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A STUDY OF THE PROTECTION AFFORDED TO
PERSONS AT RISK OF TRAFFICKING BY ARTICLE
1A(2) OF THE GENEVA CONVENTION
REGARDING THE STATUS OF REFUGEES
(1951) AS AMENDED BY THE PROTOCOL
RELATING TO THE STATUS OF REFUGEES
(1967)

Författare: Sylvia Emma Iréne Cotterill (841207-5981)

Handledare: Eva-Maria Svensson, Professor

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I want to dedicate this study to Sylvia and Wärne Eriksson, whose passion and compassion has been an inspiration all my life.

London, October 22 2009

Abstract

The Geneva Convention regarding the Status of Refugees (1951) protects whoever can be considered a refugee internationally. Even though there is little doubt trafficked persons suffer harm on account of this criminal business, the applicability of the Convention in these cases is problematic since persons at risk cannot easily fulfil the criteria set up in Art. 1A(2) of the Refugee Convention. Challenges are faced both in relation to the concept of persecution and in linking the harm to a Convention ground. Development in the field of gender-specific and gender-related persecution has however provided for limited opportunities to claim refugee status when fearing trafficking, which can be seen in case law and the Office of the United Nations High Commissioner for Refugees Guidelines on the Application of the refugee Convention to People who have been Trafficked. However, it may sometimes prove more fruitful to claim complementary protection under the European Union Refugee Qualification Directive or Art. 3 European Convention of Human Rights.

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1. INTRODUCTION

1.1 *The Topic*

Human Trafficking is an issue raising a great deal of international debate. It is also a reality for many people across the globe.¹ The most recent attempt to deal with the problem is the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Trafficking Protocol). People having been trafficked are here begun to be seen as ‘victims’ for the first time, rather than consistently illegal migrants to be prosecuted for their entry. Recognition is made of the fact that these people may not be able to return to their countries of nationality based on the same considerations as can be found in refugee law.² There is thus a link between refugee law and the protocol.

Refugee status offers wide-ranging international protection for those deemed deserving according to the determination criteria set out in Art. 1A(2) of the 1951 Geneva Convention Regarding the Status of Refugees (Refugee Convention).³ Historically this has primarily been European political refugees due to the drafting history of the treaty.⁴ The understanding and application of the Refugee Convention however continuously develops as the world changes. One of the areas within the ambit of refugee law which has developed most in the last decade is that of gender-specific and gender-related persecution. Courts and scholars are still working on how to interpret the refugee definition “with an awareness of possible gender dimensions in order to determine accurately claims to refugee status”⁵. Lately, as part of that development there has been a slow recognition of that people at risk of trafficking may be considered as refugees. It signifies a reconsideration of the refugee definition and the politics around both refugee law and the understanding of trafficking. Two previously separate areas of law have thus begun to meet in the

¹ See e.g. <http://www.stophetraffik.org/language.aspx>, accessed 18/08/09; Piotrowicz, R. ‘Victims of People Trafficking and Entitlement to International Protection’, 24 *Australian Yearbook of International Law* (2005) 159; <http://www.osce.org/activities/13029.html>, accessed 18/08/09; Scarpa, S. *Trafficking in Human Beings Modern Slavery* (2008), at 9

² Please note the saving clause in Art. 14 of the Trafficking Protocol stating that the Refugee Convention shall not be affected by the Protocol, Piotrowicz, *supra* note 1, at 162f

³ See e.g. Art. 3-8, 16, 23, 27ff Refugee Convention

⁴ Hathaway, J.C. *The Law of Refugee Status* (1991), at 1

⁵ UNHCR 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, UN Doc. HRC/GIP/02/01 (2002), at para. 2

refugee determination process bringing with it challenges on a theoretical as well as practical level. It is so far a rather unknown, territory.

Where refugee status cannot be afforded there is a possibility of receiving complementary protection in the European Union (EU) through the Refugee Qualification Directive or Art. 3 of the European Convention of Human Rights (ECHR). As this kind of protection does not offer as many benefits as refugee status, it will be secondary to refugee protection. However, it may sometimes be the only possibility to receive protection since refugee status is difficult to attain.

1.2 Literature Review

The academic context of the title of this dissertation is essentially comprised of two separate areas of law namely refugee law and law on trafficking. Relevant sources hence tend to deal with one of the two areas and are in this study brought together in order to answer the questions posed. There are however a couple of academic articles discussing the particular subject chosen. In this literature review I will firstly consider writings which specifically relate to the topic and subsequently reflect upon academic discourse in the areas of refugee law and trafficking.

Professor Ryszard Piotrowicz conducts research on refugee law and trafficking and smuggling of human beings and the legal response to people trafficking at international, regional and national levels at Aberystwyth University, Wales.⁶ In his articles “Victims of People Trafficking and Entitlement to International Protection”⁷ and “The UNHCR’ Guidelines on Human Trafficking”⁸ he takes an analytic approach to how refugee law may address the international protection needs of victims of trafficking. In his argument he problemizes the criteria in the Refugee Convention in relation to the situations faced by trafficked persons to find if and how refugee status may be granted. He concludes that there are significant hurdles to be overcome in order to secure refugee protection, which may essentially mean it is more fruitful to seek subsidiary protection. I have adopted a similar approach in my analysis in this dissertation and have taken his findings into account in the three analytical sections. I have thus made use of part of his international legal theory on human trafficking concerned with international protection obligations. His full theory

⁶ http://www.aber.ac.uk/en/law_criminology/staff/staffdirectory/ryp, accessed 20/10/09

⁷ Piotrowicz, *supra* note 1

⁸ Piotrowicz, R. ‘The UNHCR’s Guidelines on Human Trafficking’, 20 *International Journal of Refugee Law* (2008) 242

on trafficking has thus not been considered, and is neither relevant for the particular study conducted.⁹

Dr Michelle Foster is a Senior Lecturer and Director of the International Refugee Law Research Programme at the Institute for International Law and the Humanities at Melbourne Law School.¹⁰ In “Obstacles to the Road to Protection: assessing the Treatment of Sex-Trafficking Victims under Australia’s Migration and Refugee Law”¹¹ she attempts, together with Anna Dorevitch an critical approach to understanding how trafficked persons can gain protection through the Refugee Convention. In their argument, the criteria found in the Refugee Convention, as implemented in Australian law are analysed in relation to the experiences faced by trafficked persons. The conclusion drawn is that trafficking ought to be able to constitute acts of persecution where the victims are deprived of their liberty and subjected to physical, sexual and psychological violence. It may also be possible to link this persecution membership of a particular social group (PSG). The authors are however critical of the way that gender-perspectives of refugee law are being viewed in Australian jurisprudence, and of the way in which trafficked individuals are perceived. Their line of reasoning, as well as their way of conducting their analysis is taken into account when discussing the concept of persecution in section 2.1 and Convention ground under section 2.2.

When it comes to refugee law, Professor James C Hathaway is one of the most distinguished scholars. In his *The Law of Refugee Status*¹² he methodologically maps out the criteria of the Refugee Convention and scrutinizes the concepts therein. He specifically argues that the harm that is needed to substantiate persecution can be understood through a hierarchy of rights. This approach is accepted by jurisprudence. In my section on persecution, I will use this approach as I attempt to unfold how persecution in can be understood in relation to trafficked persons in section 2.1. His perspective will also roughly be followed throughout the rest of the dissertation.

⁹ Piotrowicz, R. ‘The Legal Nature of Trafficking in Human Beings’, 4 *Intercultural Human Rights Law Review* (2009) 175

¹⁰ <http://www.law.unimelb.edu.au/index.cfm?objectid=F9D2D075-B0D0-AB80E2BC989969E28989&username=Michelle%20Foster>, accessed 20/10/09

¹¹ Dorevitch, A., Foster, M. ‘Obstacles to the Road to Protection: assessing the Treatment of Sex-Trafficking Victims under Australia’s Migration and Refugee Law’, 9:1 *Melbourne Journal of International Law* (2008) 1

¹² Hathaway, *supra* note 4

A specific area of study within refugee law that has recently developed is that of gender-specific and gender-related persecution. Heaven Crawley, Professor of International Migration is particularly interested in the conceptualisation of gender in an asylum determination process and was part of drafting the Gender Guidelines for the determination of asylum claims in the UK.¹³ In *Refugees and Gender: Law and Process*¹⁴ she takes a critical approach to refugee law from a gender perspective. She argues e.g. that persecution has not traditionally been interpreted to include gender specific experiences, which makes it difficult to substantiate serious harm and Convention ground. This is said to be partially caused by what is termed the public/private dichotomy. In addition, Thomas Spijkerboer who is a Professor of Migration Law has a particular interest in the gender aspects of migration. In *Gender and Refugee Status*¹⁵ he in a similar way to Crawley criticises the application of refugee law and the failure of member states to accept gender-specific and gender-related claims. My dissertation can be said to be framed within this wider academic study of gender-specific and gender-related harm and the arguments made in relation these issues in general are in my opinion highly relevant to understanding trafficking for sexual exploitation.

Furthermore, the understanding of the Convention ground PSG is one of the most complicated issues within refugee law. In 'Protected Characteristics and Social perceptions: an Analysis of the meaning of 'Membership of a Particular Social Group''¹⁶, T. Alexander Aleinikoff who is a Professor of Law at George Town University in the USA explores the understanding of this Convention ground under international standards and state jurisprudence. He also considers difficult interpretive issues and the related nexus requirement. He argues that there is mainly two approaches to understanding the PSG ground, through the protected characteristics approach and the social perception approach.¹⁷ I have in this dissertation taken this argument into consideration

¹³ <http://www.swan.ac.uk/staff/academic/EnvironmentSociety/Geography/crawleyheaven/>, accessed 10/10/09; Asylum and Immigration Tribunal / Immigration Appellate Authority, Immigration Appellate Authority (UK): Asylum Gender Guidelines

¹⁴ Crawley, H. *Refugees and Gender: Law and Process* (2001)

¹⁵ Spijkerboer, T. *Gender and Refugee Status* (2000)

¹⁶ Aleinikoff, T.A. 'Protected Characteristics and Social Perceptions: an Analysis of the Meaning of 'Membership of a Particular Social Group' in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law: UNHCR's global consultations on International Protection* (2003)

¹⁷ http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=208 , accessed 21/10/09

when structuring my analysis of how trafficking can be linked to ground under section 2.2.2. His findings relating to case-law under these approaches have also been taken into account.

The area of refugee law also extends to complementary protection. Dr Hugo Storey who is a Senior Immigration Judge the Asylum and Immigration Tribunal in the UK explores this type of protection in his article 'EU Refugee Qualification Directive: a Brave New World'¹⁸. In the article he discusses the effort to harmonise international protection in the EU through the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (EU Qualification Directive). Part of his analysis is dedicated to comparing the subsidiary protection offered by the Directive with Art. 3 of the ECHR. This part is particularly useful for my analysis of complementary protection and I make use of it in section 2.3.2.

The study area of trafficking can be said to consist of much writings concerned with the Trafficking Protocol, and the fate of the persons concerned and the reasons behind the issue. Dr Silvia Scarpa examines, in *Trafficking in Human Beings Modern Slavery*¹⁹ the definition of trafficking according to the UN Trafficking Protocol, and other international legal instrument. The first part of the book analyses the causes and consequences of trafficking and the exploitation that it leads to. The second part contextualises trafficking under international conventions against slavery and the slave trade and makes the argument that trafficking ought to be seen as a modern form of slavery. The latter part is of particular relevance to this study. The questions posed and arguments made by Scarpa have been taken into consideration in this dissertation, in particular in section 2.1.3.

Moreover, Janice Raymond is Professor Emerita of Women's Studies and Medical Ethics at the University of Massachusetts in Amherst.²⁰ She is also Co-Executive Director of the Coalition Against Trafficking in Women (CATW).²¹ In 'The New UN Trafficking Protocol'²² Raymond

¹⁸ Storey, H. 'EU Refugee Qualification Directive: a Brave New World', *International Journal of Refugee Law* (2008)

¹⁹ Scarpa, *supra* note 1

²⁰ http://www.catwinternational.org/bio_JaniceRaymond.php, accessed 20/10/09

²¹ Ibid.

²² Raymond, J. 'The New UN Trafficking Protocol', 25:5 *Women's Studies International Forum* (2002) 491

summarises the key points of the Trafficking Protocol, the debate over the definition of trafficking, how it is to be interpreted, and its how it will affect regional and national policy against human trafficking. It also considers how trafficking for sexual exploitation is related to prostitution and debates arguments made about it not being related. She specifically argues that the consent of a victim of trafficking is irrelevant to the trafficking experience. Raymond's arguments have been considered in particular with reference to section 2.1.2 on consent in the dissertation, but as can be seen in this section the argument made has got far-reaching consequences and is hence of relevance to the entire dissertation.

Dr Jo Doezema is a Visiting Fellow at the Institute of Development Studies at Sussex University.²³ In her article 'Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol',²⁴ she explores the difficulties around the notion of consent in the UN Trafficking Protocol and the debate had during the drafting of the protocol. It is argued that the kind of trafficking discourse that Raymond and others conduct takes a patronizing stance, depriving women of choice and self-determination through stereotyping women as passive and making them either innocent victims or immoral prostitutes in way similar to what was done in early 20th century campaigns against white slavery. As with Raymond's arguments, Doezema's stand point is considered in particular under section 2.1.2 but is significant to the entire study.

In addition, Carina Johansson Wennerholm in 'Crossing borders and building bridges: the Baltic Region Networking Project',²⁵ Ann D. Jordan in 'Human Rights or Wrongs? The Struggle for a Rights Based Response to Trafficking in Human Beings',²⁶ and Beth Herzfeld in 'Slavery and Gender: Women's double exploitation',²⁷ are examples of authors who have provided valuable analyses of the various situations faced by trafficking victims across the world. These insights

²³ <http://www.ids.ac.uk/go/idsperson/jo-doezema>, accessed 20/10/09

²⁴ Doezema, J. 'Who gets to Choose? Coercion, Consent and the UN Trafficking Protocol', in Masika, R. (ed.), *Gender, Trafficking and Slavery* (2002)

²⁵ Wennerholm, C.J. 'Crossing borders and building bridges: the Baltic Region Networking Project', in Masika, R. (ed.), *Gender, Trafficking, and Slavery* (2002)

²⁶ Jordan, A.D. 'Human Rights or Wrongs? The Struggle for a Rights Based Response to Trafficking in Human Beings' in Masika, R. (ed.), *Gender Trafficking and Slavery* (2002)

²⁷ Herzfeld, B. 'Slavery and Gender: Women's double exploitation', in Masika, R. (ed.), *Gender, Trafficking and Slavery* (2002)

have been used in order to conduct analyses between the treatment faced and international protection obligations throughout the study.

1.3 Research Methodology

The purpose of this dissertation is to establish the legal standing in refugee law regarding persons who are at risk of being trafficked. For this purpose the pervasive, critical research question is:

- 1) Can/how can Art. 1A(2) of the Refugee Convention (as amended by the Protocol relating to the Status of Refugees 1967) give protection to people at risk of human trafficking?

This overarching question will be answered through the analysis of the following subsidiary questions:

- 1) Can/how can trafficking amount to persecution?
- 2) Can/how can trafficking be linked to a Convention ground?
- 3) Can/how can people at risk of trafficking receive protection through Art. 3 of the ECHR?
- 4) Can/how can people at risk of trafficking receive protection under the Swedish Aliens Act (2005:716)?

In order to reach my objectives, I have taken the determination criteria in Art. 1A(2) of the Refugee Convention as a starting point for my analysis. These have been scrutinized through the subsidiary questions above by critical analysis of literature and articles. I have mainly sought to analyse recent material from prominent scholars. The reliability of these sources is therefore high in the sense that the authors are well-reputed and acknowledged in their fields. However, they are naturally expressing their points of view on various matters. When it comes to articles specifically related to trafficking, these viewpoints are often coloured by a certain feminist stance taken. I have thus taken caution of this in my analysis. However since I have not studied the vast variety of feminism in depth, this may bring some weakness to the study.

Secondly, I have made use of case law, mostly from the common law countries United Kingdom (UK), United States (US), Canada and Australia for the international part of my analysis. I have chosen to do this firstly since there is no international organ making interpretations of the Refugee Convention. These jurisdictions provide useful alternative material since they are large

jurisdictions which interrelate. They are all also major receiving countries for trafficked persons.²⁸ I have not aimed at making a comparative study, which means an overall picture has been sought rather than one based on individual jurisdictions. This has however sometimes meant alternative approaches have had to be analysed.

For the analysis conducted with regards to subsidiary protection, case law from the European Court of Human Rights has been used. This material is highly reliable and court's interpretation of the relevant articles is binding for member states. In order to study Swedish law, Swedish case-law has naturally been used providing a reliable insight into the application of the Aliens Act (2005:716).

Thirdly, official documents from different UN organs have been useful. These have taken the form of guidelines and reports. The Office of the United Nations High Commissioner for Refugees (UNHCR) Guidelines e.g. are legal interpretive guidance to Signatory States and their composition is part of the UNHCR mandate.²⁹ They thus provide reliable information on the UNHCR understanding of the Refugee Convention and how it wills States to apply it. Moreover, reports from UN Special Rapporteurs provide insight into specific trafficking source countries. These have often been paired with reports from other sources in order to gain a more complete picture.

In addition to these, when it comes to the study of Swedish legislation, preparatory work ("propositioner") has been of much use. In the Swedish legal system, preparatory work is endowed with the quality of a source of law, which means it is highly reliable as well as relevant.

Qualitative and quantitative research such as interviews, surveys and focus groups are inappropriate to use for my purposes. Such research can only give a very limited understanding of the issue at hand, e.g. trafficking victims' understanding of refugee protection. Such research would give an important insight into the practical implications of refugee protection in state parties to the Convention. However, this would have to be partnered with the kind of theoretical

²⁸ US Department of State, Trafficking in Persons Report (2009), at 67, 293 available at: <http://www.state.gov/g/tip/rls/tiprpt/2009/index.htm>; Scarpa, *supra* note 1, at 22ff

²⁹ Statute of the Office of the United Nations High Commissioner for Refugees (1970), Art. 8(a)

research I have chosen to make in order to become broadly relevant. Therefore I have chosen against such methods.

