

# Canadian Policy on Human Trafficking: A Four-year Analysis<sup>1</sup>

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## ABSTRACT

This article introduces readers to Canadian Government policy and practice surrounding human trafficking since the adoption of the United Nations (UN) Protocol on Trafficking in 2000. After offering an overview of the UN Protocol, the article reviews and critically analyses Canada's efforts in the three key areas of the Protocol: prevention of human trafficking, protection of trafficking victims, and the prosecution of traffickers. Since the beginning of our research, progress has been made in Canadian policy responses. The Government began by developing and implementing its tools for the prosecution of traffickers, thereby responding to most of the prosecution recommendations of the UN Protocol. Different government agencies are also coordinating their efforts to implement prevention projects, both in source countries and at home, including awareness-raising campaigns, education campaigns, and policy development collaborations. However, the more structural elements of prevention have yet to be adequately addressed. Finally, without shifting their basic border control framework, Canadian government agencies are in the process of improving the protection of trafficking victims who are intercepted in law enforcement operations or who come forward for help. These protection measures would be strengthened further if migrants' rights were explicitly protected by law, something that has failed to occur given recent prioritization of crime and security. The formal protection of victims, as implemented to some degree in several European and American policies, is introduced for comparison. The article concludes with the remaining challenges that face Canadian policy makers, particularly in terms of shifting away from current focus on crime and security to the protection and promotion of the human rights of trafficking victims.

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## INTRODUCTION

In recent years, nation states' interest in security has been amplified by the conceptual linking of terrorism, transnational organized crime, and irregular migration. International cooperation has been identified as an important vehicle for addressing these concerns. Irregular migration, including human trafficking, has come to the forefront in terms of policy reform. Human trafficking, the subject of this article, was estimated in 2000 by the United Nations Educational, Scientific and Cultural Organization (UNESCO) to involve four million women a year while Kangaspunta (2001) offers a somewhat lower estimate of between 700,000 and two million women and children per year. The true incidence of human trafficking is nearly impossible to determine, however, due to the clandestine nature of the act and the difficulty in distinguishing trafficking victims from other irregular migrants. In Canada, law enforcement agencies have classified their estimates of the incidence of human trafficking as secret, leaving researchers with only fragmented and anecdotal sources.<sup>2</sup> Despite the lack of concrete data, however, the Canadian Government has made human trafficking a priority.

On 15 November 2000, the UN General Assembly adopted the UN Convention against Transnational Organized Crime, also known as the Palermo Convention, along with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Both entered into force in December 2003.<sup>3</sup> In line with these concerns, governments around the world have been adopting anti-trafficking programmes and developing domestic laws with harsh penalties for perpetrators of trafficking.

This article will critically analyse Canada's implementation of the UN Protocol against Trafficking from the perspective of migrants' human rights. Data are drawn from interviews with Canadian Government officials and policy makers (between 2000 and 2004) as well as governmental documentary sources. The first section of this article will describe the policies and programmes adopted by the Canadian Government in fulfilment of its commitments as a signatory of the Protocol, examining the specific measures taken as a means of preventing trafficking, protecting victims, and prosecuting perpetrators. The argument will be made that, although Canada has made significant efforts to comply with the international standards set by the Protocol, future legislative and policy changes are necessary if the human rights of migrants are to be respected. Of particular concern is the protection of trafficking victims who are likely to be criminalized by current legislation. A brief examination of trafficking deterrence and protection measures taken by other countries will be offered before turning to policy recommendations for Canada to address its responsibility to protect victims as urged by the UN Protocol.

## AN OVERVIEW OF THE PROTOCOL AGAINST TRAFFICKING

Canada was heavily involved in the negotiations leading to the adoption of the UN Trafficking and Smuggling Protocols, with the participation of representatives from the Department of Foreign Affairs and International Trade (DFAIT), Status of Women Canada (SWC), and Justice Canada (Department of Justice Canada, 2000). Canada was also among the first nations to sign (December 2000) and ratify (May 2002) the Protocols, thereby formalizing its commitment to fight organized crime and cooperate with other countries in combating human trafficking and smuggling.

Article 3(a) of the UN Protocol defines trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by the threat or use of force, by abduction, fraud, deception, coercion or the abuse of power or by the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of [...] sexual exploitation, forced labor or services, slavery or practices similar to slavery [...]”.<sup>4</sup> The Protocol distinguishes trafficking from smuggling, the act of arranging clandestine entry of individuals into a country for profit, but without controlling or exploiting them upon arrival.

The UN Protocol against Trafficking suggests a three-pronged approach, its overall purposes being stated as: (a) the prevention and combat of trafficking in persons, (b) protection and assistance to the victims, and (c) the promotion of cooperation among State Parties (Article 2). While the Protocol does not go as far as some advocates would like in terms of migrants’ rights, it nevertheless offers the first official framework urging the protection of victims. Of serious concern, however, is the lack of true obligation on the part of signing members to respond to all aspects of the Protocol and the absence of repercussions for those who do not.

