficked, to the benefit of the trafficker.⁴⁰⁹

The confusion between human trafficking and other concepts is exacerbated by excessively inclusive and complicated definitions for the offence of trafficking. Where there is confusion about what conduct qualifies as trafficking, there will also be confusion about who the victims of trafficking are. This may either have the effect of denying legitimate trafficking victims their 'victim' status, or it may bestow such status on persons who are undeserving of it. Where qualifying as a victim of human trafficking could provide persons with protection and assistance in the form of refugee status, this could have serious implications. Some trafficking victims will be denied the protection and assistance that they genuinely need, while state resources will be wasted on protecting other persons who should not actually qualify for refugee status. Thus, uncertainty in the understanding of the notion of human trafficking would also cause uncertainty in the application of the refugee definition to victims of human trafficking.

There is a call for greater co-operation between government agencies, non-governmental organisations and communities, and also amongst nation states in the

⁴⁰⁷ Sigmon (n 2) at 255; Dauvergne (n 1) at 83 and 89–92. As a result, victims of trafficking are deemed as perpetrators complicit in these other crimes.

⁴⁰⁸ Snyman (n 2) at 285.

⁴⁰⁹ Ibid. In contrast, the end-goal of smuggling or illegal immigration is merely to get persons into another country, by evading inspection at an international border. Once the persons have been transported to the country of destination the criminal act is complete, without any intention on the part of the perpetrators that the transported persons will continue to engage in activities that will benefit the perpetrators.

international arena.⁴¹⁰ It is submitted here that co-operative efforts at the international level should be primarily aimed at unifying conceptions of human trafficking. If there is no uniform conception of trafficking then the legislation of one state may permit some forms of trafficking conduct that another state's legislation prohibits. In the context of qualifying for refugee status, only a portion of human trafficking victims would find sympathy in the foreign country in which they end up – depending on that country's attitude towards the offence of human trafficking. Asylum seekers ordinarily have to contend with varying national requirements for refugee status. Having different conceptions of 'human trafficking' too would create additional obstacles for trafficking victims who wish to seek asylum.

4 OVERESTIMATES OR UNDERESTIMATES?

Although many sources suggest that the magnitude of the global trafficking problem is immense and continuously growing,⁴¹¹ reliable data about the number of persons who have been trafficked is severely lacking.⁴¹² This deficiency has been attributed to the difficulties associated with researching 'so-called hidden populations' like victims of human trafficking,⁴¹³ who are afraid to report their victimisation to the police, or who cannot do so because of cultural or linguistic barriers.⁴¹⁴ The extent of trafficking is also not ascertainable because of 'the criminal nature thereof and the organised crime element associated with it' and the fact that the process often takes place across international borders in different legal jurisdictions over a period of time.⁴¹⁵ Sometimes organisations are responsible for perpetuating exaggerated numbers because it benefits their agendas to do so.⁴¹⁶ Governments are furthermore blamed for a lack of commitment to collecting statistical data about the numbers of human trafficking

⁴¹⁰ Snyman (n 2) at 286–7; Trafficking in Persons Report 2010 (n 34) at 1. For example, states could collaborate to strictly control movement across the border that exists between them.

⁴¹¹ Gould (n 88) at 21; Snyman (n 2) at 282; Sigmon (n 2) at 248–9; Jones et al (n 16) at 108.

⁴¹² Gould (n 88) at 22; Snyman (n 2) at 282.

⁴¹³ Sigmon (n 2) at 248; Gould (n 88) at 22–3. This is referred to as the 'dark figure' of crime statistics in the fields of victimology and criminology – 'Victimisation' in L Wolhunter et al *Victimology: victimisation and victims' rights* (New York: Routledge-Cavendish, 2009) 33, at 34.

⁴¹⁴ Sigmon (n 2) at 254; Gould (n 88) at 23.

⁴¹⁵ Snyman (n 2) at 282; Gould (n 88) at 21.

⁴¹⁶ Gould (n 88) at 23.

victimisations that occur within their jurisdictions⁴¹⁷ Even where data *is* available, confusion about what ‘human trafficking’ actually is significantly skews the results. Researchers and journalists fail to separate trafficking conduct from actual exploitative conduct, as is required by the Protocol.⁴¹⁸ As a result, exploitative conduct that is unaccompanied by any trafficking conduct is classified as ‘human trafficking’.⁴¹⁹ Thus, statistical data often conflates trafficking with smuggling, illegal immigration and prostitution.