1.4 Limitations

The study will be limited to trafficking of women for sexual commercial exploitation. Looking at one form of exploitation allows for a sufficiently in-depth analysis. Also, in answering the second and fourth question a clear emphasis will be on membership of a particular social group (PSG) since this ground is of most interest. Furthermore, it is recognised that much procedural issues go hand in hand with the legal ones, emphasising problems faced in already difficult claims. This dimension is however too complex in itself to be contained within the space of this dissertation. Finally, this dissertation is aimed at being primarily a study of international law, which will have an impact on the balance of the work.

2. ANALYSIS

Art. 1A(2) of the Refugee Convention defines a refugee as any person who, “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”. This chapter will be analysing whether persons at risk of trafficking can substantiate the refugee definition. Henceforth it will analyse whether complementary protection through Art. 3 of the ECHR may be achieved where refugee protection cannot be obtained. Lastly, Swedish national legislation will be discussed to gain an understanding of how international refugee law may be interpreted in a domestic setting.

2.1 A Well-Founded Fear of ‘Being Persecuted’

There is little doubt that trafficked persons often suffer harm on account of this illegal activity and much international attention has been given to the issue and how victims ought to be

protected.³⁰ This section will problemize the concept of persecution in the refugee definition through analysing the question: can/how can trafficking amount to persecution? Firstly, gender-specific harm and trafficking will be considered in a refugee context. Secondly, trafficking as slavery will be studied and thirdly trafficking as torture. Hereafter, lack of state protection and location will be deliberated upon.

2.1.1 Gender-Specific Harm and Trafficking in Refugee Law

Persecution is not defined in the Refugee Convention. It is however firstly understood as a threat to life or freedom according to Art. 1A(2) read together with Art. 33 of the Refugee Convention.³¹ Other serious violations of human rights may also qualify as persecution.³² Hathaway defines persecution as the “sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community”³³. We are thus considering serious harm. In order to define what obligations are to be considered core entitlements Hathaway develops a hierarchy of rights based on four distinct types of obligations drawn from the Bill of Rights.³⁴ This approach is widely accepted and has been crystallized into hard law through case law such as *Sandralingham and Ravichandran v SSHD*.³⁵ I also find it the most helpful theory in trying to understand persecution. First in his hierarchy are the rights stated in the Universal Declaration of Human Rights (UDHR), made binding through the International Covenant on Civil and Political Rights (ICCPR), from which no derogation is permissible, even in times of national emergency. Here we find e.g. freedom from slavery and the prohibition on torture or cruel, inhuman, or degrading treatment or punishment.³⁶ This category will be the focus of this dissertation.

³⁰ Evidenced e.g. by the drafting of such treaties as the Trafficking Protocol (2000) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005)

³¹ Goodwin-Gill, G.S. *The Refugee in International Law* (1996), at 68; Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees, UNHCR, UN Doc. HCR/IP/4/Eng/REV.1 (1992), at para. 51

³² UNHCR Handbook *supra* note 31, at para. 51

³³ Hathaway, *supra* note 4, at 112

³⁴ *Ibid.*, at 108

³⁵ *Sandralingham and Ravichandran v SSHD* CA [1996] Imm AR

³⁶ Hathaway, *supra* note 4, at 109, see Art. 8, 7 ICCPR

Persecution has not traditionally been interpreted to include women's gender specific experiences.³⁷ A key problem in cases dealing with these issues has been the understanding of serious harm according to Crawley. Even though the Refugee Convention appears objective, universally applicable and gender neutral at first glance it is a product of its time and political realities.³⁸ The persecution faced by the refugee depicted in the Convention is a male, public character generally oppressed because of political views.³⁹ Much of the harm faced by women across the globe on the other hand occurs in the private sphere, which has meant their situations have fallen outside the scope of the legal definition of a refugee, rendering them without international protection.⁴⁰ However, gender-specific persecution today needs to be viewed in the context of developments in refugee and human rights law. This is acknowledged by the Office of the United Nations High Commissioner for Refugees (UNHCR).⁴¹ It concludes that the refugee definition is to be interpreted "with an awareness of possible gender dimensions"⁴². This includes claims brought by victims and potential victims of trafficking.⁴³ There is hence ground for State Parties to consider persons at risk of trafficking for refugee status. However, the guidelines provide "legal interpretive guidance"⁴⁴ and are as such not legally binding. Also, the guidelines do not deal extensively with all the circumstances surrounding a trafficking situation, which means questions are left unanswered.

Whether or not trafficking can be understood as amounting to persecution has, in my opinion to be answered with reference to Art. 3 of the Trafficking Protocol, since there is strong international consensus over this definition.⁴⁵ The definition is drafted as a process made up of

³⁷ Crawley, *supra* note 14, at 39

³⁸ Hathaway, *supra* note 4, at 1, 8; Sztucki, J. 'Who is a refugee? The Convention definition: universal or obsolete?' in Nicholson, F., Twomey, P. (eds.), *Refugee Rights and Realities* (1999), at 55; see also Art. 1B Refugee Convention; Türk, V. 'The role of UNHCR in the Development of International Refugee Law', in Nicholson, F., Twomey, P. (eds.), *Refugee Rights and Realities* (1999), at 161

³⁹ Crawley, *supra* note 14, at 7

⁴⁰ Freedman, J. *Gendering the International Asylum and Refugee Debate* (2007), at 69

⁴¹ UNHCR Guidelines on Gender-Related Persecution *supra* note 5, at para. 5

⁴² *Ibid*, at para. 2

⁴³ 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, UNHCR, UN Doc. HCR/GIP/06/07 (2006), UNHCR Guidelines on Gender-Related Persecution, *supra* note 5, at para. 18, Scarpa, *supra* note, at 95

⁴⁴ UNHCR Guidelines on Gender-Related Persecution *supra* note 5, preamble; UNHCR Guidelines on Trafficking *supra* note 28, preamble

⁴⁵ As of 26 Sept. 2008 117 states were signatories and 124 Parties to the Protocol

three parts. Firstly, there is recruitment or another trade measure. Secondly, certain illicit means are to be used, and thirdly the purpose shall be exploitation. Art. 3(a) states that “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”. As stated in the introduction this dissertation is limited to considering trafficking for ‘the exploitation of the prostitution of others’.

It should be noted that in considering a specific case, persecution is analysed in relation to future risk. This has to be assessed in accordance with the criterion of well-founded fear, requiring both a subjective and objective fear to be established. The experience of previous persecution can however support a claim made.⁴⁶ The assessment of future risk will not be considered further.

2.1.2 The Trafficking Definition and the Issue of Consent

In order to effectively analyse and more fully understand how trafficking can amount to persecution with reference to slavery and torture provisions the inherent difficulties with the trafficking definition as found in Art. 3 of the Trafficking Protocol in my opinion need to be considered.

The definition reflects a long-standing feminist debate concerning the issue of consent. The chasm between such groups as Global Alliance Against Trafficking in Women (GAATW) and Coalition Against Trafficking in Women (CATW) relates to their respective understandings of prostitution. The former understands prostitution as labour, which a woman may freely choose to engage in.⁴⁷ The latter regards prostitution as violence against women, something which cannot effectively be consented to.⁴⁸ In the drafting of the Trafficking Protocol this meant GAATW promoted a definition including violence/coercion as a necessary element of trafficking, whereas CATW saw this as superfluous. Their understanding is that trafficking is always a violation of human rights, and not something you can consent to.⁴⁹ Instead of taking a stand on the matter, the

⁴⁶ Hathaway, *supra* note 4, at 65ff, 88ff, UNHCR Handbook, *supra* note 31, at para. 45

⁴⁷ Sutherland, K. ‘Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex trade’, 42:1 *Osgoode Hall Law Journal* (2004) 139, at 144; Doezema, *supra* note 24

⁴⁸ Simm, G. ‘Negotiating the United Nations Trafficking Protocol: Feminist Debates’, 23 *Australian Year Book of International Law* (2004) 135, at 138; Raymond, *supra* note 22

⁴⁹ Sutherland, *supra* note 47, at 144

final draft of the definition became a compromise where both groups claim victory.⁵⁰ This is in my opinion troublesome. It can be seen in the formulation of Art. 3(b) and in the fact that neither the ‘exploitation of the prostitution of others’ nor ‘other forms of sexual exploitation’ have been defined.⁵¹ This allows for State parties to address prostitution in the way they desire and also to determine the precise scope of trafficking.⁵²

Where the perspective promoted by GAATW is practiced, I would argue a distinction will be made between women who have been coerced into trafficking and those who have consented to migrate for sex work. The consequence of this will, in my opinion be that consenting women will be grouped together with smuggled individuals or otherwise irregular migrants. As such they will reasonably be expelled by immigration authorities as “current destination countries are prima facie negatively disposed toward those present or working illegally in their jurisdictions”⁵³. They will not on the basis of trafficking be considered refugees. This liberalist individualistic stance can be criticised for not duly considering the contexts in which the choices of these women are made.⁵⁴ As Quirk states “trafficking can be a difficult concept to pin down. It does not denote a uniform condition but covers a spectrum of practices, involving varying degrees of consent, coercion, treatment and autonomy”⁵⁵. The question of what free choice actually is, is in my view relevant here since other factors such as poverty play a role in decisions made by women entering the trafficking process.

In contrast, where the perspective promoted by CATW is adopted I believe no distinction will be made between women who have consented to being trafficked or not. These will be separated from illegal immigrants as a category in need of protection. The consequence of this perspective

⁵⁰ Raymond, *supra* note 22, at 4; Simm, *supra* note 48, at 147; Westerstrand, J. *Mellan mäns händer Kvinnors rättssubjektivitet, internationell rätt och diskurser om prostitution och trafficking* (2008), at 258

⁵¹ Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc. A/55/383/Add.1 (2000), at para. 64; Westerstrand, *supra* note 50, at 324

⁵² *travaux préparatoires*, *supra* note 51, at para. 64; Specific Human Rights Issues Contemporary Forms of Slavery, Report of the Working Group on Contemporary Forms of Slavery on its thirty-first session, UN Doc. A/HRC/Sub.1/58/25* (2006)

⁵³ Askola, H. *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (2007), at 32

⁵⁴ *Ibid*, at 34

⁵⁵ Quirk, J. ‘The Anti-Slavery Project: Linking the Historical and Contemporary’, 28 *Human Rights Quarterly* (2006) 565, at 576

could be that all of these women can be considered for refugee status, which obviously would provide a great deal of protection. The perspective can however be criticised for depriving trafficked women of their agency in making choices and hence reducing them to helpless victims.⁵⁶ It may also in my view endanger more women of falling into the hands of traffickers when it becomes known that country X grants refugee status to all trafficking victims. However it cannot be ascertained that even where this perspective is adopted all these women will be understood as having experienced persecution. It can be argued this kind of application would mean refugee protection would be given on the basis of social and economic rights, since the lack of these tend to be push factors for women choosing to enter the trafficking process.⁵⁷ This could potentially cause conflict with the Refugee Convention since it favours protection for civil and political rights unless an element of discrimination is involved.

It seems, in my opinion as though these polarized views in relation to the Refugee Convention could result in either a significant loss of international protection for the group of trafficked women having given their consent to recruitment, or the victimisation of the whole range of women trafficked for prostitution. I would not therefore ascribe completely to any of them, even though the CATW argument is certainly the most attractive at first glance.

2.1.3 Trafficking for the 'Exploitation of the Prostitution of Others' as Slavery or Slavery-Like Practices

Prohibitions on slavery and slavery-like practices have gained the status of *jus cogens* in public international law.⁵⁸ Where it occurs it amounts to persecution within the meaning of the Refugee Convention according to Hathaway's rights hierarchy.⁵⁹ Connections have been made between trafficking and slavery from the International Agreement for the Suppression of the White Slave Traffic in 1904.⁶⁰ However, it needs to be analysed whether trafficking today can be understood as a form of slavery or slavery-like practice.

⁵⁶ Askola, *supra* note 53, at 25; Doezema, *supra* note 24

⁵⁷ Wennerholm, *supra* note 25, at 12

⁵⁸ Bassiouni, M.C. 'Enslavement as an International crime', 23:2 *N.Y.U. Journal of International Law and Politics* (1990-1991) 445

⁵⁹ Hathaway, *supra* note 4, at 9, Art. 8 ICCPR

⁶⁰ Doezema, *supra* note 24, at 23

The Slavery Convention from 1926 defines slavery in Art. 1(1) as the “status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. This is henceforth reiterated in Art. 4 Universal Declaration of Human Rights (UDHR) and Art.8 International Covenant on Civil and Political Rights (ICCPR). Many understand the definition as narrow, referring to the black slave trade where ownership was exercised on a permanent basis.⁶¹ An interpretation such as this speaks for the exclusion of trafficking from the definition. This conclusion is supported by the drafting process of the Convention. In the process a suggestion to include in Art. 2 practices resembling slavery, such as trafficking was turned down.⁶² On the other hand, the Working Group on Contemporary Forms of Slavery in 1998 adopted a recommendation stating that “transborder trafficking of women and girls for sexual exploitation is a contemporary form of slavery and constitutes a serious violation of human rights”⁶³. Their promotion of trafficking as slavery, in my view carries more weight and seems supported by the Human Rights Committee.⁶⁴ Further support for this view can also be found in humanitarian law. The International Criminal Court (ICC) Statute defines enslavement⁶⁵, a crime against humanity as including the “exercise of such power [powers attached to the right of ownership] in the course of trafficking in persons”⁶⁶. Furthermore, in the case *Prosecutor v Kunarac* before the International Criminal Tribunal for the Former Yugoslavia (ICTY) the Tribunal finds that indications of enslavement are elements of control, ownership and exploitation.⁶⁷ As examples of exploitation sex, prostitution and human trafficking are given.⁶⁸

However, even if there is support for a general understanding trafficking as slavery, it cannot in my view be concluded that every instance of trafficking for the exploitation of the prostitution of others will be considered as such. According to Westerstrand, in a trafficking context slavery is

⁶¹ Westerstrand, *supra* note 50, at 326; Bassiouni, *supra* note 58

⁶² Scarpa, *supra* note 1, at 46

⁶³ Contemporary Forms of Slavery, Report of the Working Group on Contemporary Forms of Slavery on its twenty-third session, UN Doc E/CN.4/Sub.2/1998/14 (1998), Recommendation 4

⁶⁴ Human Rights Committee, General Comment 28, ‘Article 3 (The equality of rights between men and women)’, UN Doc. HRI/GEN/1/Rev.8 (2006), at para. 12

⁶⁵ To be understood as equivalent to slavery according to *Prosecutor v Kunarac and others* (Judgement) ICTY-96-23-T and ICTY-96-23/I-T (22 February 2001)

⁶⁶ Art. 7(2) (c) ICC Statute, see also Art. 8(2)(b)(xxii), 8(2)(e)(vi)

⁶⁷ *Prosecutor v Kunarac and others supra* note 65, at para. 539, 542

⁶⁸ *Ibid*, at para. 542

the coarsest form on a continuous scale.⁶⁹ The Appeals Chamber in *Prosecutor v Kunarac and others* states that whether something is to be deemed enslavement will depend upon the operation of factors such as: “control of someone’s movement, physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”⁷⁰ In *R v Tang* before the High Court of Australia it is stated that the difference between slavery and harsh exploitative conditions “may be found in the nature and extent of the powers exercised over a complainant”⁷¹. It is emphasised that the treatment of a person as a commodity involves powers of control and inadequacy of payment well beyond those of the most exploitative employment situation. The claimants in this case were seen to have been exposed to *de facto* slavery. The basis for this understanding was that they were financially deprived and vulnerable on arrival, their passports were held by the brothel owner, they were effectively restricted to the premises and they had to work without pay until their contract debt had been paid.⁷² I would argue many trafficked persons face this power of ownership. Sometimes they will experience it already on route where they may be sold from one “owner” to another, being confined to hotel rooms and sometimes being forced into prostitution.⁷³ On other occasions, this experience only starts on arrival. Many are restricted to a brothel where they are made to work until the payment made for them, and other supposed expenses have been paid for.⁷⁴ These may thus be able to argue they have been exposed to slavery in the form of trafficking and thus make a case for that persecution has occurred and hence that they may be exposed to this harm again. What may speak against such a claim being successful is the fact that the control often is not total but limited e.g. in time. Bassiouni claims this removes the situation from protection by

⁶⁹ Westerstrand, *supra* note 50, at 326

⁷⁰ *Prosecutor v Kunarac and others* (Judgement) IT-96-23 and IT-96-23/1-A (12 June 2002), at 119

⁷¹ *R v Tang* [2008] HCA 39, at para. 44

⁷² *Ibid*, at para. 15ff

⁷³ Human Rights Watch, ‘Bosnia and Herzegovina Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution’, 14:9 *Human Rights Watch* (2002), at 15f

⁷⁴ *Ibid*, at 16ff; Coomaraswamy, R. Report of the Special Rapporteur on violence against women, its causes and consequences: Mission to Bangladesh, Nepal and India on the issue of trafficking of women and girls, UN Doc E/CN.4/2001/73/Add.2 (2001) at 10

international instruments on slavery.⁷⁵ The Appeals Chamber in *Prosecutor v Kunarac* disagrees and so do I.⁷⁶

Where the slavery definition cannot be met, the 1956 Supplementary Convention on Slavery, the Slave Trade, and Institution and Practices Similar to Slavery (Supplementary Convention on Slavery) broadens the scope of the Slavery Convention through adding institutions and practices similar to slavery.⁷⁷ These are set out in Art.1 and include debt bondage.⁷⁸ This occurrence is herein defined as the practice of repaying a loan with services where the length and value has not been specified. The creditor potentially adds interest to such a loan in order to gain further control over the debtor and to increase the length of time of the bondage.⁷⁹ The experiences faced by many trafficked women in my view fit this definition. The definition of trafficking in the Trafficking Protocol also provides recognition of that debt bondage can be involved in trafficking.⁸⁰ Many are told they have to work to repay travel and other expenses. This has been found to be common with women trafficked from Tajikistan to control the victims and ensure high profits.⁸¹ Women trafficked to Bosnia Herzegovina and Japan are similarly bound to work until large debts have been paid off.⁸² Women who face these kinds of situations may thus claim they have been exposed to slavery-like practices and might be able to ascertain they have experienced persecution.

