

Human trafficking legislation in South Africa: Consent, coercion and consequences

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ABSTRACT

This article looks at critical concepts found in the new South African counter-trafficking legislation. First it will examine the issue of consent, and its pivotal role in defining both adult and child trafficking. Next, the concept of coercion will be addressed, and whether such a term should be interpreted broadly to include psychological coercion. Finally, the potential consequences trafficking has for the victim and the role that such longitudinal damage should play in determining a just and informed sentence will be examined.

1. Introduction

Human trafficking is a global criminal and human rights concern.¹ Trafficking in human beings is generally referred to as 'modern day slavery',² and it has been asserted that slavery/trafficking is more common now than at any time in history, from the Roman Empire to the transatlantic slave trade.³ While the conditions of slaves and slavery from centuries ago may, unfortunately, still be found today in parts of the world,⁴ modern trafficking's definition is far more expansive,

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¹ United Nations Office on Drugs and Crime *Global Report on Trafficking in Persons* (2012) at 7, noting victims of 136 nationalities detected in 118 countries during the reporting period of this study.

² International Labour Organisation *Global Estimate of Forced Labour: Results and Methodology* (2012) at 13. The definition of slavery accepted in international law can be found in Article 1 of the 1926 Slavery Convention and is as follows: 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.

³ Schuster Institute for Investigative Journalism *Human Trafficking and Modern-Day Slavery*, citing Kevin Bales, available on-line at <http://www.brandeis.edu/investigate/slavery/index.html>, accessed on 11 June 2014. See also R Snyman 'Victims of human trafficking' in L Davis and R Snyman (eds) *Victimology in South Africa* (2005) at 282 (citing I Burrell *Slavery Still Common in the 21st Century* (2000)).

⁴ BBC News 'West Africa slavery still widespread' 27 October 2008, detailing both the recency of slavery's abolition in parts of West Africa, as well as its enduring existence, in spite of abolition, available at <http://news.bbc.co.uk/2/hi/africa/7693397.stm>, accessed on 30 May 2014.

recognising different types of trafficking effected by a wide variety of means, but all with the same enduring purpose: exploitation.⁵

This article will begin with an overview of contemporary trafficking in human beings. Three potentially problematic areas within the new law will then be discussed. The concept of consent will first be addressed, as well as its relevance to the definition of both child and adult trafficking. Next, the issue of coercion within trafficking of adults and the growing recognition of coercion in its psychological form, as a means of trafficking will be examined. Finally, the article will look at factors affecting sentencing and how the psychological damage inflicted on the victim, both immediate and long term, must be understood and acknowledged at sentencing, to render a sentence that accurately reflects the true magnitude of the damage done by traffickers to their victims.

2. Defining international terms

In the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Crime (2000), known as the Palermo Protocol, Article 3 defines trafficking as:

‘The recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.’⁶

The Palermo definition is generally taken as a starting point when individual nations begin to draft their own legislation.

The Convention negates the concept of ‘consent’ where any of the means set out above have been used,⁷ and most importantly states that:

‘recruitment, transportation, transfer, harbouring or receipt of a child for the purposes of exploitation shall be considered “trafficking in persons” even

⁵ K Kim ‘The coercion of trafficked workers’ (2011) 96 *Iowa L R* 409, at 436: ‘The emergence of human trafficking as the prevailing form of involuntary labour demanded new laws that could capture its complexity. Specifically, it demanded laws broader in scope, capable of addressing the more nuanced and nonphysical ways used to coerce modern-day involuntary laborers to work.’

⁶ Article 3(a).

⁷ Article 3(b).

if this does not involve any of the means set forth in paragraph (a) of this article.⁸

As this Protocol states, a child cannot meaningfully consent to his/her own trafficking. In other words, the question of consent is irrelevant when it is a child who is trafficked. As such, there is no requirement that any of the means detailed above, such as force or fraud, be present in order to prove child trafficking. Under this Protocol, a child is any person under eighteen years of age.⁹ It should also be noted that the South African Constitution similarly defines a child as anyone under 18.¹⁰

The Palermo definition does not cover every possible type of trafficking, and it should be noted that technically the Palermo Protocol deals only with organised crime's involvement in transnational trafficking. However, it must be emphasised that trafficking can occur either internationally or domestically¹¹ and be perpetrated by anyone, from an individual to those involved in large criminal enterprises.