## CANADIAN IMPLEMENTATION OF THE PROTOCOL

The Canadian Government accepts the three-pronged approach yet there has been uneven progress in addressing the three policy areas of prevention, protection, and prosecution. During the negotiations of the Protocol and up until early 2004, the federal government’s efforts regarding trafficking were coordinated by an ad hoc Interdepartmental Working Group on Trafficking in Persons (IWG-TIP) that brought together representatives from federal departments sharing an interest in furthering the anti-trafficking agenda. Since the adoption

of the UN Protocol in 2000, different federal departments had begun independent initiatives to address trafficking. The IWG-TIP was the forum where these efforts were shared and aims to coordinate them undertaken.

Our interviews with members of the IWG-TIP revealed that the individuals working on this issue were highly motivated and played an important role in slowly moving the federal government from inaction on human trafficking before the late 1990s to making it an area of high concern by 2004. Members of the IWG-TIP do not have a homogenous perspective on human trafficking, however. For example, some of those interviewed focused very much on the crime and security aspects of trafficking while others viewed it more as on a continuum with other types of irregular migrants who are also in need of state protection. Yet most IWG-TIP members agreed that a crime and security lens was helpful in getting human trafficking onto the public agenda in the post-September 11 political context when sympathy for migrants was low.

Today, however, many feel that it is time to begin raising human rights as an area of concern. In the spring of 2004, the federal Minister of Justice formalized the role of the IWG-TIP. Now, with representatives from 15 federal departments, IWG-TIP's official mandate is to develop a comprehensive anti-trafficking strategy for the Government of Canada. The following sections analyse the evolution of Canadian anti-trafficking initiatives since the year 2000, bringing us to the present-day challenges facing the IWG-TIP and Canada's response to trafficking in general.

### **Prevention of trafficking**

The Protocol urges Member States to take measures to prevent human trafficking from occurring and, for those who have already fallen victim, to prevent their re-victimization once they are intercepted or come forward to authorities for help (Article 9.1a). This re-victimization can occur through criminalization of victims, their poor treatment at the hands of authorities, or through being returned to the context in which they were initially victimized, only to be trafficked again. As we will argue below, each situation is more likely under regimes stressing crime-fighting and border control. To prevent such scenarios, the Protocol proposes continued research, information, and media campaigns (Article 9.2) along with legislative, educational, social, and cultural reforms.

Canada has acted on the area of the prevention of trafficking in three principal ways: precluding trafficking from occurring in the first place in source countries, stopping traffickers from entering with their victims through border control, and through cooperation with other countries.

## Prevention in source countries

Canada's source country prevention efforts are concentrated in lobbying, education, and project funding. For example, the Canadian International Development Agency (CIDA), Citizenship and Immigration Canada (CIC) and the Department of Foreign Affairs and International Trade (DFAIT) collaborate on educational programmes in countries "at risk" of being source countries for victims of trafficking. Specific initiatives include: public awareness campaigns and embassy staff training to stem the trafficking of women from Eastern and Central Europe, public education campaigns on the trafficking of children in the Sahel, development of anti-trafficking legislation and policy frameworks in Viet Nam and Pakistan (DFAIT, 2003b), and the use of advertisements in China to inform potential irregular Chinese and other migrants about the likelihood of being detained upon arrival in Canada (interviews). Another example is that Status of Women Canada (SWC), with its mandate to promote sexual equality and ensure the full participation of women in the economic, social, cultural, and political life of Canada, supports research and pilot projects on trafficking.

Most recently, in order to prevent trafficking in source countries, and after receiving feedback from partners in source countries, the IWG-TIP prepared an information package that was culturally tested and translated into 14 languages. It is being distributed in Canadian missions abroad and to regional and local non-governmental organizations (NGOs) working directly with potential or real victims of trafficking, especially women and street children. CIDA and the International Organization for Migration (IOM) missions will also collaborate in the distribution process.

While Canada is making headway in prevention efforts, there are serious limits to the conceptual framework guiding these efforts. The Protocol itself states that poverty, underdevelopment, and lack of equal opportunity are factors that make persons vulnerable to trafficking (Article 9.4) yet Canadian policies, and many of those interviewed, include these factors as only peripheral to the issue of human trafficking. Prevention efforts focus on the idea that if potential victims are aware of the danger of being trafficked, they will avoid exploitation. This is problematic given that the difficult socio-economic situation in many source countries, along with the continued demand for labour and difficult entry to destination countries, suggests that people will continue to search for clandestine means of migration and therefore remain vulnerable to trafficking. In terms of its contribution to international development, an action that could have an impact on the living conditions that push victims into the grasp of traffickers, Canada fails to give even the 0.7 per cent of its Gross Domestic Product as recommended by the UN. With current overseas development assist-

ance approaching a mere 0.3 per cent, and with much of this aid linked to the purchase of Canadian products and services, Canada shows a lack of true commitment to changing the international economic context that encourages human trafficking.