The definition of trafficking with its inherent problems can in relation to the above, in my view be criticised for its focus on the initial stage of the trafficking process. The discussion about consent, which will ultimately affect who is seen as a victim of trafficking, begins and ends with

⁷⁵ Bassiouni, *supra* note 58, at 459; Westerstrand, *supra* note 50, at 330

⁷⁶ *Prosecutor v Kunarac and others*, *supra* note 70, at para. 121

⁷⁷ Scarpa, *supra* note 1, at 49

⁷⁸ Art. 1(a) Supplementary Convention on the Abolition of Slavery (1956)

⁷⁹ Scarpa, *supra* note 1, at 19

⁸⁰ Art. 3(a) Trafficking Protocol; Kelley, E. 'Journeys of Jeopardy: A Review of Research on Trafficking in Women and Children in Europe', 11 *IOM Research Series* (2002), at 15

⁸¹ International Organization for Migration (IOM), *Deceived Migrants from Tajikistan- A Study of Trafficking in Women and Children, Capacity Building in Migration Management Programme* (2001), at 19

⁸² Human Rights Watch, *supra* note 73, at 16ff ; Derks, A. 'Combating Trafficking in South-East Asia A Review of Policy and Programme Responses', 2 *IOM Migration Research Series* (2000), at 29; 'Owed Justice- Thai Women Trafficked into Debt Bondage in Japan', *Human Rights Watch* (2000) available at: <http://www.hrw.org/legacy/reports/2000/japan/6-sec-6-7-8.htm> accessed 07/08/09

the means of recruitment or other trade measure.⁸³ This can according to Reilly make the exploitation following the initial process invisible and hence prevent it from becoming clear that slavery/slavery-like practices have occurred.⁸⁴ I consider this paradoxical and troublesome since slavery cannot be consented to.⁸⁵ The result Reilly foresees is that perpetrators will not be prosecuted and the crime of trafficking not fully exposed.⁸⁶ I would add that it means victims of trafficking are made invisible to the refugee determination process.

2.1.4 Trafficking for the 'Exploitation of the Prostitution of Others' as Torture

The prohibition on torture has gained the status of *jus cogens* in international law.⁸⁷ It amounts to persecution within the meaning of the Refugee Convention according to Hathaway's rights hierarchy.⁸⁸ The prohibition can be found in both human rights treaties such as Art. 5 UDHR and Art. 7 ICCPR, humanitarian law instruments such as the common Art. 3 of the Geneva Conventions and in international criminal law treaties concerned with war crimes and crimes against humanity, both of which include torture.⁸⁹ The UN Convention Against Torture (CAT) finally constitutes an instrument entirely dedicated to the eradication of torture and is understood as reflecting international customary law as far as state obligations are concerned.⁹⁰ It will therefore be at the centre of the analysis below. Torture has traditionally been understood as an interrogation method to secure evidence and hence had little to do with the gender-specific

⁸³ Compare Art. 3(a) and (b) Trafficking Protocol

⁸⁴ Reilly, A.A. 'Slavery Legislation vs. Trafficking Legislation in Prosecuting the Crime of Female Sexual Slavery: An International Law Perspective', in van den Anker, C. L., Doornik, J. (eds.), *Trafficking and Women's Rights* (2006) at 118ff

⁸⁵ *Prosecutor v Kunarac and others supra* note 70, at para. 120; *R v Tang supra* note 71, at para. 35

⁸⁶ Reilly, *supra* note 84, at 118ff

⁸⁷ *Prosecutor v Delalic, et al.* (Judgement) IT-96-21-T (16 Nov 1998), at para. 454; Burchard, C. 'The Legal Contours of the Crime of Torture', 6: 2 *Journal of International Criminal Justice* (2008) 159, at 3

⁸⁸ Hathaway, *supra* note 4, p. 9

⁸⁹ Art. 7(1) (f), Art. 8(2)(a)(ii) of the ICC Statute includes torture as a crime against humanity and a war crime, compare Art.5(f) of the ICTY Statute, Art. 3(g) of the ICTR Statute; First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (1864), Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1906), Third Geneva Convention relative to the Treatment of prisoners of War (1949), Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)

⁹⁰ *Prosecutor v Kunarac and others supra* note 70, at para. 147

harm.⁹¹ However, much development has been made in understanding gendered forms of torture and it needs to be analysed whether trafficking today can be understood as a form of torture.

In Art. 1 CAT the act of torture is defined by four essential components, namely: severe physical or mental pain or suffering, intent, purpose and the *rationae personae* reserved for public officials. These therefore need to be considered in relation to trafficking. Firstly, trafficking has been recognised as a form of violence against women.⁹² Where the exploitation takes the form of (forced) prostitution, this violence is of a sexual nature. Various forms of sexual violence against women has by the ICTY and the International Tribunal for Rwanda (ITR) been recognised as “constituting ‘wilfully causing great suffering’, ‘cruel treatment’, ‘inhumane acts’, etc.”⁹³ However, in order for such treatment to be understood as torture the acts must be of substantial gravity. According to *Prosecutor v Kunarac* there is no absolute threshold level of pain or suffering that is to be determined.⁹⁴ It is rather a matter of taking into account “objective and subjective criteria as well as the disposition of the victim”⁹⁵. In *Prosecutor v Krnojelac* some of the aspects considered are the nature, length, consistency and context of the treatment together with the age, sex, health and inferiority of the victim.⁹⁶ Rape has on a number of occasions been recognised by the tribunals as torture.⁹⁷ In the case of *Prosecutor v Kunarac* it was stated that once rape has been proved, it can be established that torture has occurred since the act of rape “necessarily implies such pain or suffering”⁹⁸ as required by the definition. The pain and suffering caused by trafficking can in my opinion effectively be compared with that caused by rape, since it also involves “a physical invasion of sexual nature”⁹⁹. During the exploitation

⁹¹ Burchard, *supra* note 87, at 9

⁹² UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation 19 ‘Violence against Women’, UN Doc. HRI/GEN/1/Rev.8 (2006), at 302

⁹³ Askin, K.D. ‘Women’s Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC’, in Shelton, D. (ed.), *International Crimes, Peace and Human Rights* (2000) 47, p. 60

⁹⁴ *Prosecutor v Kunarac and others supra* note 70, at para. 149

⁹⁵ Burchard, *supra* note 87, at 4

⁹⁶ *Prosecutor v Krnojelac* (Judgment) IT-97-25-T (15 March 2002), at para. 182, compare section 2.3 on Art.3 ECHR

⁹⁷ *Prosecutor v Delalic, et al. supra* note 87; *Prosecutor v Furundzija* (Judgement) IT-95-17/1-T (10 December 1998); *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998). Rape has also been recognised as persecution, please refer to *Lazo-Majano v INS*, 813F.2d 1432 (1987); *Lopez-Galarza v INS*, 99 F. 3d 954 (1996)

⁹⁸ *Prosecutor v Kunarac and others supra* note 70 at para. 149ff; Burchard, *supra* note 87, at 3

⁹⁹ *Prosecutor v Akayesu supra* note 97, at para. 688

phase, trafficked women serve clients during 9-18 hours a day.¹⁰⁰ Many also face beatings, rape and starvation by their “owners”.¹⁰¹ In contrast to rape victims, trafficking victims endure their ill-treatment for longer periods of time and are often held in a position of inferiority through isolation, control and deception.¹⁰² Trafficking victims also tend to be young, which adds to their vulnerability.¹⁰³ The severity of this treatment is evidenced by the fact that the experience is detrimental to the physical, sexual and reproductive health and often causes substance abuse and misuse.¹⁰⁴ Many victims also suffer from post-traumatic stress disorder, depression, anxiety and phobias.¹⁰⁵ Depending on the particular circumstances of the case, this treatment ought in my view to be considered severe enough to constitute torture. If it in a particular case is not, cruel, inhuman or degrading treatment should be possible to evidence.¹⁰⁶

Secondly, the act must be intentionally inflicted for the purpose of obtaining information or a confession, to punish, to intimidate or coerce or for “any reason based on discrimination of any kind”¹⁰⁷. It can be argued that gender-specific violence is a form of discrimination.¹⁰⁸ This means, according to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment that where violence against women occurs the “purpose element is always fulfilled, if the acts can be shown to be gender-specific”¹⁰⁹. In *Prosecutor v Delalic et al* the Trial Chamber concluded that the sexual violence experienced by the victims was inflicted because

¹⁰⁰ Coomeraswamy, R. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Report on the Mission of the Special Rapporteur to Poland on the issue of trafficking and forced prostitution of women, UN Doc. E/CN.4/1997/47/Add.1 (10 December 1996), at 11

¹⁰¹ Ibid, Coomeraswamy, *supra* note 74, at para. 21

¹⁰² Ibid, IOM Kosovo Anti-Trafficking Project, Return and Reintegration Project, Situation Report February 2000 to September 2002, at. 16

¹⁰³ Human Rights Watch, *supra* note 73, at 4, 16

¹⁰⁴ London School of Hygiene and Tropical Medicine, The Health Risks and Consequences of Trafficking in Women and Adolescents, findings from a European Study, available at: <http://www.oas.org/atip/Global%20Reports/Zimmerman%20TIP%20HEALTH.pdf>, accessed 25/06/09, p. 44ff

¹⁰⁵ UN Office on Drugs and Crime, ‘Toolkit to Combat Trafficking in Persons’ (2006), at 155, to compare with the consequences of rape see Pearce, H. ‘An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture’, 14 *International Journal of Refugee Law*, (2002) 534

¹⁰⁶ Compare *Prosecutor v Akayesu*, *supra* note 97, at para. 692ff

¹⁰⁷ Art.1 CAT

¹⁰⁸ CEDAW, *supra* note 92, at para. 7

¹⁰⁹ Nowak, M. Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/HRC/7/3 (15 January 2008), at para. 30

they were women and that it therefore “represents a form of discrimination”¹¹⁰. This is in my opinion a convincing argument which means that sexual violence experienced by women trafficked into prostitution can also be understood as a form of discrimination. It is also emphasised by the fact that the female body is made an object of purchase. The Special Rapporteur considers intent to be implied in these circumstances.¹¹¹

Thirdly, trafficking tends to be perpetrated by non-state actors.¹¹² The limitation provided by the public official requirement in Art. 1 CAT can therefore prove difficult to satisfy. In international criminal law, this requirement was lifted in *Prosecutor v Kunarac*.¹¹³ However, the main reason was the specific nature of international humanitarian law.¹¹⁴ General conclusions about the crime of torture therefore cannot be made on this basis. Gaeta suggests the public official requirement is a necessary feature with of the definition of torture in CAT, since it imposes obligations in criminal matters under exceptional circumstances.¹¹⁵ The requirement should hence not be interpreted to include acts by non-state actors.¹¹⁶ In contrast, the Special Rapporteur on torture considers the language of Art. 1 as regards consent and acquiescence by a public official to extend State obligations to the private sphere.¹¹⁷ He states that this “should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals”¹¹⁸. I consider this argument highly plausible. This stance also seems to be held by the Committee against Torture which claim that where the State knows or has reasonable grounds to believe that torture or ill-treatment is being perpetrated by non-state actors and fails to due diligently prevent, investigate, prosecute or punish these “the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts”¹¹⁹. They

¹¹⁰ *Prosecutor v Delalic, et al.* *supra* note 87, at paras. 941, 963

¹¹¹ Report of the Special Rapporteur on Torture *supra* note 109, at para. 30

¹¹² Raymond, *supra* note 22, at 493; Wennerholm, *supra* note 25, at 13f

¹¹³ *Prosecutor v Kunarac and others*, *supra* note 65, para. 459; *supra* note 70, at para. 145ff

¹¹⁴ Burchard, *supra* note 87, at 3

¹¹⁵ Gaeta, P. ‘When is the Involvement of State Officials a Requirement for the Crime of Torture?’, 6:2 *Journal of International Criminal Justice* (2008) 183, at 2ff

¹¹⁶ Gaeta, *supra* note 115, at 3

¹¹⁷ Nowak, *supra* note 109, at 31

¹¹⁸ *Ibid*

¹¹⁹ Committee against Torture, General Comment 2, ‘Implementation of article 2 by State Parties’, UN Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007), at para. 18

consider such indifference as facilitating and encouraging such actions. Even if this view is not accepted by jurisprudence, Art. 7 ICCPR provides a prohibition on torture without the public official requirement. Referring to Art. 2(1) of the ICCPR, Smith claims "state liability will not necessarily be limited to acts committed by its officials in the pursuance of their public duties, but may extend liability for harm inflicted by private actors where a State has failed to take the necessary protective and/or investigative steps"¹²⁰. Since both CAT and ICCPR are of relevance to establishing that trafficking amounts to persecution, I conclude that this requirement ought not to pose any difficulty.

The same criticism of the trafficking definition regarding the issue of consent can be made in relation to torture, as it was with regards to slavery. Like slavery, torture cannot be consented to, which means a focus on the initial recruitment stage and whether consent was given should not be of major importance where the person can be considered to have been exposed to torture.¹²¹

2.1.5 Failure of State Protection

In addition to the serious harm requirement, there needs to be a lack of state protection for persecution to be established, according to the principle of surrogacy.¹²² In most instances of trafficking in persons, private agents are the perpetrators.¹²³ The UNHCR Handbook states that when serious harm is committed by private actors, "they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection"¹²⁴. This has been analysed in *Horvath v SSHD*, where Lord Hope states that "the criterion must be whether the alleged lack of protection is such as to indicate that the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals"¹²⁵. The test is one of reasonable willingness. Lord Clyde explains this as meaning a criminal law must be in place making to punish the crime

¹²⁰ Smith, E. 'A Legal Analysis of Rape as Torture', in Peel (ed.), *Rape as a Method of Torture* (2004), at 180f

¹²¹ *R v Brown* [1993] 2 All ER 75, see in particular Lord Templeman; *Laskey, Jaggard and Brown v UK* (Case No. 109/1995/615/703-705) Judgement of 19 February 1997

¹²² Goodwin-Gill, *supra* note 31, at 9ff; *Regina v SSHD ex parte Sivakumaran* [1988] AC 958

¹²³ UNHCR Trafficking Guidelines, *supra* note 43, at para. 21

¹²⁴ UNHCR Handbook, *supra* note 31, at para. 65, UNHCR Guidelines on Gender-Related Persecution *supra* note 5, at para. 19

¹²⁵ Lord Hope of Craighead in *Horvath v SSHD* [2000] UKHL 37 (6th July, 2000); *Adan v SSHD* [1999] 1 AC 293; Hathaway, *supra* note 4, at 125

without exempting the victims as a class from this protection. There also needs to be willingness amongst law enforcement agencies to utilise this law.¹²⁶ In relation to trafficking, legislative and administrative mechanisms and their effectiveness in preventing and combating trafficking and protection and assisting victims will have to be analysed in a given country.¹²⁷

In considering case-law regarding trafficking, this could potentially pose a problem in a status claim. In *V01/13868* from 2002 the Refugee Review Tribunal of Australia (RRTA) considers whether Albania can be seen to provide state protection in relation to trafficking. It is concluded that Albania has accepted responsibility to protect women from being trafficked and that they are therefore willing and able to do so.¹²⁸ This conclusion is based mainly on the fact that Albania was promoted from a 'Tier 3' to a 'Tier 2' country in the US Department of State Trafficking in Persons Report 2002, which signifies the fact that the Albanian Government has shown willingness to stop trafficking even though they are not yet fulfilling the minimum requirements for the elimination of trafficking.¹²⁹ Similar conclusions regarding Albania are drawn two years later in *V03/16442* even though the minimum requirements are still not met.¹³⁰ It seems in my view that the Tribunal is taking a hopeful approach to state protection in relying on willingness than actual ability to perform.

Moreover, state corruption and lack of prosecution of trafficking offenders expanded upon in *VD Albania* and *V01/13868*. These major problems in the countries in question are however not given enough weight for it to be considered as impairment on available state protection. The House of Lords accept this stance in *Horvath v SSHD*.¹³¹ This seems to ignore the emphasis of the Trafficking Guidelines that when trafficking activities are *de facto* tolerated, condoned or facilitated by corrupt State officials, the agent of persecution may well be the state itself.¹³²

In contrast, in the case of *SK Albania* the Tribunal concludes that even though Albania has been promoted from a 'Tier 3' to a 'Tier 2' in the 2002 US Department of State Trafficking in Persons

¹²⁶ Lord Clyde, at para. 22

¹²⁷ See Part II Trafficking Protocol, UNHCR Trafficking Guidelines, *supra* note 43, at para. 23

¹²⁸ *V01/13868* [2002] RRTA 799 (6 September 2002)

¹²⁹ US Department of State, Trafficking in Persons Report (2002)

¹³⁰ *V03/16442* [2004] RRTA 474 (25 June 2004), compare *N05/50773* [2005]RRTA 103 (28 June 2005)

¹³¹ *Horvath v SSHD*, *supra* note 125, see Lord Clyde

¹³² UNHCR Trafficking Guidelines, *supra* note 43, at para. 24

Report it does not yet fully comply with the minimum standards for the elimination of trafficking. This is seen as an indication of there not being sufficient state protection.¹³³ The fact that a country is a major source country of trafficking and consistently fails to prosecute offenders has also been accepted as evidence of failure of state protection in *SSHD v Dzyhygun* regarding Ukraine.¹³⁴ There are also judgements contrasting what is determined above in relation to state corruption. In *N03/47757* the Tribunal accepts police corruption in Thailand as evidence of failure of state protection.¹³⁵

The requirement of there being willingness and ability to protect women from trafficking in a State seems clear and reasonable. However, judging from the case-law presented I believe it may not be as simple. In some cases a high threshold for state failure to be accepted was used. However, in others a more empathetic approach can be seen. This difference makes me wonder about the risk of arbitrariness in the consideration of country reports.