3. Scope and dynamics

It has been estimated by the International Labour Organisation (ILO) that 20.9 million people are trafficked for forced labour globally, and these figures do not include trafficking for the removal of organs or for forced marriage/adoption, unless the practices lead to a situation of forced labour or service.¹² This study estimated that approximately 4.5 million people are victims of forced sexual exploitation, and 14.2 million are victims of forced labour exploitation, in economic activities such as agriculture, construction, domestic work and manufacturing.¹³

A more recent study, the Global Slavery Index, has estimated an even higher number of 29.8 million people being enslaved, as its definition of slavery was more expansive than the ILO's.¹⁴ There are no definitive numbers on how many people are trafficked in South

⁸ Article 3(c).

⁹ Article 3(d).

¹⁰ Section 28(3) of the Constitution of the Republic of South Africa 1996.

¹¹ LG Bermudez *No Experience Necessary: The Internal Trafficking in Persons in South Africa* (2008).

¹² ILO op cit (n2) at 13. It must be noted, however, that attempts to put a definitive number on trafficked or enslaved people is notoriously difficult, and all estimations are to be treated cautiously.

¹³ Ibid.

¹⁴ Walk Free Foundation *The Global Slavery Index 2013* (2013). The definition used here, for example, includes forced marriages, available at <http://www.globalslaveryindex.org/findings/?gclid=CI3dkaHTo74CFc6WtAoddX8ADg#overview>, accessed on 6 June 2014, at 2.

Africa, but this report gave a prevalence number of 44, 545¹⁵ people in South Africa being enslaved, or slightly over .01% of the entire South African population. The report also states clearly that this number 'is, most likely, a gross underestimate'¹⁶ of the true scope, due to the underreporting and clandestine nature of this crime. The report ranked 162 countries, in terms of both the number of persons enslaved in each country, as well as that number as a percentage of the country's population. South Africa ranked 115th internationally and 41st out of 44 in sub-Saharan Africa,¹⁷ with a higher ranking (ex: 1, 2, etc) indicating a higher rate of slavery and a lower ranking (ex: 160) indicating a lesser rate of modern day slavery.

Factors that put individuals at risk of being trafficked spring from an array of sources: violence against women and children; concealment of incest and rape; discrimination and devaluation of women and children, lack of educational opportunities, patriarchy, unemployment/underemployment, political instability, armed conflict, and even natural disasters.¹⁸

Labour traffickers are motivated by greed and provide victims to unethical employers so that they are saved the expense of paying a legal wage to legally hired workers.¹⁹ Sex traffickers are also motivated by greed and provide victims to satisfy the demands of the highly lucrative and globalised sex trade. As one commentator states: 'Human trafficking is, quite simply, the exploitation of human beings for profit.'²⁰ Trafficking encompasses all those involved in the exploitation; from those who initially recruit, harbour and transport the victims to those who ultimately use the victim for sex. Trafficking is furthered by a lack of public awareness of the dangers of human trafficking, the high profit potential for those engaged in this criminal activity, a lack of effective human trafficking legislation or its effective enforcement if such legislation does exist and, widespread corruption.²¹

¹⁵ Walk Free Foundation op cit (n14) at 120.

¹⁶ Walk Free Foundation op cit (n14) at 118 fn 476.

¹⁷ Walk Free Foundation op cit (n14) at 25. The three countries in sub-Saharan Africa with worse rankings were Mauritius (ranked 44), Swaziland (ranked 43) and Angola (ranked 42).

¹⁸ *Global Slavery Index 2013* (n14) at 42, 49 and 62 for listing of causal factors. See also S Birkenthal 'Human trafficking: A human rights abuse with global dimensions' (2011-2012) 6 *Interdisc. J. Hu. Rts L* 27 at 29.

¹⁹ See e.g. UNESCO *Human Trafficking in South Africa: Root Causes and Recommendation* (2007) at 3.

²⁰ US Department of State *Trafficking in Persons Report* (2014) at 28, available at <http://www.state.gov/documents/organization/226844.pdf>, accessed on 3 July 2014, citing to remarks by Anne T. Gallagher.

²¹ Birkenthal op cit (n18), citing Caritas *Root Causes of Human Trafficking* (2010).

