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Assessing Human Trafficking in Canada Flawed Strategies and the Rhetoric of Human Rights

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ASSESSING HUMAN TRAFFICKING IN CANADA: FLAWED STRATEGIES AND THE RHETORIC OF HUMAN RIGHTS

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I. Introduction

In most quarters, Canada has earned a reputation for being a strong advocate for human rights. In fact, Canada's Department of Foreign Affairs has released the following proud proclamation:

> Canada has been a consistently strong voice for the protection of human rights and the advancement of democratic values, from our central role in the drafting of the Universal Declaration of Human Rights in 1947-8 to our work at the United Nations today. Canada is a party to 6 major human rights conventions, as well as many others, and encourages all countries which have not made these commitments to do so.[1]

Canada's decision to introduce gender-sensitive guidelines for evaluating the refugee claims of women placed it at the international forefront for protecting the human rights of women facing forced migration.[2] In addition, every Canadian child has been educated on the role Canada played as a destination point for the Underground Railroad; offering basic human rights to some fifty-thousand

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[1] This statement is posted in the introductory text located on the Department of Foreign Affairs Canada's website, http://www.dfait-maeci.gc.ca/foreign_policy/human-rights/hr1-rights-en.asp (last visited Mar. 28, 2006).

[2] IMMIGRATION REFUGEE BOARD, CHAIRPERSON'S GUIDELINES, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT (1993) [hereinafter Gender Guidelines]. The Guidelines were revised in 1996. All references to this document are to the revised version.

American Blacks fleeing slavery from 1830 to 1860.[3] Recent media reports suggest that Canada continues to fight on behalf of victims of trafficking, especially when the victims are women sold into sexual bondage.[4] It therefore appears curious that in 2003 the U.S. Department of State downgraded Canada's ranking from a Tier 1 to a Tier 2 country in an effort to address and prevent trafficking in humans.[5]

Canada shared this Tier 2 rank with a host of states, such as China and Indonesia, who possess questionable human rights records.[6] Canada's downgraded ranking reflected deficiencies in two key areas which are undeniably related. The first pertains to a poor record of convicting traffickers, while the second pertains to a poor record of protecting trafficking victims[7]. The U.S. Department of State found that although victims may be "eligible to apply for refugee status under [Canada's] gender-related persecution guidelines . . .

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[3] Ronald F. Davis, *Slavery in America: Historical Overview*, http://www.slaveryinamerica.org/history/hs_es_overview.htm (last visited Apr. 1, 2006).

[4] Annalee Lepp, Ph.D., University of Victoria Canadian Council for Refugees, Trafficking in Women and Girls, Report of Meetings, Fall 2003 34-6 (2003), *available at* http://www.web.ca/ccr/ccrtrafficking.PDF [hereinafter Lepp].

[5] *See* U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2003), *available at* http://www.state.gov/g/tip/rls/tiprpt/2003/ [hereinafter TIP REPORT 2003]. The Department of State placed each of the countries included on the 2003 TIP Report into one of the three lists, described here as tiers, mandated by the Trafficking Victims Protection Act. This placement is based on the extent of a government's actions to combat trafficking. The Department first evaluates whether the government fully complies with the TVPA's minimum standards for the elimination of trafficking. Governments that do are placed in Tier 1. For other countries, the Department considers whether their governments made significant efforts to bring themselves into compliance. Countries that make significant efforts are placed in Tier 2. Those countries whose governments do not fully comply with the minimum standards and are not making significant efforts to bring themselves into compliance are placed in Tier 3.

[6] *Id*.

[7] *Id* at 46; *see* U.S. DEPARTMENT OF STATE, TRAFFICKING IN PERSONS REPORT 19 (2004), *available at* http://www.state.gov/g/tip/rls/tiprpt/2004/ [hereinafter TIP REPORT 2004]. Senior government officials are speaking out more often, and more resources are being devoted to border control; a new RCMP anti-trafficking taskforce is also being created. Subsequently, Canada was reclassified from a Tier 2 to Tier 1 country in 2004.

[they] are [often] deported."[8] This practice in turn results in the poor conviction rate, which the U.S. Department of State concluded was "due in part to deportation of witnesses."[9] These observations by the U.S. Department of State are reflected in comments from Canadian sources as well. In a 2004 press release, a Toronto legal aid worker concurred: "When trafficked people come forward, or are found by authorities, they are treated as criminals, rather than victims of a crime."[10]

This paper will present the argument that Canada's rhetoric of protecting the human rights of trafficking victims is at odds with its practice. Trafficking victims are treated essentially the same as any other irregular migrant, and the specter of trafficking is invoked to justify acts which arguably violate Canada's international human rights obligations.

This paper will offer an overview of what little information is available regarding the extent of trafficking in Canada, and then will conduct a close examination of the Canadian approach to trafficking and its victims. In addition to considering the logic and consequences of the Canadian strategy for trafficking victims, Canada's practices are also considered in light of its obligations pursuant to the United Nations Convention on the Rights of the Child,[11] the Convention and Protocol Relating to the Status of Refugees,[12] the Convention on the Elimination of all Forms of Discrimination Against Women,[13] and the Protocol to Prevent, Suppress and Punish Traf-

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[8] TIP REPORT 2003, *supra* note 5, at 47.

[9] *Id.*

[10] Press Release, Canadian Council for Refugees, *Canada Must Offer Protection to Trafficked Persons* (Nov. 25, 2004).

[11] Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc A/44/49 (1989), adopted by GA Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, 1577 U.N.T.S. 3 [hereinafter CRC].

[12] Convention and Protocol Relating to the Status of Refugees, Jul. 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

[13] Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, G.A. Res. 34/80, U.N. G.A.O.R., 34th Sess., U.N. Doc. A/RES/34/180, (1979) [hereinafter CEDAW].

ficking in Persons, Especially Women and Children (hereinafter "Palermo Protocol").[14]

This paper will close with a brief look at how Canadian border control measures may increase the likelihood that asylum seekers will be forced to put themselves into the hands of smugglers and traffickers if they wish to bring a claim for protection in Canada.