2.1.6 Location

The whereabouts of an individual wanting to claim refugee status is important; the claimant must be outside the country of nationality.¹³⁶ It is also important in relation to where the alleged persecution took place. The claim is to be assessed with reference to the conditions in the state of nationality or origin.¹³⁷ It is the risk upon return which is assessed in the determination process. Protection in the form of refugee status is only to be afforded if protection cannot be sought from the state of origin.¹³⁸

The traditional view of a refugee is that the individual has crossed an international border to seek protection from political oppression from the state of origin.¹³⁹ In the context of trafficking, movement is not made to escape harm but the beginning of a process leading to harm. This could potentially complicate a claim for asylum. It is not necessary to have left because of fear, refugee

¹³³ *SK Albania* UKIAT [2003] 00023, para. 12; *P v SSHD* [2008] EWHC 2447 (Admin)

¹³⁴ *SSHD v Dzyhygun*, [2000] UKIAT 00TH00728, at para. 23

¹³⁵ *N03/47757* [2004] RRTA 355 (11 May 2004)

¹³⁶ Art. 1A(2) of the Refugee Convention

¹³⁷ Hathaway, *supra* note 4, at 55ff

¹³⁸ Goodwin-Gill, *supra* note 31, at 9ff

¹³⁹ Crawley, *supra* note 14, at 4ff

law recognises refugees *sur place*.¹⁴⁰ However, the question of where the harm begun may in my view cause complications, since it must relate to the country of origin.¹⁴¹ As can be seen in the definition of trafficking, it is a process. Usually it starts with recruitment by word of mouth, marriage schemes and advertisements for jobs as e.g. waitresses, dancers, baby-sitters.¹⁴² Both native and foreign girls are attracted in this way in e.g. Poland and Russia. Among the foreigners are women in search of employment, refugees, forced migrants and displaced persons having lost their nationality.¹⁴³ Recruitment is also made directly into destination countries.¹⁴⁴ After this initial contact the traffickers usually offer to handle logistical matters, tickets and necessary documents.¹⁴⁵ This part of the trafficking process is voluntary on the part of the individual and in itself not harmful. The journey hereafter may involve violence, rape, and sale from one trafficker to another, beginning the actual harm. It is equally possible for the harm to begin only on arrival in the destination country.¹⁴⁶ There is thus an inherent complexity in the trafficking process which will affect the process of establishing trafficking as persecution.

The Special Rapporteur on violence against women claims that the recruitment as well as transport of trafficked persons is “inextricably linked to the end purpose of trafficking” and suggests a holistic understanding of trafficking generally. This is a reasonable argument in my view. It also coheres with the definition of trafficking in the Trafficking Protocol.¹⁴⁷ On this basis, a woman who has been recruited in her country or origin can relate the harm she fears to this country. This is however not possible where the recruitment has taken place in a foreign country. The only link that can be made to the country of origin here is the reason for why the woman left her country in the first place. These reasons will often be of socio-economic nature

¹⁴⁰ Hathaway, *supra* note 4, at 33ff

¹⁴¹ *Ibid*, at 55

¹⁴² Orlova, A.V ‘Trafficking of Women and Children for Exploitation in the Commercial Sex trade: The Case of the Russian Federation’, 6 *The Georgetown Journal of Gender and the Law* (2005) 157, at 167ff; Coomeraswamy, *supra* note 74, at 19; Coomeraswamy, *supra* note 100, at 15

¹⁴³ Orlova, *supra* note 142, at 167; Coomeraswamy, *supra* note 100, at 14

¹⁴⁴ Coomeraswamy, *supra* note 100, at 15

¹⁴⁵ *Ibid*, at 16; Orlova, *supra* note 142, at 171f

¹⁴⁶ Human Rights Watch, *supra* note 73, at 15f ; Orlova, *supra* note 142, at 159

¹⁴⁷ Coomeraswamy, R. Report of the Special Rapporteur on violence against women, its causes and consequences, on trafficking in women, women’s migration and violence against women, UN Doc. E/CN.4/2000/68, (2000), at 9

and thus something which cannot easily be argued for as a basis of refugee status.¹⁴⁸ Where recruitment is made through the internet, the complexity is added to. Perhaps the targeting in various ways of certain countries could be used to build a claim here, but I perceive this to be difficult.

Furthermore, internal trafficking occurs in many places. From rural and economically deprived areas people are trafficked to cities.¹⁴⁹ In some places like Mauritania women are also trafficked between ethnic groups.¹⁵⁰ These individuals are out of bounds of refugee status, since they have not crossed an international border, even though their harm clearly relates to their country of origin.

2.2 For Reasons of a Ground

In addition to establishing trafficking as persecution, a claimant must show this is feared for reasons of a ground, which is what this section will be problemizing. This will be done through analysing the question: can/how can trafficking be linked to a Convention ground? Firstly consideration will be given to gender-related harm where the grounds race, religion, nationality and political opinion will be mentioned. Secondly a more in-depth analysis of membership of a PSG will be made. Lastly nexus will be discussed.

2.2.1 Gender-Related Harm and Trafficking

The harm feared by a claimant of refugee status has to be linked to a Convention ground as stated in Art. 1A(2) of the Refugee Convention. Gender is not included among the grounds, which means gender-related claims must be satisfied by the other grounds.¹⁵¹ According to Crawley “some of the most difficult issues in current jurisprudence arise over whether a gender-related asylum claim involves persecution ‘on account of’ one of the five enumerated grounds”¹⁵². It has

¹⁴⁸ Kartusch, A. *Reference Guide for Anti-Trafficking Legislative Review* (2001) at 20; Human Rights Watch, *supra* note 73, at 15

¹⁴⁹ Coomerawamy, *supra* note 74, at 29

¹⁵⁰ Coomerawamy, *supra* note 147, at 25

¹⁵¹ UNHCR Guidelines on Gender-Related Persecution, *supra* note 5, at para. 22

¹⁵² Crawley *supra* note 14, at 62

been particularly difficult to show that sexual violence is linked to a ground, rather than an expression of individual violence.¹⁵³

Some women are trafficked because of race, religion, nationality or political opinion.¹⁵⁴ This is today generally accepted as encompassed by the refugee definition.¹⁵⁵ This will therefore not be explored further. More problematic are the instances where women are trafficked because they are vulnerable. Membership of a PSG can here be used. It is also under this ground that trafficking cases commonly have been brought.¹⁵⁶ However, it is not straightforward.

2.2.2 Membership of a Particular Social Group

Purely being vulnerable to being trafficked is not enough to substantiate a claim for refugee status. The vulnerability must be attributable to membership of PSG. The understanding of the ground has mainly developed through case law and scholarly writings.¹⁵⁷ Chiefly two approaches have emerged. How trafficking can be linked to this ground thus needs to be analysed in relation to these. It should be noted initially that there is consensus over a few matters. One of them is that a PSG cannot be defined by the persecution feared although it may aid in defining the group.¹⁵⁸ Additionally, the UNHCR promotes the view that the two approaches are to be brought together.¹⁵⁹

2.2.2.1 Protected Characteristics Approach

The *ejusdem generis* approach has evolved essentially through the cases *Matter of Acosta* and *Canada v Ward*.¹⁶⁰ It is herein proposed that the meaning of membership of a PSG should

¹⁵³ Crawley *supra* note 14, at 62

¹⁵⁴ See e.g. *N03/45573* [2003] RRTA 160 (24 February 2003), Coomeraswamy, *supra* note 147, at 25

¹⁵⁵ Piotrowicz, *supra* note 1, at 168f, *SSHD v K Fornah v SSHD*, [2006] UKHL 46

¹⁵⁶ Dorevitch, Foster, *supra* note 11, at 17; Poppy Project, 'Hope Betrayed: An analysis of Women Victims of Trafficking and their Claims for Asylum' (2006)

¹⁵⁷ Aleinikoff, *supra* note 16, at 265ff

¹⁵⁸ Piotrowicz, *supra* note 8, at 249; Aleinikoff, *supra* note 16, at 286ff; *Cases and Comments: Islam v SSHD, R v IAT and Another ex parte Shah* UKHL [1999] 2 WLR 1015; [1999] INLR 144, 11 *International Journal of Refugee Law* (1999) 496, at 517; *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225; (1997) 142 ALR 331 (24 February 1997)

¹⁵⁹ Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, UN Doc. HCR/GIP/02/02 (2002); Hathaway, J.C., Foster, M. 'Membership of a Particular Social Group, Discussion Paper No. 4, Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland New Zealand October 2002', 15 *International Journal of Refugee Law* (2003) 477, at 489ff

¹⁶⁰ *Matter of Acosta*, Interim Decision No. 2986, 1985, 19 I&N Decisions 211, BIA, 1 March 1985

consider the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.¹⁶¹ Justice La Forest in *Canada v Ward* hence defines the ground as including groups defined by e.g. an innate or unchangeable characteristic.¹⁶² On this basis the House of Lords in *Islam and Shah* recognise ‘women in Pakistan’ as a PSG with sex/gender as the innate and unchangeable characteristic.¹⁶³ Central to the determination is the deeply enshrined discrimination against women found in Pakistani society, one which is condoned or tolerated by the State.¹⁶⁴ Similarly, in the case of *Fornah* the House of Lords find that ‘women in Sierra Leone’ are a group “sharing a common characteristic which, without fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men”¹⁶⁵. The group’s existence is separate from the persecution faced, specifically Female Genital Mutilation (FGM) since it exists whether or not FGM is practiced.¹⁶⁶

It is thus possible to bring a claim regarding trafficking on the basis of sex/gender as an innate and unchangeable characteristic. To succeed with this, it needs to be established that the claimant is exposed to the type of severe discrimination as seen in the cases above in the country of origin as a result of being a woman. Women who are trafficked come from countries such as Moldova, Romania and Bulgaria where they are vulnerable due to e.g. low income and socially deprived circumstances.¹⁶⁷ The question is if this is discriminatory. Many of these push-factors¹⁶⁸ will be spread broadly over the population and not only affect women. Where this is the case, it can be argued women do not constitute a PSG but are affected by generalized hardship, something which the Refugee Convention does not protect from.¹⁶⁹ I think this is a rather solid argument to be made under refugee law. In contrast it can be contended that the hardship these women face

¹⁶¹ *Attorney General of Canada v Ward*, [1993] 2 S.C.R 688, 1993 CanLII 105, at 7; Hathaway, *supra* note 4, at 158f

¹⁶² *Canada v Ward*, *supra* note 161, at 75

¹⁶³ *Islam and Shah*, *supra* note 158

¹⁶⁴ *Ibid.* at 503

¹⁶⁵ *SSHD v K Fornah* *supra* note 155, at para. 31

¹⁶⁶ *Ibid.*

¹⁶⁷ Omelaniuk, I. Trafficking in Human Beings, UN Expert Group Meeting on International Migration and Development, UN Doc. UN/POP/MIG/2005/15 (2005), at 3f

¹⁶⁸ The concept denotes such factors which help create a supply of women which traffickers take advantage of, see Jordan, *supra* note 26, at 28ff

¹⁶⁹ UNHCR Handbook, *supra* note 31, at para. 66ff

are based on uneven, patriarchal systems in society.¹⁷⁰ Masika and Williams exemplify this by referring to that families in countries where a dowry is paid are less prepared to make investments in a daughter than a son, leading to limited access to education, political participation and economic possibilities.¹⁷¹ This is also a fair argument. However, it is doubtful whether unfairness such as this reaches the threshold of making women clearly distinguishable in society, as understood by the courts. The treatment would probably have to be tolerated or condoned by the State, making it institutionalised or deeply entrenched.¹⁷² In major source countries such as Albania¹⁷³, I believe this would be a difficult argument to make. Anti-discrimination legislation is in place and series of measures are taken to improve reality.¹⁷⁴ Substantiating the existence of women as PSG is hence hard. This can be exemplified by *SSHD v Dzhygun* where consideration is given to whether women in Ukraine will be able to constitute a PSG for the purpose of substantiating a claim regarding trafficking. The Court concludes that women in the Ukraine face discrimination on account of their gender. It is however not considered to be sufficiently deep-rooted for a PSG to exist. Women are not seen as sufficiently distinct from general society. However, the court finds that a significantly narrower group exists, namely women in the Ukraine who are forced into prostitution against their will.¹⁷⁵ “The unifying factors being their gender, coercion, prostitution, societal recognition, persecution and the lack of State protection”¹⁷⁶. The group would seem to include women who have previously been forced into prostitution and possibly those who are or have been seriously threatened to be so, whether or not trafficking has occurred.¹⁷⁷ This narrow way of defining a group in my view runs the risk of excluding potential victims where they cannot evidence previous forced prostitution or a serious threat thereof. Also, the construction of the group seems slightly odd considering trafficking is

¹⁷⁰ Williams, S., Masika, R. ‘Editorial’, in Masika, R. (ed.) *Gender, Trafficking and Slavery* (2002), at 6; Fredrick, J. ‘The myth of Nepal to India Sex Trafficking, its Creation, its Maintenance and its Influence on Anti-Trafficking Interventions’, in Kempadoo, K. *Trafficking and Prostitution Reconsidered. New Perspectives on Migration, Sex Work and Human Rights* (2005), at 138

¹⁷¹ Masika, *supra* note 170, at 6; Herzfeld, *supra* note 27, at 50

¹⁷² *Fornah*, *supra* note 155, at para. 31, 54; *Islam and Shah* *supra* note 158, at 497ff

¹⁷³ CEDAW, Consideration of reports submitted by States Parties under art 18 of the Convention on the Elimination of All Forms of Discrimination against Women, initial and second periodic report of State Parties, Albania, UN Doc. CEDAW/c/ALB/1-2 (2002), at 30

¹⁷⁴ CEDAW, *supra* note 173, at 23f

¹⁷⁵ *SSHD v Dzhygun* *supra* note 134, at para. 27f

¹⁷⁶ *Ibid*, at para. 29

¹⁷⁷ *Ibid*, at para. 28

defined not only by transportation to another country but also by coercion and the exploitative purpose, in this case prostitution.¹⁷⁸ These are elements which define the group. Even so, the group is considered separate from the persecution feared. In *Petition of Olga Shimkova* similar reasoning to that of *Dzhygun* can be found.¹⁷⁹ Here however, an even more narrow definition is considered, namely ‘women being trafficked or at risk of being trafficked’.¹⁸⁰

Moreover, in the case of *SK Albania* the Immigration Appeal Tribunal (IAT) accepts that the Appellant belongs to the social group, ‘women from the north east of Albania’.¹⁸¹ This shows the possibility of establishing a ground based upon sex/gender narrowed down by geographical location. This restricts the scope of the group, but in my opinion not as much as the alternatives presented in *Dzhygun* and *Petition of Olga Shimkova*. It can be concluded that if the group is defined broadly it may not be considered sufficiently distinct from general society. On the other hand, if it is defined more narrowly women at real risk of persecution may potentially be excluded.

In addition, trafficked women may, according to the Trafficking Guidelines base membership of a PSG on the fact of having previously been trafficked. The experience is a historic fact common to all victims and unchangeable.¹⁸² This line of argument is supported by Baroness Hale of Richmond who, in the case of *Ex parte Hoxha* explains that “women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment”¹⁸³. In the case of *SB Moldova* regarding trafficking victims, this position is used.¹⁸⁴ This can be compared with the earlier case *MP Romania* where the same argument was rejected on the basis that this construction falls foul of the principle that the group must exist independently of persecution.¹⁸⁵ In addition to the sharing of a historical fact, it must bring the group a distinct identity in the relevant society, which was the case in

¹⁷⁸ Please refer to section 2.1.2

¹⁷⁹ *Olga Shimkova Petitioner Against SSHD Respondent* 2004 Scot(D) 24/3 Outer House Court of Session

¹⁸⁰ *Ibid*, para. 19

¹⁸¹ *SK Albania supra* note 118

¹⁸² Trafficking Guidelines, *supra* note 43, at para. 39, Piotrowicz, *supra* note 8, at 250

¹⁸³ *In re B (FC) (Appellant) (2002). Reg v. Special Adjudicator, Ex parte Hoxha (FC)*, [2005] UKHL 19, at para. 37

¹⁸⁴ *SB Moldova* CG [2008] UKAIT 00002, at para. 53(c)

¹⁸⁵ *MP Romania* [2005] UKIAT 00086

Moldova.¹⁸⁶ Evidence of social stigmatisation and the fact that follow-up assistance was rarely sought to avoid the local community learning about the victim's past experience brought the court to its conclusion.¹⁸⁷ This construction, helpful as it is precludes claims being made by individuals having never been trafficked.

2.2.2.2 Social Perception Approach

The social perception approach has been established in primarily Australian jurisprudence through the case *Applicant A v Minister for Immigration and Ethnic Affairs* (MIEA).¹⁸⁸ The High Court of Australia here adopts the understanding that a PSG "is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large"¹⁸⁹. It is proposed that the ordinary meaning of the words should inform its application.¹⁹⁰ Therefore the characteristic in common to group members may be any attribute which makes the group cognizable in society.¹⁹¹ On this basis Gleeson CJ holds in *MIEA v Khawar* that 'women in Pakistan' can be seen as a PSG.¹⁹² He goes on to state that "women in any society are a distinct and recognisable group"¹⁹³. As Dorevitch and Foster note, this illustrates that "the social perception test could, in theory be used to consistently recognise PSG of women"¹⁹⁴. This would of course include women who fear trafficking. However, jurisprudence regarding trafficking shows the application of the ground is not quite as straightforward as might have been the case.