4. Defining terms in South African legislation

4.1 Current state of the law

South Africa does not currently have in force a comprehensive law that specifically addresses trafficking. However, the Prevention and Combating of Trafficking in Persons Act²² was enacted in July 2013, though it has not yet been made operational. Until the Act is made operational, there are other offences that might be applied to a trafficking investigation and prosecution in South Africa, such as the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which includes ‘transitional provisions relating to trafficking in persons for sexual purposes.’²³ The legislation criminalises trafficking in persons, but only in the context of sexual exploitation, sexual grooming or abuse of a sexual nature.²⁴

Trafficking prosecutions have also been pursued under the Prevention of Organized Crime Act.²⁵ There are also a variety of other possible charges available, including violating the Children’s Act,²⁶ the Basic Conditions of Employment Act,²⁷ or other crimes, including kidnapping, torture or rape.

4.2 New legislation – the Prevention and Combating of Trafficking in Persons Act 7 of 2013

While the new law is not yet operational, it is important to understand certain of its key concepts and also some of its potentially problematic issues. The first issue to be addressed will be whether South Africa’s definition of trafficking adequately reflects and is in keeping with the Palermo Protocol’s definition of trafficking, when it is a child who is the victim.

4.2.1 *Consent, child trafficking, and trafficking in adults*

The Palermo Protocol divides trafficking into three elements: (1) the acts of trafficking; (2) the means of trafficking, and; (3) the purpose of trafficking. The South African Act defines trafficking as:

²² Prevention and Combating of Trafficking in Persons Act 7 of 2013, (hereinafter ‘TIP Act’).

²³ Section 70 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, criminalising trafficking in persons for sexual purposes.

²⁴ Section 71.

²⁵ Prevention of Organised Crime Act 121 of 1998.

²⁶ Children’s Act 38 of 2005.

²⁷ Basic Conditions of Employment Act 75 of 1997, as amended.

- ‘4. (1) Any person who delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of the Republic, [the acts] by means of—
- (a) a threat of harm;
 - (b) the threat or use of force or other forms of coercion;
 - (c) the abuse of vulnerability;
 - (d) fraud;
 - (e) deception;
 - (f) abduction;
 - (g) kidnapping;
 - (h) the abuse of power;
 - (i) the direct or indirect giving or receiving of payments or benefits to obtain the consent of a person having control or authority over another person; or
 - (j) the direct or indirect giving or receiving of payments, compensation, rewards, benefits or any other advantage, aimed at either the person or an immediate family member of that person or any other person in close relationship to that person, [the means] for the purpose of any form or manner of exploitation [the purpose], is guilty of the offence of trafficking in persons.’

This definition is generally in compliance with the Palermo Protocol though interestingly, there is no distinction drawn at this juncture between trafficking in adults and trafficking in children, as is called for under Palermo. However, a key term used within the definition of trafficking is ‘abuse of vulnerability.’ The Act defines abuse of vulnerability as:

- ‘any abuse that leads a person to believe that he or she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from—
- (a) the person having entered or remained in the Republic illegally or without proper documentation;
 - (b) pregnancy;
 - (c) any disability of the person;
 - (d) addiction to the use of any dependence-producing substance;
 - (e) being a child;
 - (f) social circumstances; or
 - (g) economic circumstances.’²⁸

The corresponding concept of ‘abuse of power’ is not defined either in the Act or in the Palermo Protocol.²⁹ Drawing on other sources for such a definition, it is seen that abuse of power as a means of trafficking might be proven by showing that the accused was a

²⁸ Section 1.

²⁹ Interestingly, while this phrase is used extensively in the ‘Sexual Offences Act’, there is no definition given in that legislation either: s1(3)(b).

parent to the trafficked child³⁰ or more generally where the trafficker occupies a position of control or authority over the child, such as other family members, clergy, teachers, neighbours or even someone representing public authority, such as police officers.³¹ Other positions of power that could apply to adults might include employer/employee relationships.³² While the two terms (abuse of vulnerability and abuse of power) undoubtedly often overlap, it must be noted that an abuse of a position of vulnerability can occur without there also being abuse of power.³³

Additionally, the TIP act states that it is no defence that:

- (a) a child who is a victim of trafficking or a person having control or authority over a child who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, even if none of the means referred to in section 4(1)(a) to (j) have been used; or
- (b) an adult person who is a victim of trafficking has consented to the intended exploitation, or the action which was intended to constitute an offence under this Chapter or that the intended exploitation or action did not occur, if one or more of the means referred to in section 4(1)(a) to (j) have been used.³⁴