II. A Snapshot of Trafficking in Canada

In Canada, as elsewhere, it is difficult to obtain an accurate figure on the number of people who are trafficked or smuggled into or through the country, or the number of active trafficking organizations who work throughout it. Researchers for a recent federal initiative to consolidate and synthesize all existing federal data on trafficked women concluded that "the scope of the problem has not been well documented and there is little hard data [and] satisfying identified information needs will be a challenge."[15] Reliable information is inherently difficult to obtain due to the criminal nature of trafficking. Unlike other crimes against persons, the victims are typically unable or unlikely to come forward. Consolidating existing federal information has also proven challenging because departmental definitions of trafficking are "significantly influenced by a given department's mandate" and vary from department to department.[16]

An additional difficulty in consolidating data is a consequence of many departments or agencies coming into contact with trafficking incidentally while fulfilling their primary agenda, and therefore not accurately recording the incidents as trafficking occurrences. For example, the Solicitor General's office may become in-

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[14] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Dec. 12, 2000, G.A. Res. 55/25, U.N. Doc. A/55/383 (2000) [hereinafter Palermo Protocol].

[15] Citizenship and Immigration [CIC], Consulting and Audit Canada, *Trafficking in Women: Inventory of Information Needs and Available Information* 1 (Ottawa: Minister of Public Works and Government Services Canada, 2000) [hereinafter Trafficking in Women].

[16] *Id*.

volved in trafficking matters incidentally to its mandate to address organized crime,[17] while Citizenship and Immigration may become involved in specific instances where individuals are in Canada without legal status.[18] The Royal Canadian Mounted Police may become involved because a criminal charge of prostitution has been brought against a person who also happens to be a trafficking victim.[19] On the other hand, Human Resources Development Canada's jurisdiction could be invoked due to the presence of illegal labor or substandard working conditions, and through its decision-making role regarding the issuance of temporary work permits to migrant workers.[20]

Despite these difficulties, attempts have still been made to measure the degree of trafficking in Canada. A declassified criminal intelligence report authored by the Royal Canadian Mounted Police, which is still only available in censored form, offers some insight into the extent of Canada's problem.[21] The report presents as a conservative estimate that at least 600 foreign women and girls are trafficked annually into Canada to work in the Canadian sex trade, and around 200 individuals are trafficked into Canada to support illicit operations or otherwise work off debts.[22] The report goes on to say that some 2,200 people are trafficked through Canada into the United States to work in brothels, sweatshops, domestic work, and construction.[23] Other reports present considerably higher figures with estimates of eight-thousand to sixteen-thousand individuals trafficked into or through Canada, earning traffickers between US$120 million and US$400 million per year.[24] There is also evidence of Canadian

[17] *Id.*
[18] *Id*.
[19] *Id.*
[20] *Id.* at 5-6.
[21] Jim Bronskill, *Human Traffickers Feed Sex Trade, say Mounties*, THE LONDON FREE PRESS NEWS, Dec. 7, 2004 (on file with author).
[22] *Id.*
[23] *Id.*
[24] Lynn McDonald, Brooke Moore & Natalya Timoshkina, *Migrant Sex Workers from Eastern Europe and the Former Soviet Union: The Canadian Case* (Center for Applied Social Research,Status of Women Canada, 2000), at 1.

girls, particularly aboriginal girls, being trafficked into the United States to work in the sex trade.[25]

III. The Canadian Approach to Trafficking

Trafficking is a manifestation of organized crime involving extensive human rights violations.[26] It is argued that trafficking can only be mitigated through strategies which simultaneously address prevention, protection of victims, and prosecution of perpetrators.[27]

Canada's approach to trafficking is not immediately apparent. Unlike the United States, which has the Victims of Trafficking and Violence Protection Act[28], Canada does not have a comprehensive policy regarding trafficking.[29] Until 2002, the primary legislative response to trafficking was through Canada's Criminal Code.[30] Under the Code, there was no specific offense for trafficking humans. In-

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[25] Jim Bronskill, *Hundreds of foreign women, girls forced into Canadian sex trade,* THE RECORDER, Dec. 6, 2004.

[26]Mike Gray, CANADIAN COUNCIL FOR REFUGEES, TRAFFICKING IN WOMEN AND GIRLS, REPORT OF MEETINGS 27-31 (Fall 2003) [hereinafter Gray].

[27] *Id*. at 31.

[28] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at scattered sections of 8, 20, 22, 27, 28, and 42 U.S.C.) [hereinafter VTVPA]. Division A of the VTVPA is further identified as the Trafficking Victims Protection Act of 2000 (codified as amended at 22 U.S.C. §§ 7101-7110 (2000), which incorporates 18 U.S.C. §§ 1589-1594 (2000)) [hereinafter TVPA]. President Clinton signed the TVPA into law on October 28, 2000.

[29] Such a policy does appear to be in the books. A targeted working group was recently formed, with representation from numerous departments and agencies, whose task is to ensure co-ordination of federal activities and the development and implementation of a comprehensive anti-trafficking strategy which is consistent with Canada's international commitments. Its participants include the following: Canadian Border Services Agency, Canadian Heritage, Canadian International Development Agency, Canadian Security Intelligence Service, Citizenship and Immigration Canada, Department of Justice Canada, Foreign Affairs Canada, Health Canada, Human Resources and Skills Canada, Indian and Northern Affairs Canada, Passport Office, Privy Council Office, Public Safety and Emergency Preparedness Canada, Royal Canadian Mounted Police, Social Development Canada, Statistics Canada, and Status of Women Canada. *See* Department of Justice Canada website, *Trafficking in Persons*, http://canada.justice.gc.ca/en/fs/ht/iwgtip.html (last visited Feb. 6, 2006).

[30] Criminal Code, R.S. 1985, c. C-46.

stead, charges could be brought against traffickers on the following grounds: passport forgery,[31] keeping a common bawdy-house,[32] controlling or living on the prostitution avails of another,[33] kidnapping and forcible confinement,[34] charging a criminal rate of interest on a debt,[35] and living off the proceeds of crime.[36] On the other hand, trafficked persons, depending on the sorts of activities they were forced to engage in, could be charged with offenses, such as prostitution.[37]

In keeping with international commitments, Canada has taken steps which could lead to addressing both the criminal and human rights aspects of trafficking. It has ratified the two key international protocols regarding trafficking: the Palermo Protocol,[38] and the Protocol Against the Smuggling of Migrants by Land, Sea and Air.[39] The Palermo Protocol contains both mandatory and discretionary provisions.[40] The mandatory provisions require signatories to criminalize trafficking and enact border and security measures.[41] Although the Palermo Protocol does contain terms regarding the offering of protection and assistance to the victims of trafficking, these terms are discretionary.