In the case *V01/13868* it is stated "the Tribunal accepts that in some countries women and more specifically young women can constitute a PSG"¹⁹⁵. It goes on to explain that age and gender may unite women, making them a cognisable group in society. A more narrow definition is thus promoted. 'Young women in Albania' is accepted as one of these groups. They are identifiable

¹⁸⁶ *SB Moldova*, *supra* note 184, at para. 74

¹⁸⁷ *Ibid*, at para. 106

¹⁸⁸ *Applicant A v MIEA*, *supra* note 158, at 9, 23

¹⁸⁹ *Ibid*, *Chen Shi Hai v MIEA*, (2000) 170 ALR 553

¹⁹⁰ *Applicant A v MIEA*, *supra* note 158, at 4

¹⁹¹ Aleinikoff, *supra* note 16, at 196, Goodwin-Gill, G.S., McAdam, J. *The Refugee in International Law* (2007), at 86

¹⁹² *MIMA v Khawar* [2002] HCA 14; 210 CLR 1; 187 ALR 574; 76 ALJR 667 (11 April 2002), at para. 32

¹⁹³ *Ibid*, at para. 35

¹⁹⁴ Dorevitch, Foster, *supra* note 11, at 35

¹⁹⁵ *V01/13868 supra* note 128, at 19; *V03/16442 supra* note 130

and distinct in Albanian society since they face the danger of being trafficked by criminals, evidenced by the many agencies working to assist young trafficking victims.¹⁹⁶ Ironically, this is also the fact which makes the claim fail on the basis of existence of state protection. Similar reasoning is made in *N98/24000*. Here the PSG considered is ‘young (vulnerable) Colombian women’. This group is not accepted because it is not seen as cognisable in Colombian society.¹⁹⁷ Vulnerability to trafficking is not enough.

Other routes of narrowing groups of women are also taken. In *060779039* the Tribunal accepts one based on the common characteristic of marital status when recognising ‘unmarried women in Nepal’ as a PSG.¹⁹⁸ Its acceptance is based on the fact that society is organised in a traditional way where family ties, caste and traditions are central. The lack of this safety net is presumably what sets them apart as cognisable. This is supported by the fact that police and government are “less than adequately responsive to protecting vulnerable women in the situation of the applicant”¹⁹⁹.

In contrast, narrowing a group of women through making reference to situations of vulnerability such as homelessness, abandonment, unemployment has not been successful. In *N02/13996* this is deemed impermissible on the basis that the group cannot exist independently of the persecution feared.²⁰⁰ Dorevitch and Foster disagree strongly with this application saying that “the persecution feared is not vulnerability per se but rather it is the harm which is intrinsic to and/or stems from situations of debt-bondage and sexual servitude”²⁰¹. I would strongly agree with their argument.

Furthermore, a woman who has already been trafficked can base a claim on membership along the lines of ‘sex workers’ or ‘trafficked’ women’.²⁰² These experiences can be seen as common characteristics which can make a group distinguishable in society. In *N98/24000* however, the Tribunal states that it is not “appropriate to characterise women forced into prostitution as a

¹⁹⁶ *V01/13868 supra note 128*, p. 20

¹⁹⁷ *N98/24000* [2000] RRTA 33 (13 January 2000), at 10

¹⁹⁸ *060779039* [2006] RRTA 187 (21 November 2006); see also *V03/16442 supra note 130*

¹⁹⁹ *060779039, supra note 183*, findings and reasons

²⁰⁰ *N02/13996*, [2003] RRTA 56 (22 January 2003)

²⁰¹ Dorevitch, Foster, *supra note 11*, p. 34; compare *VXAJ v MIA* [2006] FMCA 234 (20 April 2006) which may imply vulnerability can be accepted as part of a definition

²⁰² *Ibid*, p. 30

social group, as that would be to define the group by reference to the harm feared”²⁰³. On the other hand, in *VXAJ v Minister for Immigration & Anor* the Federal Magistrates Court of Australia finds the Tribunal has misapplied established legal principles through simply rejecting trafficked women having given evidence against traffickers as a PSG.²⁰⁴ The court found that the Tribunal erred when treating these facts as simply “providing the context and not the means to identify whether a particular social group existed”²⁰⁵. This provides support for the construction of a PSG based on past experience. Case *N03/45573* gives further affirmation of this.²⁰⁶ Different PSG are here suggested and accepted. One of them is ‘trafficked shan women’ and another ‘women who have been working in prostitution in countries neighbouring Burma’.²⁰⁷ The cognizance of the first group seems based on the wide scale of the trafficking problem, the Government’s failure to address it effectively, together with the vulnerability of shan women in general. The second group seems to be cognisable because of the wide-spread and illegal nature of prostitution.

As can be seen, both approaches allow for the inclusion of some women who are at risk of trafficking in PSGs. In making a claim it will in my opinion be important to recognise the differences of how this can be achieved. When doing this the outcome ought not to differ much.

2.2.3 Nexus and Non-State Actors

The words “for reasons of” in Art. 1A(2) of the Refugee Convention require causal nexus between a ground and well-founded fear of persecution. Where persecution is perpetrated by non-state actors such as criminals, which is often the case with trafficking, this requirement becomes particularly important. It is generally agreed that where this is the case nexus can be established either between the conduct of the persecutor and a ground or between failure of State protection and a ground.²⁰⁸

²⁰³ *N98/24000*, *supra* note 197, at 10

²⁰⁴ *VXAJ v MIA*, *supra* note 201, at para. 11

²⁰⁵ *Ibid*, at para. 21

²⁰⁶ *N03/45573* [2003] RRTA 160 (24 February 2003)

²⁰⁷ *Ibid*, at para. 70ff

²⁰⁸ UNHCR Guidelines on Membership of a Particular Social Group, *supra* note 159, at para. 20ff; UNHCR Guidelines on Trafficking, *supra* note 43, at para. 20f; *Horvath v SSHD*, *supra* note 125; Aleinikoff, *supra* note 16, at 301ff

The way in which nexus can be established between the trafficking of a person and a Convention ground will differ in and between different jurisdictions. As Foster notes “there is little consensus as to the appropriate test to be applied in interpreting this aspect of the definition”²⁰⁹. In some jurisdictions courts have promoted the understanding that the persecutor’s intention must provide the link to a ground.²¹⁰ By analogy to other gendered harms I conclude that this will have awkward consequences in trafficking cases. In *Matter of R.A* the applicant could not establish nexus between her husband’s abuse and a Convention ground. She could not show group membership was the motivation behind the abuse, rather than her being his wife.²¹¹ Equally in *V00/11003* a victim of rape could not convince the Tribunal of nexus. It found the violence to be a criminal act perpetrated against her as an individual rather than motivated by a ground.²¹² These acts are hence seen as private and outside the scope of protection. In *N98/24000* this is articulated in relation to trafficking. The Tribunal considers being a young woman as presenting an opportunity for criminal activity, however not constituting the motivation behind the persecution feared.²¹³ This brings us to the public/private dichotomy which Crawley describes and the difference between ‘normal’ versus ‘women’ claims as Spijkerboer puts it.²¹⁴ Hence where a gender-sensitive reading enables trafficking to be recognised as persecution, and a membership of a PSG has been established, the nexus requirement can still thwart efforts to claim protection. The “construction of the female applicant is thus unstable”²¹⁵, as I perceive it.

Henceforth, standards of causation are ranging from an ‘effective sole cause’ and ‘but for’ test to ‘contributing cause’ in jurisdiction.²¹⁶ The sole cause test will be virtually impossible to meet in a trafficking context, since profit tends to be a primary motivator.²¹⁷ Where the ‘but for’ test is utilised multiple causes are recognised, however it is asked whether the persecution would have occurred but for the Convention ground. This was rejected as too inclusive by Lord Hoffman in

²⁰⁹ Foster, M. ‘Causation in Context: Interpreting the Nexus Clause in the Refugee Convention’, 23 *Michigan Journal of International Law*, (2002) 265, at 266

²¹⁰ Hathaway, J.C., Foster, M. ‘The Causal Connection (“Nexus”) to a Convention Ground- Discussion Paper No. 3- Advanced Refugee Law Workshop International Association of Refugee Law Judges-Auckland, New Zealand, October 2002’, 15 *International Journal of Refugee Law* (2003) 461, at 2

²¹¹ *Matter of R.A*, BIA Interim Decision No. 3403, 11 June 1999

²¹² *V00/11003* [2000] RRTA 929 (29 September 2000)

²¹³ *N98/24000 supra* note 197

²¹⁴ Crawley, *supra* note 14, at 18ff; Spijkerboer, *supra* note 15, at 190ff

²¹⁵ Spijkerboer, *supra* note 15, at 192

²¹⁶ Foster, *supra* note 209, at 269ff

²¹⁷ Wennerholm, *supra* note 25, at 13, Foster, *supra* note 209, at 273

Islam and Shah.²¹⁸ In contrast the Court of Appeal for the Ninth Circuit has considered it to be too demanding on the basis that “it is not always possible to identify the one determinative cause of the fear of persecution”²¹⁹. Its use in trafficking cases will thus depend upon the understanding of the test. The ‘contributing cause’ will be in my view be the most beneficial in the relevant cases. It has frequently been applied in extortion cases where it is difficult to separate personal interest and Convention ground.²²⁰ In *Rajaratnam v Minister for Immigration and Multicultural Affairs* the Court recognised that even though extortion will involve attraction to personal characteristics of the victim such as wealth this does not preclude the possibility that race or ethnicity is also a (critical) factor “influencing or motivating those engaging in the extortion”²²¹. By analogy, trafficking motivated by profit may also be understood to be motivated by the victim’s membership of a PSG. This application is in line with the UNHCR Guidelines on Trafficking.²²²

Where it cannot be established that the traffickers imposed harm on account of a ground, it is necessary to look to failure of State protection. As can be seen in section 2.1.5 above this is difficult. According to Dorevitch and Foster it is only possible to rely upon this for nexus where the State’s “conduct in withholding protection is selective and discriminatory”²²³.

2.3 Subsidiary Protection and Art. 3 of the ECHR

So far the analysis has suggested significant hurdles to achieving the much sought after protection established through the Refugee Convention. International protection is however not limited to refugee protection. The principle of *non-refoulement* is wider than Art. 33 of the Refugee Convention.²²⁴ ‘Complementary protection’ or as referred to in the European context ‘subsidiary protection’, can be gained as a result of human rights obligations such as the ECHR, although this is not as beneficial as refugee protection.²²⁵ This section will be considering this kind of protection, through analysing the question: can/how can people at risk of trafficking

²¹⁸ *Islam and Shah*, *supra* note 158, at 513

²¹⁹ Foster, *supra* note 209, at 282

²²⁰ *Ibid*, at 284

²²¹ *Rajaratnam v MIMA* [2000] FCA 1111, at para. 10

²²² UNHCR Trafficking Guidelines, *supra* note 43, at para. 31

²²³ Dorevitch, Foster, *supra* note 11, at 37; *MIMA v Khawar*, *supra* note 192, para. 84ff

²²⁴ Goodwin-Gill, McAdam, *supra* note 191, p. 285

²²⁵ *Ibid*, Piotrowicz, *supra* note 1, p. 174ff

receive protection through Art. 3 of the ECHR? Firstly, an analysis of Art. 3 in relation to trafficking will be made. Secondly, subsidiary protection through the EU Qualification Directive will be considered in relation to Art. 3 ECHR.

2.3.1 Art.3 ECHR and Trafficking

Art. 3 ECHR provides an absolute prohibition on torture, inhuman or degrading treatment or punishment as can be seen in *Chahal*.²²⁶ This has extra-territorial application according to the case of *Soering*, which means liability is incurred when an action such as extradition is taken which exposes an individual to a real risk of such treatment.²²⁷ This thus provides for an extension of the principle of *non-refoulement* found in Art. 33 of the Refugee Convention, without the additional requirements therein. Therefore, if it can be established that trafficking is to be included under this prohibition, a person at risk cannot be sent home.

When Art. 3 ECHR was drafted, trafficking most likely was not considered as one of the targeted prohibited conducts. It has only recently started to gain understanding as a human rights violation rather than merely a problem of law and order.²²⁸ However, the case of *Selmouni v France*²²⁹ indicates that the Convention should be interpreted as a living instrument. This means that as a result of increasingly high standards for the protection of human rights, ill-treatment which was previously understood as suffering falling short of torture could now be considered as such. Ovey and White state that this presumably means that “conduct which previously had not attained the threshold for categorization as inhuman or degrading treatment might be so categorized in the future”²³⁰. The Council of Europe among other international organisations today recognises trafficking as a violation of human rights, human dignity and integrity, which can be seen in the Convention on Action against Trafficking in Human Beings and related documents.²³¹ Hence, even though trafficking previously may not have qualified to be included in the prohibition,

²²⁶ *Chahal v UK* (1997) 23 EHRR 413

²²⁷ *Soering v UK* (1989) 11 EHRR 439, *Ramzy v Netherlands* (App.25424/05) Judgment of 22 November 2005, *Cruz Varas v Sweden* (1991) 14 EHRR 1

²²⁸ Amiel, A. ‘Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation’, 12 *Buffalo Human Rights Law Review* (2005) 5, at 6

²²⁹ *Selmouni v France* (1999) 29 EHRR 403

²³⁰ Ovey, C., White, R.C.A. *The European Convention on Human Rights* (2006), at 75

²³¹ Council of Europe Convention on Action against Trafficking in Human Beings (2005), preamble; Council of Europe Convention on Action against Trafficking in Human Beings Explanatory Report, CETS No. 197, at para. 10ff

through the understanding of trafficking as a human rights violation, a living interpretation of Art. 3 may well include it today where it can be seen to qualify.

In order for a conduct to qualify as a prohibited treatment according to Art. 3, it must attain a minimum level of severity according to *Ireland v UK*.²³² In the case it is explained that the difference between torture and inhuman and degrading treatment lies in the special stigma of torture “to attach only to deliberate inhuman treatment causing very serious and cruel suffering”²³³. By deliberate the court meant that the suffering was inflicted intentionally and for a specific purpose.²³⁴ However, the consequence of a risk of either is *non-refoulement*. In *Cyprus v Turkey* a number of detainees were sexually assaulted and raped by Turkish soldiers. The court deemed the treatment as inhuman.²³⁵ In a more recent case *Aydin v Turkey* a 17 year-old was abducted to detention, stripped naked, and beaten, sprayed with cold jets of water and raped.²³⁶ Here, an especially cruel rape by a public official in police custody is understood to be deliberately inflicted and thus amounting to torture. The treatment is seen as “especially grave and abhorrent...given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim”²³⁷. The treatment of trafficking victims can in my view be compared with that of rape victims, as a related kind of sexual violence as stated above. Many serve some 10 clients every night of the week.²³⁸ They are often confined to the brothel they work in or kept under close surveillance, which makes it easier for the offender to exploit the woman as in the case above. In addition they often face rape and beatings by their so called owners.²³⁹ In *Aydin v Turkey* the Court gives attention to the fact that rape leaves deep psychological scars together with acute physical and emotional pain from the forced penetration.²⁴⁰ The trafficking experience equally leaves psychological scars resulting in e.g.

²³² *Ireland v UK* (1978) 2 EHRR 25, para. 162; K. Starmer, *European Human Rights* (1999), at 91

²³³ *Ibid*, at para. 63

²³⁴ Harris, D.J. et al. *Law of the European Convention on Human Rights* (2009), at 72

²³⁵ *Cyprus v Turkey* (1982) 4 EHRR 482

²³⁶ *Aydin v Turkey* (1997) 25 EHRR 251; *M.C. v. Bulgaria* (App. 39272/98) Judgement of 4 December 2003 recognised rape by non-state actors as a violation of Art.3

²³⁷ *Aydin v Turkey*, *supra* note 221, para. 83

²³⁸ Coomerawamy, *supra* note 74, at para. 12

²³⁹ *Ibid*, at para. 21, Coomerawamy, *supra* note 100, at 11; IOM *supra* note 102, at 16

²⁴⁰ *Aydin v Turkey supra* note 236, para. 83

depression and anxiety.²⁴¹ Also, the treatment can cause serious physical, sexual and reproductive health problems, which emphasises the severity of the treatment.²⁴²

Like the Refugee Convention, Art. 3 ECHR embraces situations where the risk is posed by non-state actors and state protection is for whatever reason unavailable, as established by *HLR v France*.²⁴³ This has also been recognised in relation to rape in *M.C v Bulgaria*.²⁴⁴ Since most trafficking is perpetrated by non-state actors this recognition is significant.²⁴⁵ As seen above, the gravity of a treatment is nonetheless increased where it is conducted by a state official and can potentially be the difference between inhuman treatment and torture. However, establishing lack of state protection in countries from which people are trafficked may as explained in section 2.1.5 above prove difficult.