### **Border control**

Article 11 of the Protocol establishes that State Parties should strengthen border controls in order to prevent and detect trafficking in persons. The international measures taken against trafficking are linked with the general response of Western countries to the “new migration order” (Apap et al., 2002). Thus, in the early 1990s, the issue of trafficking was included as part of the migration policy approach of intensifying border control and suppressing illegal migration. Moreover, in the aftermath of the terrorist attacks of September 11, Western countries have focused on border controls as being central to national security. The implications of this shift in policy perspective are keenly felt by irregular economic migrants who find themselves increasingly criminalized and facing intensified efforts of detention and/or deportation, especially in Europe and North America.

Since the September 11 attacks, Canada has faced significant criticism of its immigration policies. Several countries – the most vocal being the United States – have accused Canada of being a “jumping-off point” for terrorists and of being too lenient in its acceptance of immigrants and refugees (Crépeau and Jimenez, 2002). In addition to facilitating terrorism, it has been argued that the Canadian immigration regime also facilitates human trafficking. According to the United States, Canada’s “lax immigration laws” make the country “a destination and a transit point to the United States for women, children, and men trafficked for purposes of sexual exploitation, labor and the drug trade” (US State Department, 2003). In partial response to such criticism, but also in fulfilment of the pre-existing push from within the Government to take a more restrictive immigration approach, Canada announced on 12 October 2001 the creation of its Anti-Terrorist Plan, which includes reinforcing immigration controls.

Within this context of anti-terrorism, Canada has negotiated with the United States a number of new and restrictive measures regarding border crossing, particularly for refugees and individuals from countries that the United States has identified as linked to threats of terrorism. Some examples of these measures are the 2001 Canada-US Smart Border Declaration, the 2001 Joint Statement of Cooperation on Border Security and Regional Migration Issues (DFAIT, 2003a), and the 2002 Safe Third Country Agreement on Refugees between

Canada and the United States. The 2001 federal budget built on these initiatives through a comprehensive set of measures was designed, to paraphrase CIC, to keep Canada safe, terrorists out, and the Canadian border open, especially to trade (CIC, 2001).

These changes mean migrants seeking entry to Canada are first seen through a security lens before a compassionate or humanitarian lens. Concretely, irregular migrants face much more difficulty entering the country and intensified repercussions if caught outside of normal immigration channels. For example, the 2001 Immigration and Refugee Protection Act (IRPA) tightens access to immigration channels through a number of means: increased security checks at the beginning of the refugee determination process; increased detention of migrants unable to satisfactorily prove their identities; refusal to consider a refugee claim if there are reasons to believe the claimant is a terrorist (the definition of which is considered too wide by many observers, Aiken, 2001a); intensification of the use of deportation; increased penalties for those using false papers; and more severe punishments for those arranging illegal entry via smuggling, even if it is for humanitarian reasons (Jimenez, 2002).

This border-control approach to fighting terrorism – also the area of human trafficking prevention that has received to date the most government energy and resources – raises serious questions about international migrants' human and labour rights (Vedsted-Hansen, 1999; Van Impe, 2000). While some countries are actively trying to eliminate the legal, social, and labour-related hurdles that trafficked people must endure, Canada, in part due to its emphasis on border control, has fallen behind.

### **Cooperation between State Parties**

The Protocols and the Palermo Convention encourage cooperation between UN Member States to prevent and punish smuggling, trafficking, and transnational organized crime through sharing of information, resources, and training. On these fronts, Canada has been working closely with the United States and actively participating in the efforts of the broader international community, most notably through the G8. So far, CIC has negotiated bilateral agreements that allow sharing of information on illegal migration with the United States, Great Britain, Australia, and the Netherlands.

CIC has also made efforts to increase information-sharing between different law enforcement jurisdictions within Canada (municipal, provincial, federal, as well as between criminal and immigration law enforcement). Cooperation between the CIC, the Royal Canadian Mounted Police (RCMP, the federal police

force), and Canada Border Services Agency (CBSA) is currently being developed and implemented. Our interviews suggest that competition and jurisdictional tensions between the different law enforcement agencies made this task challenging but individuals with whom we spoke found it rewarding to be working through the process and felt that it was improving the work on trafficking issues.

Overall, Canada's prevention efforts (source country education and legislation, Canadian border control, transnational sharing of intelligence) have evolved since the Protocol was first introduced from almost no action on this issue to a relatively broad programme. Nevertheless, the approach remains framed by an analysis of human trafficking that is more focused on crime and security, focusing on reaching individuals at risk rather than addressing the root cause of people's vulnerability to trafficking, namely poverty and inequality.

### **Protection of trafficking victims**

When prevention fails and trafficking occurs, Member States are expected to offer protection to human trafficking victims. The Protocol assigns the status of "victim" to persons who are or were the subject of trafficking (Articles 6-8). Consequently, each State Party is urged to provide protection and assistance to victims of trafficking in persons. It is in this area of protection that the Canadian Government has made the least progress, with important legislative gaps, lack of data, and inadequate policies and programmes to assist victims. In interviews and in round table discussions with NGOs, members of the IWG-TIP discussed this policy weakness on the part of the Canadian Government and reported this to be their next area of focus for action. At present, protection efforts are concentrated in four main areas: legislative framework, refugee determination process, access to health and social services, and right of safe return.