This is an issue in the context of refugee status determination because an underestimation of the incidence of trafficking could result in mass influxes of asylum seekers where the South African government is incapable of providing protection to all of them. On the other hand, an overestimation of the incidence and severity of the human trafficking situation, both nationally and globally, could mean that a special status is being conferred on persons who do not actually require the critical protection that it is meant to provide.

Thus, despite the possibility that trafficking victims *could* meet the requirements for refugee status, confusion about the very concept and definition of trafficking and whether it actually occurs as often as supposed, may provide strong motivation for not bestowing trafficking victims with refugee status. This is particularly relevant in South Africa, where resource constraints already limit the ability of the government to provide effective protection to refugees.

⁴¹⁷ Sigmon (n 2) at 248. See for example the criticisms levelled at South African governmental departments at a meeting of the National Assembly’s Justice and Constitutional Development Committee on 17 November 2010, about the Trafficking Bill and trafficking statistics by stakeholder departments – minutes of the meeting available at <http://www.pmg.org.za/report/20101117-deliberations-cluster-departments-combating-and-prevention-trafficking> [accessed 24 November 2010].

⁴¹⁸ Snyman (n 2) at 282; Sigmon (n 2) at 255; Trafficking in Persons Report 2010 (n 34) at 298. For example, trafficking is confused with smuggling, prostitution, rape or domestic violence in police records or charge sheets – see Justice and Constitutional Development Committee meeting minutes (ibid). However, the Trafficking in Persons Report 2010 (n 34) indicates at 299 that training mechanisms have been implemented by the South African government to prevent confusion in this regard.

⁴¹⁹ See for example the South African ‘trafficking’ cases discussed in the Trafficking in Persons Report 2010 (n 34), at 298.

CHAPTER 7

Conclusion

While it is possible for trafficking victims to meet all the requirements for refugee status in some circumstances, the challenges that obstruct such qualification, particularly those relating to the broad conception of ‘trafficking’ and confusion between trafficking and other harmful or unlawful conduct, provide compelling reasons to ensure that refugee status is only granted to those certified trafficking victims who are genuinely in need of its protection.

Uncertainty about the global scale of human trafficking also generates the potential for a floodgate of refugee claims in South Africa, if trafficking victims generally were able to qualify for refugee status. South Africa is unlikely to be capable of dealing with masses of trafficking victims in addition to existing large populations of asylum seekers, refugees and other migrants.⁴²⁰ Resource constraints and infrastructure deficiencies could therefore provide powerful practical imperatives for limiting the refugee definition in relation to trafficking victims and for declining to provide trafficking victims with refugee status.

Finally, it is important to bear in mind that even where it is possible for trafficking victims to qualify, refugee status will not provide absolute solutions to their concerns, and trafficking victims will still have to contend with difficulties ordinarily experienced by refugees in South Africa. Thus, trafficking victims are likely to experience problems with assimilating into South African society. They will have to overcome cultural, linguistic and social barriers. Like many South Africans, they may struggle with poverty, unemployment, and inadequate access to housing, water, health care and education. As refugees, trafficking victims are also at risk of danger in the

⁴²⁰ See *Kiliko and Others v Minister of Home Affairs and Others* 2007 (4) BCLR 416 (C); [2007] 1 All SA 97 (C) and *Tafira and Others v Ngozwane and Others* (T) Case No 12960/06 (12 December 2006), unreported, for accounts of the strains on, and delays in, refugee status determination procedures in South Africa because of large numbers of asylum seekers and inefficient processing methods.

form of xenophobic violence and contempt.⁴²¹ Thus, qualification for refugee status in South Africa could lead to further types of victimisation for victims of human trafficking – thereby undermining the very reason for granting refugee status to them in the first place.

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⁴²¹ See Anthony Minnaar ‘Victimisation and the rights of foreign migrants in South Africa’ in Linda Davis and Rika Snyman (eds) *Victimology in South Africa* (Pretoria: Van Schaik Publishers, 2005) 291.

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