Furthermore, the assessment of the severity of a particular treatment is according to *Ireland v UK* and the *Greek* case dependent upon the duration of the treatment, its physical or mental effects and in some cases sex, age and state or health of the victim.²⁴⁶ This means the vulnerability of a victim can act as an aggravating factor to any treatment. The principle can be found in *A v UK* where it is clearly stated that children and other vulnerable individuals have the right to be protected against serious breaches of personal integrity in the form of effective deterrence.²⁴⁷ Being a young woman has been recognised as implying such vulnerability in certain situations. In *Menesheva v Russia* a young woman was beaten up, insulted and threatened with rape and violence against the family in detention. The fact that the claimant was a young female confronted by several male policemen, made her vulnerable and added to the severity of the treatment.²⁴⁸ Therefore, since many of the women trafficked into sexual commercial exploitation are young, it can be argued they possess characteristics which may help establish the severity of their treatment. The vulnerability of these women is further supported by the case of *Siliadin v*

²⁴¹ UN Office on Drugs and Crime, *supra* note 105, at 155; to compare with the consequences of rape see Pearce, *supra* note 105

²⁴² London School of Hygiene and Tropical Medicine, *supra* note 104, at. 44ff

²⁴³ *HLR v France* (1997) 26 EHRR 29; *Bagdanavicius v SSHD* [2005] UKHL 38

²⁴⁴ *M.C. v. Bulgaria* *supra* note 236

²⁴⁵ UNHCR Trafficking Guidelines, *supra* note 43, at para. 21

²⁴⁶ *Ireland v UK*, *supra* note 232, para 162; *Greek* case (1969) 12 *Yearbook* 1, as quoted in Goodwin-Gill, McAdam, *supra* note 191, at 313

²⁴⁷ *A v UK* (1998) ECHR 85, at para. 22; see also *Z and Others v UK* Application no. 29392/95 (2001), at para. 73

²⁴⁸ *Menesheva v Russia* (App. 59261/00) Judgement of 9 March 2006; see also *Bati and Others v Turkey* (App. 33097/96 and 57834/00) Judgement of 3 June 2004; *M.C. v Bulgaria* *supra* note 236

France where the court is faced with a case concerning the prohibition of slavery and forced and compulsory labour regarding a household servant having been trafficked to France. At the centre of the case is Art. 4 ECHR, not Art. 3 however the court's ruling is relevant to the extent that it recognises a sensitivity toward the vulnerability of women in this situation.²⁴⁹

2.3.2 The EU Refugee Qualification Directive

The EU Qualification Directive is the first supranational instrument harmonising the protection afforded to persons in need, who fall outside of the scope of the Refugee Convention.²⁵⁰ This has meant that a codified regime of subsidiary protection has to a great extent replaced the ad hoc, discretionary approach previously in use in the EU.²⁵¹ It is however based on obligations already in place through e.g. the ECHR, and therefore does not create any new legal obligations as such.²⁵²

The scope of the protection afforded through the Directive is limited through defining a person eligible for subsidiary protection, as a third country national or stateless person who does not qualify for refugee protection but would face a real risk of suffering serious harm on return to his or her country of origin.²⁵³ Subsequently, the key to protection here is nationality or lack thereof and the risk of suffering serious harm. Serious harm is defined in Art. 15 of the Directive. Of the three alternative definitions, paragraph (b) which defines serious harm as "torture or inhuman or degrading treatment or punishment of an application in the country of origin" is of interest here. It broadly covers the same ground as Art. 3 ECHR,²⁵⁴ which means the analysis above, regarding whether trafficking can amount torture or inhuman or degrading treatment or punishment applies when considering subsidiary protection according to Art. 15 of the Directive. However the autonomous role of Art. 3 has henceforth diminished.²⁵⁵ In order to answer the question posed it

²⁴⁹ *Siliadin v France* (App. 73316/01) Judgment of 26 July 2005

²⁵⁰ Storey, H. 'EU Refugee Qualification Directive: a Brave New World?', *International Journal of Refugee Law* (2008) 1, at 5; Piotrowicz, R. van Eck, C. 'Subsidiary Protection and Primary Rights', 53 *International and Comparative Law Quarterly* (2004) 107, at 115

²⁵¹ McAdam, J. 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', 17 *International Journal of Refugee Law* (2005) 461

²⁵² *Ibid.*, at 3

²⁵³ Art. 2(e) Refugee Qualification Directive

²⁵⁴ Storey, *supra* note 250, at 5

²⁵⁵ *Ibid.*, at 5ff; The definition in ECHR is the most liberal of the torture prohibitions which makes it plausible to consider this provision, see Lambert, H. 'Protection against *Refoulement* from Europe: Human Rights Law Comes to Rescue', 48 *International and Comparative Law Quarterly* (1999) 515, at 532

is necessary to understand when the Directive applies, and Art. 3 has a supportive role and when Art. 3 needs to be used on its own.

It can be argued that the definitions found in the Directive makes the scope of subsidiary protection narrower than Art. 3 provides for.²⁵⁶ Only third country nationals or stateless persons can gain entry to the legal regime provided by the Directive. In contrast the obligations found in ECHR extend to “everyone within their [the Member States’] jurisdiction”²⁵⁷. This limitation is of little importance for a person at risk of trafficking, since they will predominantly be third country nationals or stateless individuals having already been exposed to international trafficking. In contrast, the difference between Art. 15(b) of the Directive and Art. 3 ECHR is critical. Firstly, the Directive limits, in the same way as the Refugee Convention its protection to persons fearing ill-treatment in the country of origin. This means that as stated in section 2.1.6 a claimant will have to make a link between her trafficking experience and the country of origin in order to receive protection. In contrast, Art. 3 ECHR applies whatever the source of the ill-treatment.²⁵⁸ This means, where a person has been caught in the trafficking chain whilst abroad, Art. 3 will be applicable where the Directive is not. Furthermore, exclusion from subsidiary protection is possible under the Directive just as under the Refugee Convention.²⁵⁹ This is not the case with Art. 3 ECHR.²⁶⁰ This will not be of any major significance to most trafficked persons. However, I imagine this could have importance in a country where prostitution is illegal. It can from what has been said be concluded that Art.3’s autonomous role has been limited by the Directive, however its importance in trafficking cases is evident where the Directive limits eligibility.

In contrast to refugee status, protection under the Directive and Art. 3 ECHR does not require a link to a ground as it is focused on the ill-treatment, making it more accessible.²⁶¹ The benefits of refugee status cannot however be found anywhere else. Through the Directive, subsidiary protection status, a second-rate status has nevertheless been developed.²⁶² This includes access to

²⁵⁶ Storey, *supra* note 250, at 29

²⁵⁷ Art. 1 ECHR

²⁵⁸ Lambert, *supra* note 255, at 534

²⁵⁹ Art. 17 Refugee Qualification Directive

²⁶⁰ *Chahal v UK supra* note 226, *Soering v UK supra* note 227

²⁶¹ *Soering v UK supra* note 227

²⁶² Art. 18 Refugee Qualification Directive

entitlements regarding e.g. family unity, residence permits and employment.²⁶³ Seeking this protection will thus be secondary to claiming refugee status. Where the requirements for this cannot be fulfilled, Art. 3 provides a third possibility.²⁶⁴ In contrast to subsidiary protection, it however only guarantees *non-refoulement*.²⁶⁵ It is hereafter up to the state to decide upon other measures taken.²⁶⁶

2.4 The Swedish Aliens Act

The application of international and regional law can only fully be grasped in a domestic environment. This section aims at giving an insight into Sweden's legislation regarding protection for aliens and its relevance to the purposive question at hand. This will be conducted through analysing the question: can/how can people at risk of trafficking receive protection under the Swedish Aliens Act (2005:716)? Firstly, Chapter 4 Section 1 concerning refugees will be considered. Secondly, Chap. 4 Sec. 2 regarding persons otherwise in need of protection will be analysed. Thirdly, Chap. 5 Sec. 6 will be discussed and lastly attention will be given to Chap. 5 Sec. 15.

2.4.1 Chapter 4 Section 1 Aliens Act

Sweden has ratified the Refugee Convention and Chap. 4 Sec. 1 of the Aliens Act defines who is to be considered a refugee. It is herein stated that the alien is to be "outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country".²⁶⁷ Refugees are generally granted permanent residence according to Chap. 5 Sec. 1 of the Aliens Act along with a range of other beneficial rights.²⁶⁸ Chap. 4 Sec. 1 thus provides attractive protection. This section will be analysing whether it is currently possible for people at risk of trafficking to access this protection.

²⁶³ See Art. 23-33 Refugee Qualification Directive

²⁶⁴ Storey, *supra* note 250, at 6

²⁶⁵ Piotrowicz, van Eck, *supra* note 250, at 122

²⁶⁶ See e.g. UK Asylum Policy Instruction on "Humanitarian Protection" and "Discretionary Leave" available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/> accessed 04/08/09

²⁶⁷ Aliens Act (2005:716), Chap. 4 Sec. 1

²⁶⁸ Regeringens proposition 1988/89:86 *med förslag till utlänningslag m.m.*, at 153

The concept of persecution, failure of state protection and Convention ground will be considered as stated.

2.4.1.1 A Well-founded Fear of 'Being Persecuted'

The concept of persecution in the Aliens Act is complex, as in international refugee law. It is not defined in current legislation. Guidance as to its meaning can however be found in preparatory work and earlier legislation.²⁶⁹ From this it can be concluded that conduct which threatens the life and freedom of an alien, or that is otherwise severe in nature is to be considered persecution.²⁷⁰ We are considering serious harm.²⁷¹ Serious harm is caused by violation of fundamental human rights.²⁷² All human rights violations will however not be considered serious harm.²⁷³ The EU Qualification Directive by which Sweden is bound states that an act's severity can be estimated on the basis of its nature or its recurrence. Violations of human rights to which no derogation can be made under Art. 15.2 of the ECHR are understood as particularly serious.²⁷⁴ Among these are slavery and torture. As seen above there is scope internationally to consider trafficking as either of these violations and hence as persecution. The question is if trafficking can be understood as persecution in Sweden.

It has been particularly difficult to base a claim for refugee status on gender-related violence in Sweden until recently. This has been due to legislative difficulties regarding membership of a PSG. Until 2006 it was not possible to base such membership on gender.²⁷⁵ In my opinion, this

²⁶⁹ It is worthy of note that in the Swedish legal system, preparatory work is endowed with the quality of a source of law.

²⁷⁰ "Det skall således alltjämt vara fråga om förföljelse som riktar sig mot utlänningens liv eller frihet eller som annars är av svår beskaffenhet", prop. 1988/89:86, *supra* note 268, at 154f

²⁷¹ See section 2.1

²⁷² Statens Offentliga Utredningar (SOU) 1951:42, *Betänkande med förslag till utlänningslag*, at 170; compare Hathaway's hierarchy of rights section 2.1.1

²⁷³ Regeringens Proposition 1954:134 *rörande ratifikation av Förenta Nationernas konvention angående flyktingars rättsliga ställning*, at 20

²⁷⁴ Art. 9.1 EU Refugee Qualification Directive; Wikrén, G., Sandesjö, H. *Utlänningslagen med kommentarer* (2006), at 131f

²⁷⁵ Regeringens Proposition 2005/06:6 *Flyktingskap och könsrelaterad förföljelse på grund av kön eller sexuell läggning*; Regeringens Proposition 1996/97:25 *Svensk migrationspolitik i globalt perspektiv*; Chap. 3 Sec. 3 Para. 1. 3 Aliens Act (1989:529)

has probably meant that protection from gender-related harm has been neglected in the refugee determination process. Since 2006 it is however possible to make a claim based on gender.²⁷⁶

Sweden today recognises gender-related violence as serious harm, in line with international guidelines.²⁷⁷ In *UN 328-97* it is established that FGM is one such harm.²⁷⁸ At the time of judgement this did not however grant refugee status because of the legislative limitation mentioned. In the more recent *UM 2676-07* however the same treatment resulted in protection under Chap. 4 Sec. 1. Moreover, in *MIG 2008:39* a woman's continued exposure to domestic violence is accepted as serious harm by the Migration Appeals Court.²⁷⁹ In contrast, the court does not consider the domestic violence faced by the claimant in *UM 1030-08* as persecution, despite the treatment being understood as inhuman or degrading.²⁸⁰ Since there is a lack of reasoning behind the decisions it is impossible to know what caused the difference in outcome.

Furthermore, rape and other kinds of sexual harm have also been recognised as sufficiently serious to be considered persecution. Case law is however not coherent.²⁸¹ In *UM 10365-06* the sexual exploitation experienced by a Mongolian woman is considered to be persecution.²⁸² In a number of other cases involving rape as part of a wide range of cruel or inhuman or degrading treatment, persecution has also been confirmed.²⁸³ However in other cases concerning rape and gang rape persecution has not been established. This implies an understanding of rape as not by necessarily resulting in such pain and suffering required by the concept of persecution.²⁸⁴ The courts' reasoning however fails to reveal how a judgement on the matter is made.

²⁷⁶ Prop. 2005/06:6, *supra* note 275, at 18ff, see also the wording of Chap. 4 Sec. 1

²⁷⁷ UNHCR, Comparative analysis of Gender-related Persecution in National Asylum Legislation and Practice in Europe, UN Doc. EPAU/2004/05 (2004), at para. 140; UNHCR Guidelines on Gender-Related persecution, *supra* note 5; Migrationsverket, Utlänningshandboken, Kap. 40.1 Utredning och bedömning av skyddsbehov p.g.a. kön (2006)

²⁷⁸ UN 328-97, at 6

²⁷⁹ *MIG 2008:39*, at 4

²⁸⁰ *UM 1030-08*

²⁸¹ Bexelius, M. *Kvinnor på flykt: en analys av svensk asylpolitik ur ett genusperspektiv 1997-2000* (2000); see also UNHCR, *supra* note 277, at para. 7; compare section 2.1.4

²⁸² *UM 10365-06*; compare *UM 1324-08*

²⁸³ Bexelius, *supra* note 281, at 60

²⁸⁴ *Ibid*, at 51ff; compare *Prosecutor v Kunarac and others*, *supra* note 70 at para. 149ff; *Prosecutor v Delalic, et al.* *supra* note 87; *Prosecutor v Furundzija*, *supra* note 97; *Prosecutor v Akayesu*, *supra* note 97

Trafficking in human beings for the purpose of sexual exploitation is recognised by the 1993 UN Declaration on the Elimination of Violence against Women to constitute gender-related violence.²⁸⁵ By analogy to these gender-specific and gender-related harm it should hence be possible to conclude that certain instances of trafficking is to be deemed persecution by the court. As human trafficking is however only just emerging in refugee law it would be simplistic to draw such a conclusion in my opinion.²⁸⁶

In SOU 2008:41 it is expressed that it is possible for victims of trafficking to receive obtain refugee status.²⁸⁷ A claim for this is made in *UM 1335-06* by a young woman of roman ethnicity having suffered human trafficking for sexual exploitation.²⁸⁸ She fears ill-treatment and re-trafficking on return to her country, but is not granted refugee protection. The court is in my opinion ambiguous in its motives. It is unclear whether the treatment suffered is deemed insufficient to grant status, whether evidence with regards to future trafficking is lacking or whether it is criteria of state failure to protect or internal flight which is decisive.²⁸⁹ SOU 2008:41 also gives account of three decisions made by the Migration Board where human trafficking is considered. None of the victims are deemed refugees. Instead protection is granted under Chap. 3 Sec. 3 of the Aliens Act (1989:529) and Chap. 5 Sec. 6 of the Aliens Act (2005:716).²⁹⁰ Interestingly protection was in two of the cases was granted because of threats made against the victim's family in the country of origin. This in my opinion implies a future risk towards the victim, something which ought to cause consideration under the refugee provision. Nevertheless, in the cases available for study there is no indication of a refugee determination in favour of a person at risk of human trafficking.

²⁸⁵ UN Declaration on the Elimination of Violence against Women (1993), UN Doc. A/RES/48/104

²⁸⁶ UNHCR, *supra* note 277

²⁸⁷ SOU 2008:41, *Människohandel och barnäktenskap – ett förstärkt straffrättsligt skydd*, at 142

²⁸⁸ *UM 1335-06*

²⁸⁹ *Ibid*, p. 4

²⁹⁰ SOU 2008:41, *supra* note 287, at 142

2.4.1.2 Failure of State Protection

The Swedish Aliens Act explicitly recognises persecution committed by non-state agents, in coherence with UNHCR.²⁹¹ Failure of state protection however needs to be shown in addition to the serious harm requirement in these instances.²⁹² Where there is failure of protection is due to insufficient resources or inefficiency persecution cannot be established according to the preparatory work for the new Aliens Act.²⁹³ It is only where the reasons are of a political, social, cultural or religious nature that such a claim will be accepted.²⁹⁴ This interpretation is in my opinion more stringent than its international counterpart. The UNHCR Handbook states that where serious harm is committed by private actors, “they can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse or prove unable, to offer effective protection”²⁹⁵. The danger with the Swedish stance is of course the difficulty in determining what discriminatory inability is.

Other difficulties revealed by case law is the Migration Board and Migration Courts’ expectation that victims of gender-related violence should seek protection from the authorities in their home country in order for a determination to be made on whether there is a state failure of protection. This can be seen in *UM 1082-06* concerned with domestic violence.²⁹⁶ This is contrary to the Swedish and international definition of a refugee, where it is stated that the alien is to be “unable or, owing to such fear, unwilling to return to”²⁹⁷ the country of origin. Hence, there is seemingly no appreciation of the reasons behind unwillingness to seek protection from the state, which shows a lack of understanding of gendered aspects of persecution.