As such, under the new legislation child trafficking can be defined as occurring where the act of trafficking (delivery, recruitment, transportation, etc) and the purpose of trafficking (exploitation) are present, and showing the victim was subjected to trafficking by means of abuse of vulnerability, due to the victim being a child, thereby rendering the other means set out in section 4(1) irrelevant, in accord with Palermo. The status of being a child is universally regarded as a vulnerability factor, regardless of an individual child's particularised assessment of vulnerability or robustness/resiliency.³⁵

The drafting of the Act's definition of trafficking might have been better served by simply addressing in section 4 the issue of what elements are necessary for child trafficking. By defining the required elements of child trafficking as certain acts with a certain purpose, there would be no requirement that a completely different section on liability of persons, section 11, be called upon to conclusively

³⁰ United Nations Office on Drugs and Crime *Abuse of a Position of Vulnerability and Other 'Means' Within the Definition of Trafficking in Persons* (2013) at 17.

³¹ UNODC op cit (n30) at 74.

³² UNODC op cit (n30) at 30n72.

³³ UNODC op cit (n30) at 46.

³⁴ TIP Act supra (n22) s11(1).

³⁵ See generally UNODC op cit (n30) at 31.

eliminate the defence of consent in cases of child trafficking.³⁶ While the Act is ultimately in accord with the Palermo Protocol's definition of the elements of child trafficking, it took a more circuitous route than was needed. While setting out the elements of child trafficking in section 4 might have further protracted an already complex and intricate definition of trafficking, it would have made it clear from the outset what elements are required in the differing types of trafficking. Additionally, section 11's elimination of the defence of consent in an adult case of trafficking where any of the means listed in section 4 are present would appear to be utterly unnecessary. All the means listed in the Act are examples of ways by which it is demonstrable that the consent of the victim is lacking.

The concept of consent is key to the correct definition of trafficking. It is the lack of consent that distinguishes adult trafficking from other forms of exploitation, such as sexual or labour exploitation. Where the victim knowingly agrees to conditions under which he or she would live and work, regardless of how appalling those conditions may in fact be, there is no crime of trafficking. However, it must be emphasised that consent, even if initially given, may later be rescinded. Even if consent was initially present, once consent is withdrawn, if that person is thereafter held in service through psychological manipulation or physical force, he or she is a trafficking victim and should receive benefits outlined in the Palermo Protocol and applicable domestic laws.³⁷

With child trafficking, it is critical to understand that there are only two elements: the act of trafficking and; the purpose of trafficking. Child trafficking excludes the requirement of means as a relevant factor, and thereby excludes consent as a defense. While the Act does substantively give effect to these concepts, the Act would have been better served by simply following the blueprint of the Palermo Protocol to organise the layout of these key concepts of defining adult trafficking, child trafficking and the role that consent plays (or does not play) in each.

4.2.2 *Coercion in cases of adult trafficking*

4.2.2.1 Coercion as a means of entering trafficking

As noted earlier, one of the difficulties of using catchy phrases or nutshell definitions of trafficking such as 'modern day slavery' is that it brings to mind images of slavery as it existed in the 1700s and 1800s – people in chains, shackled together under the ever-present, watchful

³⁶ TIP Act supra (n22) s11.

³⁷ *Trafficking in Persons Report* op cit (n20) at 29.

eye of the oppressor. While such cases do still exist, that is not the only type of trafficking and such images and stereotypes may not best serve the broader realities of trafficking in the 21st century.

Victims of trafficking who are not physically restrained or constantly guarded may be blamed for their own exploitation and disparaged as not being true victims, with the ill-informed saying 'why didn't they just run away or go to the police' at those moments when they are not under the immediate physical control of the trafficker. This section will explore the role that psychological coercion plays in the trafficking dynamic and attempt to answer the question 'Why did they not just run away?' It will also argue that the concept of coercion in the new legislation might be properly understood to encompass psychological coercion.

For an adult, one of the 'means' listed in the definition of trafficking is coercion. While many of the means are readily understood, the term 'coercion' may be problematic. The Act describes 'threat or use of force or other forms of coercion' as one of the means of trafficking.³⁸ As the other forms of coercion are not defined in the Act's definitions, the question arises how broadly the term coercion should be interpreted. In particular, the question is whether courts should recognise psychological coercion as a means of trafficking.