For example, the Palermo Protocol only requires states to "*consider* implementing measures to provide for the physical, psychological, and social recovery of victims of trafficking,"[42] and to "*consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory,

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[31] *Id*. § 57.
[32] *Id.* § 210(1).
[33] *Id.* § 212(1).
[34] *Id.* §§ 279(1), (1.1) and (2).
[35] *Id.* § 347.
[36] *Id.* §§ 462.3, 462.31–.49.
[37] *See generally* Lepp, *supra* note 4.
[38] Palermo Protocol, *supra* note 14.
[39] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*:* Annex III to G.A.Res. A/55/383 (Nov. 2. 2000) and contained in G.A.Res. A/RES/55/25 (Jan. 8, 2001).
[40] Palermo Protocol, *supra* note 14.
[41] *Id.* arts. 5, 11, and 12.
[42] *Id.* art. 6(3) [emphasis added].

temporarily or permanently, in appropriate cases."[43] The distinction between mandatory and discretionary terms is perhaps reflective of these protocols having been conceived as supplemental to the United Nations Convention Against Transnational Organized Crime,[44] and not, for example, supplemental to a human rights instrument.

How has Canada implemented its obligations and practiced its discretion? Irwin Cotler, the Minister of Justice and Attorney General of Canada, spoke to the approach Canada must promote at a forum on human trafficking in 2004. In his opening remarks, he noted, "[T]rafficking constitutes an assault on our common humanity. Accordingly, it must be seen first and foremost as a human rights problem with a human face--as being the very antithesis of the Universal Declaration on Human Rights[.]"[45]

Based upon this public statement by a government cabinet minister, one would assume that Canada's approach to human trafficking is dominated by human rights considerations. Therefore, one would expect to find legislative provisions which reflect the discretionary elements of the Palermo Protocol, which in turn support restoring the dignity and freedoms taken from trafficking victims. In practice, however, legal enactments of this character are hard to find.

Where Canada's domestic legislation addresses trafficking, it is as a matter of law enforcement and not human rights. It appears that Canada's consideration of the discretionary human rights measures of the Palermo Protocol, which provide for the psychological and social recovery of victims and permit victims to remain temporarily or permanently in its territory, has resulted in a decision to not adopt such measures. Although Canada has enacted legislation to comply with the enforcement measures of the Palermo Protocol, it

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[43] *Id.* art. 7(1) [emphasis added].

[44] United Nations Convention Against Transnational Organized Crime, U.N. GAOR, 55th Sess., Annex 1, Agenda Item 105, U.N. Doc A/Res/55/25 (2001), *available at* http://uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf [hereinafter Palermo Convention].

[45] Minister of Justice and Attorney General of Canada Irwin Cotler, Speech at The Forum on Human Trafficking (Mar. 30, 2004) (transcript *available at* www.justice.gc.ca/en/news/sp/2004/doc_31158.html, last visited Apr. 15, 2006).

has chosen to not bring the discretionary human rights measures into its domestic policy.

The enforcement measures are primarily found within Canada's omnibus Immigration and Refugee Protection Act ("IRPA"), which came into force in 2002.[46] The IRPA made trafficking a criminal offense defined as "knowingly organiz[ing] the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of use of force or coercion."[47] The term "organize" is defined to include "recruitment," "transportation," and the "receipt or harboring" of such persons after entry into Canada.[48] Although smuggling bears a different definition applying to those who "organize, induce, aid or abet"[49] the entry of a person "who are not in possession of a visa, passport or other required document,"[50] Canada sees traffickers and smugglers in the same light when it comes to sentencing.

The punishment for *smuggling* may be as severe as the punishment for *trafficking* despite the fact that smuggling alone does not involve the continuing exploitation and control of those whose illegal entry has been facilitated.[51] Both traffickers and smugglers who organize the entry of ten or more individuals may be sentenced to life imprisonment and a fine of up to one million Canadian dollars.[52] Where fewer than ten persons are smuggled, the punishment is reduced to a term of not more than ten years and/or a fine of not more than 500,000 Canadian dollars for the first offense.[53]

In assessing the penalty for both trafficking and smuggling, Canada takes into account a number of factors, such as whether a criminal organization was involved, whether a person was subjected to humiliating or degrading treatment with respect to work or health conditions, whether the offense was for profit, and whether any bod-

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[46] Immigration and Refugee Protection Act, 27 S.C. (2001) [hereinafter IRPA].
[47] *Id.* § 118(1).
[48] *Id*. § 118(2).
[49] *Id.* § 117.
[50] *Id.* § 117(1).
[51] *See generally id.* § 118(1) and § 121(1)(d).
[52] *Id.* § 117(3).
[53] *Id.* § 117(2).

ily harm or death occurred during the commission of the offense.[54] Thus, the IRPA allows for discretionary distinctions to be made between the punishment of those who smuggle and those who traffic. However, it does not expressly condemn one practice over the other, despite the fact that trafficking is defined as a violation of the victim's human rights.[55]

The enforcement measures have been received with a mixed response. Most Canadian organizations share Canada's concerns about the dangers of trafficking and smuggling.[56] However, a few argue that all "anti-trafficking and/or anti-smuggling campaigns exacerbate the conditions that cause harm to migrants," and are therefore unacceptable.[57] Other concerns relate to the increased cost and risk of trafficking being passed on to trafficking victims.[58] For example, victims may be transited via more dangerous routes, forced to pay more to buy their freedom, or forced to live under even stricter terms of control.[59] Therefore, it is not surprising that another legitimate concern is that the heightened enforcement measures will have the greatest impact on refugees who wish to claim asylum in Canada

[54] *Id*. § 121.
[55] *Id*. § 118(1).
[56] *Id.*
[57] Nandita Sharma, *Travel Agency: A Critique of Anti-Trafficking Campaigns* 21(3)REFUGE 3 at 54 (2003), *available at* http://www.yorku.ca/crs/Refuge/Abstracts%20and%20Articles/Vol%2021%20No%203/sharma.pdf. Sharma argues traffickers and smugglers as responding to a need created by Canada's strict migration laws, which prevent migrants from being able to enter Canada lawfully. Her response would be to change Canada's migration policies, and its international practices which contribute to displacing peoples in other countries.
[58] National Association of Women and the Law (NAWL) "Brief on the Proposed Immigration and Refugee Protection Act (Bill C-11)" (submitted to the Standing Committee on Citizenship and Immigration, April, 2001), at section 6.1. Brief submitted on behalf of NAWL, The West Coast Domestic Workers Association, La table féministe francophone de concertation provinciale de l'Ontario, and the National Organization of Immigrant and Visible Minority Women of Canada. The Brief can be viewed at NAWL's website, http://www.nawl.ca/brief-immig.htm (last visited Apr. 15, 2006).
[59] Sharma, *supra* note 57, at 59.

as they may have no other option but to be smuggled or trafficked if they want to escape persecution. [60]