²⁹¹ Chap. 4 Sec. 1 Aliens Act; Regeringens Proposition 2004/05:170 *Ny instans- och processordning i utlännings- och medborgarskaps ärenden*, at 274; prop. 1996/97:25, *supra* note 275, at 289f; UNHCR Handbook, *supra* note 31, at para. 65

²⁹² See section 2.1.5

²⁹³ Prop. 2005/06:6, *supra* note 275, at 28; Wikrén, Sandesjö, *supra* note 274, at 136

²⁹⁴ *Ibid*

²⁹⁵ UNHCR Handbook, *supra* note 31, at para. 65

²⁹⁶ *UM 1082:06*, compare *MIG 2008:39*, *UM 133-09*, *UM 1532-09*, *UM 1030-08*, see also Bexelius, *supra* note 281, at 82ff, 111f

²⁹⁷ Art. 1A (2) of the Refugee Convention, see also Chap. 4 Sec. 1 Aliens Act

Moreover, in *UM 1335-06*, which specifically concerns trafficking it is stated that the Romanian police ought to have resources to give her protection.²⁹⁸ The court thus makes the assumption that there is state protection. Bexelius has also made note of this in relation to cases concerning domestic violence.²⁹⁹

2.4.1.3 For Reasons of a Ground

The harm feared needs to be linked to a Convention ground according to Chap. 4 Sec. 1 of the Aliens Act. As seen above in section 2.2 membership of a PSG is the most relevant ground in relation to trafficking.³⁰⁰ Before 2006 gender (“kön”) could not be the basis of a PSG under Swedish law.³⁰¹ In the preparatory work 1996/97:25 it is stated that a person can hardly be at risk of persecution purely on the basis gender.³⁰² Laws or customs would also have to be broken, attracting the attention of the government causing a risk of harm.³⁰³ This type of reasoning in my opinion fails to understand the gendered dimensions of persecution and reinforces the historical male norm found in refugee law.³⁰⁴ In 1997 protection from gender-based persecution was in accordance with this view introduced under Chap. 3 Sec. 3 Para. 1:3 of the Aliens Act (1989:529) relating to persons otherwise in need of protection.³⁰⁵ Folkelius and Noll have criticised this construction as being discriminatory, as the protection gained is clearly inferior to refugee status.³⁰⁶ The ‘gender clause’ has however had limited use.³⁰⁷ This can be seen in cases regarding FGM.³⁰⁸

²⁹⁸ *UM 1335-06*, at 4, ”Även om det, enligt vad hon berättat, finns en kvarstående hotbild mot henne, torde den rumänska polisen ha resurser att ge henne skydd”

²⁹⁹ Bexelius, *supra* note 281, at 111

³⁰⁰ See section 2.2.1

³⁰¹ *UN 328-97*

³⁰² Prop. 1996/97:25, *supra* note 275

³⁰³ *Ibid*, at 290, Migrationsverket, Gender-based persecution: Guidelines for investigation and evaluation of the needs of women for protection (2001)

³⁰⁴ UNHCR, Guidelines on Gender-Related Persecution, *supra* note 5, at para. 2; Crawley, *supra* note 14, at 39; Sztucki, *supra* note 38, at 55

³⁰⁵ Previously protection from this type of harm had to be sought under discretionary humanitarian grounds under the so called *de facto* refugee provision

³⁰⁶ Folkelius, K., Noll, G. ‘Affirmative Exclusion? Sex, Gender, Persecution and the Reformed Swedish Aliens Act’, 10:4 *International Journal of Refugee Law* (1998) 607, at 631

³⁰⁷ Prop. 2005/06:6, *supra* note 275, at 19

³⁰⁸ See e.g. *UN 420-00*; prop. 2005/06:6, *supra* note 275, at 14

In contrast, the new Aliens Act explicitly allows a PSG to be constructed on the basis of gender.³⁰⁹ According to the preparatory work 2005/06:6, the ground should be interpreted in accordance with the EU Qualification Directive and the guidance provided by the UNHCR.³¹⁰ The Directive expresses in Art. 10 (d) that a PSG can be said to exist where “members of that group share an innate characteristic, or a common background that cannot be changed... and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society”. Gender aspects are to be specifically considered. The Directive hence requires that a PSG is united by both e.g. an innate characteristic and that the group is perceived as distinct in a given society. This implies that both the protected characteristics approach as well as the social perception approach are to be satisfied, making application of the ground very restricted.³¹¹ This is contrary to the interpretation favoured by the UNHCR, which proposes the views are used as alternatives.³¹²

In SOU 2004:31 preceding current legislation the interpretation of membership of a PSG made can be compared with the stance taken by the UNHCR.³¹³ Innate and inviolable characteristics are mentioned as able to unite groups of people on the one hand. On the other hand it is stated that a PSG can be identified by the fact that it is perceived as a particular group by society.³¹⁴ These appear to be alternative options. Sweden thus seems to have developed further than its common-law counter-parts studied above since the amendment of 2006. However, it is difficult to estimate the relevance of this with regards to persons at risk of trafficking, even though it can be said to be beneficial in general to gender-related claims.

³⁰⁹ Chap. 4 Sec. 1 Aliens Act; prop. 2005/06:6, *supra* note 275; SOU 2004:31, *Flyktingskap och könsrelaterad förföljelse*; the Swedish concept “kön” is said to include biological as well as social and cultural aspects, prop. 2005/06:6, *supra* note 275, at 37

³¹⁰ Prop. 2005/06:6, *supra* note 275, at 38; UNHCR Handbook, *supra* note 31; UNHCR Guidelines on Membership of a Particular Social Group, *supra* note 159, at para. 11f; UNHCR Guidelines on Gender-related persecution, *supra* note 5, at para. 30; EU Qualification Directive

³¹¹ See section 2.2.2

³¹² UNHCR Guidelines on Membership of a Particular Social Group, *supra* note 159

³¹³ SOU 2004:31, *supra* note 309; UNHCR, Guidelines on Membership of a Particular Social Group, *supra* note 159; Hathaway, Foster, *supra* note 159, at 489ff

³¹⁴ SOU 2004:31, *supra* note 309, at 97

In *MIG 2008:39* the court accepts that the social and cultural structures in Albania prevent the state from providing protection for the claimant because she is a woman.³¹⁵ She is thus seen to belong to a PSG sharing the innate and unchangeable characteristic of gender. The reasoning behind the court's decision is scarce and it is not possible to make any far reaching conclusions as to how this type of PSG can be found. It is for instance not clear whether the court has limited the PSG to women in northern Albania, or whether the group is nation wide.³¹⁶ Nevertheless, the crucial point considered by the court seems to be the same as in *Islam and Shah* namely structural denial of rights.³¹⁷ Similar conclusions can be drawn in relation to *UM 2676-07* where a young woman fearing FGM is considered to be a member of a PSG.³¹⁸ These cases provide confirmation of the possibility of establishing a Convention ground on the basis of gender. There is a possibility this could benefit some persons at risk of trafficking, if this treatment is recognised as persecution. However as can be seen in section 2.2.2.1 it is difficult to establish there is a structural denial of rights in a country.

As an alternative to using gender as the characteristic uniting the PSG, historic facts can be used.³¹⁹ This possibility has in British jurisprudence allowed for the inclusion of persons at risk of trafficking under refugee protection.³²⁰ Today there are however no indications that Sweden is prepared to make similar interpretations.

In addition to establishing that an individual is a member of a PSG which can be evidenced to exist in the country of origin, it needs to be ascertained that the persecution feared is on the basis of this Convention reason.³²¹ This is known as the nexus requirement. According to Luopajarvi, the requirement is particularly unclear in civil law countries.³²² This seems to be partially true with regards to Sweden. Internationally, it is generally accepted that where persecution is committed by non-state actors the link can be established either between the perpetrator's

³¹⁵ *MIG 2008:39*, see also *UM 1042-08*, *UM 1324-08*

³¹⁶ Compare *SK Albania*, *supra* note 133

³¹⁷ *Islam and Shah*, *supra* note 158

³¹⁸ Compare *Fornah*, *supra* note 155

³¹⁹ Prop. 2005/06:6, *supra* note 175

³²⁰ *SB Moldova*, *supra* note 184; *ex parte Hoxha*, *supra* note 183

³²¹ See section 2.2.3

³²² Luopajarvi, K. *Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives*, at 85

conduct and a ground or between the failure of state protection and a ground.³²³ However, in the preparatory work 2005/06:6 it is stated that where persecution is committed by private actors, refugee status can be afforded where state failure can be linked to a ground.³²⁴ This coheres with the fact that state failure cannot be established where this is due to a lack of resources or inefficiency in Sweden. If this is meant as a general principle which seems to be the case, Sweden has avoided the awkward construction of a nexus based on the persecutors intention which can be seen in other jurisdiction and instead opted for a solution where the focus is on the state in the determination process. Again the problem of evaluating state intention is evident.

Henceforth, the standard of causation chosen by Sweden is ‘contributing cause’, as stated in the preparatory work 2005:06:6.³²⁵ This is the most beneficial standard in use internationally and is in my view particularly helpful with regards to trafficking where a range of motivations often cause the perpetrator to act.³²⁶

2.4.2 Chapter 4 Section 2 Aliens Act

The regulation regarding ‘persons otherwise in need of protection’ found in Chap. 3 Sec. 3 of the Aliens Act (1989:529) specifically provided protection from gender-related violence as stated above. The gender clause was however abandoned in 2006.³²⁷ Chap. 4 Sec. 2 of the Aliens Act (2005:716) defines a ‘person otherwise in need of protection’ under three categories: those having a well-founded fear of death penalty, torture or inhuman or degrading treatment or punishment; those needing protection because of conflict or having a well-founded fear of being subjected to serious abuses; and those who cannot return to their countries or origin due to environmental disaster. These individuals will generally be given permanent residence permits under Chap. 5 Sec. 1 of the Aliens Act.

³²³ Aleinikoff, *supra* note 16, at 131ff, UNHCR Guidelines on Membership of a Particular Social Group, *supra* note 159, at para. 20ff; UNHCR Guidelines on Trafficking, *supra* note 43, at para. 20f

³²⁴ Prop. 2005/06:6, *supra* note 275, at 28

³²⁵ Prop. 2005/06:6, *supra* note 275, at 23, Wikrén, Sandsjö, *supra* note 274, at 135

³²⁶ See section 2.2.3

³²⁷ Prop. 2005/06:6, *supra* note 275

Chap. 4 Sec. 2:1 of the Aliens Act, provides protection from torture and inhuman and degrading treatment and punishment as required by CAT and ECHR.³²⁸ As clarified above, Art. 3 ECHR provides an absolute prohibition on torture, which extends extra-territorially.³²⁹ Since ECHR is incorporated into Swedish law, if trafficking can be considered as torture or inhuman or degrading treatment a person at risk cannot be sent home.³³⁰ When contemplating the scope of the regulation it should be recognised that case law from the European Court of Human Rights has a direct impact upon the application of this clause.³³¹ The analysis made in section 2.3.1 is thus applicable here. Therefore I conclude that by analogy to rape and with consideration to the assessment of the severity of treatment made by the European court, it is likely that trafficking can be considered as torture or inhuman or degrading treatment under Swedish law. It is more difficult to know whether a Swedish court would in fact consider it such. Some general support for this can be found in *UM 1030-08* where domestic violence, another type of gender-related harm, is considered inhuman or degrading treatment. Also, according to the Migration Board Gender Guidelines from 2006, rape and other sexual abuse can under certain circumstances be classified as torture.³³²

In addition, Chap. 4 Sec. 2:2 of the Aliens Act, protection can be sought for fear of serious abuse. According to Wikrén and Sandesjö this includes severe abuse experienced by women.³³³ Because of the absolute nature of the torture clause, this regulation ought however to be used only where the level of severity does not reach that of torture, or inhuman or degrading treatment. In *UM 4455-08* the Migration Court grants protection under this clause to a mother in fear of domestic abuse and a daughter facing the risk of forced marriage. Depending on the treatment faced, a victim of trafficking may be able to receive protection under this provision.

³²⁸ CAT; Regeringens Proposition 1987/88:133 *med anledning av Sveriges tillträde till den europeiska konventionen till förhindrande av tortyr m.m.*; ECHR; Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna; Regeringens Proposition 1993/94:117 *Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor*; Regeringens Proposition 1993/94:115 *Valperiodens längd och vissa andra grundlagsfrågor*; Art. 2(e) of the EU Refugee Qualification Directive; Migrationsverket, *supra* note 277, at 5

³²⁹ *Chahal v UK*, *supra* note 226, *Soering v UK*, *supra* note 226

³³⁰ Chap. 4 Sec. 2:1, Chap. 12 Sec. 1 Aliens Act, Art. 3 ECHR

³³¹ Wikrén, Sandesjö, *supra* note 274, at 146

³³² Migrationsverket, *supra* note 277, at 8

³³³ Wikrén, Sandesjö, *supra* note 274, at 148

2.4.3 Chapter 5 Section 6 Aliens Act

According to Chap. 5 Sec. 6 of the Aliens Act, a residence permit may be granted to an alien where the individual cannot obtain other kind of protection and is found to be “in such exceptionally distressing circumstances (“synnerligen ömmande omständigheter”) that he or she should be allowed to stay in Sweden”.³³⁴

The application of the provision is to be made restrictively and exceptionally according to *MIG 2007:35* and *MIG 2007:15*.³³⁵ In order to access protection consideration needs to be given to the entirety of the individual situation. Particular weight is given to the alien’s health, adaption to Swedish society and the situation in his or her country of origin.³³⁶ Also, other especially difficult circumstances are to be taken into account. In *SOU 2004:74* it is stated that human trafficking is one such circumstance.³³⁷

In *UM 1335-06* the claimant is a woman having suffered from human trafficking for sexual exploitation at an age of 17. The court did not consider her circumstances serious enough to grant protection under the refugee or ‘persons otherwise in need of protection’ provisions in the Aliens Act. It is however considered appropriate to afford her protection under Chap. 5 Sec. 6. Interestingly it does not seem to be the exposure to trafficking which is decisive in the judgement. Instead the motives state that neither the claimant’s adaption to Swedish society, nor the situation in the home country, nor her state of health can be perceived to fulfil the requirements of the law. However on the basis of these circumstances together with the claimant’s young age, her situation can be understood as exceptionally distressing. It is in my opinion encouraging to find a victim of trafficking is granted a residence permit in Sweden, however the fact that the court does not seem to give particular attention to this fact is concerning.

³³⁴ Wikrén, Sandesjö, *supra* note 274, at 199; *MIG 2007:33*

³³⁵ *MIG 2007:35*, *MIG 2007:15*

³³⁶ Wikrén, Sandesjö, *supra* note 274, at 199

³³⁷ *SOU 2004:74 Utlänningslagstiftningen i ett domstolsperspektiv*, at 196ff; prop. 2004/05:170, *supra* note 291, at 192

In addition, SOU 2008:41 mentions two cases where Chap. 5 Sec. 6 of the Aliens Act has provided protection for victims of trafficking.³³⁸ This reinforces the use of the provision in these instances, but since the motives cannot be analysed it is hard to know how far this possibility reaches. The three cases taken together however show that out of the protection alternatives thus far mentioned, Chap. 5 Sec. 6 seems to be the most realistic option. In my opinion this shows a lack of understanding of the human rights abuse that human trafficking is in the courts and with the Migration Board. This is emphasised by it being only the third option in a line of protection, and by the fact that it is only applicable on a restrictive and exceptional basis.

For the purpose of strengthening protection for victims of human trafficking it is in SOU 2008:41 suggested that Chap. 5 Sec. 6 is amended to include human trafficking as a circumstance to be considered in its application.³³⁹ This would perhaps somewhat strengthen the possibility of receiving this type of protection. It would however also indicate that refugee status and protection as a person otherwise in need of protection was out of bounds for persons fearing human trafficking. This would in my opinion be an unwanted development, and one which would contradict international opinion.³⁴⁰ The government's preparatory work will be released in the spring 2010.³⁴¹

2.4.4 Chapter 5 Section 15 Aliens Act

Upon the application from the person in charge of a preliminary investigation, a temporary residence permit can be granted for six months for an alien who is needed and willing to assist in the investigation or a main hearing of a criminal court case, according to Chap. 5 Sec. 15 of the Aliens Act. The provision was first introduced in 2004 and is applicable to any type of criminal court case.³⁴² Cases concerning human trafficking have however been highlighted as a result of the EU Directive 2004/81/EC, which specifically deals with temporary residence permits for

³³⁸ SOU 2008:41, *supra* note 287

³³⁹ *Ibid.* at 147

³⁴⁰ UNHCR Trafficking Guidelines, *supra* note 43

³⁴¹ Maria Hölke, L5, Straffrättsenheten, Justitiedepartementet Regeringskansliet

³⁴² Regeringens proposition 2003/04:35 *Människosmuggling och tidsbegränsat uppehållstillstånd för målsägande och vittnen m.m.*

victims of trafficking assisting the conviction of traffickers.³⁴³ The Directive caused a clarification of the criteria in the Swedish provision.³⁴⁴

Victims of human trafficking hence have a very real opportunity to receive protection through Chap.5 Sec. 6 of the Aliens Act. In contrast to the provisions analysed above this provision is however not firstly concerned with the victim but with the achievement of law and order. This can be seen from the fact that it is the person in charge of a preliminary investigation who applies for this permit, rather than the victim.³⁴⁵ It is also stated in the preparatory work for the amendment made in 2007 that it is a basic requirement for a temporary residence permit to be granted that the alien should stay because he/she is *needed* in a criminal case.³⁴⁶ The provision is thus serving a societal rather than an individual need.

This European approach was strongly criticised by both governmental and non-governmental organisations internationally already during its drafting process. Human Rights Watch has criticised the fact that protection for victims of human rights abuse is traded for cooperation with the authorities. This is cannot be found with any other type of abuse than human trafficking.³⁴⁷ The fact that the focus in the Directive is upon law and order rather than victim protection has also been criticised by the UNHCR and the UN High Commissioner for Human Rights (UNHCHR).³⁴⁸ Piotrowicz also argues that the scheme is bound to fail since it offers little incentive to cooperate in relation to what asked of the victims. In addition to having to overcome the fear of authorities, the victims are asked to potentially increase their own risk of being harmed, with the relatively weak assurance of being able to stay in the country for a short period

³⁴³ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

³⁴⁴ Regeringens proposition 2006/07:53 *Genomförande av EG-direktivet om offer för människohandel*, at 20ff

³⁴⁵ Chap. 5 Sec. 15 of the Aliens Act

³⁴⁶ Prop. 2006/07:53, *supra* note 344, at 21

³⁴⁷ Human Rights Watch, Commentary on the European Commission Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, at 5

³⁴⁸ UNHCR, UNHCHR, Observations by the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Commissioner for Human Rights (UNHCHR) on the Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal migration or trafficking in human beings who cooperate with the competent authorities

of time. After this period is concluded, nothing in the Directive (or the Swedish provision) allows for further protection.³⁴⁹

Since, Sweden today offers very meagre protection options for trafficking victims outside of a criminal investigation or main hearing as seen above there is also not much compensation elsewhere for the lack of victim protection found in Chap. 5 Sec. 15 of the Aliens Act. The current available protection opportunities may thus not only be insufficient on the part of the victim but also for the authorities working against trafficking as a criminal activity crippling society as a whole.