Historically, coercion within the trafficking context was understood as a direct, physical act, best exemplified in a US Supreme Court case from 1988, *US v Kosminski*.³⁹ The facts of the case were that two developmentally-delayed adult men with IQs of 60 and 67 were exploited for years for their labour as farm workers. They were without proper housing, lived in a filthy trailer, had no running water, were given spoiled food to eat, and suffered verbal abuse by their employer, as well as physical isolation. The court held that this did not amount to coercion, as coercion necessitates physical force. To address this outmoded and extremely restrictive definition of coercion, the Trafficking Victims Protection Act⁴⁰ overruled the *Kosminski* decision and established that where the victim believes he/she has no reasonable alternative but to submit to the exploitation, psychological coercion was sufficient to prove trafficking. It was also reflected the modern reality that while physical coercion is one means of trafficking, psychological coercion is also prevalent in contemporary human trafficking.⁴¹ Other jurisdictions have similarly specifically included psychological

³⁸ TIP Act supra (n22) s4(1)(b).

³⁹ 487 US 931 (1988).

⁴⁰ Victims of Trafficking and Violence Protection Act 2000, (PL 106-386).

⁴¹ K Heinrich and K Sreeharsha 'The state of state human trafficking laws' (2013) 52 *The Judges' Journal* 28-31.

coercion within their definitions of ‘force’ or ‘coercion.’⁴² International model laws, such as the United Nations Office on Drugs and Crime’s Model Law Against Trafficking in Persons have also recommended definitions of coercion be broad enough to include not merely direct, physical coercion, but also psychological coercion.⁴³

Unfortunately, the new South African legislation does not define coercion, simply stating that trafficking can be accomplished through ‘the threat or use of force or other forms of coercion.’⁴⁴ Additionally, coercion is listed as one of the means of accomplishing forced labour. The Act’s definition of forced labour states:

“forced labour” means labour or services of a person obtained or maintained—
(a) without the consent of that person; and
(b) through threats or perceived threats of harm, the use of force, intimidation or other forms of coercion, or physical restraint to that person or another person.’

This lack of a definition of coercion is not unique to South Africa. As one commentator observed:

[C]oercion has emerged as a significant source of analytic concern in a developing area of the law: contemporary involuntary labor or human trafficking.⁴⁵

Within the language of the South African statute, it would appear that the definition of coercion was intended to be restricted to direct, physical coercion. However, the role that psychological coercion plays in trafficking does seem to be acknowledged in other means set out in the law, i.e. trafficking through either the abuse of vulnerability of the victim or abuse of power of the trafficker.⁴⁶ Remarking on this changing face of ‘coercion’ one commentator has stated:

‘Rather than experiencing direct threats of harm from their traffickers, many trafficked workers comply with abusive working conditions due to circumstances that render them vulnerable to the exploitation, such as lack

⁴² For example the Federal Republic of Nigeria, where section 64 of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 states:

“Force” or “coercion” includes obtaining or maintaining through act of threat the labour, service, or other activities of a person by physical, legal, psychological or mental coercion, or abuse of authority.’

⁴³ UNODC *Model Law Against Trafficking in Persons* at 11, available on-line at www.unodc.org/documents/humantrafficking/Model_Law_against_TIP.pdf, accessed on 10 June 2014.

⁴⁴ TIP Act supra (n22) s4(1)(b).

⁴⁵ Kim op cit (n5) at 414.

⁴⁶ TIP Act supra subsecs 4(1)(c), (b). It should also be noted that the psychological effects of trafficking are specifically noted as one of the aggravating circumstances at sentencing. See TIP Act subsecs 14(g), (k).

of legal immigration status and poverty. Thus, coercion in the trafficking context presents a new paradigm...“situational coercion.”⁴⁷

What exactly constitutes an abuse of power is not defined within the legislation. However, as noted earlier, abuse of vulnerability may be a means of trafficking where the victim believes he/she has no reasonable alternative but to submit to exploitation, and includes but is not limited to, taking advantage of the vulnerabilities of that person resulting from—

- (a) the person having entered or remained in the Republic illegally or without proper documentation;
- (b) pregnancy;
- (c) any disability of the person;
- (d) addiction to the use of any dependence-producing substance;
- (e) being a child;
- (f) social circumstances; or
- (g) economic circumstances.⁴⁸

While the first five vulnerabilities are objective status designations (being a child, or pregnant, or illegally in the country), the last two examples reflect relative and subjective criteria, and may be interpreted broadly to encompass the subtle methods of psychological coercion within the socio-economic realities of trafficking. As was recently stated:

‘Coercion is an umbrella term, used previously in the trafficking context to refer to a range of behaviours including violence, threats and deceit, as well as *abuse of a position of vulnerability* (italics in original).’⁴⁹

It must also be emphasised that the list of vulnerabilities in the Act is illustrative and not exhaustive, and as such may be expanded upon to clearly and decisively include the concept of psychological coercion. Under the existing legislation, the terms of what constitutes ‘coercive means’ of trafficking may be construed to cover both direct, physical coercion as well as psychological coercion exercised through an abuse of vulnerability.