The lack of substantive distinction between smugglers and traffickers is indicative of Canada's punishment of those who facilitate unlawful entry into the country, regardless of the circumstances or the motives upon entering. Had this law been in effect in 1830, the heroes of the Underground Railroad might have ended up serving life sentences in Canadian jails instead of enabling some fifty-thousand former slaves to find asylum.[61] The need for such escape routes is arguably no different today. Upon reviewing the IRPA in its draft form, the United Nations High Commissioner for Refugees ("UNHCR") expressed alarm that Canada would "unfairly punish an individual . . . who assisted a refugee, perhaps even a family member, to flee persecution and reach safety in Canada."[62] The simple fact is some refugees fleeing persecution, a sustained violation of basic human rights,[63] cannot reach a place of safety, such as Canada without using smugglers. [64]

IV. Canadian Legislation Regarding Victims of Trafficking and Smuggling

Although the IRPA has extensive provisions regarding punishing traffickers and smugglers, it has little to say about the victims. As noted above, a victim's treatment may be considered an exacerbating factor in sentencing the trafficker or smuggler.[65] One key provision provides that a person will not be found inadmissible "by

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[60] Jacqueline Oxman-Martinez, Andrea Martinez & Jill Hanley, *Human Trafficking: Canadian Government Policy and Practice* 19(4) REFUGE 1, 19 (2001); Lepp, *supra* note 4; Sharma, *supra* note 57.

[61] Davis, *supra* note 3.

[62] UNCHR, *Comments on Bill C-11: "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger,"* Submission to the House of Commons Standing Committee on Citizenship and Immigration, Mar. 5, 2001, ¶ 110.

[63] JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 104-5 (1991) (the definition of persecution also requires a failure of state protection against the violation in question).

[64] *See, for example*, NAWL, *supra* note 58.

[65] IRPA, *supra* note 46, § 121(1).

reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity." "[66] In other words, Canada will not refuse to recognize a refugee claim on the basis of the person having used smugglers to get into the country. This provision reflects obligations set out in the Refugee Convention where asylum and regularized status *must* be offered to those who are recognized as being refugees.[67] Refugees are persons who: (i) have a well-founded fear of persecution; (ii) based upon race, religion, nationality, membership in a particular social group, or political opinion; (iii) are outside their country of nationality; and (iv) are unable or unwilling to avail themselves of the protection of the claimant's country of nationality.[68]

What legal machinery comes into play when Canada becomes aware of a trafficking victim or a person who has been smuggled into the country? They are likely to face criminal charges for any illegal activities undertaken at the behest of traffickers or smugglers and face deportation for being in Canada without lawful status.[69] Canada has shown a willingness to even deport those victims who have testified against their traffickers, known as "snakeheads," unless they meet the refugee definition.[70]

The trafficked individual is also likely to be forcibly detained.[71] The fact of being smuggled or trafficked is included in a list of factors to consider when the Immigration Division decides whether a non-citizen ought to be detained pending a hearing on a variety of matters, such as whether the non-citizen is a refugee or should be ordered removed.[72] The IRPA requires decision-makers to consider

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[66] IRPA, *supra* note 46, § 37(2)(b).
[67] Refugee Convention, *supra* note 12.
[68] *Id*.
[69] Canada's Refugee Protection System, BP-185E (2002), http://www.parl.gc.ca/information/library/PRBpubs/bp185-e.htm (last visited Feb. 11, 2006) [hereinafter CRPS].
[70] *Zhu v. Canada,* [2001] 1 F.C. 379 (T.D.) ¶¶ 9-11.
[71] CRPS, *supra* note 69.
[72] IRPA *supra* note 46, Part 1, Division 6.

> involvement with a people smuggling or trafficking in persons operation that would likely lead the person to not appear for [an examination, an admissibility hearing, or a proceeding which could result in a removal order] or to be vulnerable to being influenced or coerced by an organization involved in such an operation to not appear . . . [.][73]

This provision becomes questionable where the non-citizen is also a refugee claimant. Article 31 of the Refugee Convention prohibits the punishment of refugees for illegal entry.[74] The presumptive detention of refugee claimants who have entered illegally by way of traffickers or smugglers, on the basis of *flight risk*, is arguably a thinly cloaked violation of the Refugee Convention.[75]

Aside from the notion by Canadian legislators that detention itself could be a protective measure, there are no other provisions to protect victims of trafficking.[76] Despite the Palermo Protocol, there are also no provisions for granting temporary legal status or terms under which permanent status may be appropriate.[77] In addition, there are no laws setting out whether being trafficked or smuggled ought to bear in the determination of a refugee claim[78]. The question of how to assess the relevance of being a trafficking victim as part of a refugee claim is also not addressed in Canada's Gender Guidelines, despite the fact that a large percentage of trafficked individuals are women. [79]

Surprisingly, there is also no mention in Canadian legislation of how the fact of having been trafficked, or having lived under the

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[73] IRPA, *supra* note 46, § 245(f).

[74] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 31.

[75] *See* discussion in United Nations High Commissioner for Refugees, *Comments on the Proposed Immigration and Refugee Regulations*, Submission to the House of Commons Standing Committee on Citizenship and Immigration, Jan. 23, 2002 (Ottawa: UNHCR, 2002) [UNHCR IRPR Comments], at 12, *available at* http://www.web.net/~ccr/UNHCRc11comments (last visited Feb. 18, 2006).

[76] *See generally* IRPA, *supra* note 46.

[77] *Id.*

[78] *Id.*

[79] *See generally* Gender Guidelines, *supra* note 2.

control of traffickers, ought to be considered in an application for residency based upon humanitarian and compassionate grounds.[80] Within Canada's legislative framework, all non-citizens can request that the Minister of Immigration grant them the status of a permanent resident--despite not being found a refugee, nor meeting the requirements to immigrate--on the basis of humanitarian and compassionate grounds.[81]

The practice of offering residency for humanitarian grounds is highly discretionary and only granted if the Minister of Immigration "is of the opinion that it is justified by humanitarian and compassionate considerations . . . taking into account the best interests of a child directly affected, or by public policy considerations."[82] In practice, the term "humanitarian and compassionate" is interpreted to mean that the applicant must demonstrate the return to their state of nationality would result in a hardship which is "unusual, excessive, or undeserved and the result of circumstances beyond [their] control."[83] This author is aware of no decision to permit trafficked victims to remain in Canada based upon humanitarian and compassionate grounds. Their presumptive future then, is detention and deportation.[84] However, this practice can hardly be considered as protecting human rights. For example, extensive investigation into the incidences of sex workers trafficked into Canada from Eastern Europe and the former Soviet Union concluded that there are few options for such women, especially those who believe that life is better for them as trafficked women in Canada than if they were returned to their home state.[85]