3. CONCLUSION

Human Trafficking is a current issue provoking public emotion as well as scholarly and political debate.³⁵⁰ Many trafficked individuals suffer harm on account of this activity.³⁵¹ The Refugee Convention has not traditionally been interpreted to include what is today referred to as gender-specific and gender-related harm under which trafficking for commercial sexual exploitation can be categorized.³⁵² However, the understanding of this Convention and the scope of Art. 1A(2) defining a refugee has developed much in this area in the last decade. The purpose of this dissertation was to establish if and in that case how Art. 1A(2) of the Refugee Convention can give protection to people at risk of human trafficking for the purpose of commercial sexual exploitation. This purpose was sought to be satisfied through answering four subsidiary questions, to which reference in turn will be made below.

3.1 Trafficking As Persecution

General conclusions applying to all instances of trafficking cannot be drawn with regard to the concept of persecution. I would however say it is possible to conclude with a high degree of likelihood that some instances of trafficking amount to persecution, in accordance with the

³⁴⁹ Piotrowicz, R. 'European Initiatives in the Protection of Victims of Trafficking who Give Evidence Against Their Traffickers', 14:2 *International Journal of Refugee Law* 263, at 268ff

³⁵⁰ See e.g. <http://www.stopthetraffik.org/language.aspx>, accessed on 18/08/09, Piotrowicz, *supra* note 1; <http://www.osce.org/activities/13029.html>, accessed on 18/08/09

³⁵¹ See e.g. UN Office on Drugs and Crime, *supra* note 105, at 155; London School of Hygiene and Tropical Medicine, *supra* note 104, at 44ff

³⁵² UNHCR Guidelines on Gender-related persecution, *supra* note 43, at para. 18; Scarpa, *supra* note 1, at 95

UNHCR Trafficking Guidelines.³⁵³ This will arguably to some degree be dependent upon the understanding of the trafficking definition found in Art. 3 of the Trafficking Protocol adopted in a particular state. The possibility of including or excluding consent as a requirement for the recruitment stage may cause a different scope of women to be eligible to seek protection.³⁵⁴ These conclusions can however only be ascertained through the study of how individual countries apply the Trafficking Protocol, something which is outside of the scope of this dissertation.

According to Hathaway persecution is the “sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community”³⁵⁵. In his hierarchy of rights, the prohibition on slavery and torture come first.³⁵⁶ Since these have the status of *jus cogens* any breach will constitute persecution.³⁵⁷ It can fairly safely be concluded that trafficking can be included in the definition of slavery today.³⁵⁸ However, not all instances of trafficking will reach the high threshold of slavery. In a specific case slavery can only be said to have occurred where the measure of control exercised over the individual in question implies ownership.³⁵⁹ This may be difficult to ascertain, since trafficked individuals are usually not exploited on a permanent basis.³⁶⁰ On the other hand, where slavery cannot be proved slavery-like practices such as debt bondage are included in the same category.³⁶¹ Many trafficked women experience having to work without pay in the sex industry in order to pay off debts relating to travel and other expenses.³⁶² Where this happens, it almost certainly will amount to debt bondage and persecution can be established.

An alternative argument to trafficking as slavery can be made on the basis of the torture prohibitions. Sexual violence has been recognized as causing great suffering by the ICTY and the

³⁵³ UNHCR Trafficking Guidelines *supra* note 43

³⁵⁴ Raymond, *supra* note 22, at 4; Simm, *supra* note 48, at 147; Westerstrand, *supra* note 50, at 258; Reilley, *supra* note 84, at 118ff

³⁵⁵ Hathaway, *supra* note 4, at 112

³⁵⁶ *Ibid*, at 109

³⁵⁷ Bassiouni, *supra* note 58, at 9; Burchard, *supra* note 87, at 3

³⁵⁸ See e.g. Report of the Working Group on Contemporary Forms of Slavery *supra* note 63

³⁵⁹ Art. 1(1) Slavery Convention (1926); *Prosecutor v Kunarac and others*, *supra* note 65, para, 539, 542

³⁶⁰ Bassiouni, *supra* note 58, at 459

³⁶¹ Preamble, Art. 1 Supplementary Convention on the Abolition of Slavery

³⁶² Art. 3(a) UNHCR Trafficking Protocol; Kelley, *supra* note 80, at 15

ICTR.³⁶³ It is henceforth the “objective and subjective criteria as well as the disposition of the victim”,³⁶⁴ which in a particular case determine whether the harm faced reaches the level of torture. Rape has on a number of occasions been considered as a form of torture and I have argued this treatment can be compared with trafficking.³⁶⁵ Furthermore, it can be said that many of the aspects which aggravate treatment such as nature, length and context of the treatment together with age and sex tend to be present in many instances of trafficking.³⁶⁶ In order to ascertain that trafficking can in fact be understood as torture, more specific jurisprudence needs to be awaited.

In addition to the serious harm requirement, the failure of state protection and location requirements pose challenges to claims made by individuals at risk of trafficking. Where trafficking is perpetrated by non-state actors it is necessary to establish failure of state protection.³⁶⁷ On an international basis it has not been possible to draw any certain conclusions as to what this means in practice. Case-law is contradictory.³⁶⁸ In contrast, the location requirement is fairly clear in its scope, asking of a claimant that he/she is outside the country of origin and for the harm to be related to the same.³⁶⁹ This limitation will however systematically exclude claims made e.g. by persons who have been trafficked from abroad.

3.2 Convention Ground

When it comes to establishing a Convention ground, I would argue some claims made by women fearing trafficking ought to be successful. In some instances connections can be made between the trafficking experience and the race, religion, nationality or political opinion of the victim.³⁷⁰ In order to quantify the use and success of these grounds for trafficking related claims further

³⁶³ Askin, *supra* note 93, at 60

³⁶⁴ Burchard, *supra* note 87, at 4

³⁶⁵ See section 2.1.4

³⁶⁶ *Prosecutor v Krnojelac*, *supra* note 96, at para. 182; IOM, *supra* note 102, at 16; Human Rights Watch, *supra* note 73, at 4, 16

³⁶⁷ *Horvath v SSHD* *supra* note 125

³⁶⁸ Compare *V01/13868* *supra* note 128; *V03/16442* *supra* note 130, *SK Albania* *supra* note 133; *SSHD v Dzhygun* *supra* note 134

³⁶⁹ Art. 1A(2) Refugee Convention; Hathaway, *supra* note 4, at 55ff

³⁷⁰ See e.g. *N03/45573* *supra* note 135; Coomeraswamy, *supra* note 147, at 25

studies would have to be made. Since they are of limited use and due to time restraints they were however decidedly outside of the ambit of this dissertation.

Where trafficking on the other hand is related to vulnerability, the ground membership of a PSG provides the best opportunity to achieve protection. Most trafficking claims are brought under this ground.³⁷¹ Two main approaches to understanding this ground dominate jurisprudence; the protected characteristics approach and the social perception approach.³⁷² I concluded from analysing case law that both approaches allow for the inclusion of some women facing the risk of trafficking in particular social groups. This result is however achieved in different ways.³⁷³ Under both approaches, sex/gender can serve as foundation for the existence of a particular social group.³⁷⁴ This common trait is however not enough to substantiate the existence of a PSG under either approach. Groups of women are narrowed down through such facts as geographical location and youth.³⁷⁵ The protected characteristics approach also clearly accepts previous trafficking as constituting an unchangeable characteristic, uniting women having had this experience.³⁷⁶ Identification of groups on the basis of past experience has also been attempted under the social perception approach. The result is however not as clear.³⁷⁷ It is therefore not possible to determine with certainty whether this is currently a feasible route to take under this approach.

Furthermore, establishing a nexus between a Convention ground and the persecution feared may provide considerable challenges. Much uncertainty surrounds this requirement³⁷⁸, which means further studies into specific jurisdictions would be necessary to establish the full extent of its impact upon a trafficking claim. This could be achieved through adding a subsidiary question focused on this particular issue. It can however be stated that gender-related violence such as trafficking perpetrated by non-state actors generally face a significant hurdle in this requirement.

³⁷¹ Dorevitch, Foster, *supra* note 11, at 17; Poppy Project, *supra* note 156

³⁷² Aleinikoff, *supra* note 16; Hathaway, Foster, *supra* note 11

³⁷³ Compare *Canada v Ward*, *supra* note 161; *Applicant A v MIEA*, *supra* note 158

³⁷⁴ *Islam and Shah* *supra* note 158; *SSHD v K Fornah* *supra* note 155; *MIEA v Khawar* *supra* note 192

³⁷⁵ Compare *SK Albania* *supra* note 133; *V01/13868* *supra* note 128

³⁷⁶ *SB Moldova*, *supra* note 184; *ex parte Hoxha* *supra* note 183

³⁷⁷ Compare *N98/24000* *supra* note 197, at 10; *VXAJ v MIA*, *supra* note 201, at para. 11, *N03/45573* *supra* note 206

³⁷⁸ Foster, *supra* note 209, at 266

The extent of this depends upon the standard of causation applied in a particular country.³⁷⁹ The difficulties are further emphasised in jurisdictions where this violence is generally perceived as stimulated by private motives, rather than a ground.³⁸⁰ It can with certainty be said that where the contributing cause test is applied, most trafficking cases will be considered favourably, since it is here recognised that persecution can be linked to a ground even where there are additional motivating factors such as profit.³⁸¹

3.3 Art.3 ECHR and the EU Refugee Qualification Directive

Where refugee status cannot be achieved, complementary protection can be sought through the protection afforded by Art. 3 ECHR and the related Refugee Qualification Directive.³⁸² It is likely that the development in the understanding of trafficking as a human rights violation would today allow for consideration of trafficking as torture, inhuman or degrading treatment under Art. 3 ECHR and Art. 15 of the Directive respectively.³⁸³ Thus, where the severity of the experience of trafficking in a particular case can be compared with that of rape, it is possible to reach this kind of protection.³⁸⁴ The factors affecting the assessment of the gravity of a treatment have in the *Greek* case been said to be the duration of the treatment, its physical or mental effects and in some cases sex, age and state of health of the victim.³⁸⁵ In many cases of trafficking, several of these factors will be aggravating.³⁸⁶ This means, many persons at risk of trafficking ought to be able to substantiate a claim under the complementary protection regime.

The Refugee Qualification Directive provides for subsidiary protection status which means it will be secondary to refugee status.³⁸⁷ However, its scope is limited in ways similar to the Refugee Convention, which means not all persons at risk of trafficking are encompassed even where

³⁷⁹ Compare the ‘effective sole cause’, ‘but for’ test and ‘contributing cause’, see Foster, *supra* note 209, at 269ff

³⁸⁰ *Matter of R.A* *supra* note 211; *V00/11003* *supra* note 212; *N98/24000* *supra* note 197; Spijkerboer, *supra* note 15, at 190; *Crawley*, *supra* note 14, at 18ff on the public/private dichotomy

³⁸¹ Foster, *supra* note 209, at 284; *Rajaratnam v MIMA* *supra* note 221, regarding extortion

³⁸² Compare *Chahal v UK* *supra* note 226; *Soering v UK*, *supra* note 227

³⁸³ *Selmouni v France*, *supra* note 229

³⁸⁴ *Cyprus v Turkey*, *supra* note 235; *Aydin v Turkey*, *supra* note 236

³⁸⁵ *Greek case*, *supra* note 246; *Ireland v UK*, *supra* note 232, at para. 162

³⁸⁶ IOM, *supra* note 102, at 16; Human Rights Watch, *supra* note 73, at 4, 16

³⁸⁷ Art. 18 Refugee Qualification Directive

trafficking can be seen as amounting to torture or inhuman or degrading treatment.³⁸⁸ Art. 3 ECHR here provides an outer protection scheme since it applies unconditionally to all facing a risk of harm.³⁸⁹ Its protection however only reaches as far as *non-refoulement*.³⁹⁰ In contrast to the Refugee Convention, neither of these routes require a link being made between fear of harm and a ground. This may ultimately mean complementary protection provides a more realistic protection opportunity for women facing the risk of trafficking.

3.4 The Swedish Aliens Act

In Sweden, aliens can receive international protection under the Aliens Act. Chap. 4 Sec. 1 provides refugee protection to those who have a well-founded fear of being persecuted on Convention grounds. According to preparatory work and earlier legislation acts which threaten the life and freedom of an alien, or that is otherwise severe in nature is to be considered persecution.³⁹¹ Among these is conduct violating fundamental human rights such as those from which no derogation can be made according to Art. 15.2 of the ECHR.³⁹² Gender-related violence is today recognised as such serious harm in Sweden.³⁹³ Case-law regarding domestic violence and rape however pose important questions about what the courts require in terms of ill-treatment for persecution to be established in these cases.³⁹⁴ Trafficking is to be considered gender-related violence and can as such be compared with other such violence. However there is little indication that the courts or the Migration Board would today recognise trafficking as persecution.³⁹⁵ Where this is nevertheless achieved, the requirement of failure of state protection poses considerable challenges to a claim, as in international law. In my opinion, this criterion is even more stringent than what is the case internationally, in particular since it can only be established where the lack protection is due to political, social, cultural or religious factors.³⁹⁶

³⁸⁸ See Art. 15(b), Art. 18 Refugee Qualification Directive

³⁸⁹ Art. 1 ECHR

³⁹⁰ *Chahal v UK*, *supra* note 226; *Soering v UK*, *supra* note 226

³⁹¹ Prop. 1988/89:86, *supra* note 268, at 154f

³⁹² Art. 9.1 EU Qualification Directive

³⁹³ Migrationsverket, *supra* note 277; UNHCR, *supra* note 277

³⁹⁴ See *MIG 2008:39*, *UM 1030-08*, *UM 10365-06*, Bexelius, *supra* note 281, at 51ff

³⁹⁵ UN Declaration on the Elimination of Violence against Women (1993), SOU 2008:41, *supra* note 287, *UM 1335-06*

³⁹⁶ Prop. 2005/06:6, *supra* note 275, at 28; Wikrén, Sandesjö, *supra* note 274, at 136

In establishing a PSG under Chap. 4 Sec. 1 of the Aliens Act it seems in my opinion that either the protected characteristics approach or the social perception approach can be used.³⁹⁷ This coheres with the UNHCR stance.³⁹⁸ Sex/gender can also serve as a basis for the construction of a PSG today.³⁹⁹ This can be seen in *MIG 2008:39* and *UM 2676-07*. The reasoning in these cases can be compared with that of *Islam and Shah* and *Fornah*.⁴⁰⁰ I am however weary that it may be as difficult in Sweden as elsewhere to prove a structural denial of rights and hence make use of the ground on the basis of gender. Also, even though it is accepted that historical facts may serve as foundation for a claim, no such claim relating to previous trafficking or the like has yet been accepted which makes me doubt its usefulness.⁴⁰¹ Furthermore, in making a connection between a ground and the persecution feared it seems as though Sweden as avoided a construction of this link based on the persecutor's intention. On the other hand it seems, in my view as though the link has to be made between state conduct and the Convention ground.⁴⁰² This poses a different type of challenge in making a claim, namely establishing a form of intent on the part of the state. It is however enough for a discriminatory intention to be a contributing cause.⁴⁰³

Chap. 4 Sec. 2 of the Aliens Act provides a secondary type of protection from e.g. torture and inhuman and degrading treatment and punishment. It is in my opinion more likely that persons in fear of trafficking may receive protection under this provision, on the basis of case-law from the European Court of Human Rights.⁴⁰⁴ There is however no Swedish case-law specifically in support of this to date.

Moreover, Chap. 5 Sec. 6 of the Aliens Act grants residence permits to aliens in exceptionally distressing circumstances. SOU 2004:74 states that human trafficking is a circumstance to be particularly considered when evaluating the personal situation of an individual.⁴⁰⁵ Victims of

³⁹⁷ SOU 2004:31, *supra* note 309

³⁹⁸ UNHCR Guidelines on Membership of a Particular Social Group, *supra* note 159

³⁹⁹ Chap. 4 Sec. 1 Aliens Act, prop. 2005/06:6, *supra* note 275

⁴⁰⁰ *Islam and Shah*, *supra* note 158, *Fornah*, *supra* note 155

⁴⁰¹ Prop. 2005/06:6, *supra* note 275

⁴⁰² *Ibid.*, at 28

⁴⁰³ *Ibid.*; Wikrén, Sandesjö, *supra* note 274, at 135

⁴⁰⁴ See section 2.3.1

⁴⁰⁵ SOU 2004:74, *supra* note 337, at 196ff

human trafficking have been provided protection under this provision.⁴⁰⁶ At this point in time it is thus feasible to conclude that this clause provides the most likely long-term protection opportunity. Short-term, Chap. 5 Sec. 15 may be relevant to a victim of trafficking. This provision is however not concerned firstly with the well-being of the victim but with the conduct of a preliminary investigation or main hearing of a criminal court case and hence only provides temporary residence.⁴⁰⁷ It can be criticised both from a human rights perspective and on the basis of its effectiveness in offering very little in return for gaining a valuable witness.⁴⁰⁸

⁴⁰⁶ *UM 1335-06*, SOU 2008:41, *supra* note 287

⁴⁰⁷ Chap. 5 Sec. 15 of the Aliens Act, prop. 2006/07:53, *supra* note 275, at 21

⁴⁰⁸ Human Rights Watch, *supra* note 347, UNHCR, UNHCHR, *supra* note 348; Piotrowicz, *supra* note 349, at 268ff

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Maria Hölke, L5, Straffrättsenheten, Justitiedepartementet Regeringskansliet, telephoned on the 05/10/09