⁴⁷ Kim op cit (n5) at 416.

⁴⁸ TIP Act supra (n22) s1.

⁴⁹ UNODC op cit (n30) at 17. See also Italian Criminal Code, art. 601 as amended, which also references the abuse of a vulnerability as: ‘Taking advantage of a situation of physical or mental inferiority ... or by promising money making payments or granting other kinds of benefits to those who are responsible for the person in question.’

4.2.2.2 Coercion within the trafficking experience

Once the trafficking of a victim has begun, the next question to be addressed is how the trafficker maintains control over the victim, sometimes over an extended period. In response to questions of what means could possibly be used to keep victims in a trafficking situation when it appeared that there were avenues open to them to have escaped, research suggests that trafficking victims are often psychologically coerced into remaining within the trafficking experience, even without the classic concept of physical coercion being present.⁵⁰ The technique of psychological control is summarised as:

“... [C]oercive systems utilise high levels of control, exposure to chronic stress and threat, isolation, provocation of fear, and the creation of a sense of helplessness in victims ... [T]he methods that enable one human being to enslave another are remarkably consistent ... they are based upon the systematic, repetitive infliction of psychological trauma.”⁵¹

Numbing and dissociative responses are common in the face of chronic trauma, and behavioural attempts at resistance may decline. This is often referred to as ‘learned helplessness’, which has been implicated in depression and post-traumatic stress responses, which also impede victims’ attempts to resist or escape.⁵² The ultimate effect of these coercive techniques is to convince the victim that the trafficker is omnipotent and that resistance is futile.⁵³ In short, the traffickers engage in psychological assaults on the victim designed to keep them submissive.⁵⁴ Simple threats against the victims’ loved ones, as well as the effect of witnessing, or even being forced to participate in, violence against other victims have been noted as examples of coercion that led to continued submission.⁵⁵

Research continues to address the psychologically coercive dimensions within trafficking:

‘The question arises as to why the victim didn’t try to run away or didn’t escape the situation in which she had found herself, especially keeping in mind that trafficking victims often have contact with the outside world and there are occurrences when it seems that they could have found a way out of the trafficking chain.’⁵⁶

⁵⁰ E Hopper and J Hidalgo ‘Invisible chains: Psychological coercion of human trafficking victims’ (2006) 1 *Intercultural Hum Rts L R* at 186-209.

⁵¹ Hopper and Hidalgo op cit (n50) at 191.

⁵² Hopper and Hidalgo op cit (n50) at 205.

⁵³ Hopper and Hidalgo op cit (n50) at 198.

⁵⁴ Hopper and Hidalgo op cit (n50) at 193.

⁵⁵ Hopper and Hidalgo op cit (n50) at 200.

⁵⁶ I Korićanac (ed) *Human Trafficking: Trauma and Psychotherapy* (2013) at 20.

The research further finds that after the victim is initiated into trafficking, often through initial physical violence and sexual abuse, the victim is left psychologically devastated and powerless:

'After a certain time, as the result of threats and violence, what emerges is that the victim stops feeling and loses the experience that she is a person at all ... She carries out orders just like the human trafficker demands. Numbness then becomes the sole manner to survive physically and psychologically the horror in which she has found herself. Fear is a very powerful weapon in the hands of human traffickers, whose personality profiles often manifest psychopathic traits ... [what] the victims undergo is also known in the literature as [the] *experience of mental death*.⁵⁷

A corollary to the question of why victims do not run away is why they do not contact the police, in circumstances where they have some degree of physical freedom. One way the trafficker may control the victim is through eliminating this potential route of possible escape by claiming to have a relationship with the police or other sources of authority. The role of corruption, real or perceived, is used by the traffickers to further disempower the victims.⁵⁸ It must be noted that some victims may come from countries where the police are not seen as trustworthy. Traffickers may also tell the victim that they have the police in their control, through bribery or personal relationship, such as friends or family. Traffickers may also claim to be involved with the police in larger criminal enterprises, such as organised crime. As one commentator states:

'The real nature and extent of police corruption with regard to human trafficking in South Africa remains undiscovered. However it is clear that some local law enforcement officials are believed to be connected with organised criminal elements who are engaged in human trafficking.'⁵⁹

Additionally, victims may fear even honest police as they see them as those who will send them back to their place of origin, a place from which the victims may have been desperate to leave. Victims may have initially fallen prey to traffickers as they were trying to escape sexual and/or physical violence within their home, or armed conflict/political strife and uncertainty in their homeland. The trafficking victim may perceive their only choices as being between these two appalling situations. No matter how bad trafficking may be, it may be better than the situation they were fleeing.

⁵⁷ Korićanac op cit (n56) at 21.

⁵⁸ DN Swart 'Problems surrounding the combating of women and child trafficking in Southern and South Africa' (2011) 12 *Child Abuse Research A South African Journal* 26 at 31-32. See also *Trafficking in Persons Report* op cit (n20) at 32.

⁵⁹ *Trafficking in Persons Report* op cit (n20) at 32.

Additionally, aspects of power and control found in the psychological coercion of trafficking victims, such as learned helplessness, have been found to mirror those seen in domestic violence⁶⁰ and in child abuse.⁶¹

The tactic of blaming the victim is not new. Victims of rape, domestic abuse, and even child sexual abuse have been subjected to this same ill-informed and damaging inquisition. These crimes have one common thread – failing to hold the criminal accountable for his/her actions. By understanding the true dynamics of trafficking and how traffickers control their victims, a better understanding of the true dynamics of the crime will emerge, and hopefully a more informed plan of action to combat trafficking will emerge.

4.2.3. *Consequences of trafficking*

The consequences of trafficking are multifaceted, and both physical and psychological damage may lay in the wake of the victim's experience. Consequences of trafficking may be grouped into the following categories:

- (1) *Infectious diseases* (e.g. HIV/AIDS, STD/STIs, and TB);
- (2) *Non-infectious diseases* (e.g. cervical and other types of cancer, stunted growth, malnutrition, dental health problems, skin diseases, neurological symptoms, gastrointestinal problems, lice);
- (3) *Reproductive health problems* (e.g. forced abortions, high-risk pregnancies and deliveries, gynaecological infection, permanent damage to reproductive organs);
- (4) *Substance abuse* (e.g. alcohol, inhalants, and intravenous drugs);
- (5) *Mental health problems* (e.g. Post-Traumatic Stress Disorder, anxiety, depression, insomnia and suicide); and
- (6) *Physical damage* (e.g. broken bones, burns, stabbing injuries/wounds).⁶²

The new legislation recognises these grim consequences of human trafficking and sets out aggravating factors that must be taken into consideration at sentencing. Those factors are:

- ‘(a) The significance of the role of the convicted person in the trafficking process;

⁶⁰ Hopper and Hildago op cit (n50) at 198. See also United Nations Office on Drugs and Crime *UN Gift: Anti-Human Trafficking Manual for Criminal Justice Practitioners Module 3: Psychological Reactions of Victims of Trafficking in Persons* (2009) at 3.

⁶¹ R Summit ‘The child sexual abuse accommodation syndrome’ (1983) 7 *Child Abuse & Neglect* 177 at 182-186.

⁶² S Kreston ‘Trafficking in Children in South Africa: an analysis of pending legislation’ (2007) 8 *Child Abuse Research in South Africa* 35 at 39.

- (b) previous convictions relating to the offence of trafficking in persons or related offences;
- (c) whether the convicted person caused the victim to become addicted to the use of a dependence-producing substance;
- (d) the conditions in which the victim was kept;
- (e) whether the victim was held captive for any period;
- (f) whether the victim suffered abuse and the extent thereof;
- (g) the physical and psychological effects the abuse had on the victim;
- (h) whether the offence formed part of organised crime;
- (i) whether the victim was a child;
- (j) the nature of the relationship between the victim and the convicted person;
- (k) the state of the victim's mental health; and
- (l) whether the victim had any physical disability.⁶³