Professor Sunera Thobani, former president of the National Action Committee on the Status of Women, explained that deporta-

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[80] IRPA, *supra* note 46, § 25(1).
[81] *Id.*
[82] *Id.*
[83] Citizenship and Immigration Canada, http://www.cic.gc.ca/english/applications/guides/5291e.html (last visited Apr. 15, 2006).
[84] *See generally* Sunera Thobani, *Benevolent State, Law-Breaking Smugglers, and Deportable and Expendable Women: An Analysis of the Canadian State's Strategy to Address Trafficking in Women*," 19(4) REFUGE 24, 28 (2001); Lepp, *supra* note 4, at 36-37; McDonald, *supra* note 24, at 6.
[85] McDonald, *supra* note 24, at 6, 32.

tion may place trafficked women in a more dire situation when she stated, "As international agencies and local women's organizations who work with trafficked women repeatedly stress, these women often have no family or community support for going back. In fact, quite the opposite is true as the women can be further stigmatized and ostracized upon return."[86]

As conditions in a woman's home state under which the trafficking occurred are unlikely to have changed, women remain vulnerable to being re-trafficked.[87] The rate of re-trafficking is believed to be significant.[88] Given these circumstances, deportation is unlikely to be compatible with protecting or promoting the human rights of trafficking victims. The lack of substantive protective provisions is surprising given Canada's public position on trafficking victims. Canada's Attorney General recently proclaimed that "solving this most profound of human rights assaults--of assaults on human dignity--requires a comprehensive approach; an approach that will allow us to . . . protect the victims who are sometimes forgotten[.]"[89]

Canada presents itself as a white knight to the world on human rights matters. Officials appear adamant about punishing those who would traffic other human beings, and advocate approaches which will protect the victims. However, Canada makes no formal provisions to provide that protection and restoration of dignity on its own soil, where the crime against the person in part occurred, and where presumably there is a market for such persons. The flavor of this approach is well expressed in the following passage, which describes the character of media reports on trafficking operations in Toronto and Vancouver:

> The police generally justified the raids [on massage parlors, strip clubs and brothels] on the grounds that they were fighting organized crime's involvement in illegal migration and 'rescuing' the women from 'forced sexual servitude.' What was excluded from the reports, however, was an adequate explanation for

[86] Thobani, *supra* note 84, at 31.
[87] *Id.*
[88] *Id.*
[89] Cotler, *supra* note 45.

> why the women were arrested, charged with prostitution and immigration offenses, and in some cases, deported, despite their depiction as 'victims' of organized crime.[90]

In some cases where criminal charges were not pursued against trafficked sex workers, Canada managed to deport the women in question within seventy-two hours of the trafficking ring leaders having *disappeared*.[91] According to Dr. Lepp of the University of Victoria and co-founder of the Global Alliance Against Trafficking in Women, Canada made over 700 arrests for sex trafficking-related crimes in Toronto in 2000.[92] Given that police raids have apparently only resulted in fourteen convictions of ringleaders between 1997 and 2002, it would appear that almost all of the arrested persons were victims of trafficking--arrested for the illegal activity in which they were forced to engage.[93]

Just as Canada would equally condemn traffickers and smugglers, it does not seem to expressly distinguish between the arrest of victims and the arrests of perpetrators when lauding its successes in addressing trafficking. Finally, Canada does not seem to meaningfully distinguish between persons who are victims of trafficking and any other non-citizen in the country without lawful authority. In each case, unless they make a refugee claim, they are likely deported.

V. Interpreting International Obligations

There have been fairly few reported refugee claims where the claimant relied upon having been trafficked as a part of their claim. The author is only aware of one case where a refugee claimant successfully brought an application which turned on whether they were a trafficking victim.[94] The claimant stated she had been trafficked by Ukrainian organized crime and feared retribution and potentially being re-trafficked were she returned to the Ukraine.[95] Upon conclud-

[90] Lepp, *supra* note 4, at 36.
[91] *Id.* at 37 (emphasis added).
[92] *Id.* at 36.
[93] *Id.*
[94] Re Y.C.K. [1997] C.R.D.D. 261.
[95] *Id.*

ing that the Ukrainian state would be unable to offer her protection from the traffickers, the Refugee and Immigration Board ("IRB")[96] stated:

> [T]he recruitment and exploitation of young women for the international sex trade by force or threat of force is a fundamental and abhorrent violation of basic human rights. International refugee protection would be a hollow concept if it did not encompass protection of persons finding themselves in the claimant's predicament.[97]

This strong position does not resurface in later decisions. Instead, the IRB members forge distinctions on Canada's obligations between refugees and trafficking victims pursuant to international instruments. For example, in *Re P.G.L,* the IRB wrote:

> Canada has accepted the moral obligation to assist the worldwide effort to stop trafficking, and to help victims. However, Canada has not necessarily intended to bind itself to helping victims of trafficking through giving them refugee status. The interests and obligations laid out in the smuggling and trafficking protocols are different from those in the Refugee Convention. [98]

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[96] *See* CRPS, *supra* note 69. (The Refugee and Immigration Board ("IRB") is made up of four (4) tribunals, which are designated as "divisions" as follows: (1) The Refugee Protection Division ("RPD") who decides claims for refugee protection in Canada; (2) The Immigration Division ("ID") who conducts immigration admissibility hearings for certain categories of people believed to be inadmissible to, or removable from, Canada under the law and conducts detention reviews for those being detained under IRPA; (3) The Immigration Appeal Division ("IAD") who hears the appeals of sponsorship application refusals and other decisions by officials of Citizenship and Immigration Canada ("CIC"), and the Refugee Appeal Division ("RAD") who was created by IRPA in November, 2001).

[97] Y.C.K, *supra note* 94, at ¶ 31.

[98] P.G.L. [2001] C.R.D.D. 150. In this case, the claimant alleged that he was a member of a particular social group, "trafficked children," which made him vulnerable to being persecuted in the form of being re-trafficked if returned to China (and that the state could not prevent the trafficking from re-occurring, given that the claimant's parents had arranged for the trafficking to take place, and would do so again).

Indeed, the binding international obligations of the Palermo Protocol--as opposed to its discretionary elements--can be interpreted quite differently. If Canada is to keep its word on treating trafficking, first and foremost, as a human rights problem and not just a problem of irregular migration, Canada needs to take a broader approach than merely protecting trafficking victims who also *happen to* qualify as refugees.