#### **Legislative framework**

Review of the IRPA and interviews with the members of the IWG-TIP make clear that there is as yet no legal guidance for the protection of trafficking victims within Canada. If victims of trafficking are intercepted, it is largely a matter of police discretion in deciding how to deal with them. While the act of trafficking itself has been made specifically illegal, there is no parallel mention of the legal or immigration status to be conferred upon those who fall victim to this practice.

In practice, trafficking victims are often detained as illegal migrants,<sup>5</sup> an issue brought to the forefront with the adoption of the IRPA. Section 55(2)b provides



that “An officer may, without a warrant, arrest and detain a foreign national other than a protected person (...) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act”. This additional restriction places a heavy burden on asylum seekers or trafficking victims since a lack of identity documents is presumed to indicate a lack of credibility. This type of detention is against the explicit recommendation that “trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses (guideline 6.1)” (UNHCHR, 2002).

Women trafficked into Canada’s sex trade are often charged under the Criminal Code as prostitutes as well as being treated as illegal migrants, without necessarily being provided protection or assistance measures (McDonald et al., 2000). The Canadian Council for Refugees (CCR) points out that the IRPA includes punitive measures that can easily be applied to trafficked individuals, while the Protocol’s guidelines are intended to protect migrants and victims of trafficking from criminalization due to activities related to their trafficking (CCR, 2001). Under current legislation, only those migrants recognized as refugees are exempt from prosecution for clandestine entry or false documents, leading to a tendency to invite trafficking victims to apply for refugee status as a solution to the criminalization conundrum. As we will see in the next section, reliance on the refugee determination system is problematic.

### **Refugee determination process**

The United Nations High Commissioner for Refugees (UNHCR) supports the idea of a case-by-case refugee determination process for trafficking victims. In the document titled “Guidelines on International Protection: Gender-related Persecution” issued in 2002, the UNHCR considered that trafficking survivors are entitled to refugee status when their country of origin is unable or unwilling to provide the protection needed. Canada has already extended its interpretation of the Geneva Convention to include claims on the basis of gender-related persecution (Shearer, 2003) so it can therefore grant refugee status to trafficked individuals, disproportionately women (Oxman-Martinez et al., 2001b) with well-founded fear of persecution. The Immigration and Refugee Board (IRB) of the Canadian Convention Refugee Determination Division has, in fact, already granted refugee status to certain victims of trafficking on the basis “of their membership to a particular social group”.<sup>6</sup> This approach is problematic, however, since any involvement in criminal activity (sex trade and false documents) lessens trafficking victims’ credibility and their personal situations may not correspond to the Geneva Convention definition of “refugee” (Aiken, 2001b).

In response to this grey zone, the Canadian Council of Refugees has recommended the inclusion of the category of “trafficked person” in the IRPA’s defin-

ition of “person in need of protection”, the creation of a temporary visa for trafficked persons, and the adoption of a regulatory class allowing trafficked persons to apply for permanent residence in Canada (UN CSW, 2003: paragraph 367). At the present time, trafficking survivors are not eligible for refugee status on the basis of being a trafficking victim but rather they must meet the general criteria. Applying for discretionary temporary visas or permanent residency on humanitarian and compassionate grounds is another option open to them as a way to secure status in Canada. Although the issue of linking trafficking victims to the refugee protection system remains highly controversial, we would argue that the Government should recognize trafficking victims as an independent category on which refugee status could be conferred, considering the possible persecution and lack of safety for certain victims upon return to their country of origin.

### **Access to health and social services**

SWC has taken a leadership role in increasing Canadian understanding of the social dynamics of trafficking and how victims are affected by it. SWC research has brought to the forefront social issues that are rarely considered in depth when security is the principle policy focus. In interviews, representatives of other departments expressed that it was sometimes difficult to get support for this perspective within their hierarchies, making SWC’s role important. In 2004, Justice Canada and SWC funded the Canadian Council on Refugees to undertake a broad national consultation on trafficking and the social service organizations that serve victims. Currently, while there are no laws specifying the way in which trafficking victims should be treated by law or immigration enforcement agencies, the criminal justice system sometimes assists by referring intercepted victims to NGOs.

Those services available to victims are usually arranged in collaboration with NGOs. Health Canada has offered limited support to undocumented migrants’ access to clinics. In cooperation with SWC, Health Canada has also funded small-scale local projects providing services to trafficked women, particularly those involved in the sex trade. Overseas, Health Canada collaborates with members of the South Asia Association for Regional Cooperation on policy formulation, addressing the links between health issues and human trafficking.

The problem of lack of assistance and services for trafficking victims has been noted by international observers. The UN Committee on the Elimination of Discrimination against Women (CEDAW) stated that the federal government’s January 2003 report to CEDAW did not provide sufficient information on programmes to assist victims of trafficking (UN CSW, 2003: paragraph 368).