The mental health of the victim may have been impacted in a number of ways, and each survivor will bear differing scars from her or his trafficking history. One very common experience of trafficking victims and survivors is PTSD.⁶⁴ The diagnostic features of PTSD include directly or indirectly (through witnessing or learning of a traumatic event(s) happening to a close friend or family member) a traumatic event, such as experiencing actual or threatened death, serious injury and/or sexual violence. Sexual trafficking is specifically noted as one type of sexual violence that may give rise to PTSD.⁶⁵ PTSD manifests itself in numerous ways, including the following symptoms: recurrent, intrusive distressing memories or dreams; flashbacks; avoidance of memories/thoughts and/or feelings about the traumatic event; inability to remember important aspects of the traumatic event(s); negative beliefs about oneself; self-destructive behaviour; hyper-vigilance; and problems with concentration and/or sleep. PTSD is associated with suicidal ideation and suicide attempts and is more prevalent among females than males. The functional consequences of PTSD include high levels of social, occupational and physical disability and impairment⁶⁶ and the longevity of PTSD symptoms may range from only a few months, over a year or up to 50 years.⁶⁷

One recent study⁶⁸ looked at 204 trafficking victims from Europe, West Africa and the Caribbean who were interviewed in trafficking

⁶³ TIP Act supra (n22) s14.

⁶⁴ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 5ed (2013) at 271-279.

⁶⁵ American Psychiatric Association op cit (n64) at 274. See also *Trafficking in Persons Report* op cit (n20) at 27.

⁶⁶ American Psychiatric Association op cit (n64) at 278-9.

⁶⁷ American Psychiatric Association op cit (n64) at 277.

⁶⁸ M Hossain et al 'The relationship of trauma to mental disorders among trafficked and sexually exploited girls and women' (2010) 100 *Am J Public Health* 2442-2449.

recovery centres. During the time they were trafficked, over 92% of the victims were subjected to sexual violence, over 77% were subjected to physical violence, and threats were made against the victim in 92%, with more than 37% having been subjected to threats against their family or a loved one.⁶⁹

PTSD was found in 77% of this population, slightly higher than were levels identified in a meta-analysis of associations between intimate partner violence and PTSD (63%) and in studies of persons fleeing war or mass violence (38%–65%).⁷⁰ It was also noted that PTSD was found mixed with symptoms of depression and anxiety, in which case the individual is likely to experience more distress and disability, and the outcome for recovery is likely to be worse.⁷¹ Other factors that contribute to recovery differential are length of time trafficked, with decreased time increasing the optimal prognosis, and also the identity of the trafficker and their relationship to the victim, with a closer relationship heightening the trauma to the victim. While those in this study had experienced both physical and psychological abuse during their trafficking, follow-up interviews with the women revealed that mental health symptoms persisted longer than most of the physical health problems.⁷²

When deciding the appropriate sentence for a trafficker, judicial officers need to be cognisant of the complexities and enduring legacies of trafficking. While the criminal justice component of the victim's journey may end with the verdict and sentencing, the effects of the trauma will continue for weeks, months or years after the trial has concluded. It is with this knowledge, and optimally assisted with an expert's testimony as to the harm suffered by a particular victim, as well as the likelihood and timeframe of meaningful recovery, that the judicial officer may decide upon a sentence that reflects the seriousness of the offence as well as the price paid by the victim for the defendant's criminal activity.

5. Conclusion

The launching of new legislation seldom meets with completely smooth sailing, often contending with complications and unexpected difficulties arising from implementation or interpretation of the law and its remit. Many of these troubles can be avoided by simple measures, such as defining all key terms at the heart of the law. Without such

⁶⁹ Hossein et al op cit (n68) at 2446.

⁷⁰ Hossein et al op cit (n68) at 2445.

⁷¹ Hossein et al op cit (n68) at 2446.

⁷² C Zimmerman and H Stöckl *Understanding and Addressing Violence Against Women: Human Trafficking* (2012) at 2.

precision, it is left to the courts to do the work of drafters in terms of clarifying the Act's language or intent, and inconsistencies that could readily be avoided may be encountered.

It is hoped that when the Act becomes operational, the criminal justice community will interpret the Act in a manner that manifests an informed perspective on trafficking in the 21st century, and provides maximum protection to victims of trafficking, in all its myriad forms.

It is also hoped that the punishment of the perpetrators of this crime is done in such a manner as to genuinely reflects the seriousness of the harm inflicted upon the victims. A critical component of the latter goal is understanding and recognising the consequences to the victim of having been trafficked and considering those consequences when sentencing the offender.