Canada's commitment to such an approach should flow from its decision to ratify the United Nations Convention on the Elimination of all Forms of Discrimination Against Women.[99] The Convention's monitoring body, the Committee on the Elimination of Discrimination against Women, asked Canada in 2002 to indicate actions it had taken to address trafficking in women, "including the recognition and protection of their human rights."[100] Canada was further asked to "please describe the facilities offered to victims of trafficking pending, during, and after prosecution of traffickers."[101]

Canada's written response simply did not answer the questions. Instead, it made reference to Criminal Code amendments that allow the prosecution of Canadian citizens who engage in sexual activity with female children abroad--a measure which could potentially punish those whose activities fuel child trafficking.[102] Canada also referred to its adoption of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and of the Palermo Protocol.[103] With regard to the Palermo Protocol, Canada noted it had complied with the requirement to establish trafficking as a criminal offense, and had taken steps to impose appropriate penalties against traffickers.[104]

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[99] *See generally* CEDAW, *supra* note 13, at 9.
[100] *Review of Canada's Fifth Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Responses by Canada to the Advance Written Questions of the Committee on the Elimination of Discrimination against Women (Part 1)* 23 (2002), *available at* http://patrimoinecanadien.gc.ca/progs/pdp-hrp/docs/cedaw5/5cedawcan2_e.pdf.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 24.

In essence, Canada is unable to offer evidence of steps taken to recognize and protect the human rights of female trafficking victims because it does not appear to have taken any such steps, unless one subscribes to the premise that arresting and/or deporting trafficking victims constitutes protecting their human rights. As to facilities offered to trafficking victims "pending, during and after prosecution of traffickers," Canada inexplicably only makes reference to the emphasis in its youth justice system on rehabilitation, and the offering of diversionary measures "for the vast majority of youth crime, including prostitution."[105] Instead of describing the facilities where Canada detains trafficking victims, Canada described trafficking victims as prostitutes (i.e., it reframed their status from victim to criminal), and suggested that it is committed to reintegrating former youth prostitutes "back to the community."[106] Given the practice of detention followed by deportation, perhaps Canada's silence as to facilities offered during and after prosecution of traffickers reflects the fact there is little need for such facilities to exist.

VI. Children and Trafficking

The IRB in *Re P.G.L.* considered whether the child-refugee claimant had in fact been a victim of trafficking.[107] The IRB turned to the Palermo Protocol, which states that transporting a child for the purpose of exploitation is always an act of trafficking, and that "exploitation" constitutes forced labor, or services akin to slavery, or practices similar to slavery or servitude.[108] The IRB concluded there was no indication the child would be forced to work specifically for the snakehead, but would instead enter the work force at an amount agreed upon between the minor and an independent employer so that the child had not been transported "for the purpose of exploitation," and therefore, was not trafficked. [109] This decision turned on the fact that the snakeheads would only benefit through the repayment of "a staggering debt" and "not through low-wage (or no wage, in the case

[105] *Id.*
[106] *Id*.
[107] *P.G.L., supra* note 98.
[108] Palermo Protocol, *supra* note 14; P.G.L., *supra* note 98, at 7.
[109] P.G.L., *supra* note 98.

of slavery), labor."[110] This approach to exploitation and trafficking is troubling. The snakehead transported the child due to the control over him upon arrival and through the combination of the debt load combined with the fact the child had no legal right to work or be in Canada. Given his status, it is highly likely the child would end up working in the underground economy. It is precisely these factors which place a child in a vulnerable and presumptively exploitative situation.

The matter of children and trafficking merits further discussion with reference to Canada's international obligations. In accordance with the Convention on the Rights of the Child where a minor is in Canada without lawful status, Canada must only detain a child "as a measure of last resort," taking into account the best interests of the child.[111] This principle is interpreted by the Immigration and Refugee Protection Regulations ("IRPR") to mean that when a decision-maker is considering detaining a child, he or she *must* consider, among other factors, "the risk of continued control by the human smugglers or traffickers who brought the children to Canada."[112] How should this provision be interpreted? Is it protective or punitive?

The IRPR provisions have attracted the attention of the Committee on the Rights of the Child, which is responsible for monitoring state compliance with Convention on the Rights of the Child obligations. In its 2003 review of Canada's state of compliance, which included considering a report written by Canada and giving Canada the opportunity to respond in writing to the Committee's written concerns, the Committee's initial concerns regarding Canada's approach to detaining children were not assuaged. The Committee recommended that Canada "[r]efrain, as a matter of policy, from detaining unaccompanied minors and *clarify the legislative intent of such detention as a measure of 'last resort[.]'*"[113]

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[110] *Id.* at 9.
[111] CRC, *supra* note 11, at Art. 37.
[112] IRPA, *supra* note 46, § 249(c) [emphasis added].
[113] Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Canada*, CRC/C/15/Add.215, ¶ 47 [hereinafter Committee Consideration] [emphasis added].

What does Canada consider "last resort" to mean? What other options must be considered *first,* where a child has been smuggled or trafficked into Canada? To the author's knowledge, there have been no reported decisions which refer to the provision in question. The Canadian Council for Refugees ("CCR") describes one case, where they appear to have received a copy of an unreported transcript, regarding a Chinese youth who traveled with a group of fifteen others on a rather circuitous route before arriving in Canada, where he made a refugee claim.[114] The nature of the travel route raised suspicions that smugglers or traffickers may have been involved in the youth's journey.[115] These suspicions led to a decision to detain the youth.[116] Then, as required by law, the detention decision was reviewed.[117] The Immigration and Refugee Board decided to keep the youth in detention pending review of his refugee claim, stating:

> One has to bear in mind that it certainly cost your family a lot to pay the organization for this kind of trip and in all likelihood your family is indebted for many future years and I think that on your part, if I were to order release, you would feel obligated to meet your part of the deal and the contract, so your family does not lose all that money. I am also of the opinion that the smuggling organization will remain around you, so to exercise control over you and influence you in your decisions.[118]

Is continuing detention really the *last resort*--the *only* option available--to protect the youth from the *influence* and *control* of smugglers? In a similar case, heard prior to the IRPA coming into force, a Chinese youth did manage to overcome the influence of family obligations and attempts at control by a snakehead. In *Re THK*, the Board described how the Chinese youth in question had been

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[114] Canadian Council For Refugees, *Canada Must Offer Protection to Trafficked Persons* (Montreal: CCR), Nov. 25, 2004, http://www.web.ca/ccr/traffbackgrounder.html (last visited Feb. 20, 2006).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id*. at 1-2.