The Committee encouraged Canada “to assist victims of trafficking through counselling and reintegration” (UN CSW, 2003: paragraph 366). The current dearth of services reflects a neglect of the Protocol’s recommendation to provide for the physical, psychological, and social recovery of victims of trafficking (i.e. appropriate housing; counselling and information; medical, psychological, and material assistance; employment, educational, and training opportunities). In line with this concern, access to health and social services, most likely to be provided by third sector NGOs and community groups, is considered by members of the IWG-TIP and by advocates as a key area for the expansion of government support for trafficking victims. Although many state actors are working to put such measures in place on an ad hoc basis (see IOM/RCMP/CIC collaboration mentioned below), formal laws or regulations to this effect are key to ensuring migrants’ rights.

### **Right of safe return**

Critics of Canadian trafficking policy cite involuntary repatriation of victims as a human rights issue; some victims are immediately deported as illegal migrants, while others serve criminal sentences prior to deportation (IOM, 1997; Mountz, 2003). Victims who have been abused and exploited by traffickers sometimes choose to return to their countries of origin, however. These individuals benefit in principle from the right of safe return yet they may face obstacles, particularly if they migrated without legal documents or if their traffickers have confiscated their identity documents.

As mentioned earlier, when trafficked persons are returned to their country of origin, there is a need for a mechanism to oversee the protection of their rights in the home country, if possible through an international organization. In other national jurisdictions, the IOM has sometimes played this role but not so in Canada. Such a mechanism, an important aspect of protection regimes, would avoid the potential of the so-called “revolving door”, ensuring that once people are back home they do not find themselves once again in the hands of traffickers (CCR, 2000).

In interviews, law enforcement representatives expressed unease with the fact that victims of the crime of human trafficking were often treated as criminals when they were often in need of health, psychological, and legal aid. In response to this identified deficiency, discussions with the IOM regarding potential measures for the proper treatment of victims intercepted in the course of police and RCMP investigations have been initiated.

Since the beginning of the federal government’s prioritization of human trafficking, there has been a significant shift in the way in which policy makers

discuss the victims of human trafficking. In 1999 and 2000 interviews, a number of IWG-TIP members justified the automatic detention and deportation of victims of trafficking as a measure of deterrence and viewed victims more as security threat than as people deserving of protection. Today, this view is no longer represented, at least publicly, among members of IWG-TIP. Given the advances made in the areas of prevention and prosecution, members are now willing to tackle the issue of protection, concerned in particular with the legislative framework, the refugee determination process, access to health and social services, and the right of safe return. Important initiatives, as described above, are being implemented. Of great significance, however, is the concern of IWG-TIP members to limit such protections to victims of trafficking *per se*, especially women and children (as specified in the Protocol itself), and not to irregular migrants in general. The shift toward a concern for protection among members of the IWG-TIP reflects an acceptance of the victim status of those caught up in trafficking but not necessarily a rise in sympathy for other types of irregular migrants.

### **Prosecution of traffickers**

The Convention advises Member States to harmonize and strengthen their domestic laws, establish efficient networks of information, and encourage international cooperation for the purposes of prosecution of human traffickers. In theory, Member States should aim to eliminate organized crime through a variety of measures, including the criminalization of trafficking. Canada's prosecution initiatives have focused on two areas: the legal framework addressing organized crime and human trafficking as well as the coordination of the efforts of different law enforcement jurisdictions.

### **Legal reforms**

In the 2001 reforms of the Criminal Code, Canada responded to many of the recommendations of the Palermo Convention, harmonizing its legal definition of organized crime with the Convention's. Prior to the recent changes, the Criminal Code already authorized the prosecution of specific forms of abuse such as extortion, forcible confinement, kidnapping, intimidation, pornography, prostitution, forced sexual labour, sexual harassment, and sex tourism, especially as these offences relate to children. Such illegal activities may apply to human trafficking, offering concrete elements for the prosecution of traffickers, but the Criminal Code itself does not contain specific provisions dealing with trafficking in persons. It is instead the new IRPA that declare smuggling and trafficking illegal, prescribing serious penalties (Articles 117-121):

Article 118: (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of threat, force or coercion. (2) “organize”, with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harboring of those persons.

Penalties rise dramatically with this new law, with fines up to CAN\$1 million and/or life imprisonment. This legal sanctioning is a step forward with regards to traffickers but, as mentioned earlier in this paper, the IRPA neglects to specifically mention the victims of trafficking and leaves them open to criminalization, in violation of their human rights and of the spirit of the Protocol.

### **Inter-jurisdictional cooperation**

The RCMP investigates violations of the IRPA, the Citizenship Act, and the Criminal Code, especially those relating to citizenship offences, Canadian passport offences, frauds, forgeries, and conspiracies. Among the RCMP’s immigration-related priorities are: to combat criminal organizations involved in smuggling illegal migrants, to deter unscrupulous or illegal activity on the part of professional immigration facilitators, to undertake identity investigations on refugee claimants, to identify organized crime groups and modern war criminals, and to arrest persons with a serious criminal history who are subject of an Immigration Act warrant.