placed in the hands of traffickers by his parents, and that his parents had threatened to disown him if he did not reconnect with the snakehead and enter the United States to work there. [119] The IRB noted that with the assistance of a social worker, the youth had managed to refuse to reconnect with the snakehead, despite family pressure and allegations that the snakeheads were taking retribution against a cousin.[120]

Trafficked children should presumptively *not* lose the freedom they just won from their traffickers only to be detained on the basis of speculation. Such practices are likely to prevent children from trusting that Canadian authorities can be turned to for assistance. Given the IRPR, there is a danger that panels will adopt a general practice of detaining refugee claimants, including children, if they were trafficked or smuggled into Canada, in contradiction with the Convention on the Rights of the Child and the Refugee Convention.[121]

Canada also invokes the specter of trafficking to justify imposing onerous requirements upon parents with legal status who wish to sponsor their children to immigrate to Canada. Such family sponsorships, where parents obtain status in Canada without their children, most often occur in the case where families have been forcibly separated or were unable to travel together.

The waiting period for the reunification of foreign dependent children with parents in Canada is quite long. The average processing time for dependent children located in African and Middle Eastern countries is eighteen months.[122] Thirty percent of these children will still be waiting after an average of twenty-four months.[123] The situation is worse for refugees who do not have identity documents,

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[119] Re T.H.K. [2001] C.R.D.D. 30.
[120] *Id.*
[121] *See generally* IRPA*, supra* note 46*; Refugee Convention, supra* note 12*; CRC, supra* note 11.
[122] CCR, *Impacts on Children of the Immigration and Refugee Protection Act* 15 (Montreal: CCR, 2004) [hereinafter Impact on Children]; CIC, *Facts and Figures: Immigration Overview, Permanent and Temporary Residents* (2004), *available at* http://www.cic.gc.ca/english/pub/index-2.html#statistics (last visited Feb. 20, 2005).
[123] *Id.* at 12.

or whose documents were produced by a state which does not, in Canada's opinion, produce trustworthy documents.[124] Refugees often have their documents lost or destroyed during persecution, and cannot ask their home state for replacements, and births may go unrecorded when refugees are displaced or otherwise operating under the radar of state machinery.[125] In such cases, Canada typically requires DNA testing, adding to the waiting period. [126]

Why a DNA test? Maria Iadnardi, spokesperson for Citizenship and Immigration Canada, explains, "we definitely don't want to be participating in the trafficking of children, so we have to be extremely careful."[127] However, given the fact that refugees are unlikely to have recognized documentation it seems incomprehensibly cruel to impose a DNA test *prior* to reunification of dependent children with their alleged parents in Canada, unless there is evidence or specific circumstances to substantiate a trafficking concern

In one case, husband and wife Iraqi refugees had been offered resettlement in Canada but, between the time of submitting their application and its acceptance, a child was born who had not been added to their application, as the local United Nations High Commissioner for Refugees ("UNHCR") office in Baghdad had been bombed.[128] They were forced to leave the infant behind, but promptly presented the baby's birth certificate to officials.[129] Then the request for DNA testing was received.[130] To comply, one of the refugee parents will first have to get a visa to return to Iraq to collect the baby, a frightening prospect given that the parents fled Iraq as the source of their persecution.[131] Then a second set of visas will be required for the parent and the baby to enter Jordan (the closest place

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Marina Jimenez, *Tough Refugee Rules Create Agony for Parents: DNA tests to prove paternity is hurdle for those wanting to reunite families*, GLOBE & MAIL, Oct. 16, 2004, at 13.
[128] *Id.* at 13.
[129] *Id.*
[130] *Id.*
[131] *Id.*

for a DNA test).[132] And then, as the claim for family reunification is being handled through the Damascus office, the baby's application will probably take about 18 months to be processed.[133] Is this type of delay and potential risk, under these circumstances, truly justified by the fear of enabling traffickers?

In the case of refugees, especially refugee children, one would think the DNA testing could be performed *after arrival* in Canada, where facilities can be accessed fairly easily. Of course, reliance upon DNA testing creates its own problems. In the United States, the rate of "false paternity," where children are not the biological children of their mother's spouse, is estimated to be between two and five per cent. [134] To discover this fact, while in the process of a unification application, would be devastating, and could prevent the reunification. The contradictions in such measures being put forward to protect children are multifold.

It is unclear whether the Committee was aware of Canada's DNA practices, as it did not comment upon them. The Committee did comment, however, on the increase in the number of foreign children and women being trafficked into Canada.[135] The Committee was critical of Canada's level of protection for such individuals and recommended Canada "further increase the protection and assistance provided to victims of sexual exploitation and trafficking, including prevention measures, social reintegration, access to health care and psychological assistance, in a culturally appropriate and coordinated manner "[136]

Canada does provide access to health care and social assistance to all persons who claim refugee status.[137] However, if a trafficked person does not make a refugee claim, these services are not

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[132] *Id.*
[133] *Id.;* Impact on Children, *supra* note 122.
[134] *Id.* at 14; John Seabrook, *The Tree of Me*, THE NEW YORKER, Mar. 26, 2001.
[135] Committee Consideration, *supra* note 113.
[136] *Id.* at 53.
[137] *The UN Convention on the Rights of the Child: How Does Canada Measure Up?* CRC/C/15/Add.215 (Nov. 1999) *available at* http://www.rightsofchildren.ca/report/un.pdf.

provided.[138] Canada makes no special provision for the mental or physical well-being of trafficked persons, despite the recommendation from the International Organization for Migration ("IOM") that specialist support always be made available due to the increased trauma which trafficked persons may have experienced.[139] Yet, Canada detains and deports.

VII. Linking Canadian Migration Control and Demand for Unlawful Entry into Canada

The coming into force of the Safe Third Country Agreement[140] between Canada and the United States will arguably increase smuggling and trafficking from the U.S. into Canada, and vice versa. Under the Agreement, with some exceptions, refugee claimants will not be permitted to cross the land border between the two countries to make their claim, and will instead be turned back and forced to make their claim in the country through which they transited.[141] However, if the claimant presents himself or herself other than at a land border point – such as at an inland government office in Toronto, or an airport, or along the coast, then the claim will be heard despite the claimant having traveled through the other country first.[142] As a result, those who are in one country and would have their claim heard in the other are highly motivated to find a way across the land border undetected.

At forty-one percent, Canada's acceptance rate for refugee claimants is only slightly higher than the thirty-seven percent acceptance rate in the U.S.[143] These statistics conceal the fact that Canada and the United States have very different acceptance rates for claim-

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[138] *Id.*

[139] Gray, *supra* note 26, at 30.