By criminalizing all forms of clandestine migration, Canada’s prosecution measures go beyond what is targeted under the Convention and the Protocols, to the detriment of migrants’ rights. Rather than having the protection of migrants at the core of its policy, Canada has made the dissuasion of potential irregular migrants and those who facilitate their entry one of the principal goals of its policies. It must be mentioned, however, that law enforcement agencies have begun to recognize the fact that this lack of inter-jurisdictional cooperation has led to an insufficient response to Canada’s Protocol commitment to protect victims.

To date, prosecution remains the true human trafficking priority of the Canadian Government, with the most funding and resources consecrated to this activity. The Protocol has offered a framework to guide the development of new legislation and for cooperation with other countries, something from which Canada has benefited. Increased efforts by law enforcement agencies have uncovered more scenarios of trafficking but it has also created a climate where trafficking victims find themselves more at risk of being criminalized themselves and, therefore, more reluctant to seek assistance from authorities. They must prove that they have been trafficked in order to avoid facing speedy deportation and even then their treatment is rather ad hoc. However, at the present time, while some

members of the IWG-TIP disagree that transnational organized crime is the most important lens through which to view human trafficking, there is agreement that this is the most politically expedient way to present it in order to receive government support for their efforts.

## POLICY EFFORTS IN OTHER COUNTRIES

Examination of Canada's formal measures for the prevention of trafficking, the protection of its victims, and the prosecution of its perpetrators reveals that efforts are slowly progressing as government agencies turn their attention to the prevention and protection intervention suggested by the UN Protocol. While no country seems to have yet found a perfect solution (UNHCHR, 2001), there are policy experiments elsewhere that begin to address the needs and human rights of victims of trafficking while respecting the concern of national governments to protect their citizens from organized crime and from what are considered illegitimate migrants. There are American and European examples that offer direction for Canadian policy, all while having their own limitations.

The 2000 US Trafficking Victims' Protection Act (TVPA) allows "victims of severe forms of trafficking" who agree to assist in the prosecution of their traffickers to apply for special visas (T-visas) (US State Department, 2000). The T-visa gives proven survivors of trafficking a status similar to that of refugees. They receive social benefits such as income security, food stamps, medical services, language training, and access to shelters (Hyland, 2001). Furthermore, T-visa holders can become eligible for permanent resident status (Ryf, 2002). However, the T-visa has been criticized for placing the burden of proof on victims and its strict eligibility requirements (Caliber Associates, 2002).

Italy's policies allow granting legal immigrant status to victims of trafficking. The Alien Law extends protection to trafficking survivors regardless of their collaboration with state authorities. Accordingly, victims are granted a six-month temporary residence permit, with the possibility of extension for up to 18 months. In addition, holders of this residence permit are given access to some social services (Shearer, 2003). Other countries like Germany offer free legal assistance to asylum seekers and refugees, including trafficked people (Jones-Pauly, 1999; Public Interest Law Initiative, 2003).

The European Commission's (EC) first efforts in the protection of trafficking victims included STOP I and II, programmes that aimed to improve the victim-response training and skills of anti-trafficking professionals. STOP has now been replaced by the wider 2003-2007 AGIS programme that co-finances

transnational projects of cooperation between the legal systems and the enforcement services of the Member States around the fight against organized criminality and the protection of the interests of the victims. DAPHNE, a programme launched in 2000, aims to prevent violence against children, young people, and women by providing support to the victims of violence and preventing their future exposure to violence. In the first phase, nearly 400 projects were funded and the budget has been renewed for a second phase (2004-2008). Neither AGIS nor DAPHNE is specific to trafficking yet both programmes have been interpreted to include trafficking victims within their purview. The EC intends these programmes as preventive initiatives in both the fields of better training of professionals and adequate protection of the people at higher risk of being submitted to forms of violence.

In contrast to these examples, Canada has no official response for trafficking victims in terms of immigration visas but rather suggests that victims apply for general refugee status. Canada can learn from the initiatives being implemented in the similar contexts of the United States and Europe but it might also avoid some of the limitations of these programmes. It is interesting to note that almost all countries offering temporary visas to the victims of trafficking predicate these visas upon the victim's collaboration in the prosecution of her traffickers. This is problematic due to the dangers victims and, by association, their families, may face in taking on traffickers connected to transnational crime networks. Another limitation of note is that the programmes thus far developed tend to focus on the trafficking of children or of women for the sex trade, leaving aside the needs of women trafficked for other forms of exploitation (domestic work, sweatshops) or of men in general. Finally, the current concern with the protection of victims of trafficking, an absolutely legitimate concern in itself, obscures government's desire to distinguish between irregular migrants deserving of state protection versus those supposedly deserving of state prosecution. The development of programmes to protect trafficking victims brings to the forefront the lack of provisions to protect the rights of other types of irregular migrants.

## REMAINING CHALLENGES AND RECOMMENDATIONS

Most Canadian anti-trafficking efforts have, to date, been concentrated more on the prosecution of traffickers and the interception of "irregular migrants" than on the prevention of trafficking or the protection and assistance of its victims. The Canadian response to trafficking has been to increase the policing of borders and to adopt legislation criminalizing the acts of trafficking and, under some interpretations, their victims as well. Current immigration and criminal

laws could technically exclude victims of trafficking from governmental protection and assistance, denying these victims the rights accorded to citizens and legal residents. Lack of legislation on protection allows traffickers to have a greater control over their victims due to victims' fears of incarceration or deportation.

The focus of the IRPA is criminal penalties for offenders who engage in trafficking and/or smuggling of persons as well as for migrants who possess and/or use false documents. The Government's increased power to detain foreign nationals without clear proof of identity is meant as a deterrent. Taken together, these are a strong indication of the Canadian Government's will to restrict irregular movement across its borders. But there are several provisions that endanger the rights of refugees and the victims of trafficking (Aiken, 2001b; Oxman Martinez et al., 2001a).

NGOs, the IOM, the UN, and some states offer imperfect examples of moving from rhetoric to action in the struggle to protect trafficked individuals' dignity and rights. Some of the most compelling suggestions for improving anti-trafficking measures in a way that protect victims' rights include: creating immigration policies that allow opportunities for economic migration and eliminating immigration programmes which require dependency on third parties (e.g. sponsoring spouse or employer); regularizing undocumented migrants; increased NGO participation in providing social and health services to victims; providing independent legal counsel for victims; and giving legal immigration status to victims who participate in social integration programmes (Côté et al., 2001; Langevin and Belleau, 2000; Oxman Martinez et al., 2001b).

In order to fulfil its commitments under the Palermo Convention and the Protocols, Canada should move beyond prosecution and develop clear legislative and policy priorities related to the protection of the victims of human trafficking. Those priorities should include the development of clear guidelines on how to proceed when authorities intercept trafficking victims or they come forward for help. Specifically, rather than wait until trafficked people achieve refugee or immigrant status, Canada should be proactive and begin incorporating them into Canadian society as soon as they are discovered. In each trafficked person's case, Canada should act to immediately determine the full spectrum of her rights and needs. In addition, the Government should act to remove the aspects of the IRPA that systematically criminalize irregular migrants. Beyond these measures, the Canadian Government should act to join other countries in ensuring that Labour Codes and protective regulations apply to trafficked people and other undocumented workers. Also, as there is a dearth of empirical research on the federal Government's implementation of the Convention and Protocols, it should



actively promote research on both the problem of human trafficking and the implementation of its own commitments under international law.

In the four years since the beginning of our research on the issue of human trafficking and the policy response of the Canadian Government, progress has undoubtedly been made. Canada began by developing and implementing its tools for the prosecution of traffickers and has now, for the most part, fulfilled its commitments under the UN Protocol. Canada is also engaged in significant international cooperation toward this end. With regard to prevention, different government agencies are coordinating their efforts to implement projects both in source countries and at home. Awareness-raising campaigns, education campaigns, and policy development collaborations have been at the forefront of these efforts towards prevention. The more structural elements of prevention are not adequately addressed through these efforts, however, with the government arguing that they are dependent upon political reforms on the international stage as a prerequisite for Canadian action.

Finally, Canadian Government agencies are currently in the process of improving their frameworks for the treatment and protection of trafficking victims who are intercepted in law enforcement operations or who come forward for help. This is an extremely positive development that would be strengthened even further if migrants' rights were protected by law. This shift cannot be seen as an overall move away from a criminalizing security lens to migration, however. Victims of human trafficking have in many ways become Canada's "deserving" irregular migrants; the Government's much-needed moves toward their greater protection obscures increasingly repressive treatment of other irregular migrants, regardless of the reasons for their irregular status. As stated in one of our interviews, "The Government views human trafficking as a violation of human rights. It views illegal immigration as a violation of the rights of the state."

## NOTES

1. The authors would like to acknowledge Estibalitz Jimenez for her contribution of legal research for earlier versions of this article.
2. One study of the impact of organized crime in Canada (Porteous, 1998), estimated that between 8,000 and 16,000 people enter Canada each year with the help of smugglers, some of whom may be trafficked. This estimate is problematic, however, as the figures are based on those who are intercepted at the border and those who later file refugee claims. Excluded are those who enter illegally without being intercepted and never file a refugee claim, as well as those who are trafficked on valid visas. The latter scenario is thought by many to be one of the most common forms of entry to Canada, especially for women who enter on “entertainer”, “live-in caregiver” and, until the programme was recently cancelled, “fiancée” visas (Oxman-Martinez et al., 2001b).
3. Resolution A/RES/55/25. The other two Protocols which accompany the Palermo Convention are: (a) Protocol against the Smuggling of Migrants by Land, Sea and Air: Supplementing the United Nations Convention against Transnational Organized Crime and the one that is more relevant for present purposes (b) the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.
4. Subparagraph (b) establishes that the consent of a trafficking victim is irrelevant when any of the aforementioned means have been used, a concept that has been the subject of some debate.
5. The lack of a framework for dealing with people who may have been trafficked, particularly in terms of governmental protection, generated enormous attention and considerable controversy in Canada following the July and September 1999 arrival on British Columbia’s coast of several hundred Chinese migrants suspected of being trafficked for some form of slavery. Government agencies detained most of them for several months, implementing the first instance of mass detention of refugee claimants in Canadian history (Mountz 2003).
6. For example, in a recent case involving a Ukrainian victim, the board of the Canadian Convention Refugee Determination Division stated that: “[the] 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 claimants position” (Shearer, 2003).