[140] Agreement between the Government of Canada and the Government of the United States of America for Cooperation in Examination of Refugee Status Claims from Nationals of Third Countries, signed Dec. 5, 2002, as brought into force in domestic legislative effective Dec. 29, 2004, *Regulations Amending the Immigration and Refugee Protection Regulations* SOR/2004-217.

[141] *Id.* art. 4 § 1.

[142] *Id.*

[143] Lisa Priest, *Deadline imminent for seekers of asylum,* GLOBE & MAIL, Dec. 28, 2004.

ants of certain nationalities, and for certain types of claims.[144] For example, whereas the acceptance rate for Colombian refugee claimants is thirty-five percent in the United States, it is eighty-one percent in Canada.[145] As a consequence, some individuals have very pressing reasons to make every effort to ensure that their claim is heard in a specific country. One can reasonably assume that the demand for smuggling will primarily be into Canada, given that on an annual basis only about two hundred asylum seekers present themselves at the American border after passing through Canada, while alternatively ten-thousand to twelve-thousand persons annually, seek protection at the Canadian border after passing through the United States.[146] This trend may reflect not only different acceptance rates for different sorts of claims, but also the fact that Canada provides refugee claimants with social benefits, including medical care, adult public education, and benefits which are not granted in the U.S.[147] Another significant difference is that the United States will not hear a refugee claim by a person who has been in the United States for over a year.[148] Such individuals, if they wish to obtain a regularized status in a state other than their state of citizenship, must therefore bring their claim in another country--and Canada is the closest destination.

The Safe Third Country Agreement is only the latest manifestation of Canadian border measures which make it a difficult place for refugees to reach. Indeed, the UNHCR, upon reviewing Canada's draft IRPA, made the following scathing comment:

> [T]he myriad of migration controls which many countries, including Canada, have established, also have the effect of making it more difficult for asylum-seekers to seek protection. In many cases, persons in need of protection *have no option other than to resort*

[144] *Id*. at ¶ 9.
[145] *Id.*
[146] Clifford Krauss and Robert Pear, *Refugees Rush to Canada to Beat an Asylum Deadline,* N.Y. TIMES, Dec. 28, 2004.
[147] *Id.*
[148] Immigration and Nationality Act, 8 U.S.C. § 1158 (2005).

> *to the use of false documents and the services of smugglers to bring them . . . .*[149]

An example of these migration controls is Canada's carrier sanctions in the IRPR. Severe financial penalties are imposed on carriers who transport persons into Canada who do not have all required visas, passports, or other documents, or who carry forged documents--unless that person *is* a refugee.[150]

The threat of these financial punishments effectively requires air, land, and sea carriers to decide whether or not to take a chance that a person without proper documentation will be able to successfully make a refugee claim in Canada. Carriers object to this role. In a letter from the Vice-President of the Air Transport Association of Canada to the Immigration Legislative Review Advisory Group, Howard Goldberg wrote:

> Let me be quite clear, immigration control is a government function. Air carrier staff are not Immigration Officers and should not be expected to perform that role . . . it seems that every day air carriers are being asked to do more to ensure that those seeking to come to Canada as refugees, no matter what their motivations, are kept out.[151]

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[149] United Nations High Commissioner for Refugees [UNHCR], *Comments on Bill C-11, "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger"* (Submission to the House of Commons Standing Committee on Citizenship and Immigration, Mar. 5, 2001) (Ottawa: UNHCR, 2001) ¶ 38.

[150] As well as an "administrative fee" (IRPR § 279-80), the carrier may also be required to pay all costs of removing the foreign national from Canada, including airfare, all accommodation and other expenses incurred while in Canada, accommodation, expenses and wages of escorts, and fees for any required travel visas (IRPR § 278). These expenses are not imposed in a variety of circumstances, notably if the person succeeds in being recognized as a refugee. However, as the processing time for refugee claimants is currently estimated by CIC to be 10 to 11 months, an unsuccessful claimant will have run up a considerable bill of expenses, placing carriers in a position where they may have to carry a significant financial penalty.

[151] Letter from Howard P. Goldberg, Vice President and Secretary, Air Transport Association of Canada, to Robert Trempe, Immigration Legislative Review Advisory Group (May, 8, 1997) *in* Canadian Council for Refugees, *Interdicting Refugees* 25 (1998), *available at* http://www.web.ca/~ccr/Interd.pdf.

A study of persons intercepted while trying to use fraudulent documents to board airplanes from England to Canada or the United States substantiates Mr. Goldberg's concern that carriers are being used as a tool to prevent refugees from being able to make a claim in Canada. The study was conducted by the University of Cambridge Institute of Criminology and involved 123 individuals; 66 percent of whom were bound for Canada, 34 percent of whom were bound for the United States.[152] Of these individuals, "Ninety-one percent of the prisoners gave political reasons for their flight with fifty-three percent reporting they had been imprisoned in their home country for political reasons and the other forty-six percent reporting they had experienced torture."[153] If these claims can be substantiated, then many of these individuals would likely have qualified for recognition as a refugee had they succeeded in reaching Canada. Instead, they will only obtain that protection if they are able to fall in with more skilled smugglers or traffickers.

VIII. Concluding Comments

Canadian law and practice with regard to human trafficking tends to operate by means of criminalization, in which recognition and restoration of the human rights of trafficking victims does not play a significant role. State rhetoric, that Canada sees trafficking as "first and foremost" a human rights problem, is not reflected in any substantive measures to protect the human rights or restore the dignity of those who have been trafficked into Canada.

Canada's current practice does not reflect the recommendation of the IOM to engage in the three-pronged strategy of prevention, protection and prosecution. Canada fails for the same reasons that once lead the American Department of State to downgrade its ranking, and the UNCHR, the CRC, the CCR, and various Canadian academics to criticize Canadian legislative activity. Unless Canada chooses to substantively protect victims, by giving them a form of legal status within Canada and appropriate support services, it cannot hope to effectively prosecute perpetrators. Canada's eagerness to de-

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[152] Council for Refugees, *Interdicting Refugees*, *supra* note 151, at 34.
[153] *Id.*

tain and deport trafficking victims, including those whose vulnerability has increased due to having testified against their snakehead traffickers, provides a clear disincentive for trafficking victims to present themselves to authorities, or assist in prosecution. Canada's border policies also need to be re-visited, with a critical eye on how they exacerbate the demand from asylum seekers for smuggling and trafficking.