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## LA POLITIQUE CANADIENNE EN MATIÈRE DE TRAITE DES ÊTRES HUMAINS : UNE ANALYSE SUR QUATRE ANS

Cet article présente au lecteur la politique et la pratique du gouvernement canadien en matière de traite des êtres humains depuis l'adoption, en 2000, du Protocole additionnel à la Convention des Nations unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants. Après avoir présenté le Protocole dans son ensemble, l'article examine et analyse de façon critique l'action du Canada dans trois domaines essentiels du Protocole : la prévention de la traite, la protection des victimes et la punition des trafiquants. Depuis le début de notre recherche, le Canada a fait un pas en avant dans les mesures politiques adoptées. Le gouvernement a commencé par élaborer et mettre en œuvre des mécanismes pour punir les trafiquants, donnant de ce fait suite à la plupart des recommandations du protocole des Nations unies en la matière. Par ailleurs, différents organes de l'État coordonnent leurs efforts pour mettre en place des projets de prévention, tant dans les pays d'origine que sur le territoire canadien, avec des campagnes de sensibilisation et d'éducation, et des collaborations en matière d'élaboration des politiques. Il reste néanmoins à trouver une solution adéquate aux aspects les plus structurels de la prévention. Enfin, sans s'éloigner du cadre fondamental du contrôle des frontières, les services gouvernementaux canadiens améliorent actuellement la protection des victimes de la traite interceptées lors d'opérations de police ou qui viennent demander de l'aide. Ces mesures de protection seraient davantage renforcées si les droits des migrants étaient explicitement inscrits dans la loi, ce qui n'est pas le cas en raison de la priorité accordée à la répression de la criminalité et à la sécurité. La protection formelle des victimes, telle que mise en œuvre jusqu'à un certain point par des mesures appliquées en Europe et aux États-Unis, est présentée à titre de comparaison. Les conclusions de cet article exposent les défis auxquels restent confrontés les décideurs canadiens, à savoir moins insister sur la répression de la criminalité et la sécurité pour s'occuper davantage de la protection et de la promotion des droits fondamentaux des victimes de la traite.

## POLÍTICA CANADIENSE RELATIVA A LA TRATA DE PERSONAS: UN ANÁLISIS CUADRIENAL

Este artículo presenta las políticas y prácticas del Gobierno canadiense en torno a la trata de personas desde la adopción, en 2000, del Protocolo de las Naciones Unidas relativo a la trata de personas. Tras hacer un repaso del Protocolo de las Naciones Unidas, este artículo examina y analiza críticamente los empeños del Canadá en tres esferas clave del Protocolo: prevención de la trata de personas, protección de las víctimas de la trata, y enjuiciamiento de los traficantes. Desde que se iniciara este estudio se han observado progresos en las respuestas políticas canadienses. El Gobierno comenzó desarrollando y llevando a la práctica sus instrumentos para la sanción y enjuiciamiento de los traficantes, respondiendo así a la mayoría de las recomendaciones de enjuiciamiento que contiene el Protocolo de las Naciones Unidas. Varias instituciones gubernamentales también coordinan sus esfuerzos con miras a la puesta en práctica de proyectos de prevención, tanto en los países de origen como en el Canadá, incluyendo campañas de concienciación, campañas educativas y colaboraciones con miras al desarrollo de políticas. Sin embargo, aún quedan por encarar los elementos más estructurales de la prevención. Finalmente, sin salir del marco básico de control de fronteras, las instituciones gubernamentales canadienses están tratando de mejorar la protección de las víctimas de la trata interceptadas en operaciones de aplicación de la ley o que se presentan a las autoridades con miras a solicitar ayuda. Si se aspira a proteger explícitamente por ley los derechos de los migrantes, habrá que reforzar las medidas de protección, algo que no figura entre las prioridades establecidas recientemente con relación al ámbito delictivo y de seguridad. Con fines comparativos, se presenta la protección oficial que brindan a las víctimas las políticas europeas y americanas. Este artículo concluye con los desafíos que tienen ante sí los formuladores de políticas canadienses, particularmente en cuanto al cambio del centro de atención actual en materia de actividades delictivas y de seguridad hacia la protección y promoción de los derechos humanos de las víctimas de